

Redressing the Imbalance

A study of legal protections available for consumers of credit and other financial services in Ireland



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Foreword & acknowledgments

FLAC (Free Legal Advice Centres) is an independent human rights organisation which exists to promote equal access to justice for all. FLAC was established in 1969 by law students to provide legal information, advice and representation to people who could not afford to pay for legal services and to campaign for a state civil legal aid system. Today FLAC has an office in Dublin and works for law reform for the benefit of disadvantaged and marginalised people across a range of areas. We offer legal information and advice directly to the public via publications, a telephone information line and a countrywide network of volunteer-led local centres, mostly based in Citizens Information Centres.

For several years, FLAC has been advocating for changes to Irish law that will improve protection for consumers of financial services and credit. Simultaneously, we have campaigned for changes in Ireland's legal framework for handling consumer debt. Following the enactment in 2012 of new personal insolvency legislation that transformed how the law treats

people in debt, it seemed timely to explore corresponding consumer protections in credit provision and financial services.

The report was researched and written by Paul Joyce and Stuart Stamp. Paul Joyce is FLAC's Senior Policy Analyst. Dr. Stuart Stamp is a Research Associate with the Department of Applied Social Studies, NUI Maynooth. FLAC is indebted to both of them and to all the staff and interns who helped to produce the report.

A particular thank-you is reserved for the consumers and MABS advisors who participated in the study which forms part of the report. FLAC wanted to give consumers the chance to articulate their experiences of the processes available to them. Equally, FLAC was most grateful to the MABS advisors whose insights were invaluable in compiling this report. FLAC would also like to thank senior staff from both the Central Bank and the Financial Services Ombudsman's Bureau for meeting and corresponding with FLAC in relation to various issues identified during the course of the research.

Introduction

This study is a critique from the consumer perspective of legislative provisions, codes of conduct and complaints resolution mechanisms which purport to protect users of financial services in Ireland and in particular, those using consumer credit and ancillary services.

In the course of our work in recent years, and through our involvement over time with Money Advice and Budgeting Services (MABS) and other consumer-focused organisations, FLAC has become aware of people who have had negative experiences of the provisions and procedures ostensibly developed to protect and assist them. We thus decided to embark on an enquiry to explore the adequacy of such provisions and procedures drawing on both our own experiences and FLAC user experiences in this regard. The aim of this enquiry was to identify improvements and reforms that would serve to better protect financial service consumers in general and credit consumers in particular.

This is not a scientific, comprehensive study into all aspects of financial services or indeed, consumer credit. Rather, it is an analysis of specific aspects, focusing particularly on those issues highlighted by a sample of FLAC users (both consumers and money advisers) who have consulted FLAC in recent years in relation to complaints that have involved the Financial Services Ombudsman.

Aim of the study

This study aims to evaluate existing provisions and procedures for protecting financial service users (particularly credit consumers) from the consumer standpoint, and to make proposals for reform where appropriate.

Research objectives

1. To critically review legal provisions for the protection of consumers of financial services, principally credit consumers, and to identify potential flaws and gaps within these provisions;
2. To critically evaluate existing provisions and processes for dealing with consumer complaints relating to financial service providers (and credit providers specifically);
3. To make recommendations for reform from a consumer perspective.

Research methods

Five methods were used to gather data relevant to the study. These were: a legislative and jurisprudence review; a content analysis of relevant policy documents; administrative data analysis; semi-structured interviews with users of FLAC services (consumers and money advisers); and structured interviews with representatives of relevant statutory bodies (namely the Director of Consumer Protection of the Central Bank, and senior staff of the Financial Services Ombudsman's Bureau). These methods involved:

Review of legislation, codes and jurisprudence

A number of consumer protection legislative provisions were identified and critically examined from the perspective of the financial service user, and particularly the user of consumer of credit and ancillary financial services. These included: The European Consumer Credit Directives (1987 and 2008) and Draft Directives; The Consumer Credit Act 1995 as amended; The European Communities (Consumer Credit Agreements) Regulations 2010;

The Central Bank and Financial Services Authority of Ireland Act 2004; Regulations issued by the Financial Services Ombudsman Council; The Consumer Protection Code 2012, and the 2006 Code it amended; The Code of Conduct on Mortgage Arrears 2013 and the 2010 Code it amended (together with clarifications issued by the Central Bank). In addition, relevant decisions of the High Court were also reviewed.

Documentary analysis of relevant policy documents

The focus of analysis here was on a series of reports by various government-established groups on the growing problem of mortgage arrears in Ireland, and how such arrears might most appropriately be addressed. The principal reports examined were: *The Final Report of the Mortgage Arrears and Personal Debt Group* (The 'Cooney Group') 2010; *The Report of the Inter-Departmental Group on (Residential) Mortgage Arrears* (The 'Keane Group') 2011; and *The Report of the Expert Group on Repossessions*, December 2013.

Administrative data analysis

A range of published data was analysed and critically evaluated. In relation to enforcement of existing legislative provisions, information was accessed via the website of the Central Bank in relation to Reviews and Themed Inspections undertaken, Inquiries pursued and Settlements agreed by virtue of its Administrative Sanctions Procedure; clarification was subsequently sought from the Bank (via interview and e-mail) on some issues. As regards the nature and outcomes of consumer complaints, data were accessed through the website of the Financial Services Ombudsman – these data were contained in the Bureau's Annual Reports 2006 to 2012 and in its Bi-Annual Reviews November 2010 to August 2013. Again, clarification was subsequently sought on some matters, in this instance principally by way of interview.

Semi-structured interviews

A number of semi-structured interviews were carried out with users of FLAC services in order to gather primary data on the nature of responses from financial service providers to complaints, and on experiences of the Ombudsman's scheme from a user's perspective. All complaints involved the FSO in some way. A total of 30 respondents were interviewed, and there were two distinct groups of users. The first set of users consisted of *consumers* (n=17) who had either contacted FLAC directly in relation to their complaints, or had been indirectly assisted by FLAC through the provision of technical support to MABS with regard to their case. The second set of users were *money advisers* (n =13) from around the country who had contacted FLAC for advice in relation to clients with complaints which had involved the FSO. Separate interview schedules were used for each cohort (copies are included in appendices (ii) and (iii)), and the interviews were taped with the respondent's permission and transcribed. The majority of these interviews were undertaken in October and November 2012, whilst one was carried out in February 2013.

Structured interviews

A substantial number of queries and issues arose both from our evaluation of legislative provisions and procedures, and from our analysis of data gathered from administrative sources and by way of interview with FLAC users. As a result, requests were made to interview senior officials from the Central Bank and from the Financial Services Ombudsman's Bureau for the purpose of seeking clarification on certain matters, together with their responses to issues emerging from the FLAC user interviews. These interviews took place during January and February 2013. The interview schedules used are included in appendices (iv) and (v) respectively.

Structure of report

The report begins (Chapter 1) with an evaluation of the legal framework that has developed to protect consumers of credit in Ireland and focuses specifically on European Consumer Credit Directives, the transposition of these Directives in Ireland, and the Consumer Protection Code (CPC) 2012. In Chapter 2, we further examine the specific provisions of the CPC before turning to the Code of Conduct on Mortgage Arrears (CCMA) 2013, a Code which takes on added significance in the context of recent policy developments including legislative changes that will have the effect of increasing applications to repossess family homes and the report of the Expert Group on Repossessions in January 2014. We conclude Chapter 2 by exploring the question of the legal admissibility of Central Bank Codes. In Chapter 3, we turn our attention to the legislation which established the Financial Services Ombudsman's Bureau (FSO), the complaints process which the FSO has put in place on foot of this legislation together with the practices it has adopted, and the jurisprudence which has developed in relation to appeals against its findings in the High Court. Issues arising from some of the cases in which FLAC has supported complainants in the area of consumer credit are also discussed. In Chapter 4, we examine the profile of the FSO in terms of its mission statement, the information it provides to the public on its complaints process, the outcomes of complaints, and the ways in which such outcomes are reported. In the final substantive Chapter (5), a synthesis is presented of the findings of the interviews conducted with FLAC users – both consumers and money advisers – before we conclude with a set of conclusions and recommendations arising from the review as a whole (Chapter 6).

CHAPTER

**The Legislative Framework
for the Protection of Consumers
of Credit in Ireland**

1.1 Introduction

This chapter examines the legal framework that has developed to protect consumers of credit in Ireland. It begins by outlining the piecemeal and “silo-based” approach adopted towards the regulation and supervision of financial service providers at European Union level, an approach indicative of a lack of joined-up thinking in terms of protection and rights of the financial service consumer in general. It then goes on to examine the two European Consumer Credit Directives that have been agreed (1987 and 2008), identify issues from the consumer perspective in terms of process,

content and transposition, and explore the ramifications of the move from minimum harmonisation to maximum harmonisation Directives. What we believe to be regulatory failures of the European and Irish authorities are also identified, before we conclude with a critique of how a regulatory approach that prioritises compliance with Central Bank Codes within the context of minimum harmonisation leaves many consumers of credit unprotected within a convoluted, complex and conservative legislative landscape.

1.2 European level protections generally

Supervisory structures and European Union Directives

The architecture for supervising financial services in the European Union has been substantially modified in recent years, and a number of regulatory or supervisory “watch-dog” authorities (called European Supervisory Authorities or ESAs) have been established at European level to replace the previous somewhat ad hoc arrangements. There are now, for example, European bodies to supervise banking (the European Banking Authority or EBA); insurance and pensions (the European Insurance and Occupational Pensions Authority or EIOPA); and securities and investments (the European Securities and Markets Authority or ESMA).¹ According to the Central Bank, the mandates of these bodies have recently been changed to include a specific mandate on consumer protection.

In terms of legislation in the financial service area, the European Commission has issued a number of EU Directives, including:

- The Payment Services Directive (PSD) 2009² – designed to regulate payment services and payment service providers throughout the EU and to increase competition and participation in the payments industry.
- The Markets in Financial Instruments Directive (MIFID) 2007³ – designed to increase competition and consumer protection in investment services.
- The Consumer Credit Directive (CCD) 2008⁴ – designed to improve market integration and consumer protection through increased transparency and consumer rights (this is considered in detail below).
- The Insurance Mediation Directive (IMD) 2002⁵ – aimed at achieving a

1. These bodies, together with the European Systemic Risk Board (ESRB), make up the European System of Financial Supervision (ESFS), which was established by The Council of the European Union and the European Parliament on 22 September 2010.
2. Dir 2007/64/EC transposed in Ireland by the European Communities (Payment Services) Regulations 2009 (SI 383/2009).
3. Dir 2004/39/EC transposed in Ireland by the European Communities (Markets in Financial Instruments) Regulations 2007 (SI 60/2007).
4. Dir 2008/48/EC transposed in Ireland by the European Communities (Consumer Credit Agreements) Regulation (SI 281/2010) (this is discussed in detail in part 2 of this Chapter below).
5. Dir 2002/92/EC transposed in Ireland by the European Communities (Insurance Mediation) (Amendment) Regulations 2008 (SI 161/2008).

market throughout the EU for insurance intermediaries⁶.

As can be seen from both the supervisory framework and the titles of the Directives, the approach adopted by European policymakers in the area of financial services *focuses primarily on regulating the particular product or service provider*, with the intention presumably that the interests of the consumer of the particular product or service in question will be protected as a result. Such a “silo-type” or “sectoral” approach, however, is suggestive of a lack of integration, consolidation and joined up thinking in the area of financial services as a whole; it is also indicative of a failure to focus on the rights of the financial service consumer in general. Research enquiries revealed that the Irish Central Bank is also concerned about the “piecemeal” approach adopted at European level:

The problem is at the European level it’s piecemeal, we did suggest a couple of years ago consolidating the Directive on conduct of business and that’s what should have happened... I talked about the ESAs,⁷ it’s very sectoral based, and even within the sectors you have PRIIPS⁸ which is meant to cover most investment products and insurance type products except general insurance, and you’ve the MIFID on investment instruments, and you’ve the Insurance Mediation Directive, now MIFID is being run out of the European Securities Markets Authority, and the IMD is being run out of EIOPA, and PRIIPS has come largely out of the Commission, so there’s no joined-up thinking, or very little anyway.⁹

1.3 The Consumer Credit Directives

1.3.1 Introduction

If any significant number of consumers decided that they would only pay for goods and services with money they had already saved, the operations of financial institutions would be severely undermined. If consumers waited until they had saved money before making big purchases, sellers of goods who had borrowed from banks to fund their operations would run into cash-flow problems very quickly. Lending is the lifeblood of a bank and of market economies. In essence, the lender makes a profit by lending at a greater rate of interest to borrowers than it provides to savers; that is, until financial institutions in recent years started to ignore borrowing-to-savings ratios and began to source finance in the wholesale money markets.

Without consumers willing to take the risk of borrowing money and paying a price in terms of interest charged to do so, commerce generally would move

substantially slower. Of course, there is a trade-off for the consumer – he or she receives goods and services now rather than having to wait. A pan-European market economy and arguably the whole European Union project depend to a substantial degree on consumer credit for job creation and economic growth. Governments and EU institutions need consumers to borrow so that a standard of living might be communally improved. Consumers should therefore have a stake in deciding the rules that will apply to lending and borrowing and should be protected from the excesses of the credit market. But is that stake being recognised, respected and protected, at both European and national level?

How well have consumers been protected at the point at which they enter into credit agreements, given that the failure to meet the contractual repayment terms leaves them open not only to legal action but to considerable personal and family distress? How, if at all, have consumers

6. Generally understood to be a person through whom an insurance contract is arranged and who generally acts as agent for the insurance provider.

7. European Supervisory Authorities.

8. PRIIPS is an acronym for “packaged retail investment products”.

9. Interview with the Central Bank, January 2013.

been protected from reckless and excessive lending practices? In our country and across the European Union, does the credit institution serve the customer or does the customer serve the credit institution and the wider economy? The law in this area is largely dependent on measures adopted by the EU and the domestic legislation that implements or ‘transposes’ it and these are considered in some detail below.

1.3.2 The first consumer credit directive

The Treaty of Rome establishing the then European Economic Community (EEC) in 1957 made no direct reference to the rights of consumers. In the course of the 1970s, it became apparent to EEC policy-makers that the community needed a more human face and this coincided with the adoption of a number of social and consumer policy initiatives. Consumer policy as it developed concentrated on five main elements:

- The protection of the consumer’s health and safety by providing information in relation to goods and services;
- The protection of the consumer’s economic interests through ensuring fair competition and prohibiting anti-competitive practices;
- The right of consumers to access the appropriate information to make an informed choice;
- The consumer’s right to redress if his or her rights are infringed;
- The consumer’s right to a role in the decision-making process through the promotion of consumer organisations.

In the specific area of credit, the first Directive on consumer credit was agreed in December 1986 (Dir 87/102/EEC) and a further amending Directive was agreed in 1990 (Dir 90/88/EEC). Broadly speaking, the purpose of these Consumer Credit Directives was to “level the playing field” in the provision of lending to consumers across the community, and in particular to protect the consumer’s economic interests *vis-a-vis* their unequal bargaining power

against financial institutions, and to give consumers the right to make an informed choice.¹⁰

The institutions of the EU – primarily the European Commission, the European Parliament and ultimately the Member States in the form of the Council of Ministers – agree the content of directives. Once agreed EU Directives must be transposed into the domestic legal system of each Member State. The conventional wisdom is that the transposition must involve achieving the objectives set out in the relevant directive but the ‘choice of form and methods’ is up to each Member State to choose.

EU directives are generally transposed into Irish law in one of two ways, either by way of *primary legislation* in the form of an Act of the Oireachtas (debated on, potentially amended and passed by both Houses, Dail and Senate), or by way of *secondary legislation* in the form of a statutory instrument also known as a regulation (which does not involve such debate but where the regulations must be formally laid before the Houses of the Oireachtas prior to Ministerial signature). The consumer credit area provides a good example of each method of transposition in the context of financial services, and of the problems which can arise depending on the method chosen and the European policy context within which it is transposed.

1.3.2.1 Transposing the first consumer credit directive

The transposition of this Directive into Irish law was initially delayed, principally as a result of the decision taken to repeal, amend or consolidate any existing consumer credit legislation in Ireland into a new act. Thus the Moneylending Acts of 1900 and 1933 were repealed as was the Hire Purchase legislation of 1946, 1964 and 1980. The transposition was finally carried out through the enactment of a primary piece of legislation, namely the Consumer Credit Act (CCA) 1995, which came into force in May 1996.¹¹

This Directive was a *minimum harmonisation* measure, in that Member States

10. For example, through the use of the Annual Percentage Rate (APR) of charge method for comparing different offers of credit and through more transparent advertising.

11. The CCA has been substantially amended since its enactment. For example, the creation of the Irish Financial Services Regulatory Authority in 2003 and the resulting transfer of powers from the Office of Consumer Affairs led to some significant amendments to the Act. Part 21 of the first schedule to the Central Bank and Financial Services Authority of Ireland (CBFSAI) Act 2003 and Part 12 of the schedule to the CBFSAI Act 2004 have also significantly amended the CCA.

had to comply with the minimum standards set out in the Directive but were free to introduce stronger consumer protection measures if they so wished. This was the case in Ireland, where our legislators went beyond the requirements of the Consumer Credit Directives in many ways. Thus, the Consumer Credit Act 1995 contained some rules that were put in place only because of the necessity to transpose the Directive and other rules that the State decided to introduce itself. For example, as well as dealing with the areas that were essential such as the information consumers were entitled to receive in writing in credit agreements, the form and content of credit agreements, rebates for early repayment of loans, the advertising of credit and the formal criteria around the Annual Percentage Rate (APR), the Act also regulates areas not covered by the Directive such as housing loans, bank charges, communications by lenders with borrowers and the necessity for lenders to provide written default notices to borrowers who breached agreements. There were, therefore, some progressive elements to this legislation; alas, some of its provisions have remained largely unused and untested and the legislation also contained a number of deficiencies (as discussed below).

An example of a failure to properly transpose – Interest rebates

Just because a Member State sets out to transpose a directive does not mean that it always transposes it correctly. This may result from giving the nature of the objectives designed by the directive insufficient attention or priority. It may also result from a Member State wanting to narrowly interpret the directive to limit its application in a particular area for whatever reason.

A case in point is the Irish State's failure to properly transpose the provisions of this directive, insofar as it concerns the consumer's right to an interest rebate where a credit agreement is terminated early by that consumer. This omission has never been explained by the author-

ities – neither the Central Bank or the Department of Finance. Indeed, we would suggest that this particular account may be a telling illustration of what level of priority is given to the ordinary consumer by financial regulatory authorities in Ireland.

Article 8 of the Directive states as follows:

The consumer *shall be entitled* [our emphasis added] to discharge his obligations under a credit agreement before the time fixed by the agreement. In this event, in accordance with the rules laid down by the Member States, the consumer *shall be entitled to an equitable reduction in the cost of credit* [our emphasis added].

The right provided in this article is especially relevant to fixed instalment credit arrangements such as personal loans or Hire Purchase agreements. Typically the interest charged on such agreements is at a fixed rate calculated in advance to provide for equal instalments over the lifetime of the agreement, for example 60 months. Where the borrower ends the agreement early, it would be clearly unfair if he or she was obliged to pay the full amount of interest calculated over the full term of the agreement, given that he or she no longer had the use of the money originally borrowed.

This article was transposed in principle in Part V of the Consumer Credit Act 1995. Under section 52 of that Act, a consumer is entitled at any time to terminate a credit, Hire Purchase or consumer hire agreement early by giving notice in writing and will be allowed a reduction in interest payable. Under section 53, if for any reason the amount owed by a consumer under an agreement becomes payable before the time fixed in the agreement (for example where the lender terminates the agreement because of default), a consumer should be similarly entitled to an interest rebate.

The Act goes on to provide that different formulae for differing categories of agreement may be put in place. Incredibly, however, no formula (or formulae) has ever been put in place by the Central Bank to

comply with the State's obligations under the Directive. In practice, a formula used by finance houses in the United Kingdom called the 'Rule of 78' has been used over the years by some of the finance houses involved in Hire Purchase lending in Ireland to provide a rebate, specifically in the case where the hirer brought an end to the agreement early. However not only was this method of calculating a rebate distinctly creditor as opposed to borrower-friendly¹², it was by no means universally applied in the sector.

Article 8 is quite clear and mandatory in its terms. While Member States may have some flexibility in terms of the rules they lay down to achieve the objective in question – *an equitable reduction in the cost of credit* – they do not have the power to decide not to comply with the objective.

It is not as if the Central Bank was not aware of its obligations here. The failure to put in place any formulae on rebates had been pointed out a number of times by FLAC and others. In April 2008, FLAC received a letter from the then Deputy Head of Consumer Protection Codes Department of the Financial Regulator, enclosing correspondence from an actuarial firm who had been commissioned to investigate how the article might be complied with and looking for submissions accordingly (12 years after the CCA was enacted). In its reply of 16 April 2008 in the form of a submission, FLAC stated:

We have come across clients in our work who have been told by credit providers that there is no right to a rebate and who only obtained a rebate because of advice they received that they were entitled to one under the terms of the Directive. The absence of any specific formula/formulae undoubtedly has contributed to this situation. We can only speculate how many consumers over this 12-year period did not receive a rebate when entitled to one because they did not seek or receive the appropriate information.

We will consider the revised consumer credit directive in some detail below. It has

introduced a far more precise limitation on the right of lenders to charge future interest where a consumer ends an agreement early.¹³ However, the State's singular failure to properly transpose the terms of Article 8 of the first consumer credit directive is still relevant today. This is because Hire Purchase agreements – as they operate under our domestic legislation – are not covered by the revised directive nor therefore by the new rebate rules. Thus, the Consumer Credit Act 1995 continues to apply to both new and existing Hire Purchase agreements. With car finance in the form of Hire Purchase agreements making a marked comeback as one of the few credit options available to consumers, *there is still no formula in place to calculate a consumer's entitlement to an interest rebate where he or she terminates an agreement early.*

Unfortunately, this is not the only continuing regulatory problem with Hire Purchase agreements in Ireland. As we shall see in greater detail below, the Central Bank's Consumer Protection Code does not apply to such agreements as Hire Purchase companies, for reasons that remain unclear and unjustified, are not regulated by the Bank. Because Hire Purchase agreements are not considered separately from credit agreements under the consumer credit legislation, there is no obligation on such companies to quote an interest rate in the form of the Annual Percentage Rate (APR) when offering such agreements. Consumers therefore may find it difficult to reliably compare different offers from different companies. Finally, the cost of credit on Hire Purchase agreements is generally high and they are primarily sold on behalf of lenders by garages acting as credit intermediaries, with little explanation given to the consumer about the core terms of the agreement, for example, that the goods remain the property of the lender/owner until the final payment is made.

An example of a failure to properly regulate: Excessive interest rate charges

As noted above, the first directive was a minimum harmonisation measure leaving Member States free to introduce stronger

12. The Rule of 78 was abolished in the UK for loans taken out after 31 May 2005. In 1997 the Office of Fair Trading in the UK had already declared it to be unsuitable to loans offered by non-status lenders and ordered it to be discontinued 'as it tends to produce a settlement figure which is excessive relative to the amount borrowed and repayments made and relative to the costs incurred by the lender. Lenders should discontinue its use at the earliest opportunity, and should not apply it rigidly to existing loan agreements without some form of cap to ensure that payments on early redemption are not excessive'.

13. Article 16 of Directive 2008/48/EC – 23 April 2008.

consumer protection measures as they saw fit. When the Consumer Credit Act came into operation in May 1996, the amounts of non-mortgage consumer credit being offered in Ireland were comparatively small. Nonetheless, there was clear recognition in the draft bill that consumers might be exploited at the point of accessing credit in terms of excessive charges for credit. This was manifested in two ways.

- Firstly, the Act introduced an updated system for licensing moneylenders, whereby the Office of Consumer Affairs¹⁴ took over responsibility for issuing such licences. It had the power to scrutinise rates of interest and charges in applications and grant (or refuse) a licence on that basis.
- Secondly, the Act provided in Section 47 for a method whereby the Circuit Court could assess whether the cost of credit in a credit agreement was excessive.

However, the combination of these two provisions has failed to curb the potential for excessive interest rate charges in credit agreements for a number of reasons.

Section 2 of the Consumer Credit Act 1995 defines a moneylender as a person who carries on the business of moneylending, but specifically excludes a number of entities, including – most significantly – a **credit institution**.

A ‘credit institution’ under the legislation includes a body licensed under the Central Bank Acts – for example domestic banks, foreign banks operating in Ireland and mortgage lenders.

The definition of a ‘moneylending agreement’ includes a **credit agreement entered into by a moneylender** where the total cost of credit to the consumer under the agreement **is in excess of 23% APR** (Annual Percentage Rate of Charge) and all moneylenders must first seek and obtain a licence from the Central Bank to be authorised to charge these rates of interest.

However, because only a moneylender can enter into a moneylending agreement and a credit institution is not included in the definition of moneylender, banks do not need a licence to charge moneylending

rates of interest. **This gap (or lacuna) in the law has effectively allowed banks to charge moneylending rates without having to obtain consent from the Central Bank which regulates them.**

In turn, as outlined above, section 47 of the Consumer Credit Act 1995 provides that a consumer or a person acting on the consumer’s behalf may apply to the Circuit Court for a declaration that the total cost of credit in any agreement is excessive. The Circuit Court must take into account a defined list of factors in such an assessment and has a variety of powers to set aside the agreement or revise it, or even to relieve the consumer from payment. The Central Bank must be given an opportunity to be heard at any such application.

Critically, however, this section does not apply to credit agreements advanced by a credit institution or a mortgage lender.¹⁵ This was a change from the original Bill which did not exempt any provider of credit from its terms and FLAC’s understanding is that this exemption resulted from a lobbying exercise by credit institutions.

As a consequence of this exclusion of credit institutions and mortgage lenders, FLAC has come across numerous examples of what we consider to be excessive charging practices during the boom period; practices which were permitted by the soft-touch approach to regulation, an approach that persists to this day.

The first entity to do so in our experience was called POS Finance. This company specialised in credit sale loans associated with the purchase of computer and other equipment through large retail stores in the 1990s at APRs of between 25% and 30%. These are moneylending rates and extremely high in comparative terms because of the length of the agreements, which were typically of three years duration. On closer examination, POS Finance turned out not to be a separate company at all, but a business name of Bank of Ireland. Being therefore a credit institution licensed under the Central Bank Acts, there was no requirement for it to obtain a moneylender’s licence for the reasons explained above.

^{14.} This power is now exercised by the Central Bank.

^{15.} This includes, according to section 2 of the Act, the associated banks, building societies and a defined list of finance houses.

As the credit boom got under way at the turn of the century, some banks based outside of Ireland but authorised to trade in European Union Member States by virtue of their EU banking licence worked out that they could effectively charge whatever rate of interest the consumer would pay in Ireland for personal loans without having to justify that rate. Two companies in particular (Citi Financial and HFC Bank Ltd trading as Household Bank) entered the market and targeted consumers on low incomes for high-cost personal loans.

An example of this involves a MABS case where FLAC assistance was sought. The client was an existing consumer of one of the sub-prime banks above. She had an existing personal loan with the bank with almost €15,000 outstanding. In 2008 the Bank offered her a top-up loan to clear her existing loan. Such a loan would have been unlawful for a moneylender to offer under the terms of section 99 of the CCA 1995, which prohibits a moneylender (but again not a credit institution) from offering a loan to clear an existing loan. What were quite staggering, however, were the terms and costs of this loan and these are outlined below.

Total amount of Loan	€22,777.74
Payment Protection Premium Advanced	€5,495.45
Amount of credit advanced	€17,282.29
Amount deducted to clear previous loan	€14,865.29
Net amount advanced to customer	€2,417.00
Number of instalments	72 (months)
Amount of each instalment	€561.22
Total amount payable	€40,407.84
Cost of this credit	€17,630.10
Annual Percentage Rate	23.4%

The following points should be noted from this loan:

- The client was lent the money in advance at a very high interest rate so that she could pay for the payment protection insurance for the full duration of the loan. This cost €5,495.45 plus the applicable interest over 6 years – an outrageous premium.
- The existence of this insurance almost completely protected the lender from any risk associated with

the loan, and yet the APR (annual percentage rate) on the insurance and the loan is 23.5%, an exorbitant rate for a six-year personal loan.

- The customer received a total of only €2,417 on top of the €14,865.29 she already owed but would have to pay €40,407.84 or €561.22 per month for six years in return, the equivalent of a small mortgage. She was surviving on a low income at the time and no effort was made to establish her capacity to service the ‘agreement’.

These and other excessive charging practices were brought to the attention of the then Financial Regulator (now subsumed back into the Central Bank) from 2004. MABS with the assistance of FLAC even conducted a small survey of MABS clients affected by the sub-prime lending practices of one of the two lenders named above and some files were forwarded for the Regulator’s attention.

However, nothing was done then or has been done since to plug the regulatory gaps identified above, with one small exception.¹⁶

Throughout the boom, in response to complaints about excessive rates of interest being charged by a minority of lenders, the regulatory authorities reiterated that the market and competition would look after the interests of consumers and therefore interference with it could not be countenanced. In some cases – generally for people on lower incomes who are generally more vulnerable – this is patently not the case. Despite all we have learned about reckless lending and the damage it has wreaked on so many households, what is perhaps most shocking is that **there is currently nothing to stop the above example of extortionate lending (by a bank) happening in the future.**

An example of a failure to regulate at all: Sub-prime mortgage lenders

Sub-prime mortgage lenders also managed to slip under the radar but in a different

16. Rule 3.24 of the Central Bank’s Consumer Protection Code 2012 now provides that ‘where a regulated entity offers payment protection insurance in conjunction with a loan, the regulated entity must exclude the payment protection premium from the initial repayment estimate of the loan advised to the consumer and advise the consumer of the amount of the premium separately and use separate application forms for the payment protection insurance and for the loan’.

way entirely. A number of these outfits were backed by international investment banks, packaging mortgages as investment vehicles, but did not themselves possess banking licences in any EU Member State. Arguably the biggest of the sub-prime mortgage lenders, Start Mortgages Ltd, obtained an authorisation from the then Consumer Director of the then Irish Financial Services Regulatory Authority (IFSRA) in November 2004¹⁷ to become a prescribed credit institution under Section 2 (1) (e) of the Consumer Credit Act and to engage in the business of making housing loans. Similar authorisations followed over successive years for Springboard Mortgages Ltd¹⁸; Nua Homeloans¹⁹; Stepstone Mortgage Funding Ltd²⁰ and Fresh Mortgages Ltd.²¹

The sole statutory condition imposed upon these entities was that they would not be regarded as prescribed where any credit granted to a consumer exceeded 23% APR – the limit before a loan would come into the moneylending category. This is truly shocking evidence of the complacency of the regulatory authorities at the time. Each of these entities proposed to engage in mortgage lending – by its nature lending for long periods over anything from 10 to 30 years, not short-term loans of say six months duration that a moneylender might engage in. Even the most voracious sub-prime lender would not attempt to charge anything remotely approaching 23% APR on, for example, a 20 year housing loan.

However, such a pathetic attempt to corral their operations must have seemed like the greenest of lights to go out into the market and, aided and abetted by the burgeoning numbers of ‘authorised’ mortgage brokers, sell high interest long duration housing loans to so called ‘credit risk’ customers. As FLAC said repeatedly during this period, if a lender is saying that a higher rate of interest is justified because of the greater risk of default of the borrower, there must surely be a corresponding obligation to check the capacity of the borrower to service the agreement. But there was no such obligation from a regulatory perspective for either prime or

sub-prime mortgage lenders and the carnage that followed reverberates to this day.

The plain fact of the matter was that none of the above entities were otherwise regulated by the Central Bank during this period as, for example, licensed money-lenders most certainly were. It was not until the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 purported to create a new category of regulated entity – a ‘retail credit’ firm – that sub-prime mortgage lenders were respectfully requested to apply for such an authorisation from the Financial Regulator from February 2008. This meant at least that the terms of the relatively new Consumer Protection Code 2006 could be applied to them, even if there was still no attempt to impose any kind of interest rate limit or obligation to carry out due diligence.

The failure to properly regulate the sub-prime sector was coupled with what is now widely acknowledged to be a ‘soft-touch’ regulatory regime which enabled mainstream lenders to lend, with limited due diligence, increasingly large sums of money, repayable over extended periods of time, to ever more risky borrowers. A plausible explanation for such an approach is that the nexus between the interests of the State (in the form of increased returns to the Exchequer), and those of financial institutions (through increased returns to shareholders) necessitated the incorporation and financialisation of as many owner occupiers as possible, which in turn required a ‘hands off’ approach from our regulatory authorities.

1.3.3 The revised (or second) consumer credit directive

The European Commission continually reviewed the operation of the first consumer credit directive from approximately 1995 onwards. It became clear that it was in need of updating, particularly around the turn of the century. The credit market had moved on, with some credit products such as credit cards, revolving credit and overdrafts becoming much more common across the Member States and in need of

17. SI 715/2004.

18. SI 687/2006.

19. SI 100/2007.

20. SI 138/2007.

21. SI 751/2007.

closer regulation. However, the process of agreeing an EU Directive can be tortuous and can arguably lead to some of the protections contained within it being inadequate by the time it is implemented. The revised Consumer Credit Directive is a good example. This proposal was first discussed at European Commission hearings as far back as July 2001 with the first draft of the Directive being published in September 2002. This Directive was subject to the ‘co-decision procedure’ whereby the European Parliament plays a critical role in examining proposed Directives drafted by the Commission and suggests changes and amendments. The Commission subsequently accepted a large number of the Parliament’s amendments to its first text and drafted a modified Directive in October 2004 in light of these. Again the Parliament suggested amendments to this version and a second modified proposal was published by the Commission in October 2005.

After much discussion and further disagreement between these institutions, the text of a revised Directive was finally agreed by the Member States in the form of the Council of Ministers on 23 April 2008 and the ‘transposition’ date for the Directive into domestic legislation for Member States was set for 11 June 2010.²² Hence, the formative discussions that influenced the content of this Directive took place a number of years preceding the Global Financial Crisis (GFC) and its implementation did not take place until considerably afterwards. Ultimately, it was transposed into Irish law in 2010 by the European Communities (Consumer Credit Agreements) Regulations (ECCAR)²³ and the effects of this transposition and the confused state in which it left consumer credit legislation in Ireland will be discussed in detail below.

A changed European policy context for the transposition of the revised Directive also had an impact. Whilst the first Directive was a ‘minimum harmonisation’ measure as we have seen, the revised Directive is largely a *maximum harmonisation* measure, in that there is no latitude for Member States to introduce more favourable meas-

ures, except where specifically stated in the Directive itself. The main reason for this in principle is to ensure that the provision of credit across the EU is subject to the same standards applying in each Member State; it is also designed to further encourage the provision of credit on a cross border basis.

1.3.3.1 The key issue of responsible lending

By the time the revised directive was mooted, it was clear that consumer over-indebtedness had become a growing problem across Europe. A large number of Member States already had personal insolvency legislation in place to attempt to resolve this problem and others put it in place in the years before the transposition date. The institutions of the EU however refused (and have continued to refuse) to legislate for a directive on personal insolvency that would oblige all Member States to put in place minimum legislative standards in the area.²⁴ In general terms, the rationale for this view was that common rules on consumer credit concerned the proper functioning of the EU’s single internal market whereas common rules on consumer debt did not and were thus a matter for the Member States themselves to regulate, in other words, a so-called ‘subsidiarity’ issue.²⁵

The European Commission was nonetheless aware of the extent of the debt problem when framing the first draft of the revised directive and sought to address the question of responsible lending within it. Clearly, it believed that there was a causal connection between irresponsible lending and over-indebtedness. In many respects, the attempt of the Commission to address the question of responsible lending in some tangible way was the most far reaching proposal in a directive that otherwise continued to focus on the provision of contractual information to the consumer both before and after entering into credit agreements,²⁶ an enhanced right of withdrawal from agreements for borrowers and much more clearly defined restrictions on the right of creditors to charge any future interest when the consumer terminates an agreement early.

22. Directive 2008/14/EC – 23 April 2008.

23. SI 281/2010.

24. Thus Ireland remained an outlier in this area until the Personal Insolvency Act 2012 was passed at the end of 2012.

25. For a more detailed discussion, see Joyce, *An End Based on Means*, (Dublin: FLAC, May 2003) pages 62–65.

26. Measures that much of the credit industry argued would lead to an increase in the cost of credit that would be passed on to the consumer.

Thus, the preamble to the first draft of the revised Directive in 2002 had the following to say on the subject of the draft Article 9 concerning responsible lending:

Some Member States have a number of rules in connection with credit requiring creditors to apply caution or to act as “good creditors”. This article is intended to establish a similar principle on a European scale, not only in the interests of all consumers or guarantors but also of all creditors. The latter are at risk of seeing their clients’ solvency diminished because their competitors subsequently conclude credit agreements under circumstances that seriously jeopardise the consumer’s or the guarantor’s ability to repay. The principle of “responsible lending” represents an obligation to consult centralised databases and to examine the replies provided by the consumer or the guarantor, to request the provision of sureties, to check the data supplied by credit intermediaries and to select the type of credit to be offered. It is not an obligation targeted at obtaining results such as the existence or otherwise of fault on the part of the consumer.

Similar rules requiring caution call, moreover, for an assessment of the facts and for an examination on a case-by-case basis, preferably by the legal authorities. Any assessment by the creditor of a consumer’s ability to repay is, however, in no way impartial: he is contractually bound and it is a matter of some importance that the link should be made clear between the conclusion of the credit agreement and the preliminary assessment. This provision is without prejudice to the obligation on the consumer to act with prudence when he looks for credit and to respect his contractual obligations.²⁷

It is also worth noting that the same preamble, in providing that Member States should put in place centralised credit databases to enable creditors to check borrower performance under credit agreements, suggested that:

The avoidance of over-indebtedness, both on the part of the consumer and of the guarantor, is a matter of general interest. The setting-up of centralised databases can to an extent solve this problem and at the same time the creditor could be made responsible by the imposition of civil and trade sanctions if on the basis of the information he obtained he ought to have decided not to grant new credit.

This resulted in the following articles in the draft directive:

Article 8 – Central database

1. Without prejudice to the application of Directive 95/46/EC, Member States shall ensure the operation on their territory of a central database for the purpose of registration of consumers and guarantors who have defaulted. This database may take the form of a network of databases. Creditors must consult the database prior to any commitment on the part of the consumer or guarantor, subject to the restrictions referred to in Article 9.

The consumer and, where appropriate, the guarantor shall, if they so request, be informed of the result of any consultation immediately and without charge.

2. Access to the central database in another Member State shall be ensured under the same conditions as for firms and individuals in that Member State, either directly or via the central database of the home Member State.

3. Personal data received under paragraph 1 may be processed only for the purpose of assessing the financial situation of the consumer and guarantor and their ability to repay. The data shall be destroyed immediately after the conclusion of the credit or surety agreement or the refusal by the creditor of the application for credit or the proposed surety.

4. The central database referred to in paragraph 1 may include the reg-

27. Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers – EUR-Lex – 52002PC0443 – EN, accessible at <http://bit.ly/1aofLcv>, last accessed February 2014.

illustration of credit agreements and surety agreements.

Article 9 – Responsible lending

Where the creditor concludes a credit agreement or surety agreement or increases the total amount of credit or the amount guaranteed, he is assumed to have previously assessed, by any means at his disposal, whether the consumer and, where appropriate, the guarantor can reasonably be expected to discharge their obligations under the agreement.

However, by the time the revised Directive was finally agreed in 2008, this is what the final Article 8 on assessing creditworthiness looked like:

Obligation to assess the creditworthiness of the consumer

1. Member States shall ensure that, before the conclusion of the credit agreement, the creditor shall assess the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, *where necessary*, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement. (*Our emphasis added.*)
2. Member States shall ensure that, if the parties agree to change the total amount of credit after the conclusion of the credit agreement, the creditor shall update the financial information at his disposal concerning the consumer and assess the consumer's creditworthiness before any significant increase in the total amount of credit.

In our view the words 'where necessary' in relation to the obligation to consult a relevant database amounted to a significant watering down. This seems to allow each potential lender to subjectively decide on the appropriateness or otherwise of such

a consultation, as there are no criteria in the Directive that would guide a lender on when such consultation might be considered obligatory. This reading may be confirmed by the proviso in the article that "Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement." This would appear to have ruled out any new legislation that would oblige lenders to comply with such a requirement where none previously existed.

Thus, the European Commission clearly envisaged in 2002 not only that consultation would be mandatory but that the result must influence the decision to provide the credit or otherwise. It was also suggested that there might even be a civil sanction for failure to do so. However, by 2008 we appear in principle to have an optional exercise with any given credit provider seemingly free to assess a consumer's creditworthiness on the basis of sufficient information obtained from the consumer alone.

What caused this change of view? One factor may have been the fact that Member States have different traditions concerning the need for protection of consumers of credit, particularly on how much responsibility for ensuring that consumers only take on loans they can afford should be attributed to the companies that provide the credit and how much to the consumer him or herself. Tied closely into this question is the approach taken by the European institutions in terms of the decision made to adopt this revised Directive as largely a 'maximum harmonisation' directive. This stands in sharp contrast to its 1987 predecessor which was a 'minimum harmonisation' measure. Again the latter approach leaves Member States with the flexibility to introduce stronger consumer protection measures in its own domestic legislation if it so chooses, whereas the former approach obliges Member States to go no further than the Directive allows.

The European Parliament played a significant role in the weakening of the responsible lending articles with its suggested amendments to a variety of drafts. To be fair, some of these proposals emerged

because the first draft of the Directive did not take sufficient notice of Directive 95/46/EC concerning data protection standards for data subjects. The Parliament was not alone in this regard and banking associations, economists and even some consumer groups were critical of the proposal. However, it is noticeable that the debate seemed to focus more on the protection of access to the potential borrower's information than the question of responsible lending standards themselves protecting the borrower from over-indebtedness. Indeed there is little evidence of a detailed discussion amongst the EU institutions about what responsible lending is and why in a rapidly evolving consumer credit market a tightening up of lending standards might be desirable.

1.3.3.2 The move from minimum to maximum harmonisation

Perhaps the maximum harmonisation approach provides further clues as to why this may have been the case. Writing in 2003, Nemeth and Ortner noted that not long after the publication of the first draft of the revised Directive, that minimum harmonisation had been the traditional way of regulating consumer protection issues in the EU and that the switch to maximum harmonisation amounted to a "conceptual novelty".²⁸ They observed that it was surprising that "no official reasons for this remarkable change were given". Tellingly, they suggest that "a plausible explanation seems to be that the Commission no longer considered the older concept of minimum harmonisation appropriate for producing optimal results in line with the completion of the single market".

Ultimately, Nemeth and Ortner concluded that minimum harmonisation "can, in effect, never really promote European economic integration". From the point of view of the supplier, it may be confronted with different Member State laws with the difficulties that causes. Even the consumer, they suggest, risks a loss in protection when entering the market (to borrow money) in another Member State.

In their view, it is therefore doubtful that "consumer cross-border activities are really enhanced by a concept of minimum harmonisation."

Note that quite quickly we are no longer talking about standards of protection for consumers availing of credit but about the completion of the single market, European economic integration and specifically the cross border provision of credit. The focus seems to have moved with alacrity to the needs of the supplier and the ideal of the completed market and away from the consumer. Although no doubt the EU institutions will argue that the completion of the single market with provision for cross border credit would benefit consumers, they are clearly not the priority here. Again, does the EU serve the needs of consumers or do consumers serve the needs of the EU?

Finally, Nemeth and Ortner asked whether "this new concept [that is, maximum harmonisation] will be able to reach its ambitious goals rather than eventually weakening consumer protection".

Prophetically, they suggest that:

It is important to keep in mind that, because powerful pressure groups resist many provisions of the proposal, it seems unlikely that the high level of consumer protection presently granted by its regulations can be maintained. If substantial cutbacks must be made, the concept of maximum harmonisation may well have a boomerang effect, as half-hearted maximum harmonisation – this time the lowest common denominator from a substantial point of view – would then lead to a loss of the high protection granted in some member states, as they would not be allowed to introduce additional provisions.

It would appear that this is precisely what happened. The Commission insisted on the maximum harmonisation approach, although the Parliament was said to be unhappy about it. Yet the Parliament in its reading of the Commission's drafts proceeded to water down what we would argue was the most important part of this

²⁸. Kristin Nemeth & Helmut Ortner (2003) 'The proposal for a new directive concerning credit for consumers', *German Law Journal* Vol. 4 (8), pages 809 – 812.

Directive from a consumer protection perspective. The consumer lost out on both fronts, particularly in Member States that had hitherto failed to set standards for responsible lending such as Ireland. Note however the exemption in Article 8 (1) which allowed that “Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement” so that the high protection that existed in some Member States could be maintained.

1.3.3.3 Implications for Ireland

From the perspective of lending in Ireland, the revised Directive came too late; it was and continues to be far too weak. Stronger consumer protection standards at an earlier stage, particularly before 2006–2007, would have mitigated the effects of some of the reckless lending that has caused such deep consumer indebtedness here in the area of unsecured credit, particularly credit card and personal loan debt.²⁹ It might be suggested that in theory there was nothing to stop an Irish government from imposing more stringent responsible lending standards itself at the time, in the face of mounting evidence of a consumer credit bubble.³⁰ However, it is unlikely that even an eager administration would have initiated its own legislation once the Commission had already set a revision of the Directive in train. As is now clear and as FLAC knew at the time from its own work, imposing responsible lending standards was far from the mind of both government and regulators as the free-for-all that has so fundamentally damaged our economy and the lives of many of our people was by then in full swing.

We are of course also responsible for our own mess by failing to curb the cavalier lending practices of both sub-prime and prime lenders. Many lenders ultimately abandoned any pretence at due diligence and lent money with little regard to the borrower’s capacity to repay, instead operating on the basis that property prices and the economy generally would continue to accelerate and grow. They did

this because they were allowed to. Some people in turn borrowed more than they should have because they were allowed to. The role of the EU, in terms of how it may have abetted this fiasco, must also be subjected to some scrutiny. Is there not something fundamentally wrong about an institutional labyrinth that takes eight years to get a Directive from the starting post to the finishing line, particularly in the midst of a credit market that is rapidly evolving and where some Member States had clearly been targeted by global financial conglomerates?

Is there not a touch of the Titanic – too cumbersome to change direction – about maintaining the maximum harmonisation approach? Has the emphasis on putting in place the cross-border market for financial services actually blinded the EU institutions to the protection that consumers throughout the EU, other (more ethical) creditors and ultimately Member State economies really require? For example, what is the point in ensuring through a maximum harmonisation Directive that consumers receive in advance and at the point of drawing down funds comprehensive information relating to a loan – the ‘bells and whistles’ of terms and conditions – if there is no corresponding obligation to properly assess the borrower’s capacity to service the agreement and the consequences for the creditor when it fails to do so? And with all this emphasis, the cross border provision of financial services has not actually materialised to the extent envisaged.

What FLAC is arguing for is a responsible credit market, not a market without credit. Given the heavy price that so many people in Ireland (and across the EU) have paid for reckless lending, we do not believe that this is an unreasonable request. In this regard, the principles enunciated by the European Coalition for Responsible Credit (ECRC) have already been referred to in previous FLAC publications³¹ and those principles in our view still form the basis for a fair and responsible approach to lending.³²

The consumer credit market in Ireland is now, post-boom, relatively dormant; but it will not always be. This lack of regulation

29. Mortgage credit is not covered by the Directive and the 1997 and 1990 Directives did not regulate it either.

30. See Joyce (2003), *An End Based on Means*, Dublin: FLAC – particularly pages 59 – 60.

31. See for example Joyce (2009), *To No One’s Credit*, Dublin: FLAC – ‘A note on Irresponsible lending’, pages 39 – 42.

32. See www.responsible-credit.net (last accessed February 2014). The Principles in full are given in Appendix I of this report.

of lending standards may not be creating a problem right now, when lending is comparatively thin on the ground and generally subject to very rigorous, self-imposed credit checking by the credit industry. However, it is the prospect of a return to an unfettered credit market in the future – and the spectre of further reckless lending – that is cause for concern.

1.3.3.4 *Transposing the revised (or second) directive*

To reiterate at this point, two major Directives have been issued by the European Union concerning the consumer credit area, the first in 1986³³ and the second in 2008. The economic climate within which each was implemented was, therefore, considerably different, as were their objectives in terms of harmonisation as explained above. The Consumer Credit Act 1995 had thus been in existence for several years and had been amended several times when the Irish State was faced with the decision on how to implement or transpose the second revised Directive. Under European Union law, that directive had to be incorporated into Irish law by 11 June 2010.

Ultimately, in contrast to its predecessor, the revised directive was transposed into Irish law by way of a Statutory Instrument in contrast with the first Directive which led to the Consumer Credit Act 1995. This method – presumably chosen by the State for reasons of expediency in order to meet the transposition deadline at a time when the Department of Finance was occupied with other weighty legislative matters – has contributed to a convoluted landscape of legislative rules.

Ideally, at this juncture, the State would have taken the opportunity to review the Consumer Credit Act 1995 (CCA) in its entirety, and to produce one new amended version of consumer credit legislation that would have:

- Consolidated all the changes made to the legislation by ministerial regulation since it was first passed in May 1996;
- Updated the parts of the Act that needed modernising (for example, the rules relating to communications with

- borrowers that currently do not take account of new forms of technology);
- Transposed the revised Directive and differentiated between the rules applying to different forms of credit as a result of a maximum harmonisation revision;
- Specified the forms of credit to which the new rules in the transposed Directive would not apply.

In the middle of a deep economic and monetary crisis and already facing a very heavy legislative agenda, the State (in the form of the Department of Finance) chose instead not to update the existing legislation, but rather to transpose the revised Directive by way of Ministerial Regulation. It thereby missed a major opportunity to bring cohesion and clarity to what is, by dint of piecemeal development, an already complex legislative area.

The result of this decision for the consumer credit domain is the following somewhat confusing picture:

- A (comparatively) new regulation – the 2010 European Communities (Consumer Credit Agreements) Regulations (ECCAR)³⁴ – that applies to credit agreements (personal loans, credit sales, credit cards, overdrafts) entered into **after** 11 June 2010 and to which the CCA does not generally apply.³⁵
- The Consumer Credit Act 1995 (CCA) that continues to apply to credit agreements (personal loans, credit sales, credit cards, overdrafts) entered into **before** 11 June 2010 and to which the new regulations do not generally apply.³⁶
- The Consumer Credit Act 1995 that continues to apply to Hire Purchase, Consumer Hire and Housing loans (including mortgages), **regardless of the date** of the agreement, because the revised Directive does not include them.

To add further to the confusion, **there is no consolidated version of the Consumer Credit Act** available online to take account of the numerous changes made to it by Ministerial Regulation since it was

33. Dir 87/102/EEC – It should be noted that this Directive was substantially amended by Dir 90/88/EEC.

34. SI 281/2010.

35. Some limited provisions of the Consumer Credit Act also continue to apply to these agreements.

36. Again, this is subject to some very specific exceptions concerning open end credit agreements such as overdrafts or revolving loans.

first passed in 1996.³⁷ This means that a consumer who might wish to be informed of his or her rights under this piece of legislation and checks his or her entitlements online may be looking at an out-of-date provision of the Act, in addition to not being made aware that new regulations were introduced for post-June 2010 credit agreements.

1.3.3.5 *The weakening of consumer protection standards*

The revised Directive was welcome in some respects; for example, it imposes greater obligations on credit providers to give pre-contractual information to borrowers before an agreement is entered into and it expands the amount of information that borrowers are entitled to receive in relation to credit agreements including credit cards. It has also tightened up the rules around the right of withdrawal for the consumer from credit agreements and, as referred to above, the right of a consumer to settle the agreement early without being charged excessive future interest.

However, and fundamentally important from the consumer perspective in Ireland, is that in transposing the new Directive, a significant range of existing consumer protection measures in the Consumer Credit Act 1995 have been ‘disapplied’ and thus do not apply to credit agreements regulated by the ECCAR, though they continue to apply to Hire Purchase and, in limited instances, to housing loans. An outline of some of these ‘disapplications’ is set out below. The ostensible reason for this is the maximum harmonisation nature of the Directive, with the Department of Finance arguing that the dictates of maximum harmonisation prevented and prevents the State from maintaining stronger levels of consumer protection for such credit agreements, as this would go beyond what is permitted by the Directive.

Although it may be legitimately argued that the State had no choice in the matter, our research enquiries suggest that no case was made to the European authorities to try to maintain any of these entitlements. Neither is there any written evidence of

any attempt by the Department to examine in detail whether each disapplication on its own merit is actually necessitated by the dictates of maximum harmonisation. This is a matter that FLAC has raised and discussed with the Department of Finance but apart from the restoration of Section 46 concerning communications by lenders with borrowers,³⁸ little has been done to date to rectify the situation.

In summary, only the following provisions of the CCA apply to new credit agreements issued after 11 June 2010 to which the ECCAR apply:³⁹

- Part II, relating to advertising;
- Section 30 (1) of Part III, relating to the need for credit agreements to be made in writing and signed by the consumer and by or on behalf of all other parties and a copy provided at the time of the making of the agreement or within 10 days;
- Section 42 of Part IV, relating to the right of the borrower to sue the creditor where goods are not supplied or are incorrectly supplied, having pursued his or her remedies against the supplier to no avail;
- Section 45 of Part IV, relating to communications in writing;
- Section 46 of Part IV, relating to communications.

As a consequence of this mode of transposition, the following are three examples of how the implementation of the ECCAR has served to disimprove legal protection for consumers entering into credit agreements:

Example 1: Enforceability of agreements

Consumer Credit Act 1995

Part III of the Consumer Credit Act 1995 applies in general to all credit agreements entered into before 11 June 2010.⁴⁰ Section 30 of the CCA provides that apart from advances on current accounts and credit card agreements, all pre-June 2010 credit agreements (and any contract of guarantee relating to them) must be in writing, and must observe the five elements set out

37. The Law Reform Commission, as part of its Statute Restatement Plan, has very helpfully produced consolidated versions online of 170 ‘frequently used’ pieces of legislation. These do not currently include the Consumer Credit Act 1995 (as amended).

38. This was done through the European Union (Consumer Credit) (Amendment) Regulations (SI 579/2012). However, it is arguable that S.46 itself is out of date and is a good example of law not keeping up with developments in technology, as it makes no specific provision for mobile phone or e-mail communication.

39. See Regulation 4 (2) – (5) of the European Communities (Consumer Credit Agreements) Regulations 2010 (SI 281/2010).

40. Except housing loans, for which separate rules exist. In addition, separate requirements apply in relation to hire purchase and consumer hire agreements because neither of these forms of credit comes within the definition of a credit agreement in the Act. The reason for this is that a hire purchase agreement is essentially a rental agreement with a right to purchase the goods only upon payment of the final instalment and a consumer hire agreement is a rental agreement only.

below. The five elements, or creditor obligations, are as follows:

- i. The agreement must be signed by the consumer and by or on behalf of the other parties to the agreement.
- ii. A copy must be handed to the consumer at the time of the agreement or within 10 days of making it. (A copy of the contract of guarantee and a copy of the agreement must also be sent or handed personally to the guarantor within 10 days).
- iii. The agreement must include a statement relating to the cooling off period that the consumer may withdraw from the agreement within 10 days of receipt of a copy of it if he or she indicates this in writing. This right to a cooling off period may be waived by the consumer, but only in writing by a separate signature from any other signature to the agreement.
- iv. The names and addresses of both parties must be specified in the agreement.
- v. Finally, any costs or penalties to which the consumer becomes liable if the agreement is breached should be outlined.

If these conditions are not observed for loans issued prior to 11 June 2010, the loan is unenforceable against the borrower and, according to section 38, a court has no discretion in this area to render the agreement enforceable.

In addition to these five specific requirements, section 31 (1) sets out the detailed information that must be included in writing in a credit agreement for a cash loan and section 31 (2) the information that must be included in a statement accompanying a credit card agreement. Section 32 details the written information required in a credit sale agreement and section 34 the written information required for credit agreements for the supply of services. Section 35 deals with the information a consumer must receive in connection with advances on a current account including an overdraft. Finally, section 36 of this part of the Act provides that credit agreements (apart from overdraft, credit sale and moneylending

agreements) should contain certain 'important' information on the front page of the agreement. This relates to the amount of credit advanced, the period of the agreement, the number of repayment instalments, the amount of each instalment, the total amount repayable, the cost of the credit and the Annual Percentage Rate of charge.⁴¹

In relation to these additional information requirements, Section 38 provides that a creditor will not be able in principle to enforce the agreement if s/he does not provide the requisite information. However, a court can dispense with such 'non-enforceability' if it thinks this failure was not deliberate and has not prejudiced the consumer and that it would be just and equitable to do so. It can also be a summary offence for a creditor to fail to provide any of the requisite information.

Section 38 of the Consumer Credit Act 1995 provides one of the very few instances in law where a consumer is released from his or her obligation in the event of a creditor's failure to adhere to its information obligations under the Act. The rationale for this is not to benefit the consumer individually, but to impress upon the lender the need to ensure that the requisite information is provided, by imposing a consequence in the form of a potential economic loss if it is not. It should be noted that this 'non-enforceability' is not a requirement of the first directive but is rather another example of the Irish government of the day introducing more stringent consumer protection measures than the 'minimum harmonisation' approach of that Directive required. Thus, Article 4 of the first directive simply states that credit agreements shall be made in writing, that the consumer shall receive a copy of the written agreement and that the written agreement shall include the other essential terms of the contract with an annex to the directive providing a list of indicative terms.

European Communities (Consumer Credit Agreements) Regulations (ECCAR)

Article 10 of the revised Directive is far more detailed in terms of prescribing

⁴¹. This notice is set out in the third schedule to the Act.

the information that must be included in credit agreements than the comparable Article 4 of its predecessor. Article 10 is transposed in Regulation 13 of the ECCAR. However, because the revised directive **does not impose any civil sanction for creditors who fail to adhere to its terms** and because it is a maximum harmonisation measure, the ECCAR do not impose any civil liability (such as making the agreement unenforceable) on a credit provider for failing to comply with the necessity to provide loan documentation and section 38 of the Consumer Credit Act is disappplied to post-June 2010 credit agreements.

Instead, it is potentially a criminal offence for a creditor to fail to provide the relevant information. The record of the Central Bank in policing the legislation and codes over which it has oversight is examined in more detail below. However, it is notable that of the sanctions imposed by the Central Bank on financial service providers in 2010, 2011 and 2012, none related to breaches of the Consumer Credit Act or the ECCAR. Either there were no offences committed, there is insufficient proof of offences committed or there is reluctance to prosecute criminal offences under the consumer credit legislation. Equally, as we shall see below, the Bank's stated intention to concentrate primarily on compliance with its own Codes rather than on compliance with primary and secondary legislation in the consumer credit area does not bode well for its monitoring function in this area.

Example 2: Requesting copies of agreements

A significant provision of the Consumer Credit Act⁴² allows a consumer the right to request in writing that a copy of the credit agreement or details of the current state of the agreement (repayments left, amount outstanding, and so on) be provided by the creditor to him/her or to someone specified by him/her in the request (such as a money advisor). The creditor or owner must supply this information within 10 days of the request. If s/he fails to do so

and the default continues for a further 14 days, s/he will not be entitled to enforce the agreement as long as this default continues. The creditor is entitled to charge €2.50 for this request, except in the case of a moneylending loan.

However, again this right is no longer available with credit agreements to which the ECCAR applies. The right to request a copy of the credit agreement has proven to be useful to consumers and their advocates such as MABS money advisors in the past, particularly as many consumers do not keep or can no longer locate relevant documentation. In order to ascertain an indebted client's liability, original loan documentation is vital. It is therefore regrettable that this right of request does not apply to credit agreements regulated by the ECCAR. FLAC would argue that this was not necessitated by the restrictions of 'maximum harmonisation', as Article 10 of the Directive primarily concerns itself with the information that a borrower is entitled to receive at the time the loan is made and does not in general terms provide for post-contractual requests for information on the terms and conditions of the contract.

Example 3: Limitations on the creditor's right of enforcement

Under Section 54 of the Consumer Credit Act 1995, a creditor wishing to enforce a provision of an agreement (e.g. requesting early payment or recovery of the possession of goods) must give the consumer at least 10 days' notice of the action it intends to take to enforce the agreement. If the consumer breaches the agreement (for example by failing to make a payment by the appropriate date) the creditor again, if s/he proposes to end the agreement or recover the goods, must give 10 days' notice to the consumer setting out details of the agreement and the breach and if it is capable of remedy.

The critical provision in this section is that the consumer has 21 days (including the 10 days' notice) to remedy the breach or pay compensation for his or her breach of the agreement (if the agreement permits

⁴². Section 43.

it). So, for example, if a consumer takes out a personal loan with an institution and defaults on the payment of instalments, s/he will generally have at least three weeks to sort the matter out, from the date the letter from the institution enclosing the default notice is sent. This is quite significant in that it allows a consumer who runs into financial difficulties some latitude within the confines of the agreement to recover. The appropriate court may, at the request of the creditor, dispense with the 21-day notice if it thinks it equitable. This might happen for example in cases of deliberate persistent default in payment by the borrower.

Although this section was intended to create some room for manoeuvre for borrowers, it should be noted that it has also been of significant benefit to creditors, in that it allows the creditor to formally put the borrower on notice that termination of the agreement is being considered. Thus, it serves as an early warning mechanism for a consumer to attempt to address the problem, perhaps to seek help and even to reschedule an agreement with the creditor's consent in the case of reduced financial capacity. In this sense, it acknowledges the reality of consumer indebtedness. Indeed, the framers of the consumer credit legislation back in the early 1990's should be complimented for including measures such as this and availing of the minimum harmonisation approach of the first directive to introduce stronger consumer protection measures.

However, again this section and all of Part V of the Consumer Credit Act 1995 in which it is contained has been disappplied to credit agreements to which the ECCAR apply. Thus, this useful 'early warning' provision for consumers (and creditors) is gone for post-June 2010 credit agreements. Again, there is an argument to be made that the dictates of maximum harmonisation did not require this, given that the revised Directive does not attempt to regulate post-contractual default issues and thus a Member State is free to continue to do so through its pre-existing legislation.

Summary

Even if the doctrine of maximum harmonisation is offended, should Member States not be allowed to maintain their pre-existing legislation? Perhaps this is the kernel of the issue. After all, as we have seen above, it is the institutions of the EU that have changed tack from minimum to maximum harmonisation for their own reasons. FLAC would suggest that this is linked to the completion of the internal market, rather than the interests of consumers.

In dropping a number of existing consumer protections to post-June 2010 agreements, we now have two tiers of rules. For example, insofar as it concerns a 2014 Hire Purchase agreement, the agreement is unenforceable if the hirer does not receive a signed copy of the agreement at the time it is made or within 10 days and the lender must still issue a Section 54 default notice before any termination of the agreement may take place. However, insofar as it concerns a cash loan, there is no lack of enforceability and no requirement for a default notice.

This confusing inconsistency is further compounded by a transposition that failed to include all consumer credit legislation into one act and failed to consolidate the numerous amendments of the 1995 Act into an updated version. Where is the consumer in all of this? Probably he or she is left struggling to understand his or her rights.

1.3.4 The approach of the Central Bank to supervising consumer credit legislation

In Chapter 2, we will examine in some detail the Central Bank's principal code designed to protect consumers of financial services generally – the Consumer Protection Code (CPC)⁴³ – and in particular we will look at how it and other similar Codes of Practice issued by the Central Bank are enforced and whether they are admissible in legal proceedings. The Bank's Code of Conduct on Mortgage Arrears (CCMA) will also be examined and the extent to

43. Issued by the Central Bank of Ireland – See www.centralbank.ie for a copy of the Consumer Protection Code online (last viewed February 2014).

which it has provided solutions to the key problem of mortgage arrears will be analysed. Before that the critical question of how the State polices compliance with the complex suite of consumer credit legislation described above must be addressed.

In this regard, the ad-hoc, disjointed nature of legislative development in the financial services area, which starts at European level and which may then be compounded by decisions at national level, can cause problems not just for consumers and their advocates (as we will see in Chapter 5) but also for regulatory authorities. In Ireland, it has undoubtedly contributed for example to a decision by the Central Bank⁴⁴ to focus its regulatory attentions in the area of consumer credit less on adherence with primary and secondary legislation, and more on compliance with its own Codes of Conduct, developed against this piecemeal backdrop of European and national legislation.

Thus, in relation to the ECCAR regulations transposed on foot of the revised Consumer Credit Directive, for example, the Central Bank has chosen to develop a distinct route of its own, as evidenced from this interview extract:

FLAC – Who is enforcing the (consumer credit) Regulations?

Central Bank – We’re responsible for enforcing it... but it’s difficult for us... that’s why a lot of the time we rely on the Code, because we’ve done the work to clarify what is in and what isn’t in, so people are in a better space rather than looking at Regulations that have been transposed, or Directives transposed in the Regulations and they weren’t necessarily transposed properly,

FLAC – It’s your Code.

Central Bank – Yes, and people are less likely to challenge us to be perfectly honest on the Code as they know it’s our Code.⁴⁵

1.3.4.1 Exclusions in the Code as a result of the revised Directive and the ECCAR

However, what the Central Bank has not taken into account in the above extract is that significant chapters of the Consumer Protection Code do not apply to credit agreements covered by the ECCAR – personal loans, credit sales, credit card agreements and overdrafts, entered into from 11 June 2010. Again this is ostensibly because of the maximum harmonisation nature of the directive, with the Bank forming the view that it cannot impose obligations within its Code that are more stringent than the Directive.⁴⁶ Now that it is finally starting to emerge from a deep recession following a credit boom and bust, if ever a country needed universal robust rules and principles to govern the circumstances under which any form of credit is granted to consumers into the future, it is Ireland. Notwithstanding that, as a consequence of this limited interpretation of what the Code could provide for, the following sections, for example, do not apply to credit agreements:

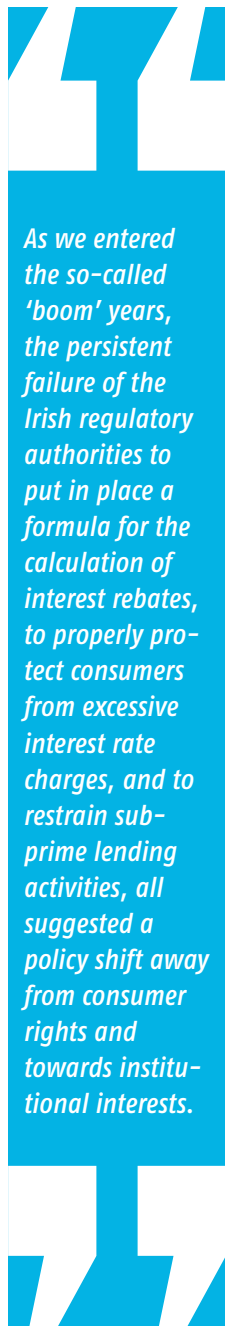
- Chapter 4 entitled “Provision of Information” applies in practice only to mortgages and not to credit agreements generally. A specific section of this chapter is entitled credit, but only rule 4.26 in that section relating to the warning that must be provided to a guarantor applies to credit agreements. This section is therefore quite misleading as it refers to credit generally rather than mortgage credit and to credit agreements rather than housing loans or mortgages.
- None of the key Chapter 5 entitled “Knowing the consumer and suitability” applies to credit agreements regulated by the ECCAR. In practice again, this means that it only applies to mortgages (as well as other financial products such as investments and insurance). This is highly regrettable as this chapter imposes upon lenders a basic obligation to gather information relating to a consumer’s financial situation and to carry out an assessment

⁴⁴. The Irish Central Bank is the authority responsible for regulating the activities of financial service providers.

⁴⁵. Interview with the Central Bank, January 2013.

⁴⁶. Thus, Chapter One of the CPC entitled ‘Scope’ at page 4 states: “Where regulated entities are providing credit under credit agreements which fall within the scope of the European Communities (Consumer Credit Agreements) Regulations 2010 (SI 281 of 2010), only the following sections of the Code apply:

- Chapter 2 – General Principles 2.1 to 2.4 and 2.7 to 2.12
- Chapter 3 – Common Rules
- Chapter 4 – Provision of Information: Provisions 4.7 to 4.11 and 4.26
- Chapter 6 – Post-sale Information Requirements: Provision 6.8
- Chapter 8 – Arrears Handling
- Chapter 10 – Errors and Complaints Resolution
- Chapter 11 – Records and Compliance.



of affordability to ascertain that consumer's likely ability to repay the debt over the duration of the agreement – precisely the kind of assessment that is likely to lead to more responsible lending.

Thus, the protections afforded by the Code vary considerably depending on the type of financial service involved and within those services, for example the provision of credit, the type of agreement involved. Again this contributes to an unevenness that is baffling. For example, when considering the provision of a mortgage, a lender must comply with the rules on knowing the consumer and assessing suitability in Chapter Five of the CPC. The same lender when offering a personal loan need only assess the potential borrower's creditworthiness under the terms of Article 8 of the directive transposed by Regulation 11 of the ECCAR – on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of the consultation of a relevant database.

It must also be pointed out that other provisions of the Code relating to mortgages and investment products may also have to be 'dis-applied' in the near future if, as anticipated by the Central Bank, certain developments come to pass:

And the Mortgage Credit Directive, if that comes through in the next couple of years, it means we have to extract mortgages out of it, so that's another problem... there won't be a whole lot left, and if PRIPS⁴⁷ comes in, the disclosure requirements will largely go for a lot of investment products.⁴⁸

Could the Central Bank have taken a less cautious approach and maintained that the Code should apply equally to all credit agreements? For example, Article 22 of revised Directive, headed 'Harmonisation and imperative nature of this Directive' states in Paragraph One that:

Inssofar as this Directive contains harmonised provisions, Member States

may not maintain or introduce in their *national law* provisions diverging from those laid down in this Directive.

Does the reference to 'national law' in Article 22 encompass Central Bank Codes of Practice? or may it be argued that such so called 'soft law' standards are outside the scope of the maximum harmonisation principle? A follow on question is whether either the Department of Finance or the Central Bank engaged on this issue with the European authorities? Our research enquiries would tend to suggest that neither did and again it is arguable that this is symptomatic of an approach to consumer protection issues that does not categorise them as important enough to warrant 'pushing the boat out' and testing the limits of what is possible and permissible.

The potential admissibility of the Central Bank's codes in court proceedings is examined in detail below, particularly in terms of the current rise in applications for repossession of family homes and the likely admissibility of the Code of Conduct on Mortgage Arrears (CCMA). This includes an analysis of the limited case law currently available on this subject. However, for the moment it may suffice to say that although Central Bank codes are issued under Section 117 of the Central Bank Act 1989, none of them constitute a piece of primary legislation (in the form of an act of the Oireachtas) or a secondary piece of legislation (in the form of a ministerial regulation issued by the Minister for Finance).

FLAC's general conclusion therefore is that the admissibility of such Codes as they are currently constituted is more than questionable from a legal perspective. If this view is correct, then we might suggest that such Codes do not constitute 'national law'. If this is in turn correct, then it follows that there was no need to only partially apply the Code to ECCAR-regulated credit agreements; the Code could and should apply fully to them.

47. PRIPS is an acronym for "packaged retail investment products".

48. Interview with the Central Bank, January 2013.

1.3.4.2 Further exclusions from the Code for domestic reasons – Hire Purchase, Moneylending and Credit Union loans

We have seen above how credit agreements (personal loans, credit sales, credit card and overdraft agreements) entered into after 11 June 2010 are only partially covered by the Central Bank's Consumer Protection Code. However, unfortunately, this is not the only exclusion of the provision of credit from the terms of the Code. Although Hire Purchase is not regulated by the revised directive and the ECCAR, and thus the State is not constrained by maximum harmonisation from applying the Code to it, it has chosen not to do so.

When the first version of the Code was introduced in 2006, there was no specific exclusion of Hire Purchase and consumer hire agreements from its scope. An addendum to the 2006 CPC was, however, introduced in May 2008, but with minimal publicity and no fanfare.⁴⁹ On the face of it, this addendum was introduced to apply the terms of the 2006 Code to the newly authorised “retail credit firms” (sub-prime lenders who up to that point were not regulated at all) and home reversion firms (who specialised in so called lifetime mortgage products). Tucked away on page 4 of the ‘addendum’ document, it is stated that the Code does not apply to regulated entities when “carrying on the business of entering into Hire Purchase agreements; or when carrying on the business of entering into consumer hire agreements”. When the revised version of the Code was put in place in January 2012, these exclusions of Hire Purchase and consumer hire agreements were continued.⁵⁰

Thus the Code has not applied to regulated entities providing Hire Purchase or consumer hire finance since May 2008 and indeed it is the Central Bank's view that it should never have applied at all, since it says that Hire Purchase has never been regulated by the Central Bank and so it cannot apply the code to these agreements or regulate HP companies at all. On this subject, an e-mail forwarded to FLAC, in response to a request for clarification on this matter, states as follows:⁵¹

Section 28 of Part V of the Central Bank Act 1997 defines “credit” as a “cash loan (whether or not provided on the security of a mortgage or charge over an estate or interest in land) but does not include credit of a class specified in Section 3 (2) of the Consumer Credit Act 1995”. Our legal advice has confirmed that hire purchase is not captured by “cash loan”. As a result, there is no requirement for hire purchase companies to seek an authorisation or licence from the Financial Regulator and they are not subject to the Consumer Protection Code (the Code). In addition, the Addendum to the Consumer Protection Code, issued in May 2008, amended the Scope section to state, inter alia, that the Code does not apply to regulated entities when “carrying on the business of entering into hire purchase agreements.

In an e-mail reply, FLAC suggested that:

Section 3 (2) of the Consumer Credit Act 1995 (CCA) merely sets out the class of credit agreements to which that Act does not apply and these do not include hire purchase agreements. On the other hand, Section 2 of the CCA does define ‘credit’ as including ‘a deferred payment, cash loan, or any other form of financial accommodation’. Surely the nature of hire purchase is that it is a financial accommodation involving deferred payments. The hirer has the use of the goods immediately and the finance provider pays the seller for them, with the hirer paying instalments to the finance provider. Under Section 58 of the CCA, the value of the goods (usually a motor vehicle) must be stated in the form of a cash price in the agreement. The hire purchase price (the total sum payable under the agreement by the hirer in order to complete the purchase including cash price, interest and other charges) must also be set out, together with the amount and number of instalments.

49. Addendum to Consumer Protection Code, Central Bank, May 2008.

50. See page 5.

51. March 2011.

FLAC had subsequent discussions with officials of both the Central Bank and the Department of Finance on this issue. Notwithstanding the difference of opinion articulated above, there was a general recognition as a result of these discussions that this is a gap in regulation here. However, remedying this would seem to be a low priority on the agenda of the Central Bank and the Department of Finance:

This has been an ongoing issue, the gap is really around the regulation of the hire purchase providers who are not already regulated under some other piece of legislation, that's where the gap is... that's our position on it, it's not that there's a gap in the Code, if they were regulated by us there would be a Code, we have discussed it with the Department of Finance, it's not a priority at the moment for our people, but we will probably end up raising it again after the Presidency, the fact that there's this gap.⁵²

The recently passed Central Bank (Supervision and Enforcement) Act 2013 provided a perfect opportunity to regulate Hire Purchase finance companies and already regulated entities when providing Hire Purchase finance. That Act for example amends Section 28 of Part V of the Central Bank Act 1997 (referred to by the bank in its e-mail above) by inserting a new regulated entity of 'debt management firm' so that finally such entities will be regulated after operating with relative impunity for a number of years. Why not Hire Purchase companies?

Why, it must be asked, does it take so long to initiate legislative changes to protect consumers? With Hire Purchase making a significant return as a form of lending (note for example the sizeable increase in radio and television advertising for Hire Purchase in the second half of 2013) and significant confusion and vulnerability around the legal consequences of entering a Hire Purchase agreement – for example, the Hirer does not own the goods until the final payment is made so it is in effect a form of secured loan – there is

no justification for not applying the Code to it, in addition to the protections provided by the Consumer Credit Act 1995.

Neither does the Code apply to any of the following:

- Moneylending under the Consumer Credit Act 1995. (However, a specific Consumer Protection Code for licensed moneylenders was introduced in January 2009);
- Services provided by regulated entities to persons outside the State;
- Services relating to the European Market for Financial Services;
- Reinsurance business;
- Bureau de change business;
- Credit union activities, other than when credit unions act as insurance intermediaries (i.e. arranging insurance);
- The provision of credit involving a total amount of less than €200.

Quite why credit unions are exempted in full from the provisions of the Code has never been adequately explained. The ECCAR now applies in full to the lending activities of credit unions so it was open to the Central Bank to apply the Code at least partially to cash loans in the same manner as outlined above.

The practical effects of this for debtors and those working with them are all too obvious. For example, the important and useful Chapter 8 of the Code obliges all lenders (with the exception of mortgage lenders to whom the parallel Code of Conduct on Mortgage Arrears applies) to adhere to common rules on arrears handling where personal consumers are encountering difficulties with repayments. The clarity brought about by common arrears handling standards is welcome. However, where a consumer has a Hire Purchase agreement or a credit union loan, or both, in arrears, these rules of engagement do not apply and so, for example, a MABS money advisor working with an over-indebted consumer cannot rely upon a uniform set of rules.

52. Interview with the Central Bank, January 2013.

1.4. Summary

The over-riding conclusion we draw from Chapter One is that the legal architecture for the protection of those availing of consumer credit in Ireland is flawed. The main reason for this is that the interests of the credit consumer have, by and large, proved over time to be secondary to the interests of others, namely policymakers, the regulatory authorities, and (primarily) the financial service providers whom they regulate. It is hard to escape the further conclusion that a disgruntled financial services consumer, and particularly a credit consumer, is not facilitated and empowered by the system so much as discouraged and befuddled by it.

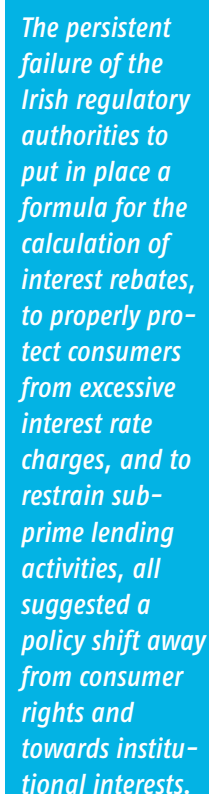
The evidence suggests, however, that it was not always thus. Pre-boom for example, the (1995) Consumer Credit Act went considerably further than the (1987) European Directive it implemented in some respects, and contained evidence of progressive thinking, for example in terms of the inclusion of rules around the making of housing loans, compulsory default notices and provisions to address the illegal moneylending problem (albeit counter-balanced by exclusions for mainstream credit institutions, including banks, from its 'excessive credit charge' provisions). The idea of minimum harmonisation worked, at least to some extent, in favour of the financial service consumer at that time, although many of the key provisions of the Act have, alas, remained unused and untested, and some key deficiencies remain unrectified.

As we entered the so-called 'boom' years, the persistent failure of the Irish regulatory authorities to put in place a formula for the calculation of interest rebates, to properly protect consumers from excessive interest rate charges, and to restrain sub-prime lending activities, all suggested a policy shift away from consumer rights and towards institutional interests. In turn, the EU policy shift towards maximum harmonisation seen in the revised 2008 directive has worked against consumers and in favour of providers and as boom turned towards bust, the revised European Consumer Credit Directive of 2008 was,

in many respects, outdated and inadequate to the changed needs of the time even before it was transposed into Irish law in June 2010. Particularly regrettable was the watering down of responsible lending provisions initially included in the draft Directive published in 2001, a dilution which could have prevented or at least mitigated the related financial difficulties afflicting many consumers.

The method of transposition of the revised Directive, by way of secondary legislation as the 2010 European Consumer Credit Agreement Regulations (ECCAR), has in turn resulted in both convolution and complexity. It appears to have been driven more by the State choosing to discharge its obligations in the quickest way possible in the midst of a very crowded legislative agenda, rather than by a desire to protect the consumer. Whilst this may have been somewhat explicable at a time of unprecedented economic catastrophe, the continuing failure to initiate a consolidation of consumer credit legislation is perhaps revealing. Further, by the Central Bank's own admission, neither the Consumer Credit Act 1995 nor the Consumer Credit Regulations of 2010 appear to be monitored or enforced to any significant extent, and the relationship between them is difficult to fathom.

The result of this transposition is that some of the protections for Irish credit consumers have been dis-improved compared to those that existed previously. Regrettably, little or no attempt appears to have been made by the Irish authorities to request a dispensation from the EU to retain some of the more consumer-friendly provisions put in place on foot of the first Directive. As a result, certain consumers can no longer argue that credit agreements are unenforceable or request a copy of the agreement or statement of account, and are no longer entitled to 'early warning' notice of potential enforcement by a creditor. The Irish authorities should seek dispensation from the EU to re-apply such consumer-friendly provisions which, FLAC argues, served consumers reasonably well in practice prior to their dis-application.



The persistent failure of the Irish regulatory authorities to put in place a formula for the calculation of interest rebates, to properly protect consumers from excessive interest rate charges, and to restrain sub-prime lending activities, all suggested a policy shift away from consumer rights and towards institutional interests.

The cumulative effect therefore of the inter-relationship between the revised Directive, the Regulations that transpose it and the Consumer Protection Code is that the protection of Irish credit consumers is seriously compromised.

Compounding the ‘convolution and complexity’ referred to above, the Central Bank has chosen a distinctly conservative approach in terms of applying its own Consumer Protection Code to credit agreements covered by the revised Directive and the regulations that transpose it. The result of such an approach, namely the ‘disapplication’ of considerable parts of the Code to many forms of credit agreement, is unfortunate from the consumer’s perspective; again, no attempts appear to have been made by the Irish authorities to seek a dispensation in this regard from their European counterparts. It is also arguable in our view that the Consumer Protection Code is not a piece of national law as such, so that it is not covered by the dictates of maximum harmonisation.

In turn, not only do the terms of the Consumer Protection Code only partially apply to credit agreements covered by the revised directive, they do not apply at all to Hire Purchase, consumer hire or credit union loans. If the Code was to no longer apply to mortgages in the future, as contemplated by the Central Bank itself, then substantial swathes of the CPC would not apply to any form of credit agreement *at all*. The Central Bank’s decision to focus its regulatory activities on monitoring compliance with its own Code further suggests that the monitoring of compliance with both the consumer credit legislation of 1995 and the ECCAR of 2010 is far from what it should be, even though the Bank has a statutory responsibility to carry out this function.⁵³

The end result is that consumers of credit are now left without key safeguards that the Code continues to provide to users of other types of financial services. In turn, given that the distinctly patchwork protection provided to borrowers of money under the Code may be further diluted by the Mortgage Credit Directive, who will be watching to ensure that credit consumers rights, under the Consumer Credit Act 1995 in the case of Hire Purchase, consumer hire and housing loans and the ECCAR in the case of personal loans, credit cards, credit sales and overdrafts, are being adhered to in the future?

The cumulative effect therefore of the inter-relationship between the revised Directive, the Regulations that transpose it and the Consumer Protection Code is that the protection of Irish credit consumers is seriously compromised. There is a common belief that the regulatory mistakes of the past are being addressed by both European and Irish policy-makers and that the result is greater protection for borrowers; unfortunately, as the above analysis illustrates, such a belief may be widely mistaken.

53. See sections 7 and 14 of the Consumer Credit Act 1995 and Regulation 25 (5) of the ECCAR concerning penalties which states that ‘Summary proceedings in relation to an offence under these regulations may be prosecuted by the Central Bank and Financial Services Authority of Ireland’.

CHAPTER

**The role of Central Bank
Codes in protecting
consumers of financial
services**

2.1 Introduction

In accordance with the power delegated to it by the Oireachtas by virtue of section 117 of the Central Bank Act 1989, the Central Bank of Ireland has chosen to develop its own codes of conduct for the variety of financial service providers which it regulates. There are a number of such codes which relate to financial service providers, principally the Consumer Protection Code 2012 (CPC), the Consumer Protection Code for Licensed Moneylenders,⁵⁴ the Code of Conduct on Mortgage Arrears 2013 (CCMA), the Code of Conduct on the Switching of Current Accounts with Credit Institutions, the Code of Conduct for Business Lending to Small and Medium Enterprises 2012, and the Code of Practice on Lending to Related Parties 2013.

In this Chapter, we focus on the Consumer Protection Code and particularly

the Code of Conduct on Mortgage Arrears, given its critical importance as the notional set of rules imposed on lenders with a view to resolving cases of mortgage arrears on principal private residences. This will include an examination of the recent revision of that Code and an assessment of how effective this Code is being and is likely to be in preventing the repossession of family homes, particularly as the Central Bank through its Mortgage Arrears Resolution Targets (MART) pushes lenders to resolve long-term arrears cases and to act on unsustainable cases. We also look in detail at the key issue of the admissibility of these codes in legal proceedings – a critical question as an increasing number of repossession actions come before the courts in respect of borrowers whose mortgages have been declared unsustainable.

2.2 The Consumer Protection Code

Having looked at the Consumer Protection Code (CPC) in the specific light of whether it applies or not to credit agreements regulated by the European Communities (Consumer Credit Agreements) Regulations 2010, as the final part of an analysis of consumer credit law in Ireland at the conclusion of Chapter One above, we now turn to an examination of this Code in more general terms.

The first Consumer Protection Code, which set out to ensure a consistent level of protection for consumers regardless of the type of financial services provider, was first introduced in August 2006 but many of its provisions did not come into operation until July 2007. A revised and strength-

ened Code was put in place from January 2012. The original 2006 CPC had been introduced following a lengthy consultation process and a similar process preceded the 2012 version. The CPC applies generally to the regulated activities of regulated entities operating in the State in terms of the provision of financial services to personal customers. This includes the provision of investment and pension products and insurance services (including payment protection insurance) as well as lending.

The purpose of the 2012 Code is two-fold:

- Firstly, to ensure that consumers adequately understand, and are advised of, the risks associated with the

⁵⁴. The Consumer Protection Code for Licensed Moneylenders (CPCLM) largely replicates the terms of the general Consumer Protection Code (CPC).

financial product or service they are obtaining. In terms of access to credit, the introduction of the updated Code reflects the need for better regulation and better and more comprehensive information in relation to the risks involved in credit agreements.

- Secondly, to ensure that where consumers fall into arrears they are protected from excessive communications by lenders or their representatives, which is to be supplemented by a mandatory requirement for regulated entities covered by the Code to introduce an Errors and Complaints Handling System.

The Code describes the relationship between two parties: the Central Bank (who devised it) and financial service providers (who are obligated to follow its terms); thus, it focuses more on the placement of responsibilities or obligations on the provider, and rather less on the specific provision of actionable rights or remedies for the consumer. This explains why a consumer or advocate who has identified a potential breach of the Code will generally be advised (by the Central Bank) to take the relevant complaint to the Financial Services Ombudsman (FSO), which the Bank clearly sees as a good practice model,⁵⁵ despite the lack of any independent evaluation of its effectiveness as a mechanism for resolving consumer complaints (we return to this issue in Chapter 3 below).

An individual consumer who believes that his or her rights under this Code have been breached by a provider and who attempts to complain to the Central Bank will be rerouted to the Financial Services Ombudsman. Nonetheless, the Central Bank does have the power to initiate investigations and, ultimately, to impose sanctions on providers under its 'Administrative Sanctions' procedure for breaches of the Code.

The Consumer Protection Code (unlike the CCMA for example) is somewhat difficult to read and to follow; it runs to 82 pages – the size of a large piece of legislation. The reader's understanding is not helped by

the location of the "definitions" section towards the end rather than at the beginning of the document, as happens in legislation for example. Perhaps with this in mind, the Bank itself issued a Guidance document on the Code in December 2012 which itself runs to 24 pages. In this respect, the Code is different from legislation. It is written solely by the Central Bank and did not go through any debate and amendment procedure, though submissions from interested parties were sought in advance of it being framed. In turn, the Central Bank itself interprets and applies the Code.

2.2.1 A summary of the Consumer Protection Code rules

Chapter 1

Chapter 1 of the Consumer Protection Code sets out the "Scope" of the Code, but it is notable that each subsequent Chapter (2, 3, 4, 5, 6, 7, 8, 9, 10 and 11) commences with its own "Clarification of Scope", which does not render the Code easily digestible and is further evidence of the complexities underpinning it. If a Code designed to impose obligations on providers of financial services and thereby provide rights to consumers must begin each chapter by explaining the areas to which that particular chapter does not apply, you know you are already in difficult terrain.

Chapter 1 provides that the Consumer Protection Code applies to the activities of regulated entities, including banks, insurance and investment companies and intermediaries; it only applies to Credit Unions when acting as insurance intermediaries, in other words when selling insurance associated with the loan but where the credit union is not the insurer. As noted in Chapter One, the justification for the complete exclusion of credit unions from the Code when acting as lenders is far from clear and is hard to fathom. If it is based on the assumption that any given credit union is uniformly acting as a social lender, it is some years out of date. The evidence from the boom and the resulting precarious financial situation of a number

⁵⁵ Interview with the Central Bank, January 2013.

of credit unions is that dubious lending practices were rife in some entities.

Chapter 2

The general principles set out in Chapter 2 of the Consumer Protection Code are high level goal type statements of intent imposed upon the regulated entities to act as a benchmark for the more specific obligations that follow. These are fine as principles in theory but in practice it will be difficult for consumers to show they have been breached. For example, the obligation to act with due skill, care and diligence in the best interests of the customer, whilst a worthy aspiration, may not always reflect the reality of the commercial world in which regulated financial service providers operate.

Chapter 3

Chapter 3 sets out a number of general requirements that apply to the provision of financial services and for the first time identifies a 'vulnerable' consumer. This is defined as a person who may have limited capacity to make his or her decisions and who requires assistance to do so, such as a person with an intellectual disability or a mental illness; or a person who has the capacity to make his or her own decisions but because of individual circumstances requires assistance to do so, such as a hearing-impaired or visually impaired person. The requirements imposed upon providers in respect of a vulnerable consumer are however arguably inadequate. Rule 3.1 provides that where a regulated entity has identified a personal consumer as vulnerable, it must ensure that he or she is provided with assistance that may be necessary to facilitate his or her dealings with that entity. Thus, there is no specific obligation imposed on providers to be rigorous in identifying vulnerability in the first place. Whilst disabilities such as hearing or visual impairment are likely to be reasonably obvious to the provider, mental illness or other impairments that might affect the personal consumer's judgment and capacity may be less apparent. It is also

of some concern that the definition of a vulnerable consumer is not wide enough to include a person with little or no experience of financial services who may be open to exploitation as a result.

Other obligations of note in Chapter 3 include the following:

- All warning statements required by the Consumer Protection Code must be prominent (Rule 3.9);
- When ceasing services or closing or merging branches, providers are obliged to notify customers (Rules 3.11 – 3.12);
- The prohibition on offering unsolicited pre-approved credit to a personal consumer is continued (3.14) as is the prohibition on increasing a personal consumer's credit limit without his/her consent (3.15);
- A provider must allow a personal consumer to pay a charge in connection with the arrangement or provision of a loan separately rather than have it included in the loan (3.16);
- Where an entity provides Payment Protection Insurance in connection with a loan, it must exclude the premium from the cost of the loan and advise separately of the premium. It must also use separate application forms for the insurance and the loan (3.24).

Personal visits and contact with consumers

Rule 3.37 specifically states that an entity must not make an unsolicited personal visit to a consumer who is an individual. It goes on to provide that the consumer must give informed consent to each and every such personal visit and a record must be maintained of it. Note that it does not specify that it must be in writing but it does suggest that a record must be kept of it, including the advance purpose of the visit and the time and date.

However, by way of so-called 'clarification' letters of April and December 2012 and its Consumer Protection Code Guidance document also of December 2012, the Central Bank effectively turned this prohibition on its head for consumers in

arrears with loan repayments. For example, the Guidance document states at page 5 under the heading 'Unsolicited visits in respect of arrears' that 'while unsolicited personal visits could be particularly difficult for some borrowers, we believe that a lender should be able to visit the home, where attempts at contact have failed and before deciding to commence legal action'. The revised Code of Conduct on Mortgage Arrears also reflects this clarification at Rule 26 which states that a lender may only make unsolicited personal visits to a borrower's primary residence when all other attempts at contact in relation to the borrower's arrears have failed and immediately prior to classifying a borrower as not co-operating.

According to Rule 3.40, an entity may only make telephone contact with an existing customer if the consumer has given his/her consent or in certain other limited circumstances including offering protection policies or where the product or service provided requires such contact. Such telephone contact made may only be made between the hours of 9am and 9pm from Monday to Saturday and excluding bank holidays and public holidays, unless the consumer otherwise consents, under Rule 3.43. When making personal visits or telephone calls, a representative of the entity must follow a sequence of steps and must end the contact if the consumer wishes it to end.

Again, however, it is clear that different rules apply to borrowers in arrears, with Rule 8.14 allowing for three unsolicited communications per month to be made by the provider (or someone acting on its behalf) to a personal consumer in respect of arrears. The latest version of the CCMA has removed this limit in respect of mortgage arrears specifically.

Chapter 4

Chapter 4, entitled 'Provision of Information', sets out the variety of types of information that regulated entities are obliged to provide to consumers. General requirements include that such information must be in plain English and undisguised; that it must be timely, legible and appropriate;

and that it be secure when communicated electronically. There is a specific section in this chapter on credit, but apart from 4.26 relating to guarantee warnings, it would appear that this applies in practice only to mortgages. This section is quite misleading as it refers to credit generally rather than mortgages specifically. The rules in this section include:

- Prior to credit being approved, an entity must explain to a personal consumer the effect of missed repayments (4.23);
- Where credit is refused, the reasons why must be explained (4.24). In relation to offering fixed rate credit or switching to a fixed rate, details of the early redemption must be provided (4.25);
- A prominent boxed warning must be provided for guarantors of credit (4.26);
- When consolidating credit, a provider is obliged to provide an indicative comparison of the total interest with the consolidation compared to the existing facility (4.27);
- Lender interest rates must be published on websites (4.28);
- Lenders must provide specific stated information in an offer document for a new mortgage (4.29).

Some notable provisions in relation to insurance products in this chapter include the obligation to provide specific information in an insurance quotation (4.30), the consequences for a consumer who fails to make full disclosure of relevant facts including medical history (4.35), the requirement with permanent health insurance (4.36) and serious illness (4.37) respectively to draw a consumer's attention to restrictions, benefits, conditions and general exclusions that may apply to these policies. This chapter is also notable for the array of information and warnings that must be provided to a consumer concerning investment products, including tracker bonds.

A breakdown of all charges which will be passed onto a consumer must be provided in advance of providing a product or service. With a mortgage to a personal consumer, the personal consumer must be

informed that any arrangement fee may be paid separately from the loan. In turn mortgage and investment intermediaries must provide details of the nature and amount of any fee received from a product provider.

Chapter 5

Entitled ‘Knowing the Consumer and Suitability’, this chapter imposes a basic obligation on regulated entities to gather and record sufficient information from a consumer prior to offering a product or service appropriate to that consumer. However, as noted towards the conclusion of Chapter One of this report, the complete exclusion of this chapter to credit agreements (and Hire Purchase and consumer hire agreements) renders it largely useless for borrowers of money, apart from the case of mortgages. As suggested above by the Central Bank, if the mortgage credit directive is put in place in the next few years, this chapter may not apply to consumer borrowing at all.⁵⁶

Chapter 6

As its title ‘Post-sale information requirements’ suggests, Chapter 6 imposes a number of obligations on regulated entities to provide ongoing information to consumers during the course of the provision of a financial service, such as the necessity to provide an annual statement of account and to inform personal consumers of any changes in interest rates on housing loans. Rule 6.8 of this chapter provides that where credit is advanced to a personal consumer subject to a guarantee, the guarantor must be informed (on paper or in another durable medium) if the terms of the credit agreement change.

Chapter 7

This chapter on ‘Rebates and claims processing’ deals primarily with insurance matters and specifies that entities must have in place a written procedure for the effective and proper handling of insurance claims, including rules in relation to offers of settlement of claims.

Chapter 8

Chapter 8 entitled ‘Arrears handling’ obliges regulated entities to have written procedures in place to deal with arrears under credit agreements. This includes arrears on credit card agreements but not mortgages on principal dwelling houses to which the Code of Conduct on Mortgage Arrears 2013 already applies. This chapter only applies to personal consumers, which means those who have borrowed money separately from the course of their trade, business or profession. Many of the provisions in the chapter closely mirror those of the CCMA. The following basic procedural rules apply:

- Entities must have written procedures in place for the handling of arrears (8.1);
- Information must be made available for personal consumers (including on a dedicated section of any website) which explains the benefits of dealing with arrears proactively, provides contact details, details of arrears charges and a link to the Money Advice and Budgeting Service website (8.2);
- The personal consumer must be assisted in resolving his or her arrears problem (8.3);
- Where an account is still in arrears 10 days after the arrears first arose, the entity must contact the consumer to establish why the arrears arose (8.4);
- As in the Code of Conduct on Mortgage Arrears, an entity must liaise with any third party nominated by the person consumer such as a MABS money advisor or other representative (8.5);
- Where the account is still in arrears 31 days after the arrears first arose, the entity must, within a further three days, write (or communicate by another durable medium) explaining the status of the account;
- Personal consumers must be informed where they have a Payment Protection Insurance policy in place purchased from the regulated entity and a copy must be provided upon request.

56. See Section 1.2.4.

Where an agreement is subsequently reached on rescheduled repayments, the personal consumer must be informed in writing within five business days of the revised repayment arrangement and the implications of the arrangement from the perspective of the records of payment performance kept by the Irish Credit Bureau. If proposals made by a personal consumer for revised repayments are rejected, reasons must be provided in writing (or another durable medium). Rule 8.13 limits the number of unsolicited communications by whatever means with a consumer in arrears to three in each calendar month, a rule now dropped in the revised CCMA. However, this limit excludes any communication requested by, or agreed to, by the consumer, and communication which is solely concerned with regulatory requirements.

Chapter 9

This chapter sets out rules in relation to the advertising of financial services but again does not apply to credit agreements other than mortgages.

Chapter 10

Headed ‘Complaints resolution’, this chapter provides, in general, that a regulated entity has 40 business days to attempt to investigate and resolve a complaint, and must outline the outcome of the complaint and any settlement offer to the consumer. The precision of the 40-day time limit is considerably undermined by the use of the words “attempt to” and there is little or no

evidence as to the extent of compliance with it. When a resolution is proposed, the consumer must be given an opportunity to accept the settlement offered and must also be informed of the details of the relevant Ombudsman to which a further complaint/appeal can be made. In the context of financial service providers, an individual consumer’s only hope of remedy (aside from the civil courts) if he or she feels a provider has not complied with the terms of the Code, is to make a complaint to the Financial Services Ombudsman.

It should be noted that this 40-day complaints resolution mechanism also applies to complaints of any failure to comply with the rules of process set out in the Code of Conduct on Mortgage Arrears. However, a separate appeals process is set out in the revised CCMA where the borrower in arrears wishes to appeal a declaration that his or her mortgage is unsustainable, to seek a more favourable repayment arrangement or to contest a decision that he or she is not co-operating under the Mortgage Arrears Resolution Process (MARP) of the CCMA.

Chapter 11

This chapter sets out detailed record keeping obligations in terms of client instructions, customer documentation and transactions. The Central Bank may require records of compliance to be provided by an entity in any period of time and/or in any specific format that it requires. It can also order that a meeting be held with personnel of the entity for this purpose.

2.3 Monitoring and enforcement of Central Bank Codes generally

2.3.1 Monitoring

The Central Bank uses a number of methods to monitor compliance with

its Codes. For example, it undertakes Reviews, Themed Inspections, Mystery Shopping and Advertising Monitoring exercises; it offers feedback (to providers)

on Themed Inspections and publishes the main issues on its website. Breaches of its own regulatory requirements, as specified in its Codes, are dealt with in accordance with the Bank's Administrative Sanctions Procedure, as described below. In February 2013, the Bank published its programme of Reviews and Themed Inspections for 2013, together with its enforcement priorities for the year.

The information published (on the Central Bank's website) as a result of such monitoring focuses on the area under inspection, the findings in terms of compliance, and the issues to be addressed by providers. However, no information is available on the extent to which these issues are, or were, subsequently addressed following the review, inspection or exercise. According to the Bank, follow-up is undertaken by way of a further theme or review, and there can be a lengthy period of a year or more between these inspections. In recent years, there has clearly been an emphasis on the use of "Themed Inspections", as illustrated by data published by the Bank in relation to each method used to monitor compliance (see below).⁵⁷ These inspections are announced in advance to enable providers to prepare documentation and ensure relevant personnel are available to the inspectors; enquiries to the Central Bank revealed that there are rarely unannounced or "cold-call" inspections of major financial service providers.

■ *Reviews:* Six Reviews have been carried out from 2008–2013 according to the Central Bank website. Two relate to consumer credit (on licensed moneylending and tracker mortgages), the remainder involve current accounts, payment services and investment practices.⁵⁸

■ *Themed Inspections:* In contrast, the Bank has carried out a much higher number (42) of Themed Inspections between 2006 and 2013. These themed inspections relate to insurance companies (13), credit institutions (22), stockbroking and investment firms (5) and licensed moneylenders (2). Two of these related specifically to the Consumer Protection Code, one review of

the compliance of insurance companies and the other of credit institutions (both published in June 2012), and two to the Code of Conduct on Mortgage Arrears (two different versions of same apply, one published in June 2011 and the other in February 2013). The findings from these inspections are discussed further below.

■ *Mystery Shopping:* The Mystery Shopping method of monitoring compliance appears, in contrast to Themed Inspections, to be not much used: only four such exercises were carried out and these took place between 2007 and 2009.⁵⁹

■ *Advertising Monitoring:* Similarly, the Advertising Monitoring method of monitoring compliance appears sparingly used; only four such exercises have been carried out between 2007 and 2012.⁶⁰

2.3.2 Enforcement

The Central Bank has the power to impose sanctions for prescribed contraventions of legislation or regulatory rules and as outlined above, this is referred to as its Administrative Sanctions Procedure. Under this procedure, the Central Bank can conduct an Examination (Investigation), which may in turn lead to an Inquiry or to a Settlement.⁶¹ From 2010 to 2013, fines of over €22 million were imposed by the Bank on regulated financial service providers in the form of 50 settlement agreements reached,⁶² and some of these related to breaches of the Consumer Protection Code.

Thus, in terms of published data relating to sanctions, the emphasis to date appears to have been on *Settlements*. Details of these are published on the Bank's website under the heading "Publicity Notices – Settlement Agreements". Of the 50 settlements reached, 12 specifically mention the Consumer Protection Code (two in 2013, three in 2012, four in 2011, and three in 2010); there is only one specific reference to a breach of the regulatory requirements of Consumer Credit Act 1995 (a case that also involved a breach of

57. Information last accessed in January 2014.

58. A Report following a review of the Licensed Moneylending Industry, November 2013; A Review of Personal Current Account Charges, 20 December 2011; a Desk Based Review of Tracker Rate Mortgage Switches, 19 August 2010; Review of compliance with the European Communities (Payment Services) Regulations 2009, 29 March 2012; Review of the Transparency of Personal Current Accounts, 29 July 2009; A Review of the Sale of Investment Products, 25 June 2008.

59. The four exercises were: Personal Account Switching Code Mystery Shop, 2 February 2009; Foreign Exchange Mystery Shop, 9 December 2008; Money Transmission Mystery Shop, 23 October 2008; Foreign Exchange Mystery Shop, 10 December 2007.

60. The four exercises here were: Review of Advertising Issues, 12 June 2007; Advertisements for Financial Products and Services, 23 July 2008; Review of Advertising Issues and related Disclosure Issues, 22 August 2011; Communication regarding advertising requirements, 10 February 2012.

61. According to the Central Bank's website: "The legislation provides that, at any time up to the conclusion of an examination, the Central Bank of Ireland may enter into a binding settlement agreement with a regulated financial service provider and/or a person concerned in its management to resolve the matter. Where an entity/individual enters into such an agreement early in the pursuit of a sanctions case, the terms of the settlement will reflect the savings in time, resources and money that would result".

62. The current Director of Enforcement of the Bank, Derville Rowland, announced on 19 December 2013 that the latest settlement agreement (in this case concluded with Allied Irish Banks, plc.) "brings to 16 the number of cases concluded this year and 50 since the Enforcement Directorate was established in 2010. It also brings the total level of fines imposed by the Central Bank in 2013 to €6.35 million and since 2010 to €22.14 million".

the regulatory requirements of the CPC) in 2011 and one settlement reached with a licensed moneylender relating to a breach of the Consumer Protection Code for Licensed Moneylenders in 2013.

The over-riding emphasis on ‘Settlements’ as opposed to ‘Inquiries’ may be set to change, at least to some degree, in line with the Central Bank’s Enforcement Strategy (2012-14) which envisaged a switch in emphasis on enforcement. In a speech given at the end of 2012, the then Director of Enforcement made specific reference to such a development:

At the end of the day, we need to act in the public interest... entering into an Inquiry will be a new experience for the Bank and the regulated firm and/or individual. Even the strongest case may suffer unexpected outcomes outside the settlement environment, creating risk and uncertainty. Such risk and uncertainty may include not just a negative outcome for the Bank but lesser sanctions at the end of an Inquiry than might have been obtained by way of settlement. Equally, at the end of an Inquiry, the firm / individual might suffer greater sanctions than it otherwise thought likely at the time of a settlement proposal. These issues will no doubt be considered by all parties at the relevant junction in an enforcement investigation...to be a credible enforcer; one must be prepared to lose. This does not mean that we will be reckless or wanton when exercising our powers and discretions. Rather we will act decisively, on an informed basis and with full regard to our statutory duties, so that when the enforcement throttle is opened, the Bank is prepared to take on the uncertainty and risks inherent in new fora.”⁶³

Whether this intention will actually translate into practice to any significant degree remains to be seen however as the above statement appears to be somewhat qualified. The decision to pursue a Settlement or an Inquiry will be taken on a case-by-case basis and it seems that from the

Bank’s perspective, there remain distinct advantages to pursuing the settlement option, principally a saving in costs.⁶⁴

Appeals – The Irish Financial Services Appeals Tribunal (IFSAT)

The perceived switch towards Inquiry and away from Settlement may in turn impact on the work of the Irish Financial Services Appeals Tribunal (IFSAT). This is an independent body established by the Central Bank and Financial Services Authority of Ireland Act 2003.⁶⁵ By giving notice in writing, any affected person may appeal to this Appeals Tribunal from an ‘appealable decision’ made by the Central Bank.

However as IFSAT notes in its Annual Report for 2008, it took the best part of a further four years for it to be properly constituted:

The Appeals Tribunal was constituted by the Central Bank Act 2003 *but it was not found necessary to set up a tribunal or appoint any members to it until January 2007 [our emphasis added].*⁶⁶

Appealable decisions are divided into two broad categories – administrative appealable decisions and supervisory appealable decisions. The former relate to penalties imposed by the Bank following an Inquiry (as opposed to a settlement) and the latter to decisions made in respect of refusals of licenses or authorisations.⁶⁷ The IFSAT produces a short annual report each year – in most years, *only one appeal has been heard:*

Table 1: Number of Appeals to the Irish Financial Services Tribunal by year

Year	Number of appeals
2007	1
2008	1
2009	3
2010	1
2011	1
2012	1

Source: Annual Reports of the Irish Financial Services Appeals Tribunal, various years.

Since 2007, the Irish Financial Services Appeals Tribunal has clearly been somewhat in the dark about what its potential

63. Address by (then) Director of Enforcement, Peter Oakes to Central Bank Enforcement Conference, 11 December 2012.

64. Interview with the Central Bank, January 2013.

65. The Irish Financial Services Appeals Tribunal Rules, (SI 224/2008), in turn set out the jurisdiction and procedures and of the IFSAT.

66. Page 1, IFSAT Annual Report 2008.

67. According to its website (www.ifsat.ie), the IFSAT “aims to provide an accessible, efficient and effective method of appeal in an informal and expeditious manner.”

workload might be from year to year. In its first published annual report in 2007, the Tribunal stated:

There are no appeals currently pending before the Appeals Tribunal. One potential appellant did explore the appeals procedure with the Registrar but did not pursue the matter further. The enquiries which the Registrar has received and the publicity given to the decision of the Tribunal does support the view that interested parties are aware of the existence of the Appeals Tribunal and the method of attaining access to it... The Chairperson, the Deputy Chairperson and the Registrar, having taken such advice as is available, have estimated that there may be four appeals in the current year (i.e. 2008). On the other hand, it is appreciated that this is speculation for which there is no reliable basis.⁶⁸

In its 2008 annual report, the Irish Financial Services Appeals Tribunal again appeared to be unsure as to the impact the Global Financial Crisis (GFC) might have on its workload:

Since it was constituted in 2007, the Appeals Tribunal has found it impossible to forecast with any degree of accuracy the number of appeals which it might expect to receive in any particular year... The current national and international financial crisis may give rise to additional appealable decisions by the Financial Regulator and generate further appeals or applications to the Appeals Tribunal. Whether this belief is justified or not the Executive Officers thereof see it as their duty to maintain the Appeals Tribunal in its present structure and to be in a position to respond efficiently and effectively to any application which may be made to it.⁶⁹

As Table 1 above illustrates, these concerns have to date proved unfounded. Whether the Bank's announced move towards "Inquiries" and away from "Settle-

ments" will significantly increase the work of the Tribunal is, at this stage, a matter for conjecture. The evidence to date suggests this to be unlikely. What these data may serve to further illustrate is that the Bank's focus on settlement rather than inquiry seems to have led to a small number of appealable decisions, if the numbers of regulated entities appealing these decisions to the Tribunal is anything to go by. However, it is also worth noting that the Central Bank website publishes no information on the number and type of inquiries it has held under the Administrative Sanctions procedure and their outcomes. A telephone enquiry to the Bank further revealed that such information is not publicly available but a specific request for it may be submitted.⁷⁰ Again quite why inquiries are shrouded in such mystery remains unexplained and again it is suggested that this is symptomatic of the behind closed doors approach to financial regulation that seems to be typical in Ireland up to now.

In agreeing to a sanction in the form of a settlement, the provider of course forgoes any right of appeal. This may be akin to pleading guilty in order to suffer a lesser sentence and perhaps less public exposure. The former Director of Enforcement put it as follows:

Settlement is voluntary. We promote the option of early settlement once an Administrative Sanctions Procedure has commenced. We do so in line with sound legal practice and to promote a cost effective resolution. Entry into a voluntary settlement early in the procedure (and I emphasise the word 'early'), may lead to a discount on the penalties which we propose to apply. The discount is in respect of the saving in time, resources and money which results from an early settlement.⁷¹

Whether it is now appropriate to continue with such an approach, particularly in light of revelations concerning financial impropriety in the recent past, is very questionable. No doubt the Central Bank will argue that confidence in and the via-

68. IFSAT *Annual Report 2007*, page 6.

69. IFSAT *Annual Report 2007*, pages 1-2.

70. FLAC telephone enquiry to the Central Bank, 19 December 2013.

71. In an address to the Association of Compliance Officers in Ireland entitled 'The role of enforcement and activities of the Enforcement Directorate' on 8 May, 2012.



bility of the financial system depends upon a certain amount of discretion in regulation. Nonetheless, to be credible, enforcement must have teeth. Whilst some of the fines that were voluntarily accepted by providers in recent years may appear large, it is suggested that a fine with a minimum of fanfare is not a sufficient deterrent against infractions by providers generally, especially those with very deep pockets. Imposing restrictions on the future opera-

tions of regulated entities found to have infringed regulatory requirements on the other hand may serve to be a more persuasive deterrent both for the entities concerned and as an example to others. We would argue that this would also serve to restore a measure of public confidence, confidence which has been considerably eroded at this point.

2.4 Monitoring compliance with the Consumer Protection Code

In terms of monitoring compliance with the Consumer Protection Code, the Central Bank carried out a review of its full implementation, concentrating on credit institutions and insurance undertakings.⁷² This review found that firms had “comprehensive plans in place” to implement the Code, and that some providers “indicated that a review of their 2012 Code implementation project will be conducted by internal audit or other independent unit once the project has been completed”. Whether these intentions and plans have actually been effectively implemented from the consumer’s point of view is unknown, and according to the Central Bank, it appears that it will be some considerable time before the extent of compliance is ascertained.⁷³

The Consumer Protection Code Review highlighted two “areas of improvement” for providers, firstly in terms of the way they deal with so-called “vulnerable consumers”, and secondly with regard to the way they provide information to consumers. Referring to the need to ensure that information is provided clearly to consumers, the Central Bank noted that “the actions taken to develop such information varied across the sample”. The Bank further “reminded” providers to “work towards embedding plain English communication into their culture”. Two

deficiencies in terms of the practice of providers were highlighted in the review, namely the failure to seek the views of the consumer, and the over-use of acronyms:

It was disappointing to note that few firms seek the views of their customers on the information that they provide to them, and that none do so on an ongoing basis. While it is acknowledged that a firm’s complaints log is a useful source of intelligence on areas of customer dissatisfaction, firms are encouraged to actively engage with their existing and potential customers, e.g. through conducting research, to establish the level of satisfaction with, and understanding of, information materials and documentation... (and requested to) consider how the use of acronyms, initialisms and jargon...can filter into their external interactions with consumers.⁷⁴

The use of terms such as “encouraged”, “requested” and “work towards” suggest a ‘soft-touch’ approach here. Again, there does not appear to have been any checks made as to whether these issues have actually been addressed or not by the providers in question, nor as described above, are there any apparent immediate plans to do so in the foreseeable future.

72. Central Bank: Review of Implementation of the Consumer Protection Code 2012, letter to providers, 18 June 2012.

73. Interview with the Central Bank, January 2013.

74. Central Bank: Review of Implementation of the Consumer Protection Code 2012, letter to providers, 18 June 2012.

2.5 The Bank's interaction with consumer interests and the consumer voice

The context for the Central Bank's consumer protection activities is its dual mandate, namely to ensure the financial stability of those providing financial services and to protect the consumers who use or depend on these services.⁷⁵ The Central Bank Reform Act 2010 provides, however, that this consumer protection function involves 'monitoring the provision of financial services to consumers of those services to the extent that the Bank considers appropriate, for the purposes of protecting the public interest and the interests of consumers'.⁷⁶ **This leaves it up to the Bank to decide what it considers appropriate and it is notable that in its Strategic Plan 2013 -2015, the Bank has articulated its vision of consumer protection, namely** 'protecting consumers by challenging firms, improving firms' compliance, promoting a better culture in the financial sector and helping consumers have more confidence in financial services'. The language is carefully chosen but it arguably reveals a limited approach, one that fails to articulate the necessity to provide consumers with wider rights of redress and to more rigorously monitor and inspect provider activity, especially in light of the financial chaos of the past decade in Ireland.

With this discretion and given the shocks to the financial sector in recent years, it is perhaps not surprising that the Bank appears to be prioritising stability.

FLAC: We're interested here in how you interpret your mandate, as the two parts to it could be seen to be conflicting?

Central Bank: We have tried to move away from 'us versus them', prudential versus consumer... there's a recognition now post-crisis, that **the key element of consumer protection is safety of deposits and bank stability**, I think that's still fresh in everyone's minds, that's up there, deposit guarantee schemes, how's that working, are the banks going to be there to deliver a basic service to

customers, whereas in the past that was just a given, nobody questioned that, there's things like will there be enough banks in the system to compete... so I think that's very fresh in people's minds, so it's not just seen as consumer protection being widespread misselling of some exotic bond or something, it's a real issue. *[our emphasis added]*⁷⁷

There is a risk, however, that the arguably selective interpretation of what are the key consumer protection issues can, albeit unwittingly, result in a tendency to overly prioritise the needs of industry over the interests of the consumer. An example of where this appears to have happened relates to the protections afforded by the CPC and the CCMA in relation to unsolicited visits to consumers' homes by providers, and to other contacts with them:

Central Bank: The danger is we hear a lot from the banks... a lot of the debate around arrears quickly comes to these 'unco-operating people' number one, and if they'd only change their lifestyle number two, so there are some people that haven't adjusted and are not co-operating, but they seem to dominate the discussion rather than the rest... now we did look specifically for examples when we were looking at the Code, for clarifications, and they'd come back with the worst case or best case... they are kind of the two big issues that we're hearing from banks that are really holding them up in terms of resolving the arrears crisis... now, we say well we do want them to resolve the individual cases, and the only way of doing that is engaging with the customer, and that's one of the reasons why we kind of accepted that a visit to the home is better than the proceedings commencing for eviction if you like, so that's why we conceded on that,

FLAC: But there's another side to that?

75. Central Bank of Ireland Strategic Plan 2013-2015.

76. Schedule One, Part One, Amendment of section 5 A (i)(f) of the Central Bank Act 1942.

77. Interview with Central Bank, January 2013.

FLAC's perspective is that consumer consultation appears to be little more than a box-ticking exercise for the Bank.

Central Bank: There is another side to it, yes, and we were conscious of that and therefore we wanted to set parameters around the contact or the visit ... it's a difficult one for us, because we're trying to get the balance right at all times...

FLAC: But if you had the evidence from the consumer's side?

CB: Yes, exactly, we've got to get that into the mix.⁷⁸

Subsequent to this interview, the Code of Conduct on Mortgage Arrears was formally amended from July 2013 to remove the limit of three unsolicited communications per month by a lender with a borrower in arrears, a change that came undoubtedly following pressure from the mortgage lending industry. The access and influence that financial service providers clearly have *vis-à-vis* the Central Bank is notable. By contrast, there is little to show that the experience of consumers on the ground has any ongoing input into the "mix". For example, input from the Consumers Association of Ireland or from Citizens Information Services as regards the consumer experience of financial service providers is limited. The Central Bank confirmed it relies heavily on the information the Money Advice and Budgeting Service (MABS) provides.⁷⁹

The Central Bank's own Consumer Advisory Group also provides input which the Bank clearly finds useful, and the National Consumer Agency (NCA) also liaises with the bank, although information provided by the Consumer Agency appears to relate more to trends arising from queries rather than to the practices of any particular firm; the Financial Services Ombudsman also provides information to the Bank through a mutual Memorandum of Understanding (MOU), but mostly on an informal, 'off the record' basis, as discussed in Chapter 3.

Another way of collecting 'consumer intelligence' is for the Central Bank to carry out its own enquiries or research, and a good example of such an initiative is a study into mortgage arrears and the Mortgage Arrears Resolution Process⁸⁰ undertaken by the Bank in 2012. However, little

or no Central Bank research or enquiries into the practices of providers in other areas of financial service provision, such as the way providers deal with complaints from financial service consumers in general, appear to have been undertaken.

The deficit in consumer input referred to here by the Central Bank must, however, be put into its proper context. For example, as part of the revision of the Code of Conduct on Mortgage Arrears which saw a new code introduced from July 2013, the Bank received submissions from advocates on behalf of consumers, including a detailed submission from FLAC.⁸¹ Many of the points made in these submissions were based on the experience of the operation of the existing CCMA on the ground for consumers. There is, however, little evidence that these submissions influenced the revision; and there is widespread agreement, certainly from the consumer perspective, that the revised code primarily serviced the needs of the State and the lending industry rather than prioritising the needs of the indebted consumer (this issue is explored in greater detail later in this Chapter). Furthermore, it is FLAC's firm view that the revised Code significantly diminishes the protection available to consumers in arrears and increases the risks of family homes being repossessed, a feature that may risk dominating 2014.

It is our view, therefore, that there are questions to be answered at this juncture as to how important the consumer voice actually is – in practice, not in theory – when the Central Bank is considering policy reform. Indeed, on the basis of how the consultation around the revision of the CCMA was done, FLAC's perspective is that consumer consultation appears to be little more than a box-ticking exercise for the Bank; it allows it to say that views were sought, meetings arranged and briefings held, but the Bank is unable to demonstrate in any tangible way how such consultation may have influenced what appears to have been largely a pre-ordained (and largely pro-industry) outcome.

It is also worth noting that the current Central Bank view of its mandate in the

78. Interview with Central Bank, January 2013.

79. Interview with Central Bank, January 2013.

80. The Mortgage Arrears Resolution Process which is part of the Central Bank's Code of Conduct on Mortgage Arrears (CCMA) is discussed in detail in Part 3 of this Chapter below.

81. FLAC Submission on the Central Bank's review of the Code of Conduct on Mortgage Arrears (Consultation Paper CP 63) April 2013 – see www.flac.ie.

area of consumer protection appears to be that monitoring the solvency and prudential standards of credit institutions largely equates to consumer protection, that those lucky enough to have money on deposit and investments in place will be protected, and that there will be in place a financial system that consumers of financial services can rely upon. However, this was also largely the mandate before the advent of the boom and the coming of the bust; the mantra that ‘the market will look after the interests of the consumer’ immediately comes to mind. This did not prevent the financial meltdown and its catastrophic outcomes for so many now over-indebted consumers in Ireland. If we are to avoid the potential of further financial calamity in the future, Ireland needs a more sophisticated view of consumer protection – one for example that protects consumers from reckless credit provision by imposing liabilities on lenders who breach legally binding responsible standards; and one

which might see the prosecution of financial service providers who break the law, as opposed to the ‘behind closed doors’ processes currently utilised by the Central Bank.

In FLAC’s view, the Central Bank’s present view of consumer protection may be seen as somewhat narrow, whether consciously or unconsciously, in that it favours those with resources, those with savings and investments and a larger stake in the economy. By contrast, those struggling because of low incomes, unemployment and other adverse factors, many of whom became over-indebted as a result of entering into high interest credit agreements, emerge as far less of a priority, though they too have a stake in that economy. In this regard, the failure of the Financial Regulator/Central Bank to properly regulate or effectively curtail the rates of interest charged by sub-prime personal and mortgage lenders – a subject addressed in some detail in Chapter 1 – is again worth noting.

2.6 Borrowers in mortgage difficulty and the Code of Conduct on Mortgage Arrears 2013

There is a further sub-group of consumers of credit, namely those who borrowed heavily to purchase or improve their family home during the boom and upon whom so much focus has been placed in recent years, with little apparent resolution. The adverse consequences of the economic downturn – including increased levels of unemployment, reduced working hours and failed business – have been exacerbated by decreased levels of disposable income as a result of state austerity-oriented policies of recent years. This has all meant that thousands of such borrowers continue to be in severe financial difficulties, especially given associated repayments on their mortgages and the complications of other credit obligations. Thus we conclude this chapter with an analysis of the protections afforded to this particular group of financial service users.

Ultimately, FLAC contends that the priority accorded by policymakers to the interests of the financial service provider over those of the user, a continuing refrain of this report, is visible yet again when considering the social problem that is mortgage arrears. In analysing the attempts to resolve this problem and how priorities are set therein, it is therefore important to recall some of the principal reasons why the mortgage arrears crisis occurred. The State over-emphasised construction both as a source of employment and as source of income in the form of stamp duty on property transactions. Many with unsure capacity to service a mortgage were encouraged to obtain one – or to ‘top-up’ or re-mortgage – as the construction of social houses and a coherent social housing policy went on the back burner. No curbs of any kind were placed by the Central Bank

(or indeed by any European supervisory authority) on the multiples of income that a lender could offer a potential borrower to fund the purchase of a family home, and a shadow buffer zone comprising a number of inexperienced and opportunistic mortgage brokers was licensed by the same Central Bank to ‘arrange’ mortgages on behalf of lenders.

2.6.1 The development of the arrears crisis and responses to it

The boom in mortgage credit between the 1990s and 2008 is well documented, as are the institutional reasons behind it, namely the development of (seemingly) sophisticated financial “shadow banking” instruments, soft-touch regulation and the setting aside of due diligence. Among the consequences of the subsequent economic downturn, bank bailouts and associated austerity measures, has been an unprecedented rise in the number of households experiencing mortgage arrears.

According to the most recently available statistics, the total number of accounts either in arrears or restructured had continued to increase quarter on quarter, and stood at 185,554 (24%) at the end of Quarter 3, 2013, with the growth in incidence and amount of long-term arrears being of particular concern.⁸² For example, again at the end of Quarter 3, 2013, some 31,834 accounts had been in arrears for over 720 days (or two years). It should be noted that contrary to what is sometimes extrapolated, this does not mean that each of these accounts were over two years behind in payments. It refers to the amount of time the account has been in arrears for. However, when the number of such accounts is divided into the total arrears said to be due on them, it is clear that the *average arrears figure* is in the order of €41,000.

Since the downturn, there has been much public and policy debate about this issue, to the extent that it became and continues to be the dominant issue of discourse relating to financial services in Ireland. Two Expert Groups – The Cooney Group (2010) and the Keane Group (2011) – were convened by government and made

some useful recommendations, some of which have been implemented. The focus of the policy response to date, however, has been on the ‘problem’ (perceived in this instance to be mortgage arrears) rather than on the ‘person’ (which would require a more holistic approach factoring in a range of debts and would encompass people who do not have mortgages). The recent enactment of personal insolvency legislation is therefore a welcome development, although FLAC has a number of reservations about how it is already operating in practice which we flagged well in advance of its commencement.⁸³

The overwhelming policy focus on the mortgage arrears problem led, among other things, to the development by the Central Bank of its Code of Conduct on Mortgage Arrears (CCMA). Essentially, this aimed to provide protection for borrowers in (or likely to fall into) arrears with the mortgage on their principal private residence – their family home. To this end, it laid down the rules of engagement for dealing with such arrears cases. The first such Code covering mortgage lenders was introduced (somewhat expediently post-crash) in February 2009, and an amendment to this Code was introduced in February 2010 to extend the moratorium on bringing legal proceedings to repossess against borrowers in arrears from six months to twelve months. A further and considerably revised third version of the Code came into effect in January 2011, primarily as a result of the recommendations of the Cooney Report in October 2010, the centrepiece of that revision of the Code being the Mortgage Arrears Resolution Process, or MARP.⁸⁴

There is quite limited evidence as to how well the MARP has worked in practice since its introduction, but information published by the Central Bank, together with data collated and analysed by MABS,⁸⁵ suggests that its effect to date has been more by way of managing rather than resolving the mortgage arrears problem. These data illustrated that lenders had, in the main, been offering temporary accommodations, most typically ‘interest-only’ payments for a limited period such as

82. Central Bank of Ireland: Residential Mortgage Arrears and Repossessions Statistics Q3 2013.

83. See numerous FLAC submissions and press releases on the personal insolvency legislation at www.flac.ie.

84. All mortgage lenders (except local authorities) must have a MARP – a system to process arrears (pre-arrears) cases with the object in principle being to resolve arrears cases by putting in place an alternative repayment arrangement, not to repossess family homes.

85. See for example: Bennett, C. (2013) MABS Clients and Mortgage Debt – a profile of MABS clients in Mortgage Difficulty and the factors associated therewith. MABS National Development Ltd, April 2013.

three or six months, subject to review and renewal.⁸⁶ The longer these temporary arrangements subsisted, the more likely it was that eventually the lender would seek a larger payment that the borrower would simply not be in a position to pay, given that in the recession, borrower's economic circumstances have generally speaking tended to deteriorate or to stagnate rather than to improve.

During the period 2011-2012, it became increasingly apparent that for a subset of those in mortgage difficulty, namely those with a mortgage which is significantly and therefore persistently in arrears, the standard lender forbearance measures – interest-only, less than interest only or a payment moratorium – would not be sufficient to resolve the problem. Hence, in 2012 the Central Bank required the principal lenders to initiate their individual Mortgage Arrears Resolution Strategy (MARS). This involved lenders having to disclose to the Bank by the end of May 2012 details of their 'advanced forbearance' strategies to deal with long-term mortgage arrears, over and above the suite of standard alternative repayment arrangements already set out under the Mortgage Arrears Resolution Process within the existing CCMA.

This Central Bank and lender MARS engagement was however notable for the lack of consultation with consumers and consumer representatives and continued what FLAC considers to be an industry-friendly approach to devising mortgage arrears strategies. Prior to the MARS initiative, for example, the state-appointed Keane group itself was made up almost entirely of civil servants (including Central Bank representatives) with two credit institution representatives and no consumer representatives whatsoever. A particular and peculiar omission was the failure to include any representative of the Money Advice and Budgeting Service (MABS) given its status as the primary state-funded response to dealing with problems of over-indebtedness. Neither did the group seek formal submissions or hold briefings with consumer groups, though it did meet with representatives of credit institutions. The deficit in consumer intelligence high-

lighted by the Central Bank earlier in this Chapter may be viewed as somewhat ironic by yet another instance here of the persistent failure of the authorities to include the perspective of the financial service user in its deliberations.⁸⁷

The consequence of an industry-friendly policy development process was that those in mortgage arrears and those representing their interests were the last to know how lenders proposed to resolve the problem. The failure to publicise lender strategies prevented borrowers (and their representatives) from assessing the available options in the round. Apart therefore from an increasing number of 'leak type' newspaper articles wherein the strategies of some of the lenders in terms of the MARS exercise were broadly outlined – for example, 'split mortgages', 'trade down mortgages', and 'long term interest only' – it was broadly unclear what exactly was on offer and from whom, what conditions borrowers were expected to meet and how these processes would work in practice. Faced with this dearth of accessible information, it is apparent that some borrowers either failed or ceased to engage with their lender about their arrears problem. The subsequent pointing of the finger of strategic default that followed served to spare the blushes of institutions who had largely created the problem in the first place and who had then dithered in terms of resolving it.

Ultimately, the MARS process led to the Central Bank setting formal Mortgage Arrears Resolution Targets (MARTs) for the principal mortgage lenders in March 2013, and these targets are explained in further detail below. However, it is only at the time of writing – five years into an officially acknowledged recession – that it is even becoming remotely apparent which lenders are offering what proposed solutions. When the four principal mortgage lenders in the State came before the Joint Oireachtas Committee on Finance and Public Expenditure in September 2013, however, we learned that threatening to bring or actually bringing legal proceedings may still be most lenders' idea of a solution and that the write-down of mortgage debt to serviceable levels may be as distant as

86. See for example: Central Bank of Ireland, Information Release: Private Dwelling House Mortgage Arrears and Repossession Statistics: Q3 2012, December 2012 which showed that of over 80,000 restructured mortgages, approximately half involved the payment of interest only or less than interest-only.

87. A notable exception here was the composition of the Cooney Group.

ever.⁸⁸ Throughout, a macro-economic thundercloud has hung ominously over the debate on how best to tackle the mortgage arrears and personal insolvency crisis— can the credit institutions and ultimately the State afford the kind of write-down that the mathematics of the situation seem to indicate? Or would that scenario propel Ireland into a second bailout?

A further review of the Code of Conduct on Mortgage Arrears by the Central Bank led to a further revision of that Code, with a new edition coming into operation on 1 July 2013.⁸⁹ This revision has already proved controversial with many consumer advocates including FLAC arguing that, in tandem with other legislative and related developments (see below) that are now in operation, the Code substantially strengthens the rights of lenders to repossess family homes and diminishes the rights of borrowers to oppose such repossessions. Indeed, as the revised CCMA was rolled out in the latter half of 2013, many borrowers, hitherto on a series of interest-only arrangements, reported that they have begun to receive letters from their lenders declaring their mortgage to be unsustainable under the terms of the revised code.⁹⁰

2.6.2 The current legislative and policy response

It has been argued by many that the rate of repossession of family homes in the courts has been quite low when compared with the scale of the arrears problem.⁹¹ This does not mean of course that borrowers have not been subjected to pressurised debt collection tactics by lenders, but for example, far more properties have been surrendered or abandoned by borrowers in recent years than have been repossessed through the courts by lenders. There are two principal reasons for this. Firstly, many of these properties are in ‘negative equity’ with the borrower often owing substantially more to the lender than the house is worth. Thus, the lender has not, up to now, wanted to repossess the property and realise a shortfall that it will find difficult to subsequently recover from the

borrower. Secondly, a High Court decision (the ‘Dunne’ judgment, so named after the judge who decided the case) in July 2011 in effect made it more costly and time-consuming for lenders to repossess properties mortgaged on registered land.⁹²

However, the government, perhaps under fire from the ‘Troika’, took more decisive action in the course of 2013 to force lenders to deal with the mortgage arrears problem, finally cranking up the pressure on lenders to act more decisively. To summarise the situation at the time of writing, there are now **four** different but interlinked measures in place that have set the rules for how it is proposed to deal with the mortgage arrears problem. One of these is the revised Code of Conduct on Mortgage Arrears (2013) which now both obliges and allows a lender to more clearly distinguish between *sustainable* and *unsustainable* mortgages in the long term, subject to limited rights of appeal for the borrower, and which we will examine in some detail below. The others are as follows:

■ Mortgage Arrears Resolution Targets 2013 (MART)

In March 2013 the Central Bank set ‘performance targets’ for the principal mortgage lenders⁹³ to resolve mortgage arrears cases. Thus 50% of each lender’s arrears cases had to be the subject of a ‘proposed sustainable solution’ before the end of 2013 and further targets are set for 2014. It should be noted that the definition of a sustainable solution *may* include the voluntary surrender or court repossession of a family home, as well as an alternative repayment arrangement that involves a borrower staying in the family home in the long run.

■ Personal Insolvency Act 2012

The personal insolvency legislation focuses on the wider problem of personal debt in general rather than just mortgages. However, in relation to mortgages, it allows an insolvent debtor to propose a Personal Insolvency Arrangement (PIA) to *all* of his or her creditors, both secured and unsecured. So if, for example, a mortgage lender decides that a mortgage is unus-

88. In early September 2013, AIB, Bank of Ireland, Ulster Bank and Permanent TSB appeared before the Committee. According to Donal O’Donovan, writing in the Irish Independent (20 September 2013), threatening legal action is the most commonly used ‘solution’ to arrears at all the main banks so far.

89. This review of the Code of Conduct on Mortgage Arrears 2010 was initiated by Central Bank Consultation Paper CP 63, March 2013.

90. As stated by a number of callers to the FLAC information and referral line from July 2013.

91. See for example contributors to the Central Bank Conference in February 2013, ‘How to fix distressed property markets’: www.centralbank.ie/stability/conferences/Pages/distressedpropertymarkets2013.aspx

92. *Start Mortgages & Others v Gunn & Others* [2011] IEHC 275, unreported, High Court, Dunne J., 25/7/2011.

93. The targets only apply to ACC Bank, Allied Irish Bank (including EBS), Bank of Ireland (including ICS), KBC Bank, Permanent TSB and Ulster Bank. They do not apply to sub-prime mortgage lenders.

tainable or offers an alternative repayment arrangement that a borrower believes may be unsustainable, the borrower may look to apply for a PIA instead. First a 'Protective Certificate' must be obtained through the Insolvency Service of Ireland and from the Circuit Court so that a proposal can be made by a Personal Insolvency Practitioner (PIP) on behalf of the debtor. Creditors must vote in favour of the PIA proposal.⁹⁴

■ Land and Conveyancing Law Reform

Act 2013

The final part of the amended infrastructure is the repeal of the Dunne judgment mentioned earlier by way of the Land and Conveyancing Law Reform Act 2013. This legislation in effect makes it easier for lenders to repossess family homes and appears to have been timed to coincide with an increase in the number of mortgages being declared to be unsustainable. Once a mortgage is declared unsustainable, the lender can bring legal proceedings in the courts. However this Act also allows a judge hearing a repossession case to adjourn it for up to two months to allow the defendant borrower to consult with a Personal Insolvency Practitioner (PIP) in order to apply for a Personal Insolvency Arrangement.⁹⁵ There is no express power in the legislation, however, for a judge to review the outcome of such a consultation and amendments submitted to allow for such a power were rejected by the Minister, who perhaps somewhat optimistically suggested that this would not prevent any individual judge from so doing.

This Act also copper-fastened the move to ensure that all repossession applications on family homes would henceforth be brought in the Circuit Court. The Land and Conveyancing Law Reform Act 2009 had already provided that for property which is subject of a housing loan mortgage, "the Circuit Court shall have exclusive jurisdiction to deal with the application and the application shall not be made to the High Court".⁹⁶ This was thought to apply, however, only to such loans made after that Act came into operation on 1 December 2009. Accordingly, the 2013 Act also provides that insofar as it concerns mortgages

on land created prior to 1 December 2009 which is the principal private residence of the borrower/s, the Circuit Court again will have exclusive jurisdiction.⁹⁷

The final piece of what might be termed the repossessions jigsaw is the Circuit Court (Actions for Possession and Well-Charging Relief) Regulations 2009,⁹⁸ which were in turn amended by further regulations of 2012.⁹⁹ The 2009 regulations saw little action until the second half of 2013 but it is notable that they grant a County Registrar in the Circuit Court, in addition to a judge, the power to grant a Possession Order.¹⁰⁰

It is now likely as a result of these changes that there will be a substantial rise in the number of applications for repossession of family homes in 2014 and beyond.

2.6.3 The Code of Conduct on Mortgage Arrears 2013

2.6.3.1 The status and revision of the Code

In contrast with the Consumer Protection Code examined earlier in this chapter, in general terms the Code of Conduct on Mortgage Arrears is drafted in much clearer language and is much easier to read. However, as with the CPC, the Central Bank has felt the need (since the publication of the 2010 edition in this instance) to issue 'clarification' letters to industry on specific aspects of the Code, principally, it appears, to facilitate lenders to make increased contact with borrowers it views as being uncooperative.¹⁰¹ The effect of these clarifications was arguably twofold: first they ostensibly diminished the protections available to consumers in arrears from unwelcome or excessive contacts by lenders; and second, they reaffirmed that the Code is basically a template drawn up by the Central Bank to regulate the collection practices of the mortgage lenders which it will adjust when it sees fit and as it believes, in conjunction with government, circumstances dictate.

The publication of the Central Bank's *Consultation Paper 63 – Review of the Code*

94. At least 50% in value of voting secured creditors, at least 50% in value of voting unsecured creditors and at least 65% of voting creditors in total.

95. See section 2.

96. Section 101 (5).

97. See section 3.

98. SI 264/2009.

99. SI 358/2012.

100. See regulation 7 (t) (e).

101. Clarification letters were issued by the Bank on 30 April 2012 and 21 December 2012.

A number of lenders had in practice failed to fully comply with the terms of the existing Code; in some cases, they had operated a selective approach to implementing it.

of Conduct on Mortgage Arrears in March 2013 illustrates this. This review of the CCMA is stated to be with the aim of strengthening the protections in place for borrowers, where necessary, while ensuring that the framework is facilitating and promoting the effective and timely resolution, by lenders, of each borrower's arrears situation. We will argue below that the revision that has followed is not achieving and will not achieve this basic objective, primarily because it is mainly focused on industry rather than consumers. However, should the Central Bank be given or take upon itself the role of legislator or quasi-legislator in this manner in the first place, on a matter of such fundamental importance to so many households in this country? Who elected it to put these rules in place and what role, if any, have the Houses of the Oireachtas had in approving the various incarnations of the Code, given that, the sole power for making laws under Article 15 (2) of *Bunreacht na hEireann 1937* vests in those Houses of the Oireachtas?

Crucially, no parliamentary scrutiny appears to apply when the Bank sets about a revision, a fact that we strongly argue affects the admissibility of this and other codes in legal proceedings, a critical issue that we examine in greater detail at the close of this chapter. It is not as if the subject matter of this Code is an excessively technical area of financial services. On the contrary, it is, at least on the surface, about trying to ensure that family homes are not unnecessarily repossessed. This is a social issue of fundamental importance to Irish society and surely one for our elected representatives to determine.

As with previous code revisions, the Central Bank sought submissions to be made by 'stakeholders', in this case by a closing date of 10 April 2013. The short window afforded was explained by the fact that so called 'pre-consultation' meetings with these stakeholders (stated to be both industry and consumer) had taken place in advance of the review, although details of who was met, when and how frequently are not provided.¹⁰² The Consultation Paper closes with a full draft revision of the Code, which when combined with the short time-

frame for submissions, may have conveyed the message to some that any changes subsequently made might be minimal.

FLAC had a number of specific concerns about how the previous 2010 version of the Code had operated, based both on an analysis of its provisions and on feedback from borrowers in arrears contacting both the FLAC telephone information and referral line and our countrywide network of legal advice centres. These borrowers were complaining of questionable interpretations or partial applications of the MARP.¹⁰³ There have been a number of instances where the Standard Financial Statement filled out by the lender has not included correct or up-to-date information so that the assessment of the borrower's capacity is incomplete. In other cases, lenders have insisted on conducting discussions and negotiations over the telephone and have refused to put in writing proposals made in the course of telephone conversations. Some borrowers also complained of having to field calls from a variety of staff; in some instances, one member of staff will contradict or deviate from something suggested by a colleague in a previous conversation. In other cases, lenders had been slow to use the terminology required by the Code, leading to confusion amongst borrowers as to what set of rules applied to their case.

In addition, our support work with MABS money advisers over an extended period had also indicated that a number of lenders had in practice failed to fully comply with the terms of the existing Code; in some cases, they had operated a selective approach to implementing it, for example, where correspondence from money advisers has been ignored and or where money advisers had not received timely replies to correspondence written on behalf of their clients. The considerable time taken to process assessments and appeals under the MARP process is an issue that was highlighted by MABS in a report published in 2013, based on research conducted in the summer of 2012.¹⁰⁴

A detailed reading of the draft revision indicated that few of these concerns voiced in meetings with the Bank had been taken

^{102.} For the record, FLAC was invited to a short meeting with the Bank that took place on 12 March 2013, a month before the publication of the Consultation Paper.

^{103.} These concerns had also been articulated in occasional meetings with the Central Bank in 2011 and 2012.

^{104.} See Bennett, C. (2013) *MABS Clients and Mortgage Debt – a profile of MABS clients in Mortgage Difficulty and the factors associated therewith*. MABS National Development Ltd, April 2013.

on board. As a result, a detailed submission was made by FLAC for the purposes of the review, and submissions were also made by a number of other consumer advocates.¹⁰⁵ However, there is unfortunately little evidence that the contents of that submission ultimately influenced the revision in any substantive way. In response to concerns raised by FLAC in this regard, the Bank nonetheless stated that:

The points you raised in our meeting prior to the consultation as well as those set out in your submission were carefully considered throughout the review process. The final revised CCMA reflects the positions reached by the Central Bank following our consideration of all submissions received and reflects our statutory role to properly and effectively regulate financial service providers and markets, while ensuring that the best interests of consumers of financial services are protected.¹⁰⁶

Ultimately, the 2013 revision of the Code of Conduct on Mortgage Arrears cannot be separated from the context within which it was initiated which sees, as outlined above, four interlinked measures come to the starting line simultaneously. The spectre of house repossession is now far more acute as a result of the changed legislative landscape now in place. Thus, even if the CCMA had stood still it would have constituted a dis-improvement for consumers. The Bank's reference above to its statutory role to properly and effectively regulate markets (as well as financial service providers) may be particularly telling here. Perhaps this anticipates subsequent comments of the Expert Group on Repossessions, considered in more detail below, to the effect that though borrowers must be protected; there is a strong countervailing public interest in protecting the interests of lenders, in order to ensure that funding continues to be made available for the purchase of residential and other property.

2.6.3.2 Reduced protections for borrowers under the CCMA/MARP

There follows a discussion of a number of specific areas where we believe the rights of borrowers in arrears have actually worsened as a result of the revision of the Code, leaving such borrowers more vulnerable to legal proceedings for repossession of their family homes. We should emphasise that we do not believe that all mortgage holders in arrears should (or even necessarily want) to hold on to their family homes, given the scale of arrears that is apparent in many instances. It is also unclear as of yet, however, whether mortgage lenders will necessarily always want to exercise the enhanced powers that they have arguably been provided with, as chronic negative equity still bedevils many properties substantially in arrears. Nonetheless, we believe that any borrower should be afforded a coherent and unbiased system that allows for such an opportunity, before appearing (almost inevitably unrepresented) before the courts. Either that or abandon any pretence at fairly codifying the area and properly legislate for the circumstances under which family homes may be repossessed and leave the courts to interpret and apply such legislation.

The areas considered may be summarised as follows:

- a) Relaxed requirements in relation to unsolicited contacts with borrowers;
- b) The imbalance of power in the decision-making process;
- c) Appeals/complaints and the moratorium on legal proceedings;
- d) Legal proceedings and borrowers not co-operating;
- e) The limited role of the Financial Services Ombudsman under external MARP appeals.

a) Relaxed requirements in relation to unsolicited contacts with borrowers

Prior to the proposed revision of the Code, there had already been a loosening of the rules which had restricted lenders' contact with borrowers and, in particular, the protections around unsolicited communications and unsolicited visits had

¹⁰⁵ See FLAC submission on Consultation Paper April, 2013 CP63, available to download at <http://tinyurl.com/lstzy92>.

¹⁰⁶ By e-mail, 11 July 2013.

Patrick Honohan, at his subsequent appearance before the same Committee to say that strategic default is a “phoney concept” and that it is actually a consequence of people prioritising what debts they repay, rather than not paying any.

been significantly diluted. The rationale for this dilution is stated in the Central Bank’s ‘clarification’ letters of 30 April and 21 December 2012.¹⁰⁷ We understand these to have been sent as a consequence of pressure from mortgage lenders.¹⁰⁸

A revised section on ‘communication with borrowers’ was then included in the proposed draft revision of the Code of Conduct on Mortgage Arrears in July 2013. This proposed to remove the limit of three unsolicited communications per month that had existed in the 2010 Code and proposed to expressly allow for unsolicited personal visits to be made to the borrower’s primary residence when all other attempts at contact have failed and immediately prior to classifying a borrower as not co-operating. The rationale for this inclusion was said to be due to “feedback from industry that would indicate that the current requirements, particularly the limit of three successful contacts, are preventing lenders from making contact and engaging with borrowers and are therefore impeding the consideration and resolution of borrower’s cases. The Central Bank does not believe that this is in the best interests of borrowers”.¹⁰⁹

In its submission on this aspect of the draft code, FLAC suggested that if these proposals were to be maintained,

the language must be much more assertive to send out a message to lenders (and perhaps more importantly any debt collectors (still as of yet unregulated by the State) who may act on their behalf) that there will be consequences for aggressive conduct and that it is aware that sharp collection practices can and do occur. Thus, if the Bank is intent on removing limits on communications and visits in this part of the Code, it should commit itself to regularly monitoring by inspections the action of lenders under this heading. In turn, the Bank should immediately prioritise the regulation of debt collection on a statutory basis with a proper licensing system and code of conduct applying to such entities. A suitable vehicle for this, it is suggested, might

be the Central Bank (Supervision and Enforcement) Bill 2011.¹¹⁰

None of the concerns and suggestions made in this section of FLAC’s submission was explicitly taken on board. The only concession made was to tinker with some of the general language around communications. For example, to the existing proviso that the level of communications must be proportionate and not excessive, the revision adds that such communications must not be ‘unnecessarily frequent’. To the general stipulation that such communications must not be aggressive or intimidating, the Bank has added ‘or harassing’. And although the Central Bank (Supervision and Enforcement) Bill 2011 did eventually make into law in the form of Central Bank (Supervision and Enforcement) Act 2013, it purports to regulate ‘debt management’ firms but not ‘debt collection’ entities.

Ultimately, it is hard to believe that the adjustments made by the Bank prior to and for the purpose of revising the Code in this regard were not in some way influenced by a belief that many borrowers were deliberately refusing to realistically engage with their lender in relation to their arrears situation, even though they had the capacity to service their mortgage commitments. There is, however, no reliable evidence base for such concerns, and estimates of so-called ‘strategic default’ amongst mortgage holders by a small number of academics have been strongly challenged by others.¹¹¹ In addition, the appearances by the principal mortgage lenders in September 2013 before the Joint Oireachtas on Finance and Public Expenditure were long on allegations of ‘strategic default’ but short on concrete evidence, prompting the Governor of the Central Bank, Patrick Honohan, at his subsequent appearance before the same Committee to say that strategic default is a “phoney concept” and that it is actually a consequence of people prioritising what debts they repay, rather than not paying any.¹¹² Few would argue that ‘won’t pay’ cases do not exist and there will always be some who will try to game the system.

107. Entitled “Re: Contact provisions of the Consumer Protection Code 2012 and the Code of Conduct on Mortgage Arrears” and “Re: Clarifications on the Code of Conduct on Mortgage Arrears” respectively.

108. See Chapter 1, Section 2.5.

109. Consultation Paper 63, page 8.

110. See FLAC submission on Consultation Paper April, 2013 (CP63, available to download at www.flac.ie/publications/submission-on-review-of-code-of-conduct-on-mtge-arrears_apr-2013/)

111. See for example: <http://brianmlucey.wordpress.com/2013/07/30/strategic-defaults-in-irish-mortgages-what-do-and-dont-we-know/>

112. ‘Honohan says strategic default is a phoney concept’, *Irish Times*, 25 September 2013.

However, assumptions made about the level of such default, in the absence of a reliable definition and in the absence of evidence that can only be by definition in the possession of the mortgage lenders themselves, form an extremely dubious basis for altering existing policy.

Perhaps what is most worrying here is not the changes that have been made so much as an apparent failure to grasp the reality that debt collection is an unpleasant business. Some credit institutions and the debt collection companies they employ – if unchecked – will seek to bully and intimidate those in debt in order to recover money (as reported by some respondents to this study), just as when unchecked they lent more money than was prudent or reasonable. Unless the Central Bank monitors and inspects tirelessly and adopts an ‘in your face’ attitude to policing compliance by lenders with the contact rules in the Code, advantage will be taken of the loosening of those rules. In this regard, a meeting that FLAC attended with the Bank in late 2013 does not bode well.¹¹³ At this meeting, the Bank stated that it did not intend to commence inspections of compliance with the Code until an unspecified time in 2014. While it stated that it had held meetings with the mortgage lenders in relation to the new Code, it accepted that it had not looked at any client/lender files and it appeared to be comparatively unaware of trends and developments on the ground with its own Code, almost five months after it had amended it.

b) The imbalance of power in the decision-making process

The basic purpose of the Code is to oblige a mortgage lender to ensure that it has an accurate account of the borrower’s financial details in the form of an up-to-date Standard Financial Statement (SFS) before it assesses how an arrears case might be resolved by putting in place an alternative repayment arrangement.

At first glance, the revised Code seems to expand the range of alternative repayment arrangements that a lender is obliged to consider in respect of a borrower in arrears. Significant new options

include split mortgages and reducing the principal sum to be paid (in other words, debt write-down). However, a closer look reveals that the revision may indeed have served to reduce the range of such options. Whereas under the 2010 version, a lender was obliged to “explore all options for alternative repayment arrangements”¹¹⁴, a lender is now only obliged to consider ‘all of the options for alternative repayment arrangements *offered by that lender*’ [*our emphasis added*].¹¹⁵ Thus, if a lender decides as a matter of policy, for example, that it is not going to offer a reduction in the principal amount owed as one of its options, then it does not even have to consider it.

In response to a specific query in this regard from FLAC, the Central Bank confirmed that:

The Central Bank does not have the power to compel lenders to offer specific products...(and) it remains the case that it is at the discretion of each lender which alternative repayment arrangements it offers to borrowers in arrears.¹¹⁶

At least this is candid, but it begs a very large question already hinted at in the introduction to this section. If the Central Bank does not have such powers, might it be doing more harm than good for consumers by prescribing rules on how cases of mortgage arrears are to be potentially resolved? In particular, by prescribing such rules, is the Bank providing any given lender with a strong justification for arguing before a court that a repossession case should proceed without opposition, once it can be shown that the lender complied with the mechanics of the process?

The 2010 Code of Conduct on Mortgage Arrears provided that a lender must document its consideration of each of the options examined and why the option(s) offered to the borrower are appropriate for his/her individual circumstances.¹¹⁷ However, no specific obligation was imposed on lenders to provide a borrower with these details, in order for a borrower to have the requisite information to inform an appeal, and some lenders withheld this

113. Meeting with officials of the Consumer Protection Section of the Central Bank, 19 November 2013.

114. Rule 33, 2010 Code.

115. Rule 39, 2013 Code.

116. e-mail response by Central Bank of 11 July 2013 to queries posed by FLAC by e-mail of 3 July 2013.

117. Rule 34, 2010 Code.

information on the basis that they believed they were only obliged to provide it to the Central Bank, their regulator.

The revision presented a perfect opportunity for the bank to rectify this omission but it failed to do so. Instead, the lender, though under an obligation to document its consideration of each option it has examined,¹¹⁸ is only obliged to inform the borrower of the reasons why a particular arrangement is considered to be appropriate and sustainable for his or her circumstances where it has chosen to offer one to him or her.¹¹⁹

Under the revised code, where a lender does not offer a repayment arrangement and concludes that a borrower's mortgage is unsustainable, it must provide reasons.¹²⁰ However it only has to keep a documentary record of its decisions in respect of those options it considers worthy of consideration (presumably in the event that the Bank undertakes a Themed Inspection of the CCMA) and does not have to document why certain options were not deemed worthy of contemplation in the first place. Equally, a lender is still under no explicit obligation to inform the borrower why specific options that were examined were ruled out, even though it will have already 'documented' the reasons.

To questions from FLAC on this issue, the Central Bank responded as follows:

The basis of an appeal (or a complaint to the lender or FSO that a particular provision of the Code has not been followed) will differ from case to case and the CCMA is not prescriptive as to the grounds of appeal which an individual borrower may raise. While it may be that you [FLAC] consider that knowledge of the lender's consideration of other options not offered to a borrower is relevant to a given appeal (and it will be open to your client to make that case to the Appeals Board), Provision 42 does not require disclosure of such information as a matter of course.¹²¹

It is tempting to translate this response into fairly simple language – you can ask your lender for all the factors it considered

in arriving at its decisions, but it is not obliged to provide this to you. In terms of a borrower seeking a more favourable repayment option on appeal than what has been offered, a lender's reasons for ruling out specific repayment options may be as important as the explanation for offering others in terms of understanding the rationale for its ultimate decision. Equally, if no alternative payment arrangement at all is offered, a borrower will need to know how and why each option was considered and rejected.

Simply put, it is the future of the borrower's family home that is at stake here. The borrower/s in question will often have made enormous sacrifices, undergone difficult struggles and made considerable interest-laden payments to try to keep the mortgage going. In declining to oblige a lender to provide the borrower with the fullest possible information, the Central Bank arguably demonstrates a lack of knowledge and understanding of the basic rules of fair procedures. This includes the requirement in law that all parties to a dispute are entitled to be heard and have the opportunity to defend their position, including being provided with sufficient information of the decision-making process to do so.

But this is not a legal forum, the Code is arguably not law and there may not even be a legal dispute given the borrower in arrears is clearly in breach of contract. If this is indeed so, then let us stop pretending that the Code provides borrowers with any rights, apart perhaps from the right to be processed in a particular way prior to a lender making the decision that suits it best. If this is the best that is on offer for borrowers in arrears, many of whom have entered into mortgages in good faith as the State actively encouraged them to do, then the State should be clear about it.

c) Appeals/complaints and the moratorium on legal proceedings

The 2010 Code provided that where a borrower co-operated with the lender, the lender had to wait 12 months from the date the borrower was classified as a MARP arrears case before commencing

118. Rule 40, 2013 Code.

119. Rule 42, 2013 Code.

120. Rule 45, 2013 Code.

121. e-mail response by Central Bank of 11 July 2013 to queries posed by FLAC by e-mail of 3 July 2013.

any legal proceedings for repossession.¹²² Crucially, any time during which the borrower was complying with the terms of any alternative repayment arrangement did not count for the purpose of the 12-month moratorium. Thus, even if the arrangement broke down, for example because of a decrease in the borrower's payment capacity, he or she would have whatever remained of the 12-month moratorium at that point to renegotiate. Equally significant was that time in which the borrower was engaged in an appeal against an unfavourable decision of a lender under the MARP, either to the lender's Appeals Board or on to the Financial Service Ombudsman, did not count for the purposes of the moratorium either. An important deficiency in the 2010 rules, however, was that any time spent negotiating an alternative repayment arrangement was counted as part of the 12 months. FLAC argued that not only was this unfair, but it amounted to an inbuilt incentive for a less conscientious lender to drag its heels about assembling the financial information and making a decision on a restructure. We suggested it be removed.

The revision of the Code in July 2013 significantly altered the rules on appeals and complaints. Rules 49 to 55 now distinguish between appeals on the one hand and complaints on the other. In summary, a borrower may now *appeal* three types of decisions made by a lender's Arrears Support Unit (ASU) to its Appeals Board. These are:

- A declaration that the mortgage is unsustainable and that no alternative repayment arrangement is suitable;
- An alternative repayment arrangement proposed by the lender that the borrower considers unsuitable from his or her perspective;
- A declaration that the borrower is not co-operating.

Where a borrower is unhappy about how the lender has treated his or her case or about whether a lender has complied with the requirements of the Code, this is now referred to as a *complaint*. It is to be dealt with under the lender's general complaints process which must comply with

the principles set out in Chapter 8 of the Consumer Protection Code.

The other alteration of considerable significance is the *removal* of the 12-month moratorium. Thus, where a mortgage is declared unsustainable or the borrower rejects an alternative repayment arrangement proposed by the lender, he or she immediately loses the protection of the MARP. The Code now provides that within *three* months of the date the mortgage is declared unsustainable (or eight months from the time arrears first arose, whichever is later)¹²³ or within three months of the lender writing back to the borrower following his or her rejection of the proposed repayment arrangement (or eight months from the time arrears first arose, whichever is later), legal proceedings to attempt to repossess the property may be served.

Not only do we now have a three-month moratorium, but lodging an appeal does not stop the clock from running either. In reply to a further question from FLAC, the Central Bank said:

A borrower's decision to appeal does not suspend the three month period referred to in provisions 45 and 47. A lender must consider and adjudicate on an appeal within 40 business days of receiving the appeal and must notify the borrower within five business days of the decision of the Appeals Board. How long a borrower would have left at the end of the process will be dependent on when the appeal was submitted by the borrower and how long it has taken the lender to consider.¹²⁴

Data collated by MABS services in respect of MARP appeals found that 50% of cases took more than two months to process; further, they found that half the appeals made were successful.¹²⁵ However, it should be noted that these figures were compiled in respect of the 2010 version of the MARP and the success rate for appeals under the revised version is unlikely to be replicated, given the more draconian decision-making powers accorded to lenders in the revision.

¹²² Rule 47, 2010 Code.

¹²³ In practice many mortgages in difficulty have been in arrears for over eight months so the three month limit is far more likely to be the relevant marker here.

¹²⁴ e-mail response by Central Bank of 11 July 2013 to queries posed by FLAC by e-mail of 3 July 2013.

¹²⁵ See Bennett, C. (2013) *MABS Clients and Mortgage Debt – a profile of MABS clients in Mortgage Difficulty and the factors associated therewith*. MABS National Development Ltd, April 2013.

The message for borrowers and their representatives in terms of how these rules are framed seems correspondingly stark.

When the 20 business days that a lender must (at least) allow a borrower to appeal from the date of the notification of the lender's decision is added to the 40 business days that the lender has to consider and adjudicate on an appeal, it is clear that once the internal appeals procedure is concluded, the borrower will now in all likelihood be close to, at or more likely beyond the three month protection period and thereby at the mercy of the creditor in relation to the instigation of repossession proceedings. Given the fact that a borrower's decision to appeal does not suspend the three month period, one would expect that the Bank is closely monitoring the time a lender takes to process an appeal now becomes a more important question. So far there appears to be little evidence of this and the Bank's record in this regard in connection with the time limits set out in the Consumer Protection Code already referred to in this Chapter does not inspire confidence. Should a borrower then wish to refer the matter on to the Financial Services Ombudsman (considered in more detail below), the three-month period will definitely have elapsed by the time that office gets to consider the matter. Thus, we face the frankly ludicrous situation where a lender is within its rights to serve legal proceedings to repossess a family home whilst the borrower is still trying to exercise his or her rights of appeal or complaint under the Code.

We are not suggesting that lenders are currently straining at the leash to repossess once the three months period elapses, at least not as of yet. However, there is a sense that in framing these internal appeals rules, the Central Bank is sending out a strong signal that will encourage lenders to get on with the business of repossession where it suits. The message for borrowers and their representatives in terms of how these rules are framed seems correspondingly stark. Even as you exercise a distinctly qualified right of appeal from a decision of your lender Arrears Support Unit to your lender's Appeals Board and onto the FSO, the dice are effectively loaded and time is rapidly slipping away.

d) Legal proceedings and borrowers not co-operating

Finally, it is worth noting here that once a lender declares a borrower not to be co-operating under Rule 29 of the Code, no three-month moratorium exists and legal proceedings may commence *immediately*, notwithstanding that the borrower has a right of appeal. The definition of not co-operating in the revised Code is so convoluted and in parts so subjective that it could easily be manipulated. For example, not co-operating includes 'failing to make a full and honest disclosure of information to the lender, that would have a significant impact on his/her financial situation'. There is already some evidence from the FLAC phone line and from MABS that some declarations of not co-operating by lenders are being made on flimsy grounds and that the threat of being declared not co-operative is being used to pressurise borrowers into accepting potentially unsuitable proposals.

e) The limited role of the Financial Services Ombudsman under external MARP appeals

Against the backdrop of this far stricter process, the role of the Financial Services Ombudsman as the avenue for external MARP appeals and complaints becomes increasingly important from the perspective of the borrower, as the FSO may in effect be the last chance a borrower may have of saving his or her family home.

Where a referral had been made by a borrower to the FSO under the previous version of the Code of Conduct on Mortgage Arrears, it had already been our understanding prior to the revision of the Code in July 2013 and to an announcement made by the FSO in August 2013 (considered in detail below) that the FSO did not consider it had the power to overturn the decision of a lender's Arrears Support Unit or its Appeals Board not to offer any particular repayment arrangement. The Central Bank clearly takes the view that although the Code envisages a unique role for the FSO in terms both of process and outcome; it is up to the FSO

to decide its specific jurisdiction in this regard.¹²⁶

Following the revision of the Code, FLAC further wrote to the Central Bank querying what merit there was in appealing decisions of the ASU to the FSO, given the position that the FSO appeared to have already taken on not interfering with the substantive decisions of lenders under the MARP. The Bank responded as follows:

The role of the FSO is separately provided for under the Central Bank Act 1942 and **the complaints which it will consider is a matter for the FSO to decide.**

If a borrower is not satisfied with the outcome of an appeal and refers the matter to the FSO, the FSO has advised that it will consider **whether the lender complied with the CCMA in reaching the decision** (our emphasis) and may direct a lender to re-assess the borrower's case.¹²⁷ [*Our emphasis added*]

At the end of August 2013, the FSO overhauled its website and complaints procedures (the reason for this will be explored in detail in Chapters 3 and 4 of this report below). On the front page of the revised website, under the heading 'Mortgage Arrears Resolution Process', the FSO posted the following notice:

Mortgages Arrears Inability to Meet Mortgage Repayments

Where a complaint relates to a mortgage arrears situation with a Provider and a proposal has been made by a Complainant to the Provider with regard to the mortgage repayment obligations, which the Provider has rejected, mortgage holders should be aware of the limitations of the jurisdiction of the Financial Services Ombudsman.

In relation to Mortgage Arrears Resolution Process (MARP) complaints, where issues of sustainability/repayment capacity are in dispute, the Financial Services Ombudsman is only

in a position to investigate a complaint as to whether the Provider, in handling a mortgage arrears issue, correctly adhered to its obligations pursuant to the Central Bank's Code of Conduct on Mortgage Arrears (CCMA).

The Financial Services Ombudsman can investigate the procedures undertaken by the Provider regarding the MARP process, but will not investigate the details of any renegotiation of the commercial terms of a mortgage which is a matter between the Provider and the customer, and does not involve this Office as an impartial adjudicator of complaints. The Financial Services Ombudsman will not interfere with the commercial discretion of a financial service provider, *unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of Section 57 CI (2) (b) of the Central Bank and Financial Services Authority of Ireland Act 2004.* [*our emphasis added*]

By virtue of this statement, the FSO has dampened down any expectation amongst borrowers in arrears with mortgages on principal dwelling houses (and their advocates) that it would act as a full avenue of appeal against the substantive decisions of lenders under the MARP, now that the CCMA has been revised and the spectre of repossession looms. The language seems carefully chosen – the FSO has a 'limitation of jurisdiction'; it can only check 'whether the Provider correctly adhered to its obligations', including 'investigating the procedures undertaken by the Provider regarding the MARP process'; but it 'will not interfere with the commercial discretion of a financial service provider'.

The source for this limited power is traced to back Section 57 CI (2) (b) of the Central Bank and Financial Services Authority of Ireland Act 2004 (part of the legislation that establishes a statutory FSO that will be explored in more detail in Chapter 3 of this report). However ground (b) is but one of a number of grounds

¹²⁶. Interview with the Central Bank, January 2013.

¹²⁷. e-mail response by Central Bank of 11 July 2013 to queries posed by FLAC by e-mail of 3 July 2013.

contained in sub-section (2). The full text states that:

- (2) A complaint may be found to be substantiated or partly substantiated only on one or more of the following grounds:
- a) the conduct complained of was contrary to law;
 - b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
 - c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
 - d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;
 - e) the conduct complained of was based wholly or partly on a mistake of law or fact;
 - f) an explanation for the conduct complained of was not given when it should have been given;
 - g) the conduct complained of was otherwise improper.

From an examination of this full text of Section 57 CI (2) set out above, we believe that the Financial Services Ombudsman has a broader remit under the sub-section to investigate the conduct of mortgage lenders in terms of their decision-making under the Code of Conduct on Mortgage Arrears than the above extract from its website indicates.

For example, sub-section (2) (c) allows the FSO to find that, notwithstanding that the conduct complained of was in accordance with a law or an established practice or regulatory standard (such as for example the lender complying with the terms of the CCMA) that the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant.

He may also find under sub-section (2) (d) that the conduct complained of was based wholly or partly on an improper motive, such as might occur for example in a case where a mortgage lender sought to repossess a mortgaged dwelling that is in positive equity though not in deep arrears.

Finally, the FSO has a residual category under sub-section (2) (g) to find that the conduct complained of was otherwise improper – for example that the borrower was simply not given an adequate chance to prove that the mortgage may be ultimately sustainable or that the lender ignored or failed to consider legitimate arguments put forward by the borrower.

Ultimately, it is difficult not to conclude therefore that the jurisdiction visited upon the Financial Services Ombudsman to take on Mortgage Arrears Resolution Process (MARP) appeals is largely unwanted and that, accordingly, the intention of this statement is to put some clear blue water between his office and a thorny issue. This is signalled by what might be termed a marked reluctance to explore the parameters of its potential jurisdiction. In its defence, it presumably did not ask for this role and arguably has enough to do already with an increasing number of complaints to investigate. The familiar sound of the borrower being short-changed however is hard not to detect. The Central Bank gets to decide the level at which it will protect consumers but it ultimately cannot direct lenders how to act. The FSO gets to decide the level at which it will consider any oversight but it appears unwilling to overturn lender's decisions.

The importance of a properly constituted, effective process which would enable borrowers to appeal issues arising out of the Code of Conduct on Mortgage Arrears was already highlighted by FLAC in 2010 through its representative on the "Cooney Group" (the recommendations of which contributed to the development of the MARP itself), in the following terms:

The Group acknowledges that the member representing Free Legal Advice Centres would have preferred to see a new appeals body set up to deal

with the full range of potential appeals arising out of the MARP.¹²⁸

In turn, FLAC's submission in 2013 on the proposed revision of the CCMA suggested that:

Given the likely rise in the numbers of mortgages to be declared by lenders to be unsustainable in the future and the likely rise in proposals for sustainable long term arrangements by lenders that borrowers may find difficult to accept, it is our view that in addition to the Code being admissible in legal proceedings before the courts, borrowers should have a genuine right of appeal to an independent third party not just on compliance with the mechanics of the MARP process but also on the substantive decisions made by the lender. Given the problem of resources, government may be against setting up a distinct body for this purpose, but that would be desirable. In the alternative, it could set up a fast-track appeal to the FSO for this purpose, but specific explicit authority would have to be conferred upon it to carry out this function.¹²⁹

The MARP process under the Code of Conduct on Mortgage Arrears is effectively the last available opportunity for a borrower to resolve his or her situation before potential loss of the family home. A lender's decision not to offer appropriate short-term or long-term forbearance arrangements to a borrower in arrears must be open to challenge, if the requirements of fair procedures are to be satisfied. What now appears to be clear evidence of the Financial Services Ombudsman's reluctance to tackle issues that might impinge on the lender's right to enforce its security, as demonstrated by the entry on its website, reinforces the suggestion above that specific explicit authority would have to be conferred upon it to carry out this function. That or a separate appeals body should be set up charged with carrying out this function. Unless a proper appeals mechanism is put in place, the Code is

rendered into nothing but a set of guidelines in a process that must be followed by lenders but where the outcomes of the process may not be effectively challenged by borrowers.

2.6.3.3 Statistical information and research into the functioning of the MARP

Despite the fact that it is the key feature of the State's response to the mortgage arrears crisis, there does not appear to be any comprehensive database recording the outcome of Mortgage Arrears Resolution Process cases in terms of the alternative repayment arrangements offered, accepted or refused, broken down by lender and type of arrangement, and how those arrangements were sustained or otherwise over time. Similarly there is no information accessible to the public on rates of appeals and their outcomes. The Central Bank does publish figures on mortgage arrears on a quarterly basis and these figures also contain details of the type of rescheduling arrangements that are in place between lenders and borrowers at the end of each quarter but these are not broken down any further.

In 2012, a mainly quantitative study was carried out by the Central Bank into the circumstances of mortgage holders, including the impact of the MARP on 209 borrowers engaging with a limited number of institutions in this regard. The Bank issued a press release in connection with this study, which suggests that whilst the MARP may be working for some, it is not working as well for considerable numbers of borrowers.¹³⁰ Substantial percentages for example claimed that their lender did not discuss their other (unsecured) debts with them (around one third) or did not enter into an alternative arrangement (again, about 3 in 10); and only 64% noted their lender's helpfulness which implies that 36% did not.

The Central Bank did not ultimately publish this research in report form; hence it is difficult to critique the findings to any significant degree. However, the research appears to have been somewhat of a 'tick-

Unless a proper appeals mechanism is put in place, the Code is rendered into nothing but a set of guidelines in a process that must be followed by lenders but where the outcomes of the process may not be effectively challenged by borrowers.

128. Mortgage Arrears and Personal Debt Group, *Final Report*, 16 November 2010, page 17.

129. See FLAC submission on Consultation Paper, April 2013 CP63, available to download at www.flac.ie/publications/submission-on-review-of-code-of-conduct-on-mortgage-arrears_apr-2013/, page 9.

130. See Central Bank press release, 'Research highlights positive experience of borrowers engaged in the mortgage arrears resolution process', 21 February 2013, at <http://tinyurl.com/kc8sz8e>, last viewed February 2014.

box' nature, as opposed to a more in-depth qualitative enquiry with these borrowers, as suggested by the following response from the Bank to a query from FLAC in respect of the research:

We are only aware of what type of arrangements the borrowers entered into. We have no information on how these borrowers are faring or details on those who did not enter into an alternative arrangement.¹³¹

By way of comparison, MABS carried out its own piece of research specifically into experiences of mortgage arrears and the Mortgage Arrears Resolution Process among its service users (drawing on a sample of nearly 6,000 clients). In contrast to the Central Bank's findings, it identified serious deficiencies and in particular significant delays within the MARP process as a whole.¹³² As will be described in Chapter 5, serious issues with the MARP (including methods used to completing the Standard Financial Statement) were also identified in the qualitative research carried out for the purposes of this study.

More recently, the Department of Finance has begun to separately publish 'Mortgage Restructures Data', described as a 'Dataset for 6 main lenders covered by the Central Bank of Ireland Mortgage Arrears Resolution Targets',¹³³ although it is noted that the data has not gone through the lender's quality control process and is unaudited.¹³⁴ It is worth noting that the Department has announced its intention to publish this data set on a monthly basis and, at the time of writing, has set specific release dates for the first quarter of 2014, operating approximately six weeks in arrears. This data set is a clear improvement on what has gone before, in particular as it now tracks on a monthly basis the increase (or otherwise as the case may be) in the number of restructures of mortgages on principal dwelling houses (PDH) that have been in arrears for over 90 days. It also provides an ongoing breakdown on a monthly basis of the types of restructures taking place.

This data set however also revealed the slow rate of current progress (after five years of comparative inertia) and the extent of the challenges facing the authorities and lenders in getting on top the problem in 2014 and beyond. For example, in the two months between the end of September 2013 and the end of November 2013, the number of restructures of mortgages in the 90-day plus category had grown from 22.8% to 25.3% of the total (an increase of 1812 accounts). Although such an increase in restructures is welcome, this means that approximately three out of four mortgages in this more intractable category were still not restructured at the end of 2013. Of the 25% that had been restructured, one in every three is only a temporary, as opposed to a permanent restructure, with all the uncertainty that this implies for the borrower into the future. There is also a lack of clarity around some of the terms used in these figures. For example, one of the permanent restructure options is described as 'Interest Only (for a period)'. In the absence of a specific explanation, it is difficult to see how 'interest only' could constitute a viable permanent restructure. Equally, the category described as 'Hybrid (Combination of Treatments)/Other' requires some explanation and there is still no mention of debt write-down as a category, despite it being specifically listed in the revised 2013 Code as an alternative repayment option.

There are also some significant omissions in this data set that might be addressed and these include the following:

- There is still no breakdown of the reschedules agreed by individual lenders in terms of numbers and type or of proposed reschedules that were rejected by borrowers.
- The figures only include the six principal mortgage lenders; thus no information is available for the remaining sub-prime lenders.
- The 'debt purchase' companies that have bought the loan books of other lenders are not included either.¹³⁵ Indeed, there is considerable doubt as to whether the CCMA/MARP process applies to these mortgages at all now that they have been sold on

¹³¹ e-mail from Central Bank to FLAC, 22 February 2013.

¹³² See Bennett, C. (2013) *MABS Clients and Mortgage Debt – a profile of MABS clients in Mortgage Difficulty and the factors associated therewith*. (MABS National Development Ltd, April 2013).

¹³³ AIB, Bank of Ireland, PTSB, ACC, KBC Ireland and Ulster Bank.

¹³⁴ The latest available set at the time of writing is from November 2013, published in January 2014.

¹³⁵ For example, the Pepper Group acquired the share capital of GE Capital Woodchester Homeloans in September 2012 including approximately 3,500 Irish mortgage accounts with over €600 million in receivables. The mortgage book of Bank of Scotland (Ireland) PLC was acquired by Tanager Ltd in December 2013.

to what are unregulated entities. Any gap in the application of the CCMA that may result must be immediately filled.¹³⁶ It is worth noting that at the time of writing (February 2014), Fianna Fail spokesperson on Finance, Michael McGrath TD has announced his party's intention to introduce a Private Member's Bill – the Protection of Residential Mortgage Account Holders Bill 2014 – to protect mortgage holders whose loans are sold to unregulated third parties. Deputy McGrath stated that “the issue is given particular urgency by the imminent prospect of the sale of the former Irish Nationwide mortgage book by the special liquidator of IBRC (Irish Bank Resolution Corporation)”.¹³⁷

- There is still no information on the unsecured debt profile of accounts in arrears over 90 days; the absence of data in this respect hinders an appropriate policy response.

Many of the changes made in the revision of the Code of Conduct on Mortgage Arrears appear to assume good faith and fair dealing on the part of mortgage lenders and by contrast, imply bad faith in the form of strategic default on an (as of now) unquantified number of borrowers. We have already outlined in this section our view that the former assumptions may be naïve when applied to financial institutions for which the bottom line is recovery of the maximum amount of money lent and that the latter may underestimate the trauma and complexities of being over-indebted in Ireland. If responsibility for repairing the major social problem that is mortgage arrears is to primarily remain with the Central Bank, not only should it police lender compliance with the revised Code much more vigorously, it should also in tandem with the Department of Finance comprehensively track rates of proposals by lender and rates of acceptance of arrangements by borrowers; it should monitor the outcomes of these arrangements once in place and monitor rates and outcomes of MARP appeals. The establishment of a much more detailed database

would both facilitate ongoing review of the success or otherwise of the MARP in terms of resolving mortgage arrears problems and contribute to evidence-based policy development in this critical area. However as 2014 rolls out, there is little evidence of the required urgency; a number of the 60,000 or so accounts which are in arrears over 90 days and are still not restructured now drift towards the repossession stage.

2.6.3.4 Services to assist borrowers in their negotiations with lenders under the MARP

Over-indebted people in Ireland now face an increasingly complex legislative and regulatory labyrinth through which they have to navigate. The fundamental overhaul of the CCMA/MARP rules and procedures, the roll out of the requirements on lenders to meet Mortgage Arrears Resolution Targets set by the Central Bank, the passage of the Land and Conveyancing Law Reform Act 2013 and the roll out of the Personal Insolvency Act 2012 have all contributed to this. Faced with this complicated architecture, where are borrowers in arrears going to obtain the ongoing financial, debt and legal advice that they require to negotiate on some kind of level playing field with their creditors and to make sustainable and workable decisions for them and their dependants?

Many will, thankfully, have the support of the state-funded Money Advice and Budgeting Service (MABS). However, this is a service under huge pressure of demand and it cannot possibly deliver on the remit expected of it with its current resources. Indeed, an example of the misunderstanding of its remit is evident in Provision 27 (d) of the revised CCMA whereby a lender, prior to classifying a borrower as not co-operating, must include a statement “that the borrower may wish to seek appropriate legal and/or financial advice, for example from MABS”. Although highly skilled at debt negotiation and income maximisation, most money advisors would not purport to specifically provide either

136. On this issue, the Government's legislative programme for the Spring/Summer session 2014, lists under the heading of Bills in respect of which heads have yet to be approved by Government at No.93 “Sale of Loan Books to Unregulated Third Parties Bill – To introduce legislation to cater for the sale of loan books by regulated financial institutions to unregulated financial institutions – Publication expected in 2015” (our emphasis added).

137. From website of Fianna Fail, available at www.fiannafail.ie, last reviewed February 2014.

legal or financial advice in the strict sense of these words.

In theory, people in arrears potentially facing repossession may also be entitled to legal advice and/or representation from the state-funded Legal Aid Board. However, many debtors may have incomes that exceed the threshold (allowances are strict) and even if they do qualify, they will go to the end of the list. At the end of January 2013, only 7 of the Board's 29 Law Centres had waiting times for an appointment of four months or less and waiting times in some centres were up to 22 months for a first appointment. Realistically therefore, civil legal aid is not an option either as people cannot wait that long for assistance.

Other options for borrowers include the Mortgage Arrears Information Helpline announced by the Citizens Information Board in July 2012. This helpline operates in conjunction with the *keepingyourhome.ie* website, but can only offer information, not advice. The National Consumer Agency also provides useful information on financial and debt issues, but does not have a specific advocacy role.

Finally, there is the potential availability of free, independent professional financial advice to borrowers in mortgage distress from any one of a panel of accountants, as a result of a scheme announced by the Minister for Social Protection, Joan Burton, TD in September, 2012.¹³⁸ However, this scheme is very limited in that borrowers can only potentially access it after a proposal for a long term sustainable arrangement has been made by the lender. The advice given by any accountant on the relevant panel is limited to explaining the proposal made by the lender and its consequences for the borrower. There is no ongoing support available to a borrower to initiate, conduct and conclude negotiations. At the time of writing, a review of this scheme has taken place and was published in December 2013.¹³⁹ The report confirms that a low number of offers to access the service have been made by lenders since its inception. This is thought to be due principally to the failure by lenders in many instances to draw the borrower's attention to their right to access the scheme

in the documentation accompanying the offer of an alternative repayment arrangement. For example, although 11,000 borrowers had apparently been informed of the availability of the independent financial advice service by the end of September 2013, lenders had received fewer than 200 invoices from accountants for the provision of the advice.

Ultimately, however, the review generally confined itself to recommending improvements to the existing service in terms of increased information obligations imposed on lenders and the possibility of expanding the range of advice to be provided when long term forbearance is offered to a borrower under the terms of the MARP. Critically, it stopped short of recommending that advice be made available to borrowers in difficulty at an earlier stage of the process and "concluded that the provision of the independent financial advice service should at this point remain as it is, pending a further review of the service".¹⁴⁰ However, comments made by the Minister for Social Protection, Joan Burton TD, at a subsequent seminar held to discuss the review suggested that this approach was being revised, with the Minister proposing that the service operate in two stages – access to the assistance of an accountant to fill out the Standard Financial Statement (SFS) at the initial engagement with the lender, as well as advice following receipt by the borrower of a long-term debt resolution offer. In addition, the Minister is considering how legal advice on the consequences may be available to those facing the loss of their homes through the declaration of a mortgage as unsustainable.¹⁴¹

Many people are struggling alone to deal with the increasingly complex financial and legal situations that they face. FLAC receives a significant number of calls daily to its legal information and referral line from mortgage holders in difficulty.¹⁴² Many will also obtain basic legal advice by attending one of FLAC's volunteer-staffed legal advice centres across the country.¹⁴³ The queries that debtors present with are often very complex and many have already exhausted the

138. Part of the Mortgage Arrears Information and Advice Service – for further information see www.keepingyourhome.ie.

139. Mortgage Arrears Information and Advice Service, *Review of the Independent Financial Advice Service Report*, December 2013.

140. Mortgage Arrears Information and Advice Service, *Review of the Independent Financial Advice Service Report*, December 2013, page 23.

141. 'Free Mortgage Advice Service: Poor take-up Prompts Revamp', by Alan McDonnell, *Epoch Times*, 26 January 2014. Available online at www.theepochtimes.com/n3/471905-free-mortgage-advice-service-poor-take-up-prompts-revamp/?sidebar=related-left (last viewed February 2014).

142. FLAC's Information and Referral Phone line dealt with 1,626 specific debt calls in 2013, almost a 10% increase on 2012.

143. In 2013, FLAC's legal advice centres dealt with 1567 debt queries, an increase of almost 25% on 2012 figures.

round of helplines by the time they call the FLAC phone line or visit a FLAC centre. Other non-governmental organisations also do their utmost to provide debtors with varying types of legal assistance from similarly limited resources. A number of professionals also assist people in distress *pro bono*. These stop-gap measures are no substitute for a proper system of legal advice and representation.

In short, we believe that there continues to be a serious imbalance of power between lender and borrower here. This was acknowledged by Minister for Finance, Michael Noonan TD on 13 March 2013 at the press conference to announce the Central Bank's Mortgage Arrears Resolution Targets plan, when he made specific reference to the need to "even up" that imbalance. Lenders have geared up for these developments and have staff dedicated to carrying out this work. Borrowers suffering high levels of financial distress, on the other hand, are unlikely to be able to afford to pay for legal or financial advice privately. However, by the end of 2013, there has been no improvement in the assistance available to even attempt to redress this imbalance and we would argue that it has been heightened by the revision of the Code of Conduct on Mortgage Arrears.

As we enter a new and potentially far reaching phase of the personal debt crisis, with the prospect of a sizeable increase in repossessions and the loss of family homes, it is worth noting what the government's own Inter-Departmental Mortgage Arrears Working Group (or 'Keane Group') had to say in its report in 2011 on the issue of more specific support and advice for borrowers in arrears with their mortgages.¹⁴⁴ Its recommendations may be summarised as follows:

- The group recommended the establishment of a mortgage support and advice function;
- It did not believe that MABS was structured or resourced to provide this service;
- It was safe to assume that 100 independent advisors would be needed *at first [our emphasis added]*;

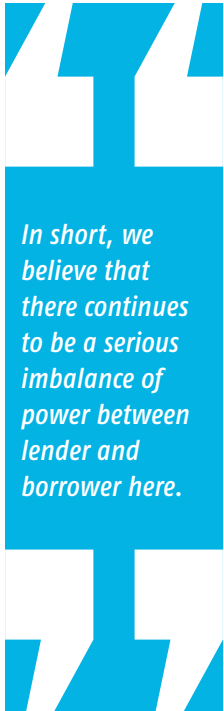
- The skills required would include financial, accounting and legal;
- The new advisors should operate in three to four regional clusters;
- These clusters should be linked to MABS offices, could legally be a part of MABS but would not have to be, but would have to have a link to the MABS network for referral purposes.

Against what was considered at the time by many to be a limited template, it is clear that what has been provided by the State since then falls far short. MABS is the obvious body to which a more specialist support service in the area of mortgage arrears should be attached. In addition, the Legal Aid Board is similarly situated country wide, with a wide legal expertise.¹⁴⁵ Substantially increased resources could therefore be made available to MABS and the Legal Aid Board to meet this need. An alternative solution is to build on the existing accountants' advice scheme and require lenders to make suitable financial assistance available to all those engaged in negotiations with their lenders under the MARP by covering the reasonable fees of all licensed accountancy and legal practitioners.

With ongoing financial, legal and debt advice for borrowers to help in negotiations, proposals for so called sustainable arrangements may indeed prove to be sustainable. Without it, many borrowers in arrears are terribly exposed. Again this is not just a question of due process and ultimately the debtor's human rights, it is also a matter of trying to ensure that arrangements are effective and therefore lasting, and that repossessions are kept to a minimum, the government's stated aspiration in this increasingly difficult arena.

2.6.4 Legal status of Central Bank Codes

Of potentially crucial importance to consumers and their advocates is whether Central Bank Codes such as the Code of Conduct on Mortgage Arrears (and indeed the Consumer Protection Code) are admissible in legal proceedings. The



¹⁴⁴. Keane Report, 30 September 2011, Page 33 – 34.

¹⁴⁵. The Legal Aid Board is the state agency that provides legal aid in civil matters to applicants who means and merits tests. More information at www.legalaidboard.ie (last viewed February 2014).

CCMA states that “lenders are reminded that they are required to comply with this code as a matter of law”¹⁴⁶ and that the Central Bank “has the power to administer sanctions for a contravention of this Code under part 111C of the Central Bank Act 1942”,¹⁴⁷ a process that we have described in some detail above. It is worth noting that the 2006 version of the CPC also explicitly provided that “regulated entities are reminded that they are required to comply with this Code as matter of law”.¹⁴⁸ The 2012 version of the CPC appears less conclusive in stating that ‘the provisions of this Code are binding on regulated entities and must, at all times, be complied with when providing financial services’.¹⁴⁹ Both editions of the CPC equally state that ‘the Central Bank of Ireland has the power to administer sanctions for a contravention of this code, under Part IIIC of the Central Bank Act 1942’.

The critical question from the consumer perspective is whether a breach of the terms of these codes is a matter that a consumer can raise in his or her defence in any subsequent legal proceedings, particularly for example in terms of the Code of Conduct on Mortgage Arrears, legal proceedings brought by a lender to repossess a family home. Generally speaking, Central Bank codes are issued under the terms of Section 117 of the Central Bank Act 1989. This section authorises the Central Bank, after consultation with the Minister (for Finance), “from time to time, to draw up, amend or revoke” such codes. Thus, the Bank is the author of a code which it alone has the power to amend. As we have seen, it has done so with the 2009 edition giving way to a more complete 2010 version and it in turn being replaced by the 2013 revision described in detail above.

None of these codes are primary legislation in the form of an act of the Oireachtas. Neither crucially do they amount to a secondary piece of legislation in the form of a ministerial regulation issued by the relevant Minister, in this case the Minister for Finance. Both primary and secondary legislation are subject to parliamentary scrutiny by elected representatives, with primary legislation generally being intro-

duced in both Houses and potentially subject to a rigorous debating and amending process. A Minister issuing a regulation in the form of a statutory instrument must be authorised under a piece of primary legislation to do so and, generally speaking, any such regulation must further an objective of the primary piece of legislation from which it is derived. And although there is no provision for debate and amendment, it must also be laid before the Houses of the Oireachtas so that elected representatives may inspect and conceivably object to it.

Nonetheless, it is undeniable that a new source of rules and regulations has become more and more prevalent in the Irish legal system over recent decades. As we have seen, these instruments are a different type of device from primary or secondary legislation. Included in this category are departmental circulars, codes of practice and guidelines. A code of practice or conduct is a device constructed with the intention of providing a set of rules and/or regulations to which a body must adhere in administering its function, taking into consideration the welfare of its stakeholders. An example is how the Consumer Protection Code obliges regulated entities to adhere to certain standards when providing financial services to their customers. The CPC is, thus, heavy on provider responsibilities but light on consumer rights, other than the right to rely on the Code in relation to complaints about the conduct of financial service providers to the Financial Services Ombudsman. One might argue that it is misnamed; “A Code of Conduct for the Regulation of Financial Service Providers” would, for example, be a more accurate title.

Administrative law would refer to non-statutory devices as ‘soft law’, and codes of practice have been referred to as the ‘softest law’.¹⁵⁰ Notwithstanding the obligations and rights provided for by way of such codes, their legal standing therefore lacks clarity. By their very nature as we have seen, codes of conduct or practice do not pass the rigorous scrutiny of the Houses of the Oireachtas. Nonetheless it is untrue to say that they have no legal effect whatsoever. In the event that a body

146. CCMA 2013, Page 1.

147. Also at page 1.

148. CPC 2006, page 2.

149. CPC 2012, page 3.

150. Hogan G. & Gwynn Morgan D. (1998) *Administrative Law in Ireland*, 3rd ed. Dublin, Round Hall page 42.

issues a code of administrative rules or some other quasi-regulation instrument, although an individual may be unable to rely on the code as law, it may give rise to a legitimate expectation.¹⁵¹ Codes can, of course, be mentioned in statute and there are numerous legislative provisions which expressly permit regulatory authorities to create and issue codes or guides. However, two primary questions arise in relation to this type of administrative code.¹⁵² Firstly, is such a code binding at law? Secondly, given the lack of legislative processes applicable to this type of code, what safeguards apply to it?

2.6.4.1 Recent case law on the legal standing of Central Bank codes

Consumer Protection Code (CPC)

Zurich Bank v McConnon¹⁵³

In this case, the defendant argued that the terms of the CPC formed an implied term of the contract between the two contacting parties, lender and borrower, and that a breach of the plaintiff of this implied term gave rise to a right of redress for the defendant. A further argument was that, in the alternative, the defendant had a legitimate expectation that the terms of the Code would be complied with in full. Mr Justice Birmingham held that there is no legal principle that a breach of the Code renders a contract null and void or otherwise exempts a borrower from the liability to repay and that there is no legal remedy available for a consumer where a lender does not adhere to a Code created under the Central Bank Act 1989. In essence this decision was confirmed, insofar as it concerns the CPC, in the subsequent case of *Friends First Finance Limited v Frank Cronin*.¹⁵⁴

Code of Conduct on Mortgage Arrears (CCMA)

Stepstone Mortgages Funding Limited v Fitzell¹⁵⁵

The plaintiffs in this case issued legal proceedings in 2009 to repossess the de-

fendant borrower's home which were adjourned from time to time as negotiations on an alternative repayment arrangement continued. In July 2011 Stepstone Mortgage Funding Ltd. initiated the MARP process with the borrowers and sought an update of their financial situation in the form of a revised standard financial statement (SFS). By virtue of this updated information, Stepstone refused to negotiate on a further repayment arrangement and sought to continue the repossession proceedings begun in 2009. Stepstone then informed the defendants that they had no right of appeal against this decision (as provided for in the CCMA) as repossession proceedings had already begun before the MARP process had been initiated. The Master of the High Court adjourned the repossession action forming the view that Stepstone had breached the terms of the CCMA in not allowing an appeal.

Stepstone appealed this decision to the High Court and Ms Justice Laffoy ruled that the Code applied to all cases in arrears at 1 January 2011 when the 2010 version of the CCMA came into operation, regardless of when legal proceedings for possession were in fact instituted. The borrowers should therefore have been allowed to appeal the decision of the lender in accordance with its MARP and the Code. She further held that where proceedings for possession of a primary residence are being pursued under a mortgage to which the Code applies, the lender is under an obligation to demonstrate to the Court its compliance with the Code. She made particular reference in this regard to the necessity to adhere to a 12-month moratorium on legal proceedings from the date the mortgage enters the MARP process (as was then the case). Stepstone was refused a Possession Order.

Irish Life and Permanent v Duff¹⁵⁶

This case again involved a claim by the plaintiff lender to recover possession of the defendant's family home. The defendants argued that the plaintiff had generally failed to comply with the 2009 edition of the CCMA prior to seeking to repossess in the High Court. In his examination of

151. Generally, for a legitimate expectation to arise, there must have been some change of position, in that the applicant must have relied on representations made by the body to their detriment. In *Daly v Minister for the Marine* [2001] 3 IR 513 however, the Supreme Court held that the doctrine may apply where there has been no change of position but it would be unfair, unjust or discriminatory not to observe the undertaking of which the claimant is aware.

152. Hogan G. & Gwynn Morgan D. (1998) *Administrative Law in Ireland*, 3rd ed. Dublin, Round Hall page 50.

153. [2011] IEHC 75, unreported, High Court, Birmingham J., 4/3/2011.

154. [2013] IEHC 59, unreported, High Court, Herbert J., 15/2/2013.

155. [2012] IEHC 142, [2012] 2 IR 318.

156. [2013] IEHC 43.

what he described as “the somewhat troublesome issue of the precise legal status of the Code of Conduct”, Mr Justice Gerard Hogan noted the contrasting approach in the two previous High Court decisions of note, that of Mr Justice Birmingham in *Zurich Bank v McConnon* and the more recent decision of Ms Justice Laffoy in *Stepstone Mortgage Funding v Fitzell*, both referred to above.

In the former case, Mr Justice Birmingham held that codes issued under the Central Bank Acts did not create any justiciable rights at the hands of a consumer, whereas Ms Justice Laffoy in the latter held that:

To take what is perhaps the best known provision of the Current Code, the imposition of a moratorium on the initiation of proceedings, which is now contained in provision 47 of the Current Code (and which is also to be found in the earlier codes, although the moratorium period in the case of the earliest code was six months, rather than twelve months), surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is being complied with. Moreover, it is likely that it would render the enforcement of provision 47 nugatory, if a lender did not have to adduce evidence to demonstrate that the moratorium period had expired.

Ultimately, Mr Justice Hogan decided that he must “nonetheless follow the most recent pronouncement of this court in *Fitzell*, given that it was the most recent and authoritative analysis of this question where the judicial comments formed part of the ratio” of the decision.¹⁵⁷ However, this was not before he sounded something of a warning note on how a court might attempt to decide what constitutes every reasonable effort by a lender to agree an alternative repayment schedule before resorting to repossession proceedings under

Clause 6 of the 2009 edition of the Code, as well as on the questionable legal status of the Code. He said as follows:

The question, for example, of what constitutes a “reasonable effort” on the part of the lender does not easily lend itself to judicial analysis by readily recognisable legal criteria. How, for example, are “reasonable efforts” to be measured and ascertained? If, moreover, non-compliance with the Code resulted in the courts declining to make orders for possession to which (as here) the lenders were otherwise apparently justified in seeking and obtaining, there would be a risk that by promulgating the Code and giving it a status that it did not otherwise legally merit, the courts would, in effect, be permitting the Central Bank unconstitutionally to change the law in this fashion.

Further cases

A number of more recent cases have also considered the status of the Code of Conduct on Mortgage Arrears, albeit perhaps not to the extent addressed in the *Fitzell* and *Duff* cases. In *Irish Life and Permanent PLC v Dylan Dunphy*,¹⁵⁸ counsel for the plaintiff objected to the question of compliance with the CCMA being raised on appeal, as it had not been raised at any stage in the pleadings up to then. Mr Justice Gerard Hogan agreed, and although a case was stated to the Supreme Court on other aspects of this case, unfortunately the question of the legal status of the Code was not amongst them. In *Freeman v Bank of Scotland (Ireland) & ors*¹⁵⁹ Mr Justice Gilligan found that the status of Central Bank codes issued under Section 117 of the Central Bank Act 1989 is not absolutely clear and may be dependent on the circumstances of each particular case.¹⁶⁰ Finally, in *ACC Bank PLC v Deacon & anor*,¹⁶¹ it was noted that Ms Justice Laffoy and Mr Justice Hogan had refused to grant Possession Orders where the code had not been complied with, but that both had stopped short of expressly holding that the Code forms part of the contract

157. The *ratio decidendi* is a Latin legal term meaning literally ‘the reasons for the decision’. In the system of binding precedent used in our superior courts, these are the parts of the decision that a future court must follow when the same issue arises in a subsequent case. They should be contrasted with what a judge terms *obiter dicta*, meaning literally ‘other things said’ in the course of a decision that may be persuasive in a future case but are not binding. For the sake of completeness, the remarks on Central Bank codes made by Mr Justice Birmingham in the *Zurich Bank* case were *obiter dicta*.

158. [2013] IEHC 235, unreported, High Court, Hogan J., 29/4/2013.

159. [2013] IEHC 371, unreported, High Court, Gilligan J., 31/5/2013.

160. [2013] IEHC 371, unreported, High Court, Gilligan J., 31/5/2013 para 20.

161. [2013] IEHC 427, unreported, High Court, Ryan J., 28/6/2013.

between the parties or that non-compliance alters the lender's rights.

2.6.4.2 Summary

The Code of Conduct on Mortgage Arrears and Consumer Protection Code are documents created by the Central Bank of Ireland and sanctions may be imposed on lenders who do not apply and adhere to their rules.¹⁶² They do not, however, have the status of legislation and neither do they provide for any type of relief for the borrower in arrears or consumer, apart from incomplete appeals processes. The uncertain legal status of these Codes is reinforced both by the guidance and clarifications provided by the Central Bank regarding some of their terms and by its respective revisions of them.¹⁶³ Clearly, if these were pieces of primary or secondary legislation, it would be the role of the courts to clarify or interpret their provisions, and not their author.¹⁶⁴ Equally, it would be the Executive and the Houses of the Oireachtas that would initiate and complete legislative amendments to them.

Ms Justice Laffoy held in the *Fitzell* case that non-adherence by the lender with the CCMA should preclude that lender from obtaining an order for possession, and this would in FLAC's view appear to be the most equitable approach and the morally correct one; what is the point in having a MARP process if it cannot be challenged when lenders refuse to abide by it? Mr Justice Hogan followed the decision in *Fitzell* in the *Duff* case but clearly had misgivings in doing so, particularly in terms of his remarks concerning the constitutional ramifications of allowing a non-statutory code to be afforded legislative status. It would appear that the only case where the status of the CPC was specifically considered involved an emphatic rejection by Mr Justice Birmingham of the question of its admissibility.

It appears therefore that the judiciary are at something of a stalemate on this issue at a particularly sensitive and important time, particularly in terms of the Code of Conduct on Mortgage Arrears, when it is clear that repossession actions

are on the increase,¹⁶⁵ facilitated by the passing of the Land and Conveyancing Law Reform Act 2013 that effectively overturned what has become known as the 'Dunne judgment'.¹⁶⁶ Thus, it is unfortunate that Mr Justice Hogan was unable to state the question of the legal status and admissibility of the Code to the Supreme Court in *Dunphy* because the Code had not been pleaded at the original hearing in the Circuit Court. Clarity from the Supreme Court would have provided a definitive answer to both lenders and borrowers as to the real value of the CCMA to borrowers, faced with potential repossession but unhappy about lender compliance. Nonetheless, it is our conclusion that there is far too much doubt as to whether Central Bank codes are in fact admissible in legal proceedings, despite the High Court decisions in the *Fitzell* and *Duff* cases, and we argue that this situation should be and might easily be remedied.

Take, for example, an analogous Code in the employment law area, the Code of Practice on Grievance and Disciplinary Procedures at Work issued by the Labour Relations Commission (LRC).¹⁶⁷ This code is frequently cited in unfair dismissal cases in the Employment Appeals Tribunal (EAT).

Section 42 (1) of the Industrial Relations Act 1990 provides that the "Commission shall prepare and draft codes of practice concerning industrial relations for submission to the Minister, either on its own initiative or at the request of the Minister".

Subsection (2) provides that before submitting such codes to the Minister, the Commission "shall seek and consider the views of organisations representative of employers and workers".

Subsection (3) states that "where the Minister receives a draft code of practice from the Commission, he may by order declare that the code, scheduled to the order, shall be a code of practice for the purposes of the Act".

Critically, subsection (4) of this Code provides that "in any proceedings before a court, the Labour Court, the Commission (LRC itself), the Employment Appeals

162. First there must be a concern that there has been a 'Prescribed Contravention' (such as an alleged breach of a Central Bank code). The Central Bank may then commence 'an Examination' to establish whether there are reasonable grounds for a suspicion that a regulated financial service provider and/or a person concerned in the management of a regulated financial service is committing or has committed a prescribed contravention'. The entity then gets an opportunity to respond prior to the possible commencement of an Inquiry. At any time before the conclusion of an Inquiry, a Settlement agreement may be reached and the terms of these are generally available on the Bank's website. If following an Inquiry an Administrative Sanction is imposed, that decision may be appealed by the entity to a body called the Financial Services Appeals Tribunal.

163. A further concern is that the terms of the Code itself have not been amended in any way to reflect these clarifications, and the clarification that has been provided (by way of a guidance document which is somewhat hidden within the contents of the Central Bank's website) has been primarily issued for the benefit of providers.

164. In December 2012, following on from the two clarifications to the financial services industry, the Central Bank published an extensive guidance document (consisting of 24 pages, amounting to nearly a third of the size of the Code itself) clarifying some of its key provisions. The 2012 Code had been published after extensive consultation; however, it now appears that as a result of lobbying from the financial service industry, some protections for the consumer have been diluted (see discussion above in relation to contacts under both the CPC and the CCMA).

165. According to the report of the Expert Group on Repossessions, 1830 new legal proceedings to enforce the security on private dwelling houses were brought in Quarter Three of 2013 (page 23).

166. *Start Mortgages & Others v Gunn & Others* [2011] IEHC 275, unreported, High Court, Dunne J., 25/7/2011.

167. SI 146/2000.

The Code of Conduct on Mortgage Arrears should be admissible in legal proceedings.

Section 42 of the Industrial Relations Act 1990 provides a relatively straightforward template for use in amending Section 117 of the Central Bank Act 1989.

Tribunal, a rights commissioner or an equality officer, a code of practice *shall be admissible in evidence* [our emphasis added] and any provision of the code which appears to the court, body or officer concerned to be relevant to any question arising in the proceedings shall be taken into account in determining that question”.

Subsection (6) provides that “the Minister may at the request of or after consultation with the Commission by order revoke or amend a code of practice”.

Finally, subsection (7) provides that “every order made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made”. A resolution annulling the order may potentially be made by either House within 21 days.

The similarities between the objectives of these codes are worth noting – with the Code of Conduct on Mortgage Arrears, a state agency seeks to oblige lenders to follow a set of rules when dealing with its customer’s mortgage arrears on principal dwelling houses; with the code on grievance and disciplinary procedures a state agency seeks to oblige employers to follow certain procedural rules with its employees when dealing with disciplinary issues at work. The main difference is the question of admissibility; the latter is expressly admissible, the former is not.

We suggest therefore that Section 42 of the Industrial Relations Act 1990 provides a relatively straightforward template for use in amending Section 117 of the Central Bank Act 1989. In such an amendment, the Central Bank could be mandated to prepare draft codes of practice concerning financial services for submission to the Minister for Finance and the views of stakeholders could be sought in advance. The Minister might then declare the draft code to be a code of practice for the purposes of the Central Bank Act 1989, which might be laid before the Houses of the Oireachtas. Such a code would be admissible in any proceedings before a court and relevant provisions might be used to determine any question arising in such proceedings, such as whether a Possession Order should be granted in a mortgage

arrears case. The Minister for Finance might then, at the request of or after consultation with the Central Bank, revoke or amend a code of practice by Ministerial Order.

As far back as July 2010, the Mortgage Arrears and Personal Debt Group (or ‘Cooney Group’), in which FLAC participated, recommended in its interim report that the Code of Conduct on Mortgage Arrears should be admissible in legal proceedings and this recommendation is also reflected in the final report of the group.¹⁶⁸ If the State is really serious about repossession being a last resort, and in a scenario where it has reversed the *Dunne* judgment and reopened the summary procedure for the potential repossession of properties, this must be done. We would then at least have a Code that lenders would have to follow to the letter so that borrowers could rely upon having a real chance of demonstrating their ability to service a sustainable alternative arrangement on their mortgage that would keep them in their homes, if they chose to. Failure to allow the borrower this opportunity, and to accord him or her the right to fair procedures and fair decision-making, could then be challenged in the courts if necessary.

2.6.5 Report of the Expert Group on Repossessions

According to its final report,¹⁶⁹ the Expert Group on Repossessions was established in September 2013 in response to the following commitment to the Troika contained in the 9th review of the Memorandum of Economic and Financial Policies (MEFP):

As part of our ongoing review of the effectiveness of statutory repossession arrangements as set out in the MEFP for the 9th review, we will define, in consultation with the staff of the EC, ECB, and IMF, terms of reference by mid-August for an expert group to review by end-2013 the length, predictability and cost of proceedings, including relative to peer jurisdictions, and propose, where necessary, appro-

¹⁶⁸. See page 6, Final Report, Mortgage Arrears & Personal Debt Group, 16 November 2010.

¹⁶⁹. See page 3, Report of the Expert Group on Repossessions, December 2013.

appropriate measures to be brought forward quickly to deal with any problems arising.

The group completed its work by end 2013 and reported its conclusions to the Troika, but its final report was only released to the wider public on 14 January 2014. This report sketches the history of the mortgage arrears problem in Ireland and the measures taken to alleviate it, as well as summarising the legal position in relation to repossession actions in the Irish system. The context for its deliberations is the Troika's concerns with what it saw as the abnormally low rate of repossessions in Ireland and the lengthy, complicated and expensive court repossession system. The role of the group was therefore to examine that system, to identify any shortcomings and to make recommendations. It should be noted that this group was composed exclusively of civil servants representing: the Office of the Attorney General; the Departments of Finance, Justice, the Taoiseach and the Environment, the Central Bank of Ireland and the Courts Service. It would also appear that the Group consulted a limited number of other bodies, as it thanks those who responded to the Group's enquiries, namely lending institutions, the legal professions, the County Registrar's Association and the Money Advice and Budgeting Service.¹⁷⁰

Following its analysis, the broad thrust of the Group's conclusions might be summarised as follows:

- While the law must seek proportionately to safeguard the interests of borrowers, especially those who may be in default (and some of whom also find themselves in negative equity), *there is a strong countervailing public interest in protecting the interests of lenders*, not least in order to ensure that funding continues to be made available for the purchase of residential and other property and also where there is an equity in property, to release funding for other productive purposes. [our emphasis added]
- Significant efficiencies could be achieved through more effective case management by lenders, harmonised

documentation standards and a more structured framework for borrowers entering defences in repossession proceedings.

The report then goes on to make a number of recommendations for reform, broadly consisting of technical issues concerning harmonisation of documentation and more streamlined processes for the service of legal documents, the granting of adjournments, the filing of defences, the eventual enforcement of orders and the collation of data.¹⁷¹

We have already outlined in this chapter the basic structure of the current legislative and policy response to the largely unresolved problem of mortgage arrears and our view that it will lead to a substantial rise in repossession rates, despite the government's stated desire to avoid the repossession of family homes wherever possible.¹⁷² The nature of this report and the timing of its publication is further proof of this, if further proof were needed. The Troika's position would seem to be crystal clear – there are too few repossession orders given the scale of the arrears problem and the system is inefficient. The request for an investigation clearly presages a ramping-up of repossession activity and the review group does not demur; its carefully worded conclusion that there is “a strong countervailing public interest in protecting the interests of lenders” whilst safeguarding those of borrowers is something of a green light. Indeed the report itself notes that 1,830 new actions for repossession were brought in Quarter Three of 2013, an increase in activity largely attributable to the overturning of the *Dunne* judgment in the Land and Conveyancing Law Reform Act 2013 and the setting of MARS targets.

In seeking to protect the interests of lenders at the potential expense of borrowers, the report of the Expert Group on Repossessions is very short on analysing the causes of the mortgage arrears and debt crisis generally. The issue of reckless lending gets a very curt dismissal, with the report finding refuge in two High Court decisions that confirm that neither contract nor tort law in Ireland provide any

The issue of reckless lending gets a very curt dismissal, with the report finding refuge in two High Court decisions that confirm that neither contract nor tort law in Ireland provide any such defence for indebted borrowers, when in fact it was the legislature and the regulatory authorities (both national and European) that failed to provide for more rigorous lending controls.

170. See page 7, *Report of the Expert Group on Repossessions*, December 2013.

171. See generally pages 60 – 63, *Report of the Expert Group on Repossessions*, December 2013.

172. See Section 2.6.2 of this Chapter.



such defence for indebted borrowers, when in fact it was the legislature and the regulatory authorities (both national and European) that failed to provide for more rigorous lending controls.¹⁷³ Implicit too in this conclusion is that in seeking to establish a properly functioning mortgage market, the casualties of the previous dysfunctional one will take the hit so that the economy can move on.

In summary, we would again argue that the treatment of the mortgage arrears problem on principal dwelling houses is yet further evidence of the low priority accorded to consumers/borrowers when compared to their financial service providers and in what authorities may deem to be the wider economic interest. Unfortunately, some mortgages are so damaged and impaired that they cannot reasonably survive. The danger now is that many others who were encouraged to climb onto an increasingly escalating property ladder may ultimately be deemed dispensable, when a structured write-down of their mortgage might ensure its survival.

A final question might also be posed – is the State clear about where it is going on this issue?

At the end of Quarter 3 2013, 31,834 mortgages on principal dwelling houses had been in arrears for more than two years, with an average arrears figure of €41,224. A further 28,010 had been in

arrears for more than a year with an average arrears figure of €18,235.¹⁷⁴ A total of 99,189 had been in arrears for longer than 90 days.

Of the 80,487 accounts on principal dwelling houses with the six principal lenders which had been in arrears for over 90 days at the end of November 2013, only one in four had been restructured and only two out of three of those restructures were permanent. To be fair, some progress has been made, with an increase from 22.8% to 25.3% in the percentage of restructured accounts from the end of September to the end of November 2013. However, that still leaves 60,000 accounts with the six main lenders still unresolved. It might also be noted that a number of ‘permanent restructures’ may have been agreed on terms that are too restrictive from the borrower’s perspective – and some of these may fail.

It is regularly reported that around 100,000 families are currently waiting on social housing, with little sign of a social housing dividend from the National Asset Management Agency (NAMA). The Department of Environment’s Mortgage-to-Rent scheme seems to have yielded little in terms of concrete success, with a reported 60 successful conclusions from 1,332 applications as of August 2013.¹⁷⁵ Is the State prepared for the social and other consequences of a spate of repossessions were that to materialise?

2.7 Summary

The Central Bank is responsible both for consumer protection and for ensuring the stability of our financial institutions. Each of these things is clearly important, but it is our conclusion that the Bank’s prioritising of its stability remit is compromising its protection one and that this is working in practice to the detriment of the financial service consumer. For example, it has clearly bowed to pressure from lenders in terms of its clarifications of the ‘unsolicited visits’ provisions of its Consumer Codes, and has dis-improved these protec-

tions for all borrowers in arrears in order to better facilitate providers to chase people they see as uncooperative defaulters. The ready access to the Central Bank that financial service providers appear to enjoy is in sharp contrast to the limited lobby on behalf of financial service consumers. This is a fact acknowledged by the Bank during interview, and compounded by its decision to largely ignore pro-consumer recommendations put forward by consumer advocates.

173. See page 10, *Report of the Expert Group on Repossessions*, December 2013.

174. Central Bank Residential Mortgage Arrears and Repossessions Statistics: Q3 2013. Available online at <http://tinyurl.com/ofnr694> (last viewed February 2014).

175. As reported by Louise McBride in the *Sunday Independent*, 11 August 2013.

The Central Bank has evidently decided on a distinctive approach to monitoring the activities of financial service providers. This approach is based on devising and enforcing compliance with Codes of Conduct that the Bank itself produces (and clarifies and revises from time to time), and which we conclude are not expressly admissible in legal proceedings – although it is clear that they *could* be made expressly admissible in such proceedings. The Bank’s approach prioritises the placing of obligations on providers over the conferring of rights on consumers (other than the right to make a complaint to the Financial Services Ombudsman). The monitoring of compliance with such obligations, through pre-announced Reviews, Themed Inspections and associated Settlements, tends more in our view towards ‘soft-touch’ than rigorous regulation – as illustrated by the negligible number of appeals made by financial service providers to the Irish Financial Services Appeals Tribunal, and by the behind closed doors nature of the Inquiries that the Bank has conducted.

The Consumer Protection Code contains a number of flaws from the consumer perspective, and those which relate specifically to consumers of credit have already been discussed in some detail in the previous Chapter. More generally, the Code is very difficult to read, a difficulty not helped by extensive use of the term “clarification of scope” at the commencement of each section. Some of these difficulties could be overcome were a decision to be taken – or dispensation sought – to apply the Code more widely as has already been argued. As in other areas of financial service provision, the failure to undertake any evaluation from the consumer perspective is noteworthy. The experience of many respondents to this study¹⁷⁶ suggests for example a need to evaluate the extent to which the provisions of the Code relating to consumer complaints are being applied on the ground, and particularly in the context of ‘vulnerable consumers’.

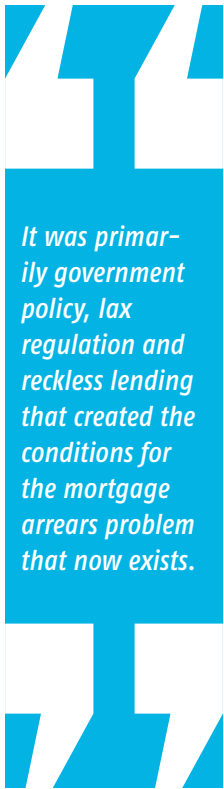
As regards the protection of consumers in mortgage arrears, context is hugely important. In FLAC’s view, it was primarily government policy, lax regulation and

reckless lending that created the conditions for the mortgage arrears problem that now exists, although it was the economic downturn and subsequent austerity measures that have largely triggered and compounded it. The main policy response, namely the Code of Conduct on Mortgage Arrears, has clearly provided some protection to distressed borrowers since the advent of the Global Financial Crisis in 2008. However, the deficiencies highlighted in this report indicate that its provisions were in need of considerable reform. That reform, when it came, has likely worsened rather than improved the situation, certainly from the indebted consumer’s perspective.

Fundamental issues remain to be addressed, such as the power imbalance between provider and borrower; the speed with which legal proceedings for repossession can now be issued; the lack of any meaningful appeals process; and the lack of significant advice and support available to borrowers. There is also a need for the Central Bank to increase both its monitoring activities in relation to the Code of Conduct on Mortgage Arrears and its awareness of the borrower’s experience through accessing qualitative input from the consumer perspective on an ongoing basis. In light of a likely and substantial increase in repossessions facilitated by other policy developments, including the recent report of the Expert Group on Repossessions, these are matters of the utmost urgency.

More fundamentally, the issue of the legal admissibility of Codes such as the CCMA becomes critical when a matter as important as the family home is at stake. Linked to this issue is a democratic deficit, namely the side-lining of parliamentary scrutiny in relation to the development, clarification and amendment of the CCMA. All of these tasks are currently undertaken solely by an unelected body, in the form of the Central Bank, the same body which manifestly failed to act with the necessary urgency during the evolution of the mortgage crisis.

More broadly, developments in the advanced forbearance area are still largely



It was primarily government policy, lax regulation and reckless lending that created the conditions for the mortgage arrears problem that now exists.

¹⁷⁶ Described later in Chapter 5.

shrouded in secrecy; such initiatives need to be much more transparent and appropriate to the situations that many borrowers find themselves in. Our experience is that some of these ‘strategies’ appear to amount to debt peonage¹⁷⁷ masquerading as a solution. For example, in March 2013, FLAC was consulted by a MABS money adviser in relation to a split mortgage offer. In this case, the lender proposed to ‘warehouse’ or put aside half the outstanding principal mortgage balance of approximately €450,000, with the other half being serviced in full; this meaning repayments on both capital and interest. Crucially, it was proposed that the full rate of interest was to be charged on the warehoused portion and payable monthly. Between capital and interest on the annuity portion and interest-only on the warehoused part, more than €2,000 was to be paid in monthly instalments, amounting to a total in the region of €750,000 over thirty years. At the end of the 30-year period, almost a quarter of a million euro would still remain to be paid. Such a proposal not only adds insult to injury, it might be termed usury. With assistance from MABS and FLAC, the borrower rejected the offer. However, how many others may have signed up to these hopelessly one-sided proposals without the benefit of third-party and independent expert advice?

As in other areas of financial service provision, it is FLAC’s conclusion that the policy approach to the problem of mortgage arrears veers considerably more towards the interests of industry than it does towards those of the borrower. The protections that are there for consumers seem to work up to a point, but as far as the mortgage industry is concerned, the authorities continue to adopt the approach that lenders must be allowed to deal with matters on a case-by-case basis and that it is better to implore than to require.¹⁷⁸

177. A condition of enforced servitude by which a person is restrained of his or her liberty and compelled to labour in payment of some debt or obligation.

178. See for example, ‘Central Bank says lenders must tackle arrears crisis’, *Irish Times*, 30 January 2013.

CHAPTER

**An assessment of the Financial
Services Ombudsman (FSO) Service
and its legislative basis**

3.1 Introduction

Following a lengthy description and critical analysis of the range of European directives, the domestic legislation that transposes them and domestic codes put in place to protect consumers of financial services in Ireland, Chapter Two concluded with the general observation that the principal forum for consumer complaints, apart from the potentially expensive arena of the courts, is to the Financial Services Ombudsman (FSO).

This chapter then proceeds on to an examination of that service under a number of headings. It is divided into two different sections.

(i) The first section (3.1.) will provide a summary of the relevant legislation in the form of an overview of the statutory functions of the Financial Services Ombudsman and will also initially flag some issues of concern in relation

to the legislation to be discussed in greater detail later in Section 2 of the chapter.

(ii) The second section (3.2.) will explore and discuss in greater detail some of the problems we would argue have arisen out of the legislative scheme over the years since its inception in 2005, in terms of the substantive rules outlined in the legislation (and associated regulations) as they have been interpreted and applied, some unclear wording in some of the sections and some areas where it will be argued that the legislation does not go far enough. Proposals for reform in the form of recommendations will be made and in keeping with the focus and tenor of this report, these will centre on enhanced protection for the consumer of financial services.

3.2 Overview of the core statutory functions of the Financial Services Ombudsman (FSO)

3.2.1 Statutory basis for the Financial Services Ombudsman (FSO)

The Financial Services Ombudsman Bureau was set up on a statutory basis by virtue of the Central Bank and Financial Services Authority of Ireland Act 2004. Section 16 of that Act inserts a new Part VIIB into the existing overarching Central Bank Act 1942 for this purpose. The primary object of this part and its constituent chapters was to take the existing industry-funded and administered Ombudsman

offices for the Banking and Insurance sectors and amalgamate them into one statutory office. This office was also intended to broaden the range of financial service providers against whom complaints could be made, to include for example credit unions, a range of finance intermediaries including credit, mortgage and investment intermediaries as well as stockbrokers, finance houses and licensed moneylenders.

3.2.2 Financial Services Ombudsman Council

Part VIIB also establishes a Financial Services Ombudsman Council¹⁷⁹ empowered under Section 57BD to carry out a number of functions, most notably:

- to prescribe guidelines under which the FSO may operate;
- to determine the levies and charges payable (by the financial services industry) for the performance of the services provided by the FSO;
- to appoint the FSO and any deputy FSO;
- to keep under review the efficiency and effectiveness of the Bureau;
- to advise the Minister for Finance on matters relevant to the office.

The Council has the power to make regulations that may be required to further the functions outlined for it under Section 57BD or that may be necessary or convenient to enable the FSO to perform his or her functions and/or exercise his or her powers. The Council however has no role with respect to how the FSO deals with a particular complaint.

3.2.3 Types of statutory complaint

According to Section 57BX (1), an eligible consumer¹⁸⁰ may complain about the conduct of a regulated financial service provider involving:

- The provision of a financial service;
- An offer to provide a financial service;
- A failure to provide a particular financial service that has been requested.

The significant majority of complaints come under the first category, that is, financial services that have been provided with which the recipient is unhappy, but as can be seen above a complaint may also be made about some aspect of an offer of financial services or indeed a failure to provide a financial service at all. Thus, a person who wishes to avail of a financial service such as, for example, to access credit such as a credit card facility or an

overdraft but who is refused access to that service may make a complaint.¹⁸¹

3.2.4 Excluded complaints

According to Section 57BX (3), a complaint may not be made if the conduct complained of:

- is or has been **the subject of legal proceedings** before a court or tribunal;
- occurred more than **six years** before the complaint is made;
- is a matter outside the FSO's jurisdiction.

In relation to first point here, FLAC pointed out in a short submission in 2004 on the proposed legislation to set up the statutory Financial Services Ombudsman that “[i]t is possible that a well-resourced provider could embroil a complainant in legal proceedings that the complainant can ill afford in order to avoid his/her complaint being dealt with by the Ombudsman. A second point here is what is meant ‘by the conduct complained of’”. Do the legal proceedings in question have to explicitly relate to that conduct or will proceedings on the general subject matter of that financial service preclude a complaint?¹⁸²

It may have been this observation that resulted in a subsequent amendment to the draft legislation now contained in Section 57BX (3A). This provides that “the FSO may accept a complaint against a regulated financial services provider who has begun legal proceedings in relation to matter to which the complaint relates, but only if that Ombudsman reasonably suspects that that the regulated financial service provider has begun those proceedings in order to prevent the making of the complaint or to frustrate or delay its investigation.”

In relation to the second point, the section further provides that “conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred”. The six-year limitation rule has proved to be very contentious since

179. For the sake of transparency, it should be noted that one of the two principal authors of this report, Paul Joyce, FLAC Senior Policy Analyst, served as a member of the Financial Services Ombudsman Council from October 2004 to September 2008.

180. The definition of ‘consumer’ was widened by Council regulations in 2005 to include not just a natural person, but also commercial entities with an annual turnover of less than €3 million per annum.

181. It does not appear that the annual reports of the FSO divides complaints into these three initial categories specifically, but it might be helpful if they did in order to provide a template to further break down complaints into more detailed areas.

182. Submission on the Central Bank and Financial Services Authority of Ireland Bill 2003, Free Legal Advice Centres, September 2004. Available at www.flac.ie.

the statutory scheme was introduced. In effect, it means that *regardless of when the complainant became aware of the detrimental consequences* of the conduct (or last instance of conduct), he or she will be precluded from pursuing a complaint if six years has passed.

3.2.5 Complaints outside jurisdiction

Once a complaint is received, the Financial Services Ombudsman has a duty under Section 57BY to investigate that complaint if it falls within jurisdiction. Potential complaints that do not fall within the jurisdiction as we have seen above include matters that are currently the subject of legal proceedings, complaints originating more than six years previously and matters within the jurisdiction of the Pensions Ombudsman that cannot be dealt with by the FSO. In addition under Section 57BZ, the FSO can also decline to investigate or to continue to investigate a complaint on the grounds that:

- the complaint is frivolous or vexatious or was not made in good faith;
- the subject matter of the complaint is trivial;
- the conduct occurred at too remote a time to justify an investigation (presumably even it occurred within the six-year time limit);
- there is or was available to the complainant an alternative and satisfactory means of redress in relation to the matter about which the complaint was made;
- the complainant has no interest or an insufficient interest in the conduct about which the complaint was made.

3.2.6 The necessity to first complain to the provider

Section 57BX, subsection (6) of the Act provides that a consumer “is not entitled to make a complaint unless the consumer has previously communicated its substance to the regulated financial service provider concerned and has given that financial service provider a reasonable opportunity to

deal with it”. Thus, the Financial Services Ombudsman website, under the heading ‘Making a Complaint – Overview’, suggested up until August 2013 in connection with this obligation that “if you have followed the internal complaints procedures of your financial service provider and you are still not satisfied the FSO may investigate a complaint” (providing of course that the complaint falls within its remit). It is clear therefore that in principle a pre-requisite to accessing the FSO is making a complaint internally to the regulated financial services provider.

Once it had been established that the case fell within the jurisdiction (or remit) of the Financial Services Ombudsman, the FSO advised the complainant to seek a Final Response letter from the financial services provider in question and the provider had 25 working days to furnish this. If this did not lead to the resolution of the complaint the FSO took up the matter, provided that the complainant had furnished the FSO’s office with a copy of this letter within 15 working days of the date on which the letter was issued and indicated that he or she wishes the complaint to proceed to an investigation.

However, in the course of our enquiries with staff of the Financial Services Ombudsman, it emerged that there was some confusion in the service itself around the obligation to first make a complaint to the provider. This confusion is evident in the relevant extracts from interviews with senior staff. Two principal issues were in question here:

- First, how a consumer might satisfy the requirement to initially make a complaint internally to the regulated financial services provider. Specifically, whether a consumer had to first comply with the rules in relation to complaints set out under the Central Bank’s Consumer Protection Code, before making a further complaint to the FSO. This allows a provider up to 40 working days to resolve a complaint made by a consumer.
- Second, whether having done so, the consumer had to then wait a further 25 days for the provider’s final response

letter to issue before the complaint could proceed to an FSO investigation.

These issues are considered in much greater detail in Chapter Four. It suffices to say for the moment that following the interviews conducted by FLAC with senior staff of the FSO and the consumer protection section of the Central Bank, undertakings were given to review these procedures. The result is that the FSO has overhauled its complaints mechanisms and a more consistent process is in place since September 2013.

3.2.7 Mediation, investigation and adjudication

Prior to proceeding with an investigation, the Financial Services Ombudsman will first advise the parties about the option of mediation. However, if one party does not agree to engage in mediation then the matter will proceed to the next stage – investigation and adjudication by the Ombudsman. Despite the fact that the principal function of the FSO is to deal with complaints by mediation and only where necessary by investigation and adjudication, it is worth noting that only a very small number of cases are dealt with by mediation. For example, the FSO Bi-Annual Review of 2012 states that of 2995 complaints that proceeded to the investigation stage, only five were dealt with by way of mediation. An exploration of why mediation is so rare an occurrence and the consequences of this for consumers, the FSO process and the High Court as an avenue of appeal is in the next section.

In order to facilitate the investigation of complaints, the Financial Services Ombudsman has a number of powers under Section 57CE to ensure that finance providers furnish documentation either orally or in writing. Officers of such providers may be summonsed to attend before the FSO and may be examined under oath. Under Section 57CF, the FSO has powers of entry onto premises in order to inspect and copy documents. Compliance with the FSO's powers under these sections may be

enforced by an application to the Circuit Court under the terms of Section 57CG.

The following revised extract from the FSO website describes in brief the procedure once a complaint proceeds to investigation:

Summary of Complaint

In the course of investigation this office will issue a "Summary of Complaint" to the Provider. The "Summary of Complaint" sets out the complaint which is the subject of the formal investigation and requires the Provider to answer a series of questions, to submit evidence and make any submissions which the Provider sees as being desirable to put before the Ombudsman to investigate and adjudicate upon the complaint. A copy is sent to the Complainant. The original "Summary of Complaint" and copy "Summary of Complaint" is issued to the Provider and Complainant(s) respectively on the same day.

Time Frames

It should be noted that all timeframes are guidelines. This office has the discretion to grant time extensions if required on the request of either the Complainant or the Provider. Each Party will be given every reasonable opportunity to make such submission or observation as required.

Exchange of documentation

Upon receipt of the Provider's response to the Summary of Complaint, a full copy of these responses and any evidence submitted will be copied to the Complainant who will be given 10 working days to submit any observations. Any observations from the Complainant will be copied to the Provider who will be given 5 working days to submit any further observations.

The process of documentary exchange continues until each party has made the required submissions.¹⁸³

¹⁸³. 'How complaints are dealt with' – see www.financialombudsman.ie (last viewed February 2014).

3.2.8 Acting in an informal manner and without regard to technicality or legal form

Section 57BK(4) requires the Financial Services Ombudsman in the discharge of his or her functions “to act in an informal manner, and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.” It is hard to know exactly what the Houses of the Oireachtas intended when coming up with this wording, but FLAC considers that there is a level of ambiguity here that could result in the FSO being given too much latitude in dealing with complaints. It is of course clear that the FSO is not a court of law and informality is to be encouraged up to a point. However, to specifically absolve the FSO of the responsibility to have regard to technicality or legal form in circumstances where the complaint in question may involve the interpretation and application of both legislative provisions and codes seems to be stretching informality beyond what is reasonable.

As we shall see in more detail below, a complainant or a respondent unhappy with a decision of the Financial Services Ombudsman, for example, because it gives insufficient regard to technical legal issues or because it seems unfair or arbitrary or shows bias to a particular party, may only seek to judicially review the FSO in the High Court or appeal the decision under the terms of the legislation to the High Court. The scope of this avenue of appeal has been interpreted much more narrowly than a layperson would be given to understand by the wording of the legislation. The cost implications of going down this road are also obvious, especially for what might now be termed ‘personal consumers’: a person who avails of a financial service outside of the course of his or her trade, business or profession.

3.2.9 The holding of oral hearings

The legislation is silent on the question of whether the Financial Services Ombudsman is obliged to conduct an oral hearing

for the purposes of the investigation and adjudication of a complaint. Broadly speaking, it is apparent that the FSO would rather avoid the adversarial nature of an oral hearing, preferring to rely on the parties written accounts of events and related submissions by way of exchange of documentation before arriving at a decision on the merits of the complaint.¹⁸⁴ This may be likely to be less time consuming and therefore less of a drain on resources and it may also be suggested that it is more in keeping with an Alternative Dispute Resolution (ADR) approach. However, in some cases an oral hearing may become necessary, for example where there is a clear and crucial discrepancy in the account of events in the respective submissions between the parties that is fundamental to arriving at a conclusion. However, the FSO is not obliged to hold an oral hearing in every case and a number of decisions of the High Court on appeal have upheld this view. An examination of some of the case law in relation to this issue takes place below.

It should also however be noted here that some of the complainants interviewed for the purposes of this study expressed frustration at not being allowed to confront and challenge the financial service provider whom they perceived had wronged them. This frustration combined with a sense that the FSO’s complaints procedures had instead weighed them down with detailed and indigestible financial paperwork from providers so that the real essence of their complaint was not grasped was a frequent cause of complaint (as described in Chapter 5).

3.2.10 Financial Services Ombudsman findings

Section 57CI (1) provides that where a complaint has not been settled or withdrawn, the Financial Services Ombudsman must issue a finding in writing that either the complaint is substantiated, partly substantiated or is not substantiated. Subsection (2) provides that a complaint may be substantiated or partly substantiated on any one or more of the following grounds:

¹⁸⁴. According to staff of the FSO during interview, only 15 oral hearings were held in 2012.

- the conduct complained about was contrary to law;
 - the conduct complained about was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
 - although the conduct complained about was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
 - the conduct complained about was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;
 - the conduct complained about was based wholly or partly on a mistake of law or fact;
 - an explanation for the conduct complained about was not given when it should have been given;
 - the conduct complained about was otherwise improper.
- to review, rectify, mitigate or change the conduct complained about or its consequences;
 - to provide reasons or explanations for that conduct;
 - to change a practice relating to that conduct;
 - to pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained about;
 - to take any other lawful action.

It is worth noting again that under the terms of Section 57BK (4), the FSO is required “to act in an informal manner, and according to equity, good conscience and the substantial merits of the complaint *without regard to technicality or legal form*” (*our emphasis added*). Nonetheless, he is empowered under the terms of this section to find that the conduct of the respondent provider “is contrary to law” or that the conduct complained of “was based wholly or partly on a mistake of law”. FLAC considers that there are mixed messages in these perhaps conflicting wordings; this is an issue discussed in more detail later on in Section 2 of this chapter.

3.2.11 Potential remedies where a complaint is upheld

Under the terms of Section 57CI (4), if a complaint is found to be wholly or partly substantiated, the Financial Services Ombudsman may direct the financial service provider to do one or more of the following:

Subsection (5) provides that the FSO may not direct the payment of an amount of compensation exceeding an amount (if any) prescribed by Council Regulations. Regulations were passed by the Council in April 2005 that included provisions on this question.¹⁸⁵ If the subject of the complaint relates to an annuity, compensation is limited to a potential award of €26,000. In the case of all other complaints, the maximum compensation ceiling is €250,000 and this limit will apply even if the loss suffered by the complainant may amount to more than that.

3.2.12 Appeal to the High Court

Section 57CL (1) of the Act provides either party (complainant or respondent) with a right of appeal to the High Court against a finding of the Financial Services Ombudsman within 21 days of the finding or such further period as the High Court may allow. The prospect of having to appeal to the High Court is a daunting one, especially for a consumer faced with the potential for an award of costs to be made against him or her should the appeal not succeed. In addition, the wording of this section does not make it clear to the layperson that an appeal, if brought, will not involve a complete re-examination of the case. However, in practice, in a series of cases, the High Court has taken the view that what it refers to as a ‘statutory appeal’ is limited in its form. The difficulties caused by these limitations are considered in some detail in Section 2 of this chapter.

¹⁸⁵ SI 190/2005.

Section 57CM of the Act gives the High Court broad discretion in terms of the orders it can make in such an appeal, including affirming the finding of the Financial Services Ombudsman with or without modification, setting aside the finding of the FSO or remitting the finding to the FSO for further review. If the High Court makes an order remitting a finding or a direction within a finding to the FSO for review, the FSO is required to do so in accordance with the directions of the Court, for example, the Court could direct that the matter be addressed by the FSO as a matter of priority.

The time limit for filing an appeal is provided for in Section 57CL (3) of the Central Bank Act 1942, as amended. This, read in conjunction with the Rules of the Superior Courts, equates to 21 days. Any potential appellant may apply to the High Court for an extension to the 21 day period. A number of decisions of the High Court again have considered the question of the grounds that might justify an extension and these are considered further below.

A further appeal on a point of law lies from the decision of the High Court to the Supreme Court. To date the Supreme Court has only heard one appeal – a judicial review brought by the respondent in the case of *J and E Davy (trading as Davy) and the Financial Services Ombudsman (Notice Party – Enfield Credit Union)*¹⁸⁶ – which will be looked at in Section Two below. At the time of writing, a further Supreme Court appeal is pending, that of *L Lyons and Murray v Financial Services Ombudsman (Notice Party – Bank of Scotland (Ireland) PLC)*, also examined in Section Two of this chapter.

In addition to the right of either party to appeal, the Financial Services Ombudsman may, of his own volition and in the course of dealing with a complaint, refer a question of law to the High Court; either party to the complaint may also request that the FSO make such a reference. FLAC is, however, unaware of any case where the FSO has exercised this power. Finally, the High Court's general power of judicial review also applies to a statutory

body such as the FSO. A judicial review may be distinguished from an appeal in that the review concerns itself not with the merits of the decision, but as to whether the adjudicating body correctly interpreted and exercised its powers and followed fair procedures. So, for example, if a party to a complaint is of the view that the FSO has, in dealing with that complaint, exceeded the powers provided to him under the legislation or on the other hand neglected to properly exercise his powers, the High Court may be requested to review the matter. The leave of the Court must be sought and obtained. A small number of judicial reviews have been heard since the statutory FSO began hearing complaints in 2005.

3.2.13 Enforceability of the FSO's directions

Should a provider fail to comply with a direction issued by the Financial Services Ombudsman as part of a finding, Section 57CJ allows either the FSO or the complainant to apply to the Circuit Court for an 'Enforcement Order'. The Circuit Court may not hear such an application where the provider has appealed the finding to the High Court. Neither can the application be heard unless the provider is present or the Court is satisfied that, though not present, the provider has been served with a copy of the application. Curiously, the Court must also satisfy itself that the direction that it is sought to enforce was one that the FSO was empowered to make, even though the provider has not appealed the finding containing the direction to the High Court as it is entitled to under the legislation.

186. [2010] IESC 30; [2010] 3 IR 324; [2010] 2 ILRM 305.

3.3 Discussing potential recommendations for legislative reform

The Financial Services Ombudsman is a creation of statute and cannot assume powers that it simply does not have under the legislation. If it did, it might very quickly be subject to the judicial review process of the High Court for exceeding his legislative mandate, or as the law would have it, acting *ultra vires*.

This section of this chapter identifies and examines a number of what we consider to be problem areas under Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 which, as we noted in the introduction to this chapter, inserts a new Part VIIB into the existing overarching Central Bank Act 1942 for the purpose of setting up the office of Financial Services Ombudsman.

A number of the problems identified here therefore require legislative reform, but it is submitted that the FSO may also have adopted a narrow interpretation of his powers in some instances. For example, Section 72 of the Central Bank (Supervision and Enforcement) Act 2013 has recently been commenced to provide the FSO with the power to name financial service providers who have at least three complaints against them substantiated.¹⁸⁷ We argue below, however, that the FSO was never specifically prohibited from naming institutions and could have taken a more pro-active approach to naming and shaming unless and until it was otherwise indicated.

These perceived problem areas come under the following headings:

- The six-year rule limiting complaints;
- The low levels of mediated cases;
- The wording of the legislation in relation to discharge of functions;
- Remedies (including ‘naming and shaming’);
- The appeal to the High Court and other appeal issues.

3.3.1 The six-year rule limiting complaints

As noted in 3.2.5 above, Section 57BX (3) of the legislation provides that a complaint may not be made if the conduct complained of occurred more than *six years* before the complaint is made. The section further provides that “conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred”.

We observed that the six-year rule has been applied to mean that, regardless of when the complainant became aware of the adverse consequences for him or her of the conduct (or last instance of conduct) complained of, he or she will be precluded from pursuing a complaint if six years has passed since the conduct or the last in a series of acts or omissions occurred.

As outlined in some detail in Chapter 4 below the Financial Services Ombudsman has just revised its complaints procedures to align them with the Central Bank’s Consumer Protection Code and this has also coincided with a revision of the FSO website, including the publication of new guidelines. Under the heading ‘Can I bring a complaint’, the website states as follows:

This office has a strict six year time limit from the time the conduct complained of occurred to when a complaint is made to this office. For example if you were mis-sold a payment protection policy close to or 6 years before submitting the complaint, you may be time barred – it is important that you lodge your complaint with this office first and then you shall be redirected to the Provider.¹⁸⁸

It is clear from this that the Financial Services Ombudsman is acutely aware of the consequences of the six-year rule. Thus,

¹⁸⁷. No 26/2013.

¹⁸⁸. www.financialombudsman.ie

it is prepared to waive the newly enshrined requirement to have concrete evidence of having made a complaint through the provider's internal complaints procedure first (which in turn must comply with the rules and time limits set out in the Consumer Protection Code), in a case where the complaint is approaching the six-year time limit, so that the complainant does not have their complaint ruled out by a matter of weeks. It is notable too that specific reference is made to payment protection policies here – the principal bone of contention right now insofar as the six-year rule is concerned and considered in detail below.

3.3.1.1 Endowment mortgages

One of the principal areas where the problem of the limitation of the six-year rule initially manifested itself was in relation to endowment mortgages, a financial product that is no longer in vogue but which at one point in the late 1980s and early 1990s was a common investment vehicle. An endowment loan under the terms of the Consumer Credit Act 1995 means a housing loan which is to be repaid out of the proceeds of an insurance policy on its maturity. Thus, it is a type of investment mortgage towards which the borrower makes only interest payments, while payments that would have gone to repay the principal are instead paid into an endowment fund or insurance policy. The borrower does not repay the principal until the mortgage expires and the expectation is that the amount invested in the fund would accumulate in value in sufficient amount to pay off the capital owed on the loan at the end of the term, with a residue to show as profit.

A number of consumers who availed of these products, however, found to their cost that the fund lost rather than made money, leaving a sizeable shortfall on the principal owed to the lender at the end of the term. This shortfall left a number of consumers vulnerable to repossession as they were not in a position to make up the difference. Some argued that the product was a blatant case of mis-selling

in the first place, arguing that lenders and intermediaries selling these products had assured customers that they could not lose. It was therefore perhaps inevitable that consumers in this situation would try to raise this issue in the form of a complaint to the Financial Services Ombudsman, rather than risk the costs of litigation in the courts.

In the course of a detailed statement to the Joint Oireachtas Committee on Finance and the Public Service on 18 January 2006, the then Financial Services Ombudsman explained that if the complaint is that the product was mis-sold at a date which is more than six years before the complaint is made, then it falls outside the FSO's statutory remit. If, on the other hand, the complaint is that on the maturity of the policy the Provider failed to pay out monies in accordance with a contractual agreement, then provided it is made within six years of the maturity of the policy, the FSO will investigate and make a ruling.

Given the duration of endowment mortgages (normally at least ten years or more), complaints of mis-selling were therefore in practice inadmissible, as six years would always have elapsed since the product was sold. Unless a consumer could argue that the provider breached the contract by neglecting to pay out monies on the maturing of the policy, there was no admissible complaint. Establishing that a contractual promise had been made and had not been honoured, as opposed to the provider failing to adequately warn of the potential dangers of financial loss with such a policy, seems to have been the key difficulty that has precluded successful complaints being made by consumers under this heading.

3.3.1.2 Payment Protection Insurance (PPI)

Whilst endowment mortgages may largely be a financial product of the past, albeit one whose tentacles very much reach forward into the present for a number of unfortunate 'investors', payment protection insurance (PPI) is a financial product

Given the duration of endowment mortgages (normally at least ten years or more), complaints of mis-selling were therefore in practice inadmissible, as six years would always have elapsed since the product was sold.

that is both very current and which has in recent years proved to be controversial. In brief, PPI is a form of insurance usually sold in conjunction with a credit agreement designed to cover the insured person in the event of incapacity to service the terms of the agreement.

Perhaps the most fundamental example of payment protection insurance is mortgage protection insurance which is largely mandatory for housing loans under Section 126 of the Consumer Credit Act 1995.¹⁸⁹ In practice, however, many borrowers have availed of other types of insurance cover designed to ensure that instalments on other forms of loan are paid in the event of critical illness, incapacity or in the event of loss of employment on grounds of redundancy. Thus PPI has become very common in connection with both credit card and personal loan agreements. Lenders effectively double up as insurance intermediaries and sell 'optional' PPI to be provided in conjunction with such agreements, often provided by companies associated with the lender. Quite apart from the commission that may be payable to the insurance intermediary/lender by the insurance company for sending business its way, it is also worth noting that PPI may also provide cover against the prospect of default in payment in the event of a debt trigger such as illness or unemployment occurring for the borrower, clearly also in the lender's interests.

In some instances, the rush to sell payment protection insurance in connection with personal loans during the credit boom was such that the lender would also lend the borrower the money to pay for PPI, albeit at the same (sometimes extravagant) interest rate. Some of the loans advanced by the now departed sub-prime unsecured lenders in this regard revealed some of sharpest practice that could be imagined. This sometimes involved the topping up not just of existing loans (a practice unlawful for licensed money-lenders) but of existing PPI. The Office of the then Financial Regulator was made aware of these practices but unfortunately nothing was ever done from a regulatory reform perspective to stop them.

Whether the product was appropriate for the borrower's needs or whether the insurance would actually cover the insured person in the event of a claim was sometimes not even checked. For example, some self-employed borrowers were sold payment protection insurance appropriate only to people working under a contract of employment, and where a cursory glance at the information on the credit application form would have shown that the policy would not cover them. Others who were employed on a temporary contract basis were sold policies where cover would only exist if the insured person was in permanent insurable employment. Statutory protection for the insured in terms of information provision also seems to have been in short supply. Typically, in the case of unsecured lending PPI, a cursory information sheet at the back of the relevant credit agreement provided for the borrower to select the insurance option and to sign that he or she understood the terms and conditions. Often the booklet outlining the terms and conditions was not supplied to the insured person to read and it is obvious that many of those selling the insurance did not understand and perhaps did not care to understand the terms of the product themselves.¹⁹⁰

3.3.1.3 Complaints trends with Payment Protection Insurance (PPI)

In recent years there has been a surge in the number of allegations of mis-selling of payment protection insurance policies. For example, the UK Financial Ombudsman is said to have dealt with 100,000 PPI complaints in 2011, upholding 75% of these. The website of the UK FSO estimates that £50 billion worth of PPI policies were sold over the last 10 to 15 years.¹⁹¹ It stated that it is receiving around 2,000 new complaints about PPI every working day and that eight out of every ten complaints it now receives concern PPI.

It is estimated that some 340,000 such policies have been sold in Ireland since 2007.¹⁹² In July 2012, the Central Bank announced that seven firms in Ireland

189. This section obliges a mortgage lender to "arrange, through an insurer or an insurance intermediary, a life assurance policy providing, in the event of the death of a borrower before a housing loan made by the mortgage lender has been repaid, for payment of a sum equal to the amount of the principal estimated by the mortgage lender to be outstanding in the year in which the death occurs...". It goes on to set out a number of exceptions to this lender's obligation including where the mortgaged property is not intended to be used as the principal residence of the borrowers or his or her dependants, where the borrower(s) are an undue insurance risk or are over 50 years old at the time of the loan approval or already have separate appropriate life cover in place.

190. The legislative infrastructure was also inadequate here. It would not have been difficult once PPI became a standard product in connection with the selling of credit to provide that such agreements must be in writing separate from the loan agreement itself. This could have been done by for example by amending the Consumer Credit Act 1995 with additional obligations on the intermediary to assess the suitability of the product for the borrower's needs and to explain the core terms of the agreement. However, it was not until the first edition of the Consumer Protection Code was fully rolled out in July 2007 that regulated entities such as insurers and insurance intermediaries were obliged to adhere to any standards of due diligence.

191. See www.financial-ombudsman.org.uk, last viewed on 19 March 2013.

192. See www.moneyguide-ireland.com, last viewed February 2014.

were being told to review all their PPI sales since July 2007 following a themed inspection by the Bank that examined the sales files for PPI policies sold to Irish consumers.¹⁹³ This review focused in particular on “instances where the consumer has made a claim under their policy for reasons of unemployment /redundancy and that claim appears to have been declined in accordance with the terms and conditions of the relevant policy”.

Concerns that the Financial Services Ombudsman could become inundated with complaints also clearly informed the strategy adopted by the Bank in this regard. It should be noted however that pre-July 2007 payment protection insurance sales are not covered by this review, because the Central Bank’s first edition of the Consumer Protection Code in 2006 only fully came into operation in July 2007. Research enquiries with the Central Bank suggest that it does not intend to use what powers it had prior to the adoption of the Code to direct insurance providers to provide a rebate of premiums paid where the policy was entered into prior to July 2007.

The Financial Services Ombudsman 2012 Bi-Annual Review figures show that complaints relating to payment protection insurance doubled from 218 in the second half of 2011 to 410 in the first half of 2012, and that 74% of those complaints were about alleged misselling of a PPI product.¹⁹⁴ The Executive Summary to the August 2013 Bi-Annual Review states that:

44% of insurance complaints relate to Payment Protection Insurance (PPI). PPI complaints comprise of 22% of complaints overall and have increased 150% from the same period in 2012 from 410 to 1027 (in the first half of 2013). The increase in these complaints can, in part, be attributed to the Review directed by the Central Bank of Ireland into the sale of Payment Protection Insurance (PPI) policies from 1st July 2007 and media coverage on the issue.¹⁹⁵

Again, however, payment protection insurance is an area where the six-year rule will militate against a claim being processed where the policy was sold over six years prior to the complaint being made by the insured person. This was the situation encountered by one of the respondents to our review as discussed in Chapter Five. As we shall also see in Chapter Four, staff of the Financial Services Ombudsman informed us that 99% of their “outside remit” cases involve the six-year rule.¹⁹⁶ It is not clear how many of these involve an attempt to claim on a PPI policy sold over six years before the complaint was lodged.

3.3.1.4 *The Courts as an alternative*

Admissible complaints to the Financial Services Ombudsman concerning the conduct of a provider in offering an endowment mortgage or payment protection insurance policy have therefore been rendered very difficult by the six-year rule. An alternative to a complaint to the FSO is to bring legal action for breach of contract or an action based on alleged provider negligence in the courts, but it must be said that this is outside the reach of most consumers.

However, in any case, similar limitations apply. Indeed, it is certain that the six-year rule in the Financial Services Ombudsman scheme was introduced to mirror the limitations placed on various types of claim in the courts under the Statute of Limitations Act 1957 (as amended).¹⁹⁷ Section 11 (1) (a) of that Act provides that a legal action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. Equally, legal action based on a number of types of civil wrong (or torts) may also have a six-year time limit from the date on which the cause of action accrued.¹⁹⁸ Do the courts provide any greater flexibility in terms of deciding the date on which the cause of action accrued than is provided under the FSO scheme?

193. Only six of the seven entities were actually named. These were Bank of Ireland, Allied Irish Bank, EBS, GE Money, Ulster Bank and Permanent TSB.

194. Published 13 September 2012.

195. FSO August 2013, Bi-Annual Review, page 4.

196. Interview with FSO staff, 14 February 2013.

197. The Act was comprehensively amended for example in the Statute of Limitations (Amendment) Act 1991.

198. A number of torts such as a claim of negligence resulting in personal injury or a defamation claim have shorter time limits.

■ **Kilmartin v Bank of Ireland**

In what might be potentially described as a landmark case in May 2010, then President of the Circuit Court, Mr Justice Matthew Deery, is reported to have determined in this case that a couple who took out an endowment mortgage in 1991 and crystallised a loss of nearly €5,000 when the policy matured in 2006 were entitled to €16,000 in damages in respect of the shortfall, additional premiums and interest charged and the loss of the projected surplus. Summarising this case, *Business & Finance* magazine suggested that the endowment was sold over the phone and quoted Mr Justice Deery as stating that “the documentation, far from warning of the risk to the sum available at the end of the mortgage, suggested that there was no risk’, and that the assistance given by the Bank ‘was deficient in many respects’”.¹⁹⁹

This article then suggested that in light of this decision, more of the supposed 70,000 endowment mortgage holders in Ireland might look to the courts for a remedy. Other online sources suggested that Bank of Ireland had in fact appealed this decision and that it was due to be heard by the High Court in December 2010. However, there is no record that FLAC can find of any High Court ruling and any anticipated flood of claims does not appear to have materialised.

Unfortunately, we have failed to source any written judgment in respect of this decision and so do not have precise detail of the legal basis upon which the ruling was made. However, *Business & Finance* did report that damages were awarded in this case for “the negligent mis-selling of an endowment mortgage”, so it would appear more likely that the plaintiffs in question sued under the civil wrong (or tort) heading rather than for breach of contract. We are not aware in what detail Mr Justice Deery considered the Statute of Limitations question. What seems clear is that the proceedings were brought some 15 years or more after the endowment mortgage was sold, manifestly outside any time limit under the Statute of Limitations. Thus, it is conceivable that the judge deemed that time should only run for the

purpose of the Statute from the time the policy matured and the loss was crystallised, this being 2006.

■ **Gallagher v ACC Bank**²⁰⁰

A more recent Supreme Court case may have helped to further clarify the law in this area. The plaintiff in this case had borrowed €500,000 in October 2003 from the defendant Bank to invest in a bond which was set to mature some five years and 11 months later. Despite assurances that the investment was not only 100% guaranteed but that it would also provide a sufficient return to deliver a profit after the payment of interest due on the amount that he had borrowed in order to purchase the bond, the plaintiff suffered a financial loss when it matured. In June 2010, he brought legal proceedings alleging both breach of contract and negligence. As the claim was brought more than six years from the date he had invested in the bond, both parties ultimately agreed that the claim for breach of contract was out of time (or statute-barred).

Far less clear was the status of the negligence claim. In the High Court, Mr Justice Charleton found that the six-year limitation period had not expired by the time the plaintiff commenced his legal action, because he did not suffer any immediate financial loss at the time the bond was purchased. If the defendant bank had misrepresented the guarantee on the investment bond, it would not have been possible to determine what damages the plaintiff had suffered until his financial loss crystallised when the bond matured. Only at that point, Mr Justice Charleton suggested, would the tort of negligence “have become complete”.

On appeal, ACC argued that if a cause of action existed (which it disputed), it arose at the time the bond was purchased, as “the claim related to the inherent features of the bond rather than any ongoing mismanagement or departure from investment strategy” and that “the kernel of the claim was that Mr Gallagher would not have entered the transaction but for the bank’s negligence”.²⁰¹ In reversing the High Court’s decision and deciding that

199. See *Business & Finance*, ‘Endowment mortgages: Another fine mess’, Summer 2010.

200. *Gallagher v ACC Bank Plc.* [2012] IESC 35; [2012] 2 IR 620; [2013] 1 ILRM 145.

201. From ‘Supreme Court clarifies Statute of Limitations periods for financial loss claims based on negligence’ published online at www.beauchamps.ie, 7 June 2012 (last viewed February 2014).

the plaintiff was not entitled to compensation, the Supreme Court distinguished between two investment scenarios, one where there is a ‘mere possibility of a loss’ and the other where loss is suffered immediately even though the amount may not be immediately quantifiable. In the former case, time for the purposes of bringing a claim does not immediately run, in the latter it starts from the time the investment is made and the Court determined that the bond that the plaintiff invested in fell into the latter category.

It is important to note that the Supreme Court only made this decision having closely examined the features of the particular investment product in question. This would appear to leave open the question of when time starts for the purposes of a potential claim of negligent misrepresentation concerning the sale of an investment product such as endowment mortgage, where it could be argued that a loss under the endowment policy was not necessarily inevitable from the outset but was only a possibility. It is conceivable that a legal argument could be made to stretch this principle to negligent misrepresentation concerning the sale of a payment protection insurance product.

3.3.1.5 The Statute of Limitations and recommendations of the Law Reform Commission

By the time the Financial Services Ombudsman legislation was initiated in 2004 and the FSO commenced operations in 2005, the Law Reform Commission (LRC), the State’s legal reform research agency, had already recommended a loosening of the rules around contract and tort limitation periods. It is unfortunate therefore that its thinking was not incorporated into the FSO legislation.

In its 2001 report on the *Statute of Limitations – Claims in Contract and Tort*, the Law Reform Commission considered in detail the adequacy of the existing limitations provision in direct response to a request made by the Attorney General.²⁰² The introduction to the Report notes that:

Under the existing law, claims for damage in contract and tort (other than personal injury), will be statute-barred after a period of six years from the date the cause of action accrues. It is irrelevant whether the claimant was aware or could have been aware of the right of action until after that period. The central question which the reference asks by implication is whether this law sets the correct balance.²⁰³

In response to the question, the Commission suggests that:

The Commission is of the opinion that the current law does not adequately protect the plaintiff in cases *where the damage is so latent as not to be discoverable until after (or perhaps shortly before) the expiration of the current limitation period*. This conclusion leads the Commission to propose the introduction of a special provision to extend the limitation period in such cases. [*our emphasis added*]²⁰⁴

However, it also adds that:

The Commission is also mindful of the valuable functions served by limitation periods and would not wish to introduce undue uncertainty into the law. It is for this reason that, along with its main recommendation of the introduction of a discoverability test in cases of latent loss in contract and tort, excluding personal injury, the Commission recommends in Chapter Four the enactment of a long-stop limitation period after which all claims would be statute-barred.²⁰⁵

And it concludes that:

In short, the Commission’s main recommendations are that a *discoverability* test be introduced, balanced by the enactment of a *long-stop limitation period*. The Commission believes that its final recommendations would reduce the potential for injustice to the plaintiff who suffers latent loss under

202. LRC (2001) *Report on Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001), Dublin: LRC. Available online at www.lawreform.ie (last viewed February 2014).

203. LRC 64-2001, page 3, para 11.

204. Page 3, Para 12.

205. Page 3, Para 13

the present law, while still retaining the appropriate limitation period. [*our emphasis added*]²⁰⁶

Finally, further on in the report, the Commission outlines how it would see these amended provisions working in the following extracts:

The Commission recommends the following test: the plaintiff may take action within six years from the accrual of the cause of action (present position); or three years from the date the cause of action *is or ought to be discoverable* by the plaintiff, whichever expires later. [*our emphasis added*]²⁰⁷

The second main recommendation of the Commission stipulates an ultimate limitation period, commonly referred to as a “long-stop” period, beyond which no claim can lie. In the Consultation Paper the Commission provisionally recommended the introduction of a long-stop limitation period of fifteen years from the date on which the cause of action accrued. Essentially, this would mean that upon the expiration of fifteen years from the accrual of the cause of action, any claim would be statute-barred and for most purposes effectively dead. The central point is that this rule would apply even if the damage was not discoverable and the extra three years under the discoverability test had not elapsed.²⁰⁸

In summary, the Law Reform Commission therefore suggested in 2001 that:

- The six-year period to bring proceedings from the date the cause of action accrued would remain;
- In addition, a potential plaintiff would have three years to bring an action from the time she or he *discovered or ought to have discovered* that a cause of action had accrued, even if this was outside of the six-year limitation period;
- An absolute limit of 15 years from the date the cause of action accrued would apply, even if the potential plaintiff had not discovered that she or he had a cause of action by that point.

The Commission revisited this issue in a further report in 2011 and revised its thinking on the matter without substantially altering its basic approach.²⁰⁹ In summary in this report, it recommended the introduction of a 2-year (as opposed to 3-year) basic limitation period, which would apply to the common law actions including contract and tort, and that this period should run *from the date of knowledge of the plaintiff*. The date of knowledge would be determined by a number of factors including the date on which the plaintiff first knew, or ought reasonably to have known, that the injury, loss, or damage had occurred and that the injury, loss, or damage is attributable to the conduct of the defendant.

The Law Reform Commission crucially now proposes that this limit would replace rather than supplement the existing six-year limitation periods for contract and some tort cases. A further ‘ultimate limitation period’ of 15 years’ duration from the date of the defendant’s act or omission (as opposed to the date the cause of action accrued, which may be different) was also recommended along the lines of the 2001 report.²¹⁰

3.3.1.6 Other recent developments

After slow progress through the legislative process, the Central Bank (Supervision and Enforcement) Act 2013 was finally signed into law on 11 July 2013.²¹¹ In the course of discussions in the Dáil on this bill, some proposals were made by members of the opposition for amendments that pertain to the question of the six-year limitation rule and by extension the Financial Services Ombudsman. For example, Deputy Michael McGrath TD proposed that Section 2 of the Statute of Limitations (Amendment) Act 1991 be amended to the effect that in relation to any action in respect of a *financial product*, time should only run from when the plaintiff first had knowledge that the financial product was defective.

In the course of the Select Committee debate,²¹² the deputy suggested that this amendment “concerned the workings of the Office of the Financial Ombudsman”.

206. Page 3, Para 14

207. Page 29, Para 3.05

208. Page 30, Para 4.01

209. Law Reform Commission (2011) *Report on Limitation of Actions* (LRC 104-2011). Dublin: LRC. Available at www.lawreform.ie (last viewed February 2014).

210. LRC 104-2011, pages 105-106.

211. Central Bank (Supervision and Enforcement) Act 2013, No 26 of 2013.

212. Select Sub-Committee on Finance and Public Expenditure, 24 April 2013, page 2.

However, it is notable that the proposed amendment makes no specific reference to amending the legislation establishing the Financial Services Ombudsman. The deputy went on to say that he was

proposing this amendment to deal with the potential mis-selling of payment protection insurance policies, problems that arise some year's later about endowment mortgages, risky borrow-to-invest schemes and so forth. Very often people only find out well after the six year period has expired and there is a problem with the product they bought. The most high profile example involves the mis-selling of payment protection insurance policies, a matter which is being investigated by the Central Bank.

I understand that in other jurisdictions the time limit applies after a person becomes aware that the product he or she bought was in some way defective or potentially mis-sold. That is the essence of what I am proposing.

In response, the Minister for Finance, Michael Noonan TD, rejected the basis for the amendment, commenting that he was aware that the Law Reform Commission “has published reports recommending the introduction of an element of discoverability in provisions on the limitation periods applicable to claims arising in tort” and that “The Minister for Justice has indicated his willingness to consider the reports in the context of future legislation on the Statute of Limitations”.

Minister Noonan went on to suggest that he was “supportive of the general principle and understand the Law Reform Commission’s recommendation was that the limitation period run for two years from the time one became aware of the flaw with the product[...]but that the Bill before the committee is the wrong vehicle for it”.

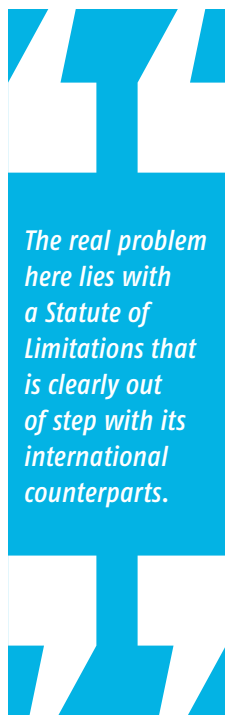
Finally, he said that in “the absence of a legislative commitment from the Minister for Justice to legislate on the generality of the Law Reform Commission’s recommendations”, he would look for an

appropriate legislative vehicle originating in his department. This, he suggested, might be afforded by the publication of legislation that will be necessary to facilitate the amalgamation of the offices of the Pensions Ombudsman and the Financial Services Ombudsman, which he hoped would be introduced within the lifetime of the government.

3.3.1.7 Summary

From the review above, it may be argued that a consumer wishing to bring a complaint to the Financial Services Ombudsman might be disadvantaged when compared to a potential litigant in the courts, where the subject of the complaint or proceedings concerns allegedly negligent mis-selling of an investment product by a financial service provider, such as an endowment mortgage or other form of investment. A complaint to the FSO is absolutely cut off where six years has elapsed since the selling of the product, unless the complainant can show that there has been a later breach of contract by the provider so that time for the purpose of the six-year rule runs from the date of that breach. However, on the basis of *Gallagher v ACC Bank* above, if the mis-selling of the product only involved a “possibility of a loss” rather than the inevitability of loss (albeit unquantifiable in amount), time may not run for the purposes of alleging negligent misrepresentation in the courts until that loss is crystallised. It may be possible to argue that the sustaining of a loss on an endowment mortgage product when the policy matures comes under this ‘possibility of a loss category’. A similar argument of negligent misrepresentation in relation to the sale of a payment protection insurance product might also be made in the courts.

The Financial Services Ombudsman was introduced as a form of alternative dispute resolution to potentially expensive litigation in the courts for consumers of financial services. It does not make sense therefore that access to this form of complaints mechanism may be potentially more restrictive than to a court on



the limitations issue. At the very least, access should be on an equal footing. We will critically examine in greater detail below the FSO's statutory obligation to act informally and according to *equity and good conscience* and without regard to technicality or legal form. However, it clearly makes a mockery of that mandate to tell a complainant that because he or she was blatantly mis-sold a payment protection insurance policy six years and one month ago, as opposed to five years and 11 months ago, there is no potential remedy. There should not be, in our view, any legal or other justification for refusing to allow a consumer to recoup the cost of premiums that were paid towards an insurance policy that would never have covered the insured consumer, had he or she ever had reason to claim upon it. The interval of time should not be relevant to this issue, unless the insured consumer was aware of the deficiency with the product and did nothing to address it within a reasonable period of time.

The real problem here lies with a Statute of Limitations that is clearly out of step with its international counterparts in terms of taking into account the plaintiff's lack of knowledge of a right of action, particularly as the six-year rule in the Financial Services Ombudsman scheme is clearly borne out of the Statute. The Law Reform Commission made a series of recommendations well over a decade ago now to amend the Statute of Limitations concerning contract and tort claims in terms of the rules around time running. It addressed these issues again in a further report in 2011 which also provided extensive comparative analysis with other legal systems.

None of these recommendations has as yet been implemented. From the evidence of the discussions that took place on these issues in the course of the Committee Stage leading to the passage of the Central Bank (Supervision and Enforcement) Bill 2013, there is nonetheless a vague acceptance that a blanket six-year rule is unfair and rules out a number of legitimate complaints. However, there is far from an express commitment to rectify this situa-

tion. The Finance Minister seems to quite squarely place the responsibility for reform upon the Justice Minister as far as reforming the Statute of Limitations is concerned; only committing his department to any potential action should his colleague omit to do so. However, as we have seen, the Financial Services Ombudsman is a creation of Central Bank legislation and reform of that office is clearly therefore a matter for the Department of Finance.

Insofar as it concerns reforming the Financial Services Ombudsman legislation in this regard, FLAC suggests that the six-year rule might be retained, with the addition of a proviso that a complainant consumer would as an alternative have two years to make a complaint to the FSO from the date of knowledge of the consequences of the conduct which forms the subject of complaint.

Of course, this will not now help those consumers whose complaints are currently barred because of the six-year rule and this is quite simply wrong and anti-consumer. Again, some consumers who have paid in good faith for a product and could have had no idea that it did not cover them in the event of a potential claim are left with no remedy. It is notable in this regard that the Central Bank appears to have decided that pre-July 2007 payment protection insurance sales were not covered by its 'look back' review, because the Central Bank's first edition of the Consumer Protection Code 2006 only fully came into operation in July 2007; clearly the Bank does not intend to use what powers it had prior to the adoption of the Code to direct insurance providers to provide a rebate of premiums paid where the policy was entered into prior to July 2007.

The Central Bank should revisit this matter and urge the insurance entities involved to refund the relevant consumers, using whatever regulatory powers it has. Those companies that refuse to do so should be subject to whatever potential sanctions may be applicable and should be named as having refused to co-operate.

3.3.2 Low levels of mediated cases

Five out of 2995 cases that proceeded to investigation in 2012 were dealt with by mediation. This is despite the fact that the wording of the S.57BK (1) of the legislation provides that “the principal function of the Financial Services Ombudsman is to deal with complaints made under this Part by mediation and, where necessary, by investigation and adjudication”. The use of the words “where necessary” would seem to clearly suggest that the imperative of the FSO is to promote mediation as the primary method of resolving consumer complaints. S.57CA in turn provides that on receiving a complaint, the FSO shall, as far as possible, try to resolve the complaint by mediation though it adds that participation in the mediation by the parties to a complaint is voluntary and a party may withdraw at any time.

3.3.2.1 Financial Services Ombudsman Guidelines

The current and recently revised guidelines (as of September 2013) on the FSO website make the following points in relation to mediation:

- Mediation is offered to both parties to a complaint in all cases as an alternative method of resolving their dispute.
- Mediation can be a very beneficial process to those who agree to take part, and it has been the experience of the Office that those who do participate in mediation often achieve a mutually agreeable outcome.
- Mediation is a voluntary and informal process in which the parties to a complaint actively participate in the resolution of their dispute with the assistance and support of a neutral, trained mediator supplied by the Bureau. The parties are given the opportunity to voice their case from their own perspective and to hear the other party in a non-confrontational setting. The mediation process is entirely voluntary and is conducted in confidence and in private. If a settlement is agreed during

the mediation to the satisfaction of both parties, the terms agreed will be written down, the document will be signed by the parties and become legally binding. This concludes the dispute.

- Mediation can result in much quicker results for the parties to a complaint than a formal investigation and adjudication by the Ombudsman. The success of mediation depends on the willingness of the parties to take part, and to cooperate with the process and with each other. Mediations are unlikely to be successful when one of the parties is simply not prepared to compromise or to alter their point of view.
- The experience of the Office has been that, even if a mediation is unsuccessful, the willingness to take part demonstrates a willingness to communicate and negotiate a solution which, whether successful or not, can go a long way towards restoring the relationship between the parties to the dispute.
- The Office generally recommends that parties who wish to avail of its mediation service set aside a full working day for the scheduled mediation. However, frequently mediations are concluded within a number of hours. The staff of the Office includes three trained and accredited mediators, and the service is provided free of charge to the parties.
- **If either party chooses not to engage in mediation, or if the mediation is not successful, then the complaint will be dealt with by the Office by way of formal investigation and adjudication.**
- Any costs or expenses incurred by either party to a complaint by participating in the mediation process will not be paid for by this Office. Any such costs/expenses are a matter for the party who incurs the costs/expenses to bear himself/herself. This includes travel expenses getting to and from the venue, any legal cost, or any associated costs.

These guidelines specifically state that if either party refuses to engage in media-

tion, the matter will proceed to formal investigation and adjudication. Whilst it is true that in practice, mediation requires ‘two to tango’ and the absence of willingness by either party to engage is generally fatal to any mediation process, perhaps the Financial Services Ombudsman is under-selling mediation here.

First, there is no strong assertion in these guidelines that the primary method envisaged by the Houses of the Oireachtas for resolving complaints is mediation and only where necessary investigation and this should be remedied.

Second, the Financial Services Ombudsman, as in the case of its Mission Statement (see Chapter 4), seems to have decided that the consumer’s *complaint*, as it is specifically described throughout the legislation, is in fact a *dispute* between the parties.

We would submit that this is mistaken. The consumer is making a complaint about the conduct of the financial service provider. That complaint may give rise to disputed versions about what happened in the course of the provision of a financial service of course, but the primary focus here should be on the conduct of the provider, at least initially. Thus, if the complainant consumer decides that he or she wants to have *his or her complaint* dealt with by way of mediation, the provider should have to advance a convincing reason why it should not be dealt with this way.

Most of our interview sample (see Chapter 5) had opted for mediation, but their provider had refused to engage. We enquired of the Financial Services Ombudsman whether this was indicative of an overall trend. The answer was clearly yes, and the over-riding reason for refusal appears to be cost:

FLAC: Just you mention mediation there, from the reports it’s a very small number of cases that are mediated. Can you throw a bit of light on that for us, why is that?

FSO: Basically, we offer mediation in all cases where the final response is in and no settlement has been reached and that’s by law we must have mediation on all cases. So we send out the

same letter to the complainants and providers, the complainants get a guidance leaflet which is quite informative with that and asking them to revert within a certain period of time. Providers generally do not go to mediation.

FLAC: So where is the blockage? Is it the provider refusing...?

FSO: Absolutely 100%, some complainants say no but it’s providers in general and it’s a resource issue. They could have a full time person, some companies would have to have a full time person attending mediation every day, I think, perhaps certain companies would have to especially with their PPI issues and what not.

If our Ombudsman were here, if Bill were here he would probably answer that, that there are certain providers who are very happy to allow complaints to come through here because in effect we’re doing the work of their complaints department for them... but it is a disappointingly low number.²¹³

The view of senior staff of the FSO seems to be that the decision of the provider is primarily motivated by resource issues, summed up by the comment that “there are certain providers who are very happy to allow complaints to come through here because in effect we’re doing the work of their complaints department for them”. It is hardly a secret that financial levies imposed upon providers by regulations of the FSO Council essentially fund the costs of running the Bureau and this may well be another factor in the thinking of some providers here. This mentality may be summed up in an attitude of ‘if we are already paying for it, why would we spend more of our own resources sorting out complaints or sending personnel to attend at mediation.’

We would suggest, however, that there may be other reasons apart from resources for declining mediation. Given the low levels of oral hearings – an issue explored in some detail below – this will generally condemn the complaint to be dealt with by way of exchanges of documentation and submissions. It is suggested that in many

213. Interview with FSO staff, 14 February 2013.

cases this will serve to disadvantage the complainant and to favour the provider, especially where the complainant has no access to professional advice. Again this may serve to strengthen the imbalance of power between the parties to the complaint. This is clear from the views expressed by our interviewees in Chapter Five.

It is also clear that some complainants whose choice of mediation was vetoed and who were also refused an oral hearing felt short-changed as well as disadvantaged by the process. The desire of a complainant to get to air their frustration and to hear the other side explain their conduct is often overwhelming and is only natural. Such potential catharsis is not as likely to be available in exchanges of paper.

3.3.2.2 Summary

It should be stressed that the view offered above on behalf of the Financial Services Ombudsman of providers rejecting mediation only applied to certain (unnamed) providers. The Minister for Finance recently decided in the Central Bank (Supervision and Enforcement) Act 2013 to specifically empower the FSO to name providers with three unfavourable decisions made by the FSO against them. The FSO guidelines should oblige a provider to supply reasons why mediation is being objected to when the complainant has agreed in principle to resolve *his or her complaint* in this way. Providers who routinely object to mediation without duly substantiated reasons should also be named. If the FSO does not feel that it has the existing statutory power to insist upon this, the legislation should be amended to provide for it.

The FSO should quote the specific wording of S.57BK (1) in the guidelines in order to make it clear that mediation, where it is desired by the complainant, should be the preferred approach to resolving complaints.

3.3.3 The wording of the legislation in relation to discharge of functions

Section 57BK(4) requires the Financial Services Ombudsman in the discharge of his functions “to act in an informal manner, and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.”

As stated in the introduction to this chapter, it is not at all clear why this wording was chosen to guide or indeed shoe-horn the FSO in his deliberations. The Pensions Ombudsman legislation does not attempt to reign in that Ombudsman into such a potential muddle. The wording is arguably too wide, is potentially contradictory and arguably divisive. For example, to specifically absolve the Financial Services Ombudsman of the responsibility to have regard to technicality or legal form in circumstances where the complaint in question may involve the interpretation and application of both legislative provisions and codes seems to be stretching informality beyond what is reasonable. In turn, how the substantial merits of many complaints can be adequately considered without having regard to technical and legal matters is highly questionable.

3.3.3.1 The requirement to act in an informal manner and the question of holding oral hearings

Irish administrative law generally requires that a body that is exercising a judicial (such as a court) or quasi-judicial function (such as a tribunal, appeals committee or regulatory body) must adhere to the principles of fair procedures and natural and constitutional justice. Amongst a plethora of other protections under the ‘fair procedures’ umbrella falls the principle that everybody be afforded the best opportunity to make their case. The legal rule of *audi alteram partem* essentially means that the body making a decision has to provide a proper opportunity to the person affected by a decision to present their case and to

respond to the evidence and arguments being put forward by the other side. Although there is no express right to an oral hearing in Ireland, the courts have tended to take a very pragmatic approach to allowing this right – in essence, a balancing test is applied; a court will weigh up the need for an oral hearing with the implications of the decision being made by the deciding body.

As a body provided with a statutory function under the Central Bank Act 1942 (as amended) to investigate and adjudicate complaints from consumers in relation to the provision of financial services by providers, the FSO is obliged to adhere to the principles of fair procedures and may be subject to review by the High Court if it fails to do so.

Review of relevant case law

■ **The Davy Stockbrokers case**

The Financial Services Ombudsman is required [*our emphasis added*] to act in an informal manner. However, the FSO is not a dealmaker at a horse fair. He or she may be involved, for example, in disputes over investments that go seriously awry or insurance that does not pay out leaving the relevant consumer in severe distress and difficulty. It was therefore not too long before the High Court was asked to consider amongst other issues the relative informality of the FSO's procedures; this happened in the *Davy Stockbrokers* case.²¹⁴

In that case, Enfield Credit Union had complained to the Financial Services Ombudsman that Davy Stockbrokers had failed to properly advise it in relation to the risks involved in purchasing certain investment bonds. Davy in its defence argued strenuously that it had given proper advice at all times. The FSO found in favour of the credit union and directed Davy to pay €500,000 to Enfield Credit Union in exchange for the three bonds in question and to refund all the fees that had been charged. Davy appealed this decision to the High Court on a number of grounds, including that the procedures adopted by the FSO in dealing with the

complaint were in breach of the rules of natural justice.

Amongst other matters, the High Court ruled that the Financial Services Ombudsman ought to hold an oral hearing where important facts between the parties are in dispute. It also decided that both parties must receive equal treatment in terms of stating their position. The FSO appealed the High Court's ruling to the Supreme Court on the basis that these requirements would interfere with the 'informality' of the office. In general terms, the Supreme Court upheld the High Court's ruling in finding that Davy was denied access to documentation that may have been necessary to answer the complaint. It determined that "it is necessary that any factual matters which are before a decision maker and which form part of the material upon which he will base his decision should be made available to the parties to the procedures".

It also ruled that it may be appropriate to consider directing an oral hearing in the interest of fairness where there is a conflict of material fact and it concluded that there were two such conflicts in this case. Thus, whether an oral hearing is needed is very much dependent on the case itself and the broad notion that the Ombudsman can deal with cases as he sees fit was reined in by the *Davy Stockbrokers* case. In summary, the Supreme Court largely approved the High Court ruling that certain procedural requirements must be adhered to by the Ombudsman: namely that the Financial Services Ombudsman ought to hold an oral hearing where key facts are in dispute and that both parties must receive equal treatment, as a requirement of procedural fairness.

A further issue of note that was considered in the *Davy* case was the then FSO's 'two-tier' practice of delegating a complaint to a Deputy Ombudsman to file a report with a view on the merits of the dispute and then circulating that report to the parties for their further views before he (the Ombudsman) would make a final decision. Mr Justice Charleton in the High Court characterised this practice as the "FSO allowing an appeal against himself"

²¹⁴. *J & E Davy v Financial Services Ombudsman & another* [2010] IESC 30; [2010] 3 IR 324; [2010] 2 ILRM 305.

and declared it to be unacceptable. However, the Supreme Court disagreed with this conclusion and suggested that “if anything the procedure adopted allowed for an additional layer of fair procedures for the parties to the complaint”.²¹⁵ However, it did express concern at the “confusion in terminology which attends the process [...] variously described as conducting an appeal or requiring submissions”. It found for the FSO on this particular issue. However, it is worth noting that this two-tier practice was discontinued by the FSO following the High Court decision and was not reinstated, even in the light of the Supreme Court review of the High Court’s findings on this practice.

■ The Hyde case

In *Hyde v Financial Services Ombudsman*,²¹⁶ Mr Justice Cross said that he fully accepted the words of Mr Justice MacMenamin in *Ryan v Financial Services Ombudsman*²¹⁷ when he stated:

The Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing ... It is important to recognise that, if the Ombudsman’s office is to be permitted to carry out its statutory function, effectively it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law.

However, Mr Justice Cross went on to explain that the difficulty in the appeal he was considering was that as a result of his decision not to hold an oral hearing, the Financial Services Ombudsman was compelled to conduct his investigations solely based upon the available documentation. As a result the FSO in the complaint in question concluded that from an analysis of the offer and acceptance documents that only €715,000 was offered by the lender to the appellant borrower and that this amount was accepted by the appellant. Mr Justice Cross suggested that the FSO could hardly have come to any different conclusion based on the documents alone. However, he noted that:

The appellant is a layperson without the benefit of legal advice in the presentation of her complaint but it is clear that what the complainant was saying was that the Bank had, in effect, given her oral representations that the balance of €250,000 would be paid down subsequently and that it was only when the difficulties or disagreements arose in relation to the payments of the €715,000 that they changed their minds or sought to alter their positions. *Such a case could not in my judgment be fairly determined without an oral hearing so that witness’s credibility could be properly assessed. [our emphasis added]*

The matter was remitted to the FSO for further consideration.

■ The Lyons case

Similarly, in *Lyons & Anor v Financial Services Ombudsman* (currently under appeal to the Supreme Court) Mr Justice Gerard Hogan held that the essence of the applicant’s case had not been properly evaluated in the absence of an oral hearing.²¹⁸ The appellants in this case were two business people who had borrowed in the region of €17 million from Bank of Scotland Plc. to acquire a succession of properties. It was clear that there was a fundamental dispute of fact between the parties as to the basis upon which these borrowings were to be repaid. The appellant borrowers maintained that there was an oral agreement that these mortgages would carry interest-only payments for ten years and would carry a low rate of interest to enable repayments to be made out of the rental income from the properties. The Bank insisted that there was no such agreement and that the borrowers were therefore in arrears of payments and in default.

The appellants made a complaint to the Financial Services Ombudsman in November 2009 and requested an oral hearing but this request was rejected and ultimately their complaint was not upheld. In explaining his decision to refuse an oral hearing, the FSO stated that he was satisfied that both parties had given detailed accounts of their meetings/discussions

215. [2010] IESC 30, page 46.

216. [2011] IEHC 422, unreported, High Court, Cross J., 16/11/2011.

217. Unreported, High Court, MacMenamin J., 23/9/2011.

218. [2011] IEHC 454, unreported, High Court, Hogan J., 21/2/2012 Para 37 (on appeal to Supreme Court).

relating to the relevant lending facilities and that he did not consider that an oral hearing would serve any purpose, other than a reiteration of the points already submitted in writing namely; the statements provided by both the Bank's staff and the complainants.

However, Mr Justice Hogan observed that this was "tantamount to saying that simply because the bank officials adhered steadfastly in their statements to their position that they gave no such oral assurances regarding interest only loans that an oral hearing – and specifically cross-examination – would prove to be of no value" (*our emphasis added*).

Later in his judgment, he suggests that the belief in such circumstances that "cross-examination is likely to be of no value is one which, time after time, has been shown to be unfounded" and that "no greater truth-eliciting process has been devised". Ultimately, he concluded that the FSO's decision to refuse an oral hearing negated the very substance of the appellant's constitutional rights to fair procedures.

■ The Murphy case

The High Court has also determined that a potential obligation on the Financial Services Ombudsman to hold an oral hearing in an appropriate case is not dependent on a request to do so coming from one of the parties. In *Murphy v FSO and Allianz Plc*,²¹⁹ Mr Justice Peart held that:

the Ombudsman ought to have directed an oral hearing even though one had not been requested by either party. The power vested in the Ombudsman to direct such an oral hearing is not dependent upon him being requested so to do by either party. It is a matter which he must consider and decide upon. While he stated in his final affidavit that having considered the parties' submissions he did not believe that an oral hearing would have advanced matters further, he has not disclosed the basis on which that belief was reached.

219. [2012] IEHC 92, unreported, High Court, Peart J., 21/2/2012.

220. These include, for example: *Molloy v FSO*, High Court, 15 April 2011; *Cagney v FSO*, High Court, 25 February 2011; and *Caffrey v FSO* [2011] IEHC 285, 12/7/2011.

221. FSO Annual Report 2011, Part Two – Legal Setting section, page 29.

Effect of this case law on the operation of the FSO

It should not of course be assumed from the above that every request for an oral hearing must be acceded to. A number of other High Court decisions have upheld the FSO's decision to refuse an oral hearing on the specific facts of the case in question.²²⁰ If there is a key determining factor, it is whether a material disputed question of fact *could only be resolved by an oral hearing*. As Mr Justice Gerard Hogan also put it in the *Lyons & Murray* case, "the appellants could not realistically hope to establish the underlying merits of their case without an oral hearing".

It would appear that an office such as the Financial Services Ombudsman would by and large prefer to avoid repeated oral hearings; this is understandable from its perspective. Any statutory body involved in the provision of alternative dispute resolution is likely to regard the necessity to hold oral hearings as a major obstacle to the throughput of its caseload and therefore the efficacy of its service provision. On the other hand, failure to accord either party due process will (and as we have seen) has on occasions landed the FSO in protracted, time consuming and expensive appeals in the High Court and beyond.

The 2011 *Annual Report* of the Financial Services Ombudsman is candid in this regard in explaining that:

One High Court decision is of particular significance to the Bureau; *Lyons and Murray v FSO and Bank of Scotland (Ireland)*, High Court judgment 14th December 2011, delivered by Mr Justice Hogan. Issues arise from the judgment which are likely to very significantly and materially impact upon the work of the Bureau. These issues concern the application of fair procedures, the holding of an oral hearing and the scope of the FSO's jurisdiction. The FSO has lodged an appeal to the Supreme Court against the judgment of the High Court.²²¹

Mr Justice Hogan was very conscious of this in the *Lyons & Murray* case, stating

that he was “very mindful of the fact that this decision will have many inconvenient consequences (including perhaps, considerable resource implications at a time of austerity) for the Ombudsman’s office”. He also agreed with the conclusion of Mr Justice McMenamin in the *Ryan* case, that should an adversarial court-style model be imposed on the FSO, it would mean in reality that the office simply could not function.

As a result of this line of High Court cases (remembering that the *Lyons & Murray* case is still under appeal as we go to print), the Financial Services Ombudsman is now obliged to review the submissions of both parties in order to at least consider the possibility of an oral hearing. This is also reflected in the fact that there is a full-page entry on the FSO website that sets out the circumstances in which an oral hearing might take place and the parameters of such hearings. In practice, therefore, findings must demonstrate that this possibility has been investigated. From what we can discern in the cases that we have looked at for the purposes of this research, however, this seems often to consist of the insertion of a formula of words into any written finding. This wording often appears as follows or variations thereof:

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence submitted do not disclose a conflict of fact such as would require the holding of an oral hearing to resolve any such conflict. I am also satisfied that the submissions and evidence submitted are sufficient to enable a Finding to be made in this complaint without the necessity for holding an oral hearing.

Effect on complainants of refusing an oral hearing

The essence of a complaint to the Financial Services Ombudsman focuses on the conduct (or perhaps more accurately, the alleged misconduct) of a financial service provider. The consumer often brings the

complaint alone and is arguably therefore at a disadvantage *vis-à-vis* the financial service provider in the exchange of submissions, paperwork and general technical detail.

It is worth noting then that some of the interviewees (and even MABS money advisors) in our study felt that the absence of an oral hearing somewhat diminished the status of their complaint. Some maintained that they became bogged down in a welter of complex financial information, much of which they found difficult to understand. The effect of this was in some cases to disguise and even undermine the substance of the complaint and to reduce the prospects of a successful outcome. Perhaps what is suggested here can be summarised as the ‘complaint by exchange of documentation’ method of dealing with a complaint may provide a buffer for the financial service provider and a barrier for the complainant. Some of those interviewed felt that they had been deprived of the equivalent of their ‘day in court’, the opportunity to ask straightforward and perhaps searching questions.

It is obvious that a witness giving sworn testimony is under a far greater amount of pressure than when drafting a submission in the uncontested comfort of his or her office. Is this not the point being made by Mr Justice Hogan when he observed in the *Lyons & Murray* case that “no greater truth-eliciting process has been devised” than cross-examination under oath? Is this not one of the key functions of a judge sitting in a court or of any other adjudicative body; to carefully assess the demeanour and scrutinise the disposition of witnesses when giving evidence in order to determine who is more likely to be telling the truth in a situation where fundamental questions of fact are disputed?

3.3.3.2. The requirement to act according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form

In *Square Capital Limited v Financial Services Ombudsman*, Mr Justice McMahon

examined the statutory powers of the FSO and concluded that:²²²

From reading these statutory provisions and from a consideration of the functions, powers and flexible procedures mandated by the Act, it is obvious that the office of Ombudsman is different from an ordinary court discharging its lawful functions. In this connection, I agree with the views advanced by MacMenamin J. in *Hayes v Financial Services Ombudsman* (Unreported, High Court, 3 November, 2008) where he described the Ombudsman's office in the following language: "What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue. The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter; or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper (see s. 57 CI (2)). He can also make orders of a type that a court would not normally be able to make, such as directing a financial services provider to change its practices in the future. Thus, he possesses a type of supervisory jurisdiction not normally vested in court. These observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction." (p. 14)

It may be suggested from these extracts that the High Court views the wording of the legislation as conferring on the

Financial Services Ombudsman flexibility and discretion that the High Court itself does not have. Thus, for example, the FSO "is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue"; "He is enjoined not to have regard to technicality or legal form" and "he possesses a type of supervisory jurisdiction not normally vested in court". Significantly, this means that "these observations are to be borne in mind when considering whether the decision made by the respondent was validly made within jurisdiction".

However, should not great responsibility come with greater flexibility? If the Financial Services Ombudsman is given such wide discretion, should accountability in decision-making not be enhanced rather than diminished, especially as an expensive (and as we shall see below quite limited) appeal to the High Court is the only way of challenging the decision. Instead, it would appear that the wide statutory discretion given the FSO may be cited as a reason to be less intrusive in terms of examining the decision-making process.

It is perhaps significant here that the High Court confines itself to interpreting the wording of the legislation and does not critically evaluate it. Thus, the jurisdiction conferred upon the FSO is analysed mainly from the point of view of the limited latitude afforded to the Court in reviewing FSO decisions, rather than whether the wording allows the FSO a clear and unambiguous mandate. Neither is the question posed as to whether the FSO always has the necessary expertise to deal with the subject matter of a dispute. In our view, if the FSO has such greater flexibility and discretion, then those powers come with an obligation to get processes and decision-making right, especially as an expensive (and as we shall see below quite limited) appeal to the High Court is the only way of challenging the decision.

A complainant, especially one not well versed in financial and legal matters, does not generally take on a financial institution with relish. An alternative dispute resolution (ADR) process in which the

222. [2009] IEHC 407; [2010] 2 IR 514.

complainant is often unrepresented should not be allowed to short change his or her rights just because he or she does not have the financial wherewithal to challenge that institution in the courts. It is submitted that the wording concerned – acting according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form – may perhaps be well intentioned but is arguably ill thought out, potentially contradictory and can lead to mixed results for complainants.

FLAC has had an involvement in three particular complaints all centering on the area of consumer car finance; these may serve to illustrate some of the dangers of this perhaps confused wording.

■ The Bank of Scotland case

The first case involves a complaint described by a money advisor for the purposes of this review, brought on behalf of a client against Bank of Scotland Plc. The first plank of the complainant's case was that the provider failed to include all the written information required in the relevant consumer hire agreement and that this was a breach of Section 84 of the Consumer Credit Act 1995, rendering the agreement itself unenforceable under Section 85 of that Act. The Financial Services Ombudsman declined to rule on this particular aspect of the complaint, deciding that the matter of the unenforceability of a consumer hire agreement under the terms of the section was a matter that only a court could rule upon. This was despite the fact that it did not appear to be disputed by the bank in question that it did not comply with the obligations to include a cash price for the vehicle nor a total amount payable under the agreement – both clear breaches of the information requirements of Section 84.

In providing a rationale for its decision, the Head of Legal Services of the Financial Services Ombudsman remarked that

notwithstanding the broad remit granted to the FSO under Chapter 5 of the Central Bank and Financial Services Authority of Ireland Act 2004,

in respect of the determination of jurisdiction, I am nonetheless satisfied that the wording of Section 85 of the Consumer Credit Act 1995 is sufficiently clear in that it envisages that a court, and not a tribunal or other quasi-judicial body such as the FSO is the body to determine the enforceability of an agreement, contract or guarantee under Section 85.

Section 85 of the Consumer Credit Act 1995 reads as follows:

An owner shall not be entitled to enforce a consumer-hire agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer, and no security given by the hirer in respect of money payable under the consumer-hire agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the hirer or guarantor by any holder thereof, unless the requirements specified in section 84 have been complied with:

Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 84 (1), was not deliberate and has not prejudiced the hirer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable.

A second ground of complaint in this case was that the complainant received a consumer hire agreement from Bank of Scotland (Ireland) Ltd arranged by the relevant garage (an authorised credit intermediary) when in fact they should have received a Hire Purchase agreement.²²³

However, the Financial Services Ombudsman found that the garage was solely responsible for arranging the consumer hire agreement, following the Bank's contention that it was not responsible for the advice and business of the intermediary garage which, it maintained, operated

²²³. A Hire Purchase agreement carries a right to purchase the goods the subject of the agreement if the terms of the agreement are otherwise complied with; a consumer hire agreement does not. The result is that a HP agreement is generally a more advantageous option for a consumer to enter into.

wholly independently of the Bank. It did not help in this instance that the complaint was only brought against the Bank; the garage intermediary was not joined as a co-respondent.

However, the Financial Services Ombudsman did not take into account what FLAC would regard as two salient facts in relation to this aspect of the case. First, the consumer hire agreement was between the Bank and the complainant – the garage was not (and never is) a party to such agreements – and therefore it was the responsibility of the Bank to ensure that the agreement was the correct one as the provider of the finance and the beneficiary of a profit from the agreement. Second, in order to arrange for the provision of Hire Purchase or consumer hire credit, a garage must obtain a credit intermediary's authorisation under Part VII of the Consumer Credit Act 1995 and must obtain a letter of recognition from each lending institution it proposes to arrange finance for. Whilst this may not necessarily create a legal relationship of agency between lender and intermediary, it clearly suggests that the two cannot be dissociated from each other in terms of the transaction the intermediary arranges and the lender concludes.

The lender also escapes any criticism for the complainant receiving a consumer hire agreement instead of a Hire Purchase agreement. Receiving a consumer hire agreement meant that technically she could never purchase the goods, a fact she clearly did not understand, given that she had the vehicle adapted to take account of her disability. At least a Hire Purchase agreement would have allowed for rights of ownership to pass once she completed the payments. How a consumer with no specialist knowledge of loan products is supposed to know the consequences of the difference is not explored. The lender concluded the agreement with the hirer, through the medium of an intermediary it must approve, but is not apparently in any way responsible for ensuring that the agreement services the hirer's needs. The relevant sections of the Consumer Credit Act 1995 concerning the authorisation of

credit intermediaries are not once mentioned in the finding.

So much again for equity, good conscience and the substantial merits of the complaint being a primary factor in Financial Services Ombudsman thinking, insofar as it concerns this particular complaint; as for technicality or legal form, FLAC sees little regard for it. When it is understood that the only way this decision can be overturned is by way of an appeal to the High Court with all the risks that this entails, some measure of the frustration clearly felt by both the consumer and the money advisor in the case in question, may be readily understood.

■ The Gabriel case

It is interesting to contrast this case with the case of *Gabriel v GE Money*,²²⁴ where the FSO's decision was ultimately appealed by the complainant to the High Court with the assistance of FLAC (and counsel acting *pro bono*). Here the same Financial Services Ombudsman seemed to have no hesitation in interpreting Section 63 of the self-same Consumer Credit Act 1995. It decided that, despite the hirer's express statutory right to bring the Hire Purchase agreement to an end at any time during its currency, a provider offering Hire Purchase finance was entitled to prevent the return of a motor vehicle which was the subject of the Hire Purchase agreement, where the hirer was clearly unable to pay the requisite financial compensation in advance.²²⁵

As it transpired, the complainant managed to successfully argue before the High Court that this decision was mistaken in law. However, without that appeal, that decision would have stood and literally hundreds (and perhaps thousands) of hirers, many in severe financial difficulty, would have remained stuck with vehicles that they did not want, did not legally own and could no longer afford to finance.

It is salutary that in the former case, the Financial Services Ombudsman declined to enforce the law at all and in the latter, he interpreted it incorrectly, with both complainants' complaints being accordingly rejected. Neither complainant was legally represented (both were MABS

224. [2011] IEHC 318, unreported, High Court, Hanna J., 27/7/2011.

225. For the sake of clarity, under the terms of s.63 of the Consumer Credit Act 1995, the amount in question is the difference between what has already been paid by the hirer under the agreement and half the total hire purchase price. In this case, this amounted to some €1300. The complainant was in receipt of a social welfare payment as her sole income at the time.

clients) and both were in difficult financial circumstances. Yet both decisions singularly failed to explore the consequences for the complainant but also for a wider group of consumers to which they might belong.

It is worth noting too that even if the Financial Services Ombudsman had not found in the *Gabriel* case that the provider's conduct was contrary to law (erroneously as it turned out), it was open to it to find under the terms of Section 57C1 that "although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant". Yet this possibility was never adverted to or seemingly entertained by the FSO in its finding and it never explored the balance of power in the relationship under examination. Instead, it asserted that the complainants (this included Ms Gabriel and her mother, a nominal joint hirer on the agreement), who had offered to discharge the outstanding liability to GE Money from a social welfare payment at the rate of €65 per month, were attempting to "unilaterally terminate the agreement on terms that they had proposed". Again, we find it difficult to square the FSO's approach in this case with the requirement for it to act according to equity, good conscience and the substantial merits of the complaint.

The reality of the situation was far different in our view. A lone parent no longer able to afford instalments under a Hire Purchase agreement had quite responsibly brought the agreement to an end as the law allowed her to do, wished the car to be repossessed by the institution to whom it rightfully belonged and had offered to pay off what she legally owed *in full* over time as her circumstances allowed, knowing that she was not nor would be capable of payment in one lump sum. The respondent lender on the other hand, no doubt fully cognisant of the poor state of the second hand car market, blocked the return of the vehicle on the basis of its purported interpretation of Section 63 of the Consumer Credit Act 1995, so that it would not have

to dispose of the vehicle in question at a potential loss.

■ The O'Brien case

To compound the error of law made in the *Gabriel* case, the subsequent (initial) decision of the Financial Services Ombudsman in the case of *O'Brien v PTSB Finance* takes what FLAC would regard as a pro-industry attitude considerably further. Here a hirer, again under a Hire Purchase agreement, had attempted to terminate that agreement under s. 63 **prior** to the High Court decision in the *Gabriel* case but was not permitted by the owner/lender to do so, again because he could not afford to pay the resulting liability in question in one lump sum. Thus, he was forced to hold onto the vehicle and he therefore resumed instalment payments. Following the decision in *Gabriel* and aware of its ramifications, he then successfully terminated his Hire Purchase agreement. His subsequent complaint to the FSO that, in light of the High Court finding in *Gabriel*, PTSB Finance was incorrect in blocking the original termination of the agreement and that he should be compensated for the instalments subsequently paid, failed. In the course of another short decision, the reasoning of the FSO in arriving at its conclusion is again in our view lacking in depth and legal clarity.

The following extracts give a flavour of the Financial Services Ombudsman reasoning in this case:

I am satisfied that at the time, the respondent (i.e. PTSB Finance) was acting in accordance with the *generally accepted [our emphasis added]* interpretation of Section 63 (2) of the Consumer Credit Act 1995. However, this interpretation of Section 63 (2) was subsequently clarified by the judgment of Hanna J. [in *Gabriel*]

However, it must be explained that the effect of *Gabriel* etc is not retrospective and only applied from the date of the judgment which was 27 July 2011. The respondent cannot be faulted for its behaviour as it was acting in accordance with the then widely accepted

interpretation of Section 63 (2) of the Consumer Credit Act 1995. This was the accepted interpretation of Section 63 (2) at that time and this interpretation of Section 63 (2) of the Consumer Credit Act 1995 was only amended in July 2011.

Without wishing to overplay the significance of this, what kind of legal reasoning is at play here? A section of the consumer credit legislation (previously contained in specific Hire Purchase legislation) is judicially interpreted for what we believe to be the first time and the FSO decides that the effect of the decision is not retrospective, as if it were considering the retrospective effect of a legislative amendment to existing legislation.

Also telling are the repetitive references to the “widely accepted interpretation of Section 63 (2)”. Widely accepted by whom, it must be asked? To which the answer can only be – by the financial service providers involved in the business of Hire Purchase. On the other hand, the view consistently offered by FLAC to both MABS money advisors and to callers to our phone line over a number of years was that the right to terminate a Hire Purchase agreement under Section 63 of the Consumer Credit Act 1995 was unilateral and could not be circumvented by a requirement to pay the applicable compensation up front, though of course any liability would be due and owing after the vehicle had been returned.

Convinced therefore that the Financial Services Ombudsman decision in this case was also incorrect, O’Brien appealed that decision to the High Court, supported by FLAC. After a number of procedural applications and niceties, the FSO ultimately decided that it was not going to oppose the appeal; a clear admission that it now believed its decision in *O’Brien* could not be stood up and was manifestly incorrect. Solicitors on behalf of the FSO then agreed that the matter would be remitted to the FSO to be investigated anew by another staff investigator, presumably with a different finding than the one that gave rise to the appeal. At the time of writing, the second investigation remains to be car-

ried out and does not appear to have been prioritised, itself a source of great frustration to both FLAC and the client.

Yet again a complainant on a low income and in a difficult financial situation who had attempted to terminate a Hire Purchase agreement was frustrated by the lender in his attempts to do so. When a High Court decision clarifies that the law is on his side, the Financial Services Ombudsman frustrates his subsequent attempts to obtain compensation. How have equity, good conscience and the substantial merits of the complaint been taken into account here? Perhaps there is a suggestion here that the right of a hirer to terminate a Hire Purchase agreement and deliver the vehicle back to the lender without paying the appropriate compensation up front is not equitable from the lender’s perspective, even though the hirer is still liable for the amount owed?

Clearly the decision-maker, at least implicitly, expresses some surprise at the High Court decision. The High Court in *Gabriel* has not, it would appear, accepted the FSO’s “generally accepted interpretation of Section 63 (2) of the Consumer Credit Act 1995.” If in turn, the FSO in arriving at its decisions does not have to act with regard to technicality and legal form; can it ignore the substance of the decision in *Gabriel* and declare it not to be retrospective in order to dismiss O’Brien’s complaint? If this is the case, the FSO is effectively taking the law into its own hands.

3.3.3.3 Summary

There is a clear thread running through the decisions of the High Court on appeal that a specialist body such as the Financial Services Ombudsman should be shown an appropriate amount of ‘curial deference’ by appellant courts. This translates in practice into a reluctance to overturn its decisions unless, in the words of then President of the High Court Mr Justice Finnegan in the *Ulster Bank* case, the decision is “*viti-ated by a serious and significant error or a series of such errors*” [our emphasis]. This issue is explored below in more detail when we

come to examine the appeals mechanism to the High Court. However, it should be noted that in the *Gabriel* case, Mr Justice Hanna did assert that the doctrine of curial deference did not and could not apply where any error made by the FSO involved an incorrect interpretation and application of the law. The salient fact remains: the only way that such an incorrect interpretation may be potentially remedied is by the aggrieved party appealing to the High Court, with all the risks that this entails in terms of legal costs.

This begs the question of whether such a level of curial deference is justified in the first place, in the case of an alternative dispute resolution body with such a confusing mandate? The Financial Services Ombudsman is required *'to act in an informal manner, and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.'* Is there not a contradiction in terms in this wording? How, for example, can the substantial merits of a consumer complaint be properly considered without having regard to technicality or legal form, when the complaint concerns a provider's alleged breach of statutory rules? Equally, since Section 57CI (1) empowers the FSO to find that the conduct of the respondent provider "is contrary to law" or that the conduct complained of "was based wholly or partly on a mistake of law", how can this be done without regard to technicality or legal form? By extension, how can the FSO arrive at a reasoned decision without the appropriate legal expertise?

The question then inevitably must arise as to how expert exactly the Financial Services Ombudsman is in this regard. Certainly, on the analysis of the three decisions summarised above, all of which FLAC had a greater or lesser involvement in, we would argue that there may be a shortfall of expertise in the area of consumer credit or car finance. The High Court overturned the decision in one case; the FSO declined to defend a second High Court appeal and the third in our view would have made a worthy High Court appeal but for the fact that such appeals are time consuming and


require considerable resources, often provided by counsel *pro bono*.

It is also clear from interviews with some of the informants in Chapter Five that there is a considerable level of dissatisfaction with Financial Services Ombudsman processes and outcomes. This would have led in some instances to legal challenges but for lack of access to the necessary resources and/or expertise. Again we stress and acknowledge that our interviews are only a very small selection and may not be broadly representative of consumers. It is our view however that they raise significant questions which require consideration.

The Chairperson of the FSO Council in the most recent annual report at the time of writing (2012) asserts that "the public profile and reliance upon the office remains at a high and trusted level by consumers of the service and this is reflected in the fact that the 8,000 complaints received in 2012 was the highest ever recorded since the establishment of the Bureau".²²⁶ With respect, FLAC would query how he can be sure of this, when to our knowledge the FSO has never sought to be independently evaluated since it began accepting complaints in 2005? In FLAC's view, the increase in complaints is unlikely to necessarily be a vote of confidence in the FSO but rather to stem from recession and disillusionment with the work and methods of financial service providers. The FSO is the only place where this might be addressed, especially for those without financial resources. The time to assess consumer satisfaction is surely when the complaint has been progressed to its conclusion; yet, from our interviews with senior staff, it is clear that this has only happened informally and to a limited degree.

In our view, the Financial Services Ombudsman cannot do its job correctly without having regard to technicality or legal form, given the complex terrain of financial services and related legal and regulatory requirements that it must traverse. In summary then, we believe that the wording of Section 57BK (4) should be reappraised and ultimately amended. For

226. FSO (2013) *Annual Report* 2012, page 5.



The FSO should seek to be independently evaluated.

example, it might usefully be amended to allow the Financial Services Ombudsman to simply act “according to equity, good conscience and the substantial merits of the complaint”. However, the FSO should be under a statutory obligation to explain cogently in its decisions how it has taken these elements of its mandate into account in arriving at its decision. Whether it has done so in any particular case should also be open to review by any appellate court, the doctrine of curial deference notwithstanding.

More serious consideration should also be given to the consumer request for an oral hearing to vindicate the right of complaint and the FSO should look at putting in place an appeal mechanism where an oral hearing is refused. Finally, the FSO should seek to be independently evaluated and this should involve opening up the years of unpublished decisions to the scrutiny of an objective third party.

3.3.4 Remedies (including ‘naming and shaming’)

In terms of addressing similar or so-called ‘systemic’ complaints, there are two related issues that should be noted. First, although the Financial Services Ombudsman is empowered to direct the provider to change a practice relating to the offending conduct, this is not retrospective, so for example, the provider cannot be legally obliged to carry out a trawl for similar cases and apply any potential remedy to these. Each complainant must therefore bring their complaint separately for any potential remedy to apply to them. However, a Memorandum of Association (MOU), agreed between the Central Bank, the Financial Services Ombudsman and the Pensions Ombudsman also exists whereby the FSO, for example, can report systemic issues of concern to be acted upon by the Central Bank in terms of its regulatory powers with providers and this MOU is discussed in detail in Chapter 4 below.

227. See for example, ‘Thorn in the flesh of financial institutions’, *Irish Examiner*, 15 September 2012.

228. Interview with FSO staff, 14 February 2013.

229. For example, on RTE’s *Morning Ireland* news programme on 16 February 2012, the Ombudsman repeated his view that that the public interest would be best served by publishing the complaints record of individual financial service providers but that the legislation did not currently allow for it.

3.3.4.1. The ‘name and shame’ issue

The second is what has been popularly called the ‘name and shame’ issue. The current Ombudsman and his predecessor have frequently made reference in the media both to the inability of his office to publicise the names of providers whose practices are the subject of repeated complaints to his office, and his desire to do so.²²⁷ During interview, staff from the Bureau elaborated on the reasons why they considered the FSO is unable to do so, reasons which primarily relate to confidentiality:

FSO staff: The constraint has been legislation or lack of it. That has been the constraint really.

FLAC: There isn’t any specific prohibition in the legislation, though, on naming institutions.

FSO staff: There isn’t, we take it from an interpretation that our proceedings are confidential, and we think that if we were to, and we took advice on this, legal advice, that if we were to start publishing details that that would be in breach of the confidentiality under which we’re expected to operate. You’re correct there is no specific prohibition in the legislation.²²⁸

This is not exactly the impression that has been created in the public domain. A sense of ‘we would if we could, but we can’t’ has been the message.²²⁹ If however, as acknowledged by senior FSO staff quoted in the extract above, there is in fact no express prohibition, would a more pro-active office not have taken the opportunity to expose financial service providers with a poor track record? Again, this has not happened to date, perhaps because of an undue deference to the reputation of financial institutions and needs of the financial system along with a poorly developed culture of consumer protection.

At the time this interview was carried out, legislation was in train which would eventually empower the Ombudsman specifically to publicise the names of pro-

viders whose practices repeatedly come to the attention of the FSO:

There is an amendment to the next Central Bank Bill, the Supervisory and Enforcement Bill to include the Ombudsman. That hasn't yet gone to committee stage but it's to go very shortly, and that's where we are on that. The Ombudsman would welcome it, the Bureau would welcome it... it's in the Committee stage, it's got the support of the Government, it's got the support of the Opposition and it's got the support of the Ombudsman. So it will happen.²³⁰

On 27 August 2013, the Minister for Finance, Michael Noonan TD, signed the Statutory Instrument commencing section 72 of the Central Bank (Supervision and Enforcement) Act 2013.²³¹ The Minister stated:

I have given the Financial Services Ombudsman the power to name financial service providers who have at least three complaints against them substantiated. This additional provision will mean that financial service providers who are failing their customers will be publically identified and incentivised to make real improvements. The section will come into effect on 1st September.

The second issue relevant to addressing systemic complaints, in the absence of a specific power to order providers to conduct a 'look back' of files, is the Memorandum of Association (MOU), agreed between the Central Bank, the Financial Services Ombudsman and the Pensions Ombudsman (referred to within the MOU as "the co-operating authorities"). The purpose of the MOU is among other things to

contribute to promoting the best interests of consumers of financial services and to the efficient and effective handling of complaints. The Co-operating Authorities recognise that close co-operation and communication with each

other will be of particular importance, because their functions are closely related. In particular, it is recognised that there will be mutual benefits in ensuring that *systemic patterns of complaints* are acted upon at the earliest opportunity, to improve the general position of consumers of financial services. If an Ombudsman feels during his investigation of a complaint that a matter indicates an issue that may be of concern to the Bank, he will inform the Bank. He will also co-operate with the other Ombudsman so as to avoid unnecessary duplication of work.²³² [*our emphasis added*]

Given that there is no information publicly available as to the impact of the MOU since its inception in March 2006, we asked both the Head of Consumer Protection of the Central Bank and staff of the Financial Services Ombudsman during their respective interviews for their views on how the MOU is working in practice. Both parties clearly felt that the Memorandum is proving to be effective in the sense that it provides a framework for the informal exchange of information between the Central Bank and the FSO. For example from the Central Bank's perspective:

Central Bank: The MOU is working well, we meet regularly, we exchange information,

FLAC: What's regularly?

CB: I think it's every three months that we meet, we go up, he comes down, we would go through things like what's on his mind, it's more him telling us things rather than us telling him things, although we would share things, we have worked well on things like the PPI... so that's working well, so he gives us the information on the individual firms without telling us the names of the individual complainants, so that kind of really helps us then... he's very much in the 'I'm telling you these things, what you do with them, if I believe there's something major there I will formally refer it to you...but I want to share all this informal stuff as well', which we

²³⁰ Interview with FSO staff, 14 February 2013.

²³¹ SI 321/2013.

²³² See further the website of the FSO, available at www.financialombudsman.ie/about-us/mou.aspx (last viewed February 2014).

The Central Bank itself has refused to publish, in a coherent and systematic manner, details of transaction and other fees it allows lenders to charge consumers.

are pleased to get, so there's very few formal referrals, now is that good or is it bad, there are pros and cons,

FLAC: The informal ones far outnumber the formal ones by the sound of it?

CB: Oh yeah, at every quarterly meeting he would... tell us about individual firms, cases, or how they are handling complaints,

FLAC: And what's the evidence of the impact of the MOU?

CB: Major, I think he's pretty influential on the complaints handling, I think when he calls them in I think they listen, but it does help when they know that we know, because then they could be a target for an inspection which they'd obviously prefer not, so overall I think it's one of the things that's going well

FLAC: But more informal and under the radar?

CB: Yes.²³³

In turn, staff at the Financial Services Ombudsman also referred to the emphasis on informal information exchanges under the umbrella of the framework provided by the MOU. Again, as with the Central Bank, what is noticeable is that the downside of such an approach is the absence of any hard data or evidence as to the impact of these information exchanges:

FLAC: The MOU, just can you talk to us a little bit about that, how that's working out in practice between yourselves and the Central Bank?

FSO Staff: Yeah... I would probably, at least certainly on a week-to-week basis be in touch with a liaison person in the Central Bank over a number of issues. We'd probably formally meet them... at some sort of meeting maybe three times, four times a year.

FLAC: Is it formal or is it more informal?

FSO Staff: It's formal that we've agreed that we will send four sets of stats to them a year and it's formal that, I mean in that regard it's formal.

FLAC: In terms of the issues you're reporting...

FSO Staff: That's informal.

FLAC: Yeah, that's what I'm getting at.

FSO Staff: They would have seen certain reports which I suppose would be feeding into their PRISM system that they have which would identify if they wanted to do audits on particular areas of the industry or as the case may be. So it would be certainly formal and there would be an informal approach to it as well.

FLAC: Okay... and in terms of numbers, systemic issues could you tell us how many systemic issues, let's say, that have been reported by yourselves to the Central Bank?

FSO Staff: If my memory serves me right, (the Ombudsman's) probably only written to the Central Bank on one or two occasions.

FLAC: So it's plainly more sort of by meetings and by dialogue and informal and so on. Have you any data for us on the outcome of the reports; can you give us anything on that?

FSO Staff: No, we wouldn't.²³⁴

It is notable that at the time of these interviews, neither party was subject to the provisions of the Freedom of Information Act. FLAC understands that there are moves to make the Central Bank subject to the provisions of freedom of information legislation, with the caveat that certain commercially sensitive information will be exempt; there appear to be no plans, however, to make the FSO subject to the Act.²³⁵

3.3.4.2 Summary

FLAC considers there is a lack of transparency about how the Memorandum of Understanding operates and this is reflected in the details of the interviews outlined above. Given the backdrop – poor regulation, possibly excessive trust in the ethics of financial institutions, insufficient consultation with consumer bodies over the past decade – this is worrying. Six years

²³³ Interview with Consumer Protection section Central Bank.

²³⁴ Interview with Consumer Protection section Central Bank.

²³⁵ In the UK, the Financial Ombudsman Service came under that jurisdiction's Freedom of Information Act in 2011.

into a full-blown recession which credit institutions played a major part in creating and which has detrimentally affected the lives of so many consumers, one might imagine that bodies charged with a specific consumer protection function would be especially conscious of their consumer remit; you might think they would be all over any institutions stepping out of line like a rash. Instead, the responses from the interviews are almost casual. There is no information publicly available on the process; in response to a direct request for data on the outcome of reports, it became apparent that such data did not exist.

On the 'name and shame' issue, it is also instructive that senior Financial Services Ombudsman staff accepted that there was nothing in the legislation that actually prohibited the FSO from naming a respondent against whom a decision of particular note had been made. This is not perhaps the impression that has been given in public exchanges. On the other hand, it was suggested that reasons of confidentiality prevent such disclosure and that legal advice has been obtained to this effect. Somehow, in FLAC's experience, this legal advice is never available for review by third parties.

This is by no means FLAC's first encounter with the broad cape of confidentiality being used to prevent the release of what should be publicly accessible information in a participative democracy. For example, the Central Bank itself has refused to publish, in a coherent and systematic manner, details of transaction and other fees it allows lenders to charge consumers under s.148 of the Consumer Credit Act 1995. Instead, details of individual charges are available upon request; again, confidentiality is cited as the reason. It is as if consumers are expected to continue to play their economic role (and indeed help to fuel any recovery) but, crucially, not to ask too many inconvenient questions about how much they are being charged for this somewhat dubious privilege.

In this and in many other respects, it is FLAC's conclusion that the change in culture needed to drag Ireland out of an ex-

cessively deferential attitude to banks and other financial institutions may be as far away as ever. However, the head of Banking and Insurance regulation at the Central Bank struck a very encouraging note in a recent speech given at the Kemmy Business School at the University of Limerick. She said:

In my opinion though and having worked in both [public and private sectors], changes to the rules are all very well but real, lasting change and reform will come only with a change in mindset in both public and private sector. That is when concepts like value-for-money, efficiency, performance management are as familiar a part of the everyday lexicon of a public sector regulator as ethics, the public good and doing the right thing by the customer are in the culture of the private sector firms that it regulates.²³⁶

It is clear of course that the Central Bank must have a primary weather eye on the solvency of financial institutions and that prudential supervision is accordingly a key priority. However, this should not be at the expense of the basic standards of consumer protection and fairness which also form part of its mandate. It is not as if favouring institutions over consumers has benefitted the country in the long run. Instead, it has been one of the factors that has caused the most damaging recession this Republic has faced in its short existence.

3.3.5 Appeal to the High Court and other appeal issues

The legislative provisions

Section 57CL (1) of the Act (as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004) provides either party with a right of appeal to the High Court against a finding of the Financial Services Ombudsman within 21 days of the finding or such further period as the High Court may allow. Section 57CM of the Act gives the High

It is FLAC's conclusion that the change in culture needed to drag Ireland out of an excessively deferential attitude to banks and other financial institutions may be as far away as ever.

²³⁶ As reported in the *Irish Examiner* by Kathryn Hayes, 'Muldoon: Mindset change needed', 20 September 2013, available online at www.irishexaminer.com/business/muldoon-mindset-change-needed-243679.html (last viewed February 2014).

It is not as if favouring institutions over consumers has benefitted the country in the long run.

Court broad discretion in terms of the orders it can make in such an appeal including, affirming the finding of the FSO with or without modification, setting aside the finding of the FSO or remitting the finding to the FSO for further review. The full text of the relevant sections extracted from the legislation is set out immediately below:

57CL.—(1) If dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding.

(2) The Financial Services Ombudsman can be made a party to an appeal under this section.

(3) An appeal under this section must be made—

- (a) within such period and in such manner as is prescribed by rules of court of the High Court, or
- (b) within such further period as that Court may allow.

57CM.—(1) The High Court is to hear and determine an appeal made under section 57CL and may make such orders as it thinks appropriate in light of its determination.

(2) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:

- (a) an order affirming the finding of the Financial Services Ombudsman, with or without modification;
- (b) an order setting aside that finding or any direction included in it;
- (c) an order remitting that finding or any such direction to that Ombudsman for review.

(3) If the High Court makes an order remitting to the Financial Services Ombudsman a finding or direction of that Ombudsman for review, that Ombudsman is required to review the finding or direction in accordance with the directions of the Court.

(4) The determination of the High Court on the hearing of such an appeal is final, except that a party to the appeal may apply to the Supreme Court to review the determination on a question of law (but only with the leave of either of those Courts).

57CN.—A finding of the Financial Services Ombudsman does not take effect, and may not be implemented, while an appeal under section 57CL or an application under section 57CM(4) is pending in relation to the finding.

3.3.5.1 The High Court interpretation of the scope of the appeal

The issue of what form a Financial Services Ombudsman appeal should take has been subject to considerable judicial deliberation. However, it should be said that there has been a high level of consistency in the views of judges on this matter in the written judgments of the High Court available for the purposes of this research since the FSO scheme came into operation. The first decision of the High Court under Section 57CL in the case of *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* set the tone and subsequent decisions have quoted with approval the principles set out in that case.²³⁷

In his judgment in the *Ulster Bank* case, Mr Justice Finnegan, then President of the High Court, cited as an important authority the decision of the Supreme Court in *Orange Communications Limited v The Director of Telecommunications Regulation and another*.²³⁸ In that case, the Court had considered the nature of a statutory appeal in the context of telecommunications legislation transposing an EU directive.²³⁹ Amongst other matters, this legislation allowed for an appeal to the High Court by a party whose application for a mobile phone licence had been refused by the relevant regulator. Like Section 57CL relating to the appeal from a decision of the FSO, the appeal here appeared on the face of it to be

^{237.} *Ulster Bank Investment Funds Limited v Financial Service Ombudsman* [2006] IEHC 323 unreported, High Court, Finnegan P., 1/11/2006.

^{238.} *Orange Communications Ltd v The Director of Telecommunications Regulation and Another*, [2000] 4 IR 159.

^{239.} Postal and Telecommunications Services Act 1983 as amended by the European Communities (Mobile and Personal Communications) Regulations 1996 (SI 123/1996).

an unqualified one. Nonetheless, the then Chief Justice Keane suggested that:

In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant (i.e. the Director of Telecommunications Regulation). It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court *as a matter of probability, that, taking the adjudicative process as a whole, the decision was vitiated by a serious and significant error or a series of such errors. In applying the test, the Court will have regard to the degree of expertise and specialist knowledge of the defendant. [our emphasis added]*

The necessity for a court to give due consideration to the degree of expertise and specialist knowledge of a tribunal or other adjudicating authority outside the courts, empowered by legislation to make decisions on specific matters, is a legal doctrine known as ‘curial deference’. In the *Orange* case, Chief Justice Keane referred with approval to a passage from a decision of the Canadian Supreme Court on the subject:

An appeal from a decision of an expert Tribunal is not exactly like an appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a Tribunal and not (initially at least) to the courts, it is because the Tribunal enjoys some advantages that judges do not. For that reason alone, review of a decision of a Tribunal should be of a standard more deferential than correctness...I

conclude that ...the standard should be whether the decision of the Tribunal is unreasonable.²⁴⁰

In this light, Mr Justice Finnegan commented on the nature of appeals from specialist tribunals into the courts:

It is desirable that there should be consistency in the courts in the standard of review of statutory appeals. Accordingly, unless the words of the statute mandate otherwise, it is appropriate that the standard of review in this case be that enunciated by Keane C.J. [in the *Orange* case], Kearns J. and Laffoy J. [in two similar decisions examining this issue²⁴¹]. I see nothing in the wording of the statute with which I am concerned to mandate a different approach to the statutory appeal under the Central Bank Act 1942 Section 57 CL. To succeed on this appeal, the Plaintiff must establish *as a matter of probability that, taking the adjudicative process as a whole, the decision was vitiated by a serious and significant error or a series of such errors. In applying the test, the Court will have regard to the degree of expertise and specialist knowledge of the defendant. [our emphasis added]*

3.3.5.2 The consumer understanding of the scope of the appeal

In many of the decisions subsequently made by the High Court concerning an appeal against a decision of the Financial Services Ombudsman, these passages have been quoted expressly and followed. Thus, it is clear that a High Court judge knows by and large where he or she is going from a procedural viewpoint when considering such an appeal. However, how is a consumer, especially one who has no access to detailed legal advice or representation, to understand this? These difficulties are arguably compounded by the short timeframe allowed for bringing an appeal; the potential appellant must lodge the appeal within 21 days. If he or she has to access

²⁴⁰ *Canada (Director of Investigation and Research) v Southam Inc* (1997) 153 D.T.R. 748.

²⁴¹ These are, respectively: *M. and J. Gleeson v Competition Authority*, [1999] 1 I.L.R.M. 401; and *Carrickdale Hotel Ltd v The Controller of Patents, Designs and Trademarks and Another*, [2004] 3 I.R. 410.

legal advice for the first time and make a decision within this timeframe, it may act as a substantial deterrent to exercising this right. This was an issue for some of the respondents interviewed for this review (as described in Chapter 5).

The text of Section 57CL (1) seems on the face of it to be straightforward. It says that “[i]f dissatisfied with a finding of the Financial Services Ombudsman, the complainant or the regulated financial service provider concerned may appeal to the High Court against the finding”.

Most potential appellants on seeing the legislation therefore may take from this – not unreasonably, it must be said – that the merits of the FSO’s decision will be examined in full by the High Court should they decide to exercise their right of appeal. There is no clue in the wording here to suggest, certainly to a non-lawyer, that this appeal will involve a limited review of the FSO’s finding and that to succeed with such an appeal, an appellant will have to show as a matter of probability that the FSO’s decision was “vitiating by a serious and significant error or a series of such errors”. Not only this, but also that the Court will have regard to the degree of expertise and specialist knowledge of the FSO – and this would appear to translate into a reluctance to overturn his decisions.

On the contrary, a logical interpretation of the words would suggest that the appeal is an opportunity to have the matter re-examined in its entirety. However, it is instructive that the President of the High Court in the *Ulster Bank* case considered that “unless the words of the statute mandate otherwise, it is appropriate that the standard of review in this case be that enunciated by Keane CJ.”

As well as the appellant bearing his or her own costs if the High Court confirms the decision of the Financial Services Ombudsman, it is clearly FSO policy to pursue its own costs in that event from the appellant. Having initiated a complaint that involved no costs and therefore little risk, the complainant may therefore suddenly find his or herself in a ‘high stakes’ game; for example, an initial loss on an investment or a failure to pay out on an in-

surance claim may be compounded by two large sets of legal costs (three if the notice party successfully claims its costs) which the appellant will have to fund from his or her resources. It should also of course be pointed out that the High Court might equally be a forbidding venue for a regulated financial service provider seeking to appeal an FSO finding and not just a consumer, particularly a small firm or an intermediary with limited resources.

The issue of costs was a particular issue for some of the respondents we interviewed. One respondent for example reported that:

I went as far as having a High Court date, I had a meeting with Senior Counsel, he said it’s like a football match, you’re 1-0 down, you’re going in to ask one statutory body to overturn another, the Judge, in the vast majority of cases he usually sides with the Ombudsman, you have a very good case but it’s a lottery, I said to him so the law’s an ass and he agreed with me, I was going to risk 300,000 euro to get 300,000 euro back.

3.3.5.3 The FSO view of the appeal

The appeals question and the attendant costs issue is also a pressing one for the Financial Services Ombudsman itself. During interview, staff of the FSO highlighted concerns around the expensive and time-consuming nature of responding to appeals against its decisions in a High Court setting. They also referred to considerations around pursuing costs against domestic consumers:

FSO staff: It’s certainly, again I’d say ‘Look we don’t make the rules, we operate within the rules.’ Having said that, for the domestic consumer, if you like there is no doubt about it that the High Court and all the attendant risks of cost, particularly because if a complainant can come through our system free and there’s no charge, their own

risk is for costs. That is probably not really appropriate for an appeal against one of our decisions, but unfortunately that's what the legislation says... just on the costs it's in our annual report and it'll be in our 2012 figures, but the legal costs are our biggest single costs here in the Bureau and have been for a number of years, it'd be welcome to reduce that figure... at any one time, and again, it's public information in our annual report, at any one time we're running...40 odd cases...35 to 40 High Court appeals, at any one time, not the same but some fall off and get dealt with, and then more come in so that's a very high ...

FLAC: It's grown considerably hasn't it?

FSO staff: It has grown considerably in the last two years, two and half years it has, yeah...

FLAC: I know obviously you have an obligation to pursue your costs but in the case of a lay litigant who has not succeeded and perhaps not properly understood the nature of the appeal, do you think it's fair to pursue that person for costs?

FSO staff: The short answer is no we don't think it's fair and our practice is we don't pursue; we take a commercial decision if you like on each and every case.²⁴²

The narrow interpretation of the scope of the statutory appeal may also mean that some appeals, which may have merit but do not fall within this rigid interpretation, are not allowed. Thus, thorough legal advice in order to understand the true nature of the appeal should therefore be an essential pre-requisite to deciding whether or not to proceed, as it may be several bridges too far for an unrepresented complainant to analyse the niceties and differences between *de novo* appeals (literally, a new hearing where the reviewing court substitutes its judgment for that of the trial court), statutory appeals and judicial review. Nonetheless, it would appear that some litigants have brought appeals without legal representation or thorough

advice, unaware that the "serious and significant error" test sets a high bar and exposes them to a risk of a substantial costs award being made against them. To many, this would seem to contradict the spirit of this part of the legislation, which is to provide further legal avenues to consumers and financial services providers alike who may be unhappy with the outcome of the complaint.

3.3.5.4 Other forms of statutory appeal into the courts

In summary, judicial interpretation of the extent of the appeals mechanism legislation means that unless the legislature explicitly says that the appeal from the FSO's decision must be a *de novo* appeal, it will be limited, ostensibly to ensure consistency in the courts in the standard of review of statutory appeals. However, perhaps what the then President of the High Court had in mind here was consistency in relation to statutory appeals *to the High Court* rather than the courts generally.

An alternative would be to provide for an appeal to a lower court such as the Circuit Court. For example, there is currently statutory provision under the Unfair Dismissal Acts 1977-2007 for the Employment Appeals Tribunal (EAT) to hear the claim of an employee claiming that she or he has been unfairly dismissed from his or her job. Either party – employer or employee – may appeal the determination of the EAT to the Circuit Court under Section 10 of the Act (as amended).

The text of Section 10 (4) of the unfair dismissals legislation is also worded in a very straightforward manner. It says that "[a] party concerned may appeal to the Circuit Court from any determination of the Tribunal in relation to a claim for redress under this Act within 6 weeks from the date on which the determination is communicated to the parties". In practice and for the past 35 odd years, such appeals have been *de novo* appeals, rather than limited reviews underpinned by considerations of 'curial deference'. It is also significant that the Employment Appeals Tribunal plays no part in the appeals

²⁴² Interview with FSO staff, 14 February 2013. Nonetheless, a typical warning note in letters issuing from the FSO's solicitor reads: "Please note that in litigation involving our client, it is the general policy of our client to apply for recovery of its legal costs against such parties to the litigation as appropriate and as it may be advised."

process; it does not appear in the Circuit Court to defend its decision. The parties to the appeal are still the original claimant employee and respondent employer.

It is difficult to discern any substantive difference between the wordings in terms of the scope of the appeal under the respective pieces of legislation. Section 57CL (1) of the Central Bank Act 1942 allows for an appeal to the High Court against the finding of the FSO; Section 10 (4) of the Unfair Dismissals Act 1977 allows for an appeal to the Circuit Court from the determination of the Employment Appeals Tribunal. Both appeals are from bodies set up by legislation to provide a form of alternative dispute resolution with a degree of expertise and specialist knowledge. What seems therefore to distinguish these avenues of appeal most graphically is that one is to the High Court and the other is to the Circuit Court. One other significant distinguishing feature is that the EAT hears all claims by way of an oral hearing whereas the preference of the FSO as we have seen is to adjudicate on the basis of an exchange of written documentation and submissions.

Article 34.3 of Bunreacht na hEireann 1937 (the Irish Constitution) provides that “The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”. On the other hand, the Circuit Court is not specifically named in the Constitution. Instead, Article 34.3 provides that “The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law” and the Circuit Court was subsequently designated as a court of such local and limited jurisdiction. Set in this context, it may be perfectly valid for the High Court to wish to limit the scope of appeals from specialist tribunals to itself, so as not to spend an undue amount of time examining and re-examining a potentially increasing number of appeals that might be more appropriate for another forum. Equally, it may not have been readily envisaged by the High Court in the *Ulster Bank* case that a consumer, as opposed to a

regulated financial service provider, might wish to appeal a decision of the FSO and that the consumer, as opposed to a regulated financial service provider, might not have the financial resources to mount such an appeal.

3.3.5.5 FLAC submission on proposed appeal mechanism 2004

It is worth noting that back in 2004 when it was proposed that an Ombudsman for Financial Services be set up and the draft legislation was published, FLAC queried in a short submission why the High Court was the chosen avenue of appeal.²⁴³ The relevant extract from the submission is as follows:

Appeals from Ombudsman to the High Court

We note that under Section 57CL, an appeal lies to the High Court from a decision of the Ombudsman for either party (as well as cases stated on a question of law). It can be safely assumed that the provider of financial services is more likely to use this avenue than the consumer. Who will represent the consumer in these appeals proceedings? Given the current crisis in civil legal aid funding, it is highly unlikely to be the state Legal Aid Board and it is equally unlikely that an individual consumer will be able to afford their own representation.

What is the rationale behind choosing the High Court as the forum of appeal? Could this lead to a situation where a provider of financial services can overturn a perfectly rational decision by the Ombudsman simply by lodging an appeal which the complainant consumer is unlikely to respond to, given the stakes involved?

It is submitted that the appeals mechanism from a decision of the Financial Services Ombudsman be revisited to provide a less intimidating and costly option. For example, could the District Court not deal with these appeals?

²⁴³ Submission dated 9 February 2004 to the Financial Regulator, available online at www.flac.ie (last viewed February 2014).

In response, the then Minister for Finance, Charlie McCreevy TD, wrote in the following terms to his party colleague Sean Fleming TD, who had passed on FLAC's submission for the Minister's attention, and who in turn passed on the Minister's response for FLAC's attention:

A number of proposed amendments at Committee Stage reflected FLAC's proposal to provide a less costly appeals mechanism against a decision of the Ombudsman, by substituting the District Court for the High Court. I accept that the costs factor could be seen as a deterrent for the consumer in a way they would not be for a financial institution. *However, it would be highly exceptional that either a financial institution or a consumer would find it necessary to appeal against a determination of the Ombudsman.* It is right, in accordance with the precedent set by the Pension's Ombudsman, that the High Court would review the Ombudsman's final determination in the highly exceptional case that there was an appeal against such a determination. Section 57CL (2) allows the Ombudsman to be made a party to an appeal to the court. This provision would help level the playing field, as it were, as the ombudsman would be expected to vigorously defend his or her decision in such proceedings. I reject the proposed amendments for these reasons.²⁴⁴ *[our emphasis added]*

This exchange may be considered interesting for a number of reasons. Firstly, FLAC proposed the District Court as an alternative at that time. This reflected its concern that consumers would have an avenue of appeal that would be local and quickly accessible and inexpensive. Perhaps in retrospect, the Circuit Court might have been suggested as a better option, being a halfway house between the somewhat speedy administration of justice on the civil side of the District Court and the more potentially costly confines of the High Court. It is also interesting that FLAC was then of the view that a provider of financial services is more like-

ly to use this avenue than the consumer; this has not been the case in the appeals that have been brought to the High Court since. For example, the Financial Services Ombudsman *Annual Report* for 2012 records that 37 appeals to the High Court from decisions of the FSO were resolved in 2012. 13 of these were heard with 4 succeeding and 9 being dismissed. A further 10 were withdrawn before the hearing; 10 were remitted to the FSO from the Court on the consent of the parties and 4 closed 'for other reasons'.²⁴⁵ A further search of the High Court list would suggest that the consumer was the appellant in 31 (84%) of the 37 appealed cases with the remaining six consisting of appeals by financial service providers.

In addition, FLAC asked the question then – one that can only be reiterated now – as to who would represent the consumer at such appeals, particularly in light of the crisis at the time in civil legal aid funding, a crisis that has undoubtedly worsened in the interim since the full gravity of our economic woes has become apparent. In that submission, FLAC intended "consumer" to mean a consumer in the narrower sense – a person acting outside the course of his or her trade business or profession who does not generally have the resources to access legal professionals to assist with the presentation of an appeal to the superior courts. The definition of consumer for the purposes of the Financial Services Ombudsman complaints mechanism (and other avenues of complaint such as the Central Bank's Consumer Protection Code) however has been broadened considerably in 2005 and the ramifications of this are explored below (3.2.5.6).

In his response, the (then) Minister accepted that cost would be a factor in deterring consumers from appealing but offered the view that it would be 'highly exceptional' that any party (whether provider or consumer) would wish to appeal. Time does not appear to have borne out that assumption either if the increasing number of appeals being lodged and the concerns expressed above by senior Financial Services Ombudsman staff are anything to go by, an issue also considered

²⁴⁴. Letter from Charlie McCreevy TD to Sean Fleming TD, 8 April 2004.

²⁴⁵. Financial Service Ombudsman, *Annual Report 2012*, page 23.

in more detail below. It is hard to understand how this could have been forecasted with any certainty at the time and it would appear that the choice of the High Court ultimately appears to have been swayed by the existing precedent of the Pensions Ombudsman legislation rather than any other detailed considerations. It is also interesting that the passage quoted above suggests that the Ombudsman's final determination would be *reviewed* in the event of an appeal and this may be indicative of the limited form of appeal that was contemplated at the time.

Finally, FLAC asked if it was possible that a situation might arise where a provider of financial services could seek to overturn a decision by the Ombudsman simply by lodging an appeal which the complainant consumer would be unlikely to respond to, given his or her lack of resources. In retrospect, this apprehension was based on the belief that where the consumer brought a complaint against the provider and the FSO found in the consumer's favour, the provider would appeal the FSO's decision against *the consumer*. The Minister in his reply pointed out in this regard that "Section 57CL (2) allows the ombudsman to be made a party to an appeal to the court. This provision would help level the playing field, as it were, as the ombudsman would be expected to vigorously defend his or her decision in such proceedings".

As it transpires, this is now what happens in every instance of appeal. The Financial Services Ombudsman has become the respondent (or defending party) in all cases and the provider (or consumer depending on which party appeals) is merely a notice party entitled to make its observations. A consumer who decides to appeal is therefore appealing the FSO's decision not against the provider but against the FSO, and also risks a scenario where the provider as notice party will wish to take a full part in the proceedings. Thus, a consumer who appeals and does not succeed may face the costs of two full legal teams – double the costs that a private person might risk when they take on the State.

The normal adversarial order in civil proceedings is thus subverted. Returning to our comparison above of appeals to the Circuit Court in unfair dismissals cases from decisions of the Employment Appeals Tribunal (EAT), this would be akin to every appeal brought by an employer or employee in an unfair dismissal claim being brought against the EAT itself; with the employer or employee (depending on which party appeals) being entitled to make observations as a notice party.

We have perhaps arrived at the heart of the problem here. For some reason the Financial Services Ombudsman, who under the terms of Section 57 CL (2) *can* be made a party to an appeal rather than *must* be made so, has either taken it upon itself to act as respondent in all cases or has had that role imposed upon it. As noted above, FLAC's research enquiries have established that a substantial percentage of the FSO budget (raised by virtue of levies and fees imposed on financial service providers) is used to defend High Court appeals and it is arguable that this is not necessary.

3.3.5.6 The expanded definition of consumer

The now very wide definition of consumer, extended by regulations passed by the Financial Service Ombudsman's Council in April 2005, essentially means that a consumer may be as diverse a natural or legal person as an individual unhappy with the failure of an insurance company to process a claim on a motor insurance policy or a credit union whose investment of members money, running to hundreds of thousands of euro, has gone awry.

The traditional definition of a consumer is that set out in Section 2 of the Consumer Credit Act, 1995 – A person acting *outside* the course of his or her trade, business or profession. In Section 57BA of the Act, consumer was originally and similarly defined as meaning "a natural person when not acting in the course of, or in connection with, carrying on a business or a person, or group of persons, of a class (to be) prescribed by Council

regulations”. Council regulations of April 2005 added the following to the definition of consumer:²⁴⁶

A person or group of persons, but not an incorporated body with an annual turnover in excess of 3 million euro. For the avoidance of doubt a group of persons,

- includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate, and
- incorporated bodies having an annual turnover of 3 million euro or less in the financial year prior to year in which the complaint is made to the Ombudsman (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said 3 million euro).

What sparked this considerable enlargement of the definition of consumer so that, for example, limited companies with an annual turnover of up to €3 million or partnerships with seemingly unlimited turnover could use the (free) complaints mechanism of the FSO? It is likely to have stemmed from an understandable desire to ensure that small firms, clubs and other enterprises could access redress against much more powerful financial institutions without having to engage in the expensive avenue of commercial litigation in the courts. However, the question must be asked: how much thought went into the expanded definition both in terms of the scope of the expansion and the consequences of it for the integrity of the statutory scheme? Certainly, the significance of this development is not entirely lost on the judiciary. For example, the recent comments of Mr Justice Gerard Hogan in the case of *Lyons and another v Financial Services Ombudsman (Bank of Scotland PLC, Notice Party)* are worth noting on this question.²⁴⁷ Early on in his judgment, he expresses his concern that he finds himself dealing with this matter as an appeal from a decision of the FSO when saying:

At first blush it may seem surprising that a complaint of this nature would come within the remit of the FSO, rather than being the subject of litigation in the Commercial Court.

In the *Lyons* case, the appellants were two business people who borrowed a total of €17 million from the notice party for the purpose of what was clearly a series of commercial property transactions. A dispute arose between the parties as to whether the succession of loans was or was not taken out on an interest-only basis at an agreed interest rate. They had access to the services of an accountant in connection with their business dealings with the notice party and when they decided to make a complaint to the FSO, their complaint was framed by their solicitor. At the High Court appeal, the appellants were represented by Senior Counsel. In the course of his judgment, Mr Justice Hogan had this to say about the expanded definition of consumer:

In effect, therefore, the consequence of the 2005 Regulations is radically to expand the scope of the jurisdiction of the FSO to categories of cases beyond retail banking *simpliciter* to a point beyond which, some might think, it might sensibly or appropriately bear. It means, for example, that loans negotiated by a syndicate of businessmen running to hundreds of million Euros could well be the subject of a complaint to the FSO. Whether this definition of “consumer” as effected by the 2005 Regulations is, in fact, *intra vires*, s. 57BA or, if it is, whether the section would survive a constitutional challenge in the light of Article 15.2.1 of the Constitution having regard to cases such as *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26 and *John Grace Fried Chicken Ltd v Catering JLC* [2011] IEHC 277 are matters which fall outside the scope of this statutory appeal.

Article 15.2.1 of the Constitution states that “[t]he sole and exclusive pow-

²⁴⁶ SI 190/2005.

²⁴⁷ [2011] IEHC 454, unreported, High Court, Hogan J., 21/2/2012 – It should be noted that at the time of writing this decision in this case is still under appeal to the Supreme Court

er of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.” The inference in the passage above may be that in fundamentally altering and expanding the definition of consumer so that access to the Financial Services Ombudsman scheme has been radically changed, the Council of the FSO exceeded the power delegated to it under the terms of Section 57 BA and thus that it strayed from the realm of regulating the FSO scheme into the realm of law making which only the Oireachtas has the power to do.

One way or another, the matters discussed by the learned judge may be clearly outside the scope of the appeal that he was dealing with, but it is hard not to conclude that he deliberately elaborated upon the problem of the definition of consumer in order to make a point. Perhaps the point is that the definition is too wide and that the cumulative effect is to muddy the waters of the Financial Services Ombudsman scheme. In effect, turning what the Oireachtas might have intended to be an informal process into one where a (well resourced) complainant might bypass potentially expensive litigation and try their hand at an FSO complaint first, with the prospect of a High Court appeal if that did not succeed. In any event, there is clearly a world of difference between the traditional definition of consumer in the consumer credit legislation and the expanded definition in the Council regulations.

3.3.5.7 Summary

In light of the discussion above, reforming the legislation to provide a more accessible avenue of appeal appears to be far from a straightforward matter. We have emphasised that the High Court is a prohibitive venue, especially from a costs point of view. In addition, it has taken a narrow view of the scope of the appeal to the extent that the prospects of success are low, unless the Financial Services Ombudsman has made a serious error or series of errors that are fundamental to the decision. Thus, FLAC can see no compelling reason from the

point of view of ensuring accessibility, particularly from the traditional consumer’s perspective, for retaining the High Court as the avenue of appeal. The Circuit Court would seem to be the viable alternative with appeals on a point of law and judicial review still lying to the High Court.

We have seen that the default position with appeals up to now, whether the appeal is brought by the complainant consumer or the respondent provider is that the Financial Services Ombudsman always defends his own finding. It is unclear whether this is a practice that gradually evolved over time or a specific policy decision made by the FSO in consultation with the State. It would appear to be the former as the relevant section in the legislation only provides that the FSO can be made a party to an appeal rather than must be made so. However, by the admission of FSO staff themselves, this practice has had a detrimental effect on the budget and operation of the FSO Bureau, as a disproportionate amount of the annual budget is spent defending High Court appeals.

Whilst it might be tempting to revert to the more traditional approach used by the Employment Appeals Tribunal (EAT) for example in unfair dismissal cases outlined above – the EAT makes a decision, either party may appeal to the Circuit Court but the EAT plays no further role in the matter leaving the employer and employee to contest the appeal – this might in turn have adverse consequences for consumers without access to resources. For example, it is likely to be of considerable comfort to a traditional consumer in receipt of a favourable decision from the FSO but where that decision is appealed by a well-resourced financial service provider, to find that it is the FSO that becomes the respondent and takes the risk of any legal costs that might ensue and that the consumer may sit back as a notice party or may not even participate in the appeal at all.

But how to ensure that the Financial Services Ombudsman does not become bogged down in appeals in the courts whilst simultaneously providing that vulnerable consumers do not find themselves

trying to respond to a provider's appeal without the necessary expertise?

One option would be to restore the status quo in civil cases that the parties to the original complaint remain the parties to any appeal. However, the FSO could be empowered to decide which appeals it would defend from the consumer perspective when a provider appeals against its decision by assessing the consumer's capacity and resources. Perhaps the Central Bank's Consumer Protection Code (CPC) may be of assistance here as it differentiates a personal consumer from a consumer.²⁴⁸ The definition of personal consumer corresponds to the traditional definition of consumer in the Consumer Credit Act 1995 – a consumer who is a natural person acting outside the course of his or her trade, business or profession. A consumer on the other hand corresponds exactly to the definition in the FSO Council regulation outlined above – a person or group of persons, but not an incorporated body with an annual turnover in excess of 3 million euro and including partnerships and other unincorporated bodies such as clubs, charities and trusts.

The FSO's jurisdiction to defend an appeal could be confined to cases where he has upheld the complaints of personal consumers, i.e. persons who availed of financial services outside the course of their trade, business or profession. All others – what might be termed business consumers and the providers of financial services – would have to respond to any appeal themselves or through their representatives, if any. While this might appear on the surface to be harsh, it may at least serve to place some distance again between the traditional consumer and what Mr Justice Hogan in the *Lyons and Murray* case might have been suggesting are business people with access to resources masquerading as consumers to avoid the potential costs of commercial litigation in the courts.

It must however be conceded that even the lines between these two categories can become seriously blurred. For example, in reality the owner of a small struggling business in dispute with a lender or an

insurance company may be just as much in need of protection as a house owner with similar difficulties. Whether therefore a wider recalibration of the definition of consumer in order to have access to the scheme in the first place needs to take place so that essentially commercial complaints are excluded may need to be seriously examined. Equally, setting up a two-tier type Financial Services Ombudsman service – one tier for personal consumers, another for complainants acting in a professional commercial capacity – might also be worthy of consideration in the long run. The potential savings in the budget of the FSO were its role in a revised appeals system involving the Circuit Court to be so curtailed could be used to fine tune its decision-making processes and perhaps also to invest in adding expertise to those processes.

None of this, of course, would solve the problem of a personal consumer who feels that he or she has been on the wrong end of an incorrect decision of the Financial Services Ombudsman and who might wish to appeal that decision. In our sample of interviewees, there are a number of such instances; further, the outcome of the two High Court appeals brought by FLAC against FSO decisions also suggests that the FSO's process of decision-making may not give sufficient attention to both the correct application of the law and to standards of fairness in at least some instances. Where should such consumers look for assistance?

Were the Financial Services Ombudsman to tighten up its decision-making processes and increase its expertise in, for example, areas such as consumer credit, it may be suggested that there would be fewer appeals. However, it is clear that a non-governmental organisation such as FLAC simply does not have the capacity to take anything other than the very occasional appeal into the courts and we are not aware of other similar organisations working in this particular field. Ultimately, therefore such a complainant may have to rely upon bringing an appeal alone or engaging in the potential expense of hiring legal representation, though an appeal

²⁴⁸ There is also a definition of a vulnerable consumer in the Code – See page 75.

being taken on a 'no win, no fee' basis is always a possibility. The prospect of an adverse costs order might also prove to be a deterrent here but at least the Circuit Court might prove to be a less intimidating venue for unrepresented appellant consumers than the High Court.

In theory at least, a consumer wishing to appeal may also apply for civil legal aid, as although such assistance is not available outside the courts, it becomes available in principle for an appeal from an alternative dispute resolution body such as the Financial Services Ombudsman into the courts. Currently, the Legal Aid Board budget is severely challenged in terms of providing civil legal aid to mount such appeals; a consumer whose complaint has not been successful before the FSO would also be likely to fail any strict application of the merits test imposed by the Board in such cases. However, a more thorough application of the merits test involving a detailed consideration of the grounds of appeal might allow a consumer who passes a financial means test to present sufficient evidence that an appeal is justified in the circumstances and representation at such an appeal could be outsourced by the Board to a private practitioner.

In summary, we would broadly recommend that the efficacy and fairness of providing for an appeal from a decision of the Financial Services Ombudsman to the High Court be reviewed thoroughly, with a view to amending the legislation in this critical area. Arising out of the discussion above it is suggested that the following alterations might form an agenda to be considered:

- That appeals would henceforth lie to the Circuit rather than the High Court with appeals on a point of law lying to the High Court;
- That these appeals to the Circuit Court would be *de novo*, involving a full reconsideration of the facts and the law arising;
- That the FSO would not normally be the respondent in appeals;
- That the FSO could continue to elect to be the respondent to a provider appeal, especially where the consumer

concerned is a 'personal' consumer without the resources to be legally represented;

- That the definition of consumer in the legislation be re-examined with a view to clearly distinguishing between personal and business consumers;
- That the financial savings that might result from the FSO not being the respondent in appeals would be redeployed to increase the decision-making expertise of the FSO and to increase the transparency of its decisions;
- That 'personal' consumers wishing to appeal unfavourable decisions of the FSO have access to state-funded legal representation to conduct their appeals where they have insufficient means to fund their own appeal and where they make out a *prima facie* case that an appeal is warranted.

3.3.5.8 Other legal issues arising out of the appeal to the High Court

■ Extension of 21-day period for filing appeal in High Court

The time limit for filing an appeal to the High Court for a decision of the FSO is provided for in Section 57CL (3) of the Act as follows:

An appeal under this section must be made:

- a. within such period and in such manner as is prescribed by rules of court of the High Court, or
- b. within such further period as that Court may allow.²⁴⁹

This, read in conjunction with the Rules of the Superior Courts, equates to 21 days. In *Little v Financial Services Ombudsman, notice party AXA Ireland Ltd*,²⁵⁰ Mr Justice McMahon decided that an appellant must bring his/her appeal:

- within 21 days of being notified of the decision; or
- such further period as the court may allow where the court is satisfied that there is good and sufficient reason for extending that period, provided

249. O. 84C, r. 1(5) of the Rules of the Superior Courts ("the Rules") states that: Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued – (a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or (b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter.

250. [2011] IEHC 137, unreported, High Court, McMahon J., 11/3/2011.

that any such extension of time will not result in an injustice to any other person concerned in the matter; or

- within such further period as the Court may allow as permitted under s. 57CL (3) (b) of the Act of 1942.

The case in question concerned a term in the appellant's insurance policy with the notice party. The appellant had parked his trailer at the Midland Machinery Yard in Portlaoise and he returned four days later to find that it had been stolen. It was never recovered. The notice party refused to pay out on the appellant's policy on the grounds that the trailer was not within his "care, custody and control" when it was stolen and the Financial Services Ombudsman dismissed his complaint on that basis. However, the relevant section in the insurance policy stated "care, custody *or* control" [*our emphasis added*]. Thus, in effect the FSO had made its decision based on an incorrect reading of the wording of the policy.

The FSO's decision was issued on 20 April 2010. The evidence disclosed that the appellant was fully aware of the 21-day time limit and had instructed his solicitor to appeal immediately. Nonetheless, the affidavit grounding his appeal was not filed until October – some six months later – because he had no funds to pay his legal team and because he was out of the country in search of work and therefore had difficulty communicating with his solicitor. However, it should be noted that the first time he raised these difficulties was in a second affidavit – and not at the time of making the appeal. Mr Justice McMahon did not accept any of the reasons proffered as it was clear that the appellant was represented at the hearing and that his solicitor was still acting for him during the 21-day period in which an appeal could be lodged. However, he added that while he was not willing to accept financial difficulties as a valid excuse in this case, there may be cases where it is a relevant consideration.

Despite the fact that the appellant did not satisfy the established criteria for obtaining an extension in ordinary civil and

commercial matters, Mr Justice McMahon found that the exceptional circumstances of the case meant that he could exercise his discretion in the matter. He went on to decide that the appellant should be allowed a further 21 days to appeal from the date of the Court's decision. Furthermore, he said given that under the legislation the Ombudsman is "cast as the consumer's champion" it seemed strange that the Ombudsman would oppose the appeal where a serious error had been made. In summary, the Court allowed the appeal on the following grounds:

- The nature of the Ombudsman's office. Here the Court emphasised that given that the FSO was established primarily to keep matters out of the courts and given its 'relatively informal procedure', a 'more tolerant approach may be warranted' to extensions;
- There was a patent error on face of FSO's decision as outlined above which was not denied by the FSO;
- The 'misconstrued phrase' in the FSO's reasoning was important in the context of the decision made;
- There was an absence of 'obvious prejudice' to the FSO or the notice party in allowing the extension.

In the case of *James Hayes v Financial Services Ombudsman*, the appellant brought his appeal one day after the 21-day limit. Mr Justice McMenamin stated that "the respondent took no point on this issue, however, and I will extend the time for making this application accordingly."²⁵¹

While the appellant has only 21 days in principle to file his appeal, the Financial Services Ombudsman may be granted considerably more time to file its response, particularly if the case is adjourned, which is a common occurrence in many such cases. Thus, while the appellant, often without the benefit of any legal advice, must decide swiftly whether to appeal, the FSO, who has access to legal advice both internally and externally, often has a few months to formulate his response. It is submitted that this is another imbalance in the current system. While the decision of the High

251. [2008] Unreported, High Court, MacMenamin J., 3/11/2008 para 1. See www.financialombudsman.ie/case-studies/judgements/A5-HAYES-FSO-MacMenaminJ-03Nov08-33101.PDF (last viewed February 2014).

Court therefore in the *Little* case involved an arguably enlightened decision to grant the extension, the Court cited the exceptional circumstances of the case and there is no guarantee that this would be replicated in a less exceptional case.

O. 84C, r. 1(5) of the Rules of the Superior Courts (“the Rules”) states that the 21-day period to appeal is “subject to any provision to the contrary in the relevant enactment”. It is clear therefore that the Oireachtas could amend Section 57CL (3) of the Act to allow for a longer period to consider an appeal. In our view, given the risks involved for potential appellants, particularly consumers, and the necessity to source comprehensive legal advice prior to making such a consequential decision, the period to appeal should be extended to something in the order of three months.

■ Issue estoppel

The case of *O’Hara v ACC Bank plc*²⁵² is authoritative for the proposition that once a complaint has been made to the Financial Services Ombudsman – and where the matter is not subsequently resolved between the financial services provider and the consumer prior to the FSO looking into the complaint – then the complainant is bound by the decision of the FSO and cannot bring subsequent proceedings in the courts to have the matter adjudicated upon again. Thus the court found that the plaintiff’s case could not succeed owing to what is called *issue estoppel*. In the course of his judgment, Mr Justice Charleton said:

The plaintiff claims that the prior adjudication by the Financial Services Ombudsman does not bar him from legal proceedings because the claim that he seeks to bring before the High Court in separate proceedings is different. It is contended, on behalf of the plaintiff, that some of the pleas made in these proceedings exceed in scope what was put before the Financial Services Ombudsman. It seems to me that even if this contention were correct, it is not necessarily always an answer to the plea of issue estoppel. The subject matter of the claim in these proceedings, misrep-

resentation leading to the purchase of bonds from a bank that also supplied the finance, is in essence the same. Additional claims founded in that subject could and should have been included in the complaint to the Financial Services Ombudsman.

It has even been suggested by some that a person whose potential complaint is properly within the jurisdiction of the Financial Services Ombudsman should be precluded from bringing legal proceedings in the courts in the first place.²⁵³ In FLAC’s view, this is a step too far and may be seen to run counter to the concerns expressed by Mr Justice Hogan in the *Lyons and Murray* case, to the effect that what are in reality commercial cases are commenced by a complaint to the FSO, with the fallback position of an appeal to the High Court should the complaint not be upheld. The effect of this has arguably been to compromise the FSO scheme, the original intention of which was to allow consumers and small business people unhappy with the conduct of a financial service provider to make a complaint against that provider, without having to incur the potential expense of litigation in the courts.

It is not uncommon in Irish law for legislation to attempt to delineate between potential remedies that might be said to run parallel with each other and to require the potential litigant to make a choice. For example, Section 15 of the Unfair Dismissals Act 1977 provides that where an employee gives notice in writing of an unfair dismissal claim under the legislation, he or she shall not be entitled to recover damages at common law for wrongful dismissal in the courts in respect of the same dismissal. Similarly, where proceedings for damages at common law for wrongful dismissal are initiated in the courts, the employee shall not be entitled to redress for an unfair dismissal claim. In light of the decision in the *Little* case and the comments of Mr Justice Hogan in the *Lyons and Murray* case, it would be useful if a revision of the legislation concerning the FSO scheme might clarify these issues.

²⁵². [2011] IEHC 367, unreported, High Court, Charleton J., 7/10/2011.

²⁵³. Arthur Cox, *Financial Regulatory Group Briefing: Recent Decisions of the Financial Services Ombudsman*, April 2012: available at <http://tinyurl.com/jw8ppkb> (last viewed February 2014).

3.4 Summary

It is now almost a decade since the legislation establishing the FSO was put in place. Just as we have already suggested that the FSO might now seek to conduct an external evaluation of its processes and how it is perceived by its stakeholders and service users, it would also be timely for the State to conduct a review of the legislation put in place in 2004 to establish the FSO on a statutory basis. The imposition of a blanket six-year rule within which a complaint can be made appears to have resulted in injustice that is counterintuitive to an alternative dispute resolution scheme supposed to be based on equitable principles. In the same vein, the extraordinarily low level of mediated cases (particularly where providers oppose mediation elected for by consumer complainants) is unwelcome. In our view there is confusion, ambiguity and uncertainty in the wording of the FSO's remit which has not helped in establishing reliable and consistent decision-making and the avenue of appeal to the High Court is limited in terms of its scope and prohibitive in terms of its access.

We must stress again that the FSO is a creation of statute and must work with the legislation provided to it. While acknowledging that it is not an exhaustive list, it is hoped that the matters that are explored in this Chapter and summarised in Chapter Six of this report (Conclusions and Recommendations) might form some kind of initial agenda for a review.

CHAPTER

**The Financial Services Ombudsman
from the public perspective**

In this chapter, we address a number of issues relating to the presentation of information to the public on the functions and outcomes of the Financial Services Ombudsman service, including a review of its Mission Statement, the recording of outcomes and sundry matters addressed in

its annual reports, the information available on complaints procedures and other matters of importance concerning the FSO website. Some recommendations for potential improvements in these systems will be made in the course of the section.

4.1. Review of Mission Statement

Although the principal function of the Financial Services Ombudsman is described in section 57BK (1) as being “to deal with *complaints* (from eligible consumers) by mediation and where necessary by investigation and adjudication”, it is interesting and perhaps telling that the FSO’s Mission Statement is “to adjudicate on unresolved *disputes* between complainants and financial services providers in an independent and impartial manner thereby enhancing the financial services environment for all sectors.” [*our emphasis added*]

Thus the *complaint* brought by the consumer against the financial service provider which the Financial Services Ombudsman must investigate within the terms of the legislation becomes an *unresolved dispute* between the parties in the mission statement. Into this unresolved dispute steps an independent and impartial FSO to ostensibly look at the conduct of both parties. In this regard it is worth noting at this point that a number of the complainant contributors to this study felt that there was not enough emphasis being placed on the conduct of the provider in the FSO investigation but rather their own behaviour was under an undue amount of spotlight (see Chapter 5 later).

The wording of the final part of the Mission Statement is also a little curious.

The adjudication of unresolved disputes is said to be undertaken to enhance the financial services environment for all *sectors*. What does the reference to *sector* mean here? Presumably, unless the enhancement of the myriad sectors of financial service industry is the unique object of the Financial Services Ombudsman’s mission, this reference is to a consumer sector, a financial services sector and a state sector at the least. If this is what is intended, FLAC would argue that this is a mistaken template. In our view, a consumer does not belong to a ‘sector’, and certainly not in the Republic of Ireland, where the consumer lobby – insofar as it applies to financial services – is weak and where, as we have argued in Chapters One and Two, the welfare of the consumer is not generally regarded as a high priority. On the contrary, each individual consumer, perhaps with the possible exception of a person with a sophisticated level of financial knowledge, may be said to be at somewhat of a disadvantage in availing of financial services from a provider. Thus, while it is right and proper that a Financial Services Ombudsman be independent and impartial in its decision-making, it should be understood that there is generally an inequality of arms between the financial service provider who is part of a sector and a domestic

That there is generally an inequality of arms between the financial service provider who is part of a sector and a domestic consumer who by and large is acting as an unsupported individual.

consumer who by and large is acting as an unsupported individual.²⁵⁴

Although we are only dealing with a Mission Statement here, it may be argued that on occasion such statements reveal something of the ethos of the service pro-

vided; in this case, that it is an independent arbiter acting without apparent fear or favour in a contest of equals, when in fact many or indeed most customers of financial institutions are in a far from equal negotiating position.

4.2 Review of information available on complaints procedures

4.2.1 Overview of procedures up to September 2013

4.2.1.1 The FSO's complaints process

We have seen in our overview of the legislation in Chapter 3 that a consumer “is not entitled to make a complaint unless the consumer has previously communicated its substance to the regulated financial service provider concerned and has given that financial service provider a reasonable opportunity to deal with it”.²⁵⁵

This requirement was reflected at the beginning of a section on the Financial Services Ombudsman website headed ‘Making a complaint – Overview’ which, up until September 2013, stated:

When should you seek help from the Ombudsman?

If you have followed the internal complaints procedures of your financial service provider and you are still not satisfied the Financial Services Ombudsman may investigate a complaint about.

- The provision of a financial service
- An offer to provide a financial service
- Failure to provide a particular financial service that has been requested.

Under the heading “Making a Complaint – Initial Steps”, the Financial Services Ombudsman website suggested that

“there *should* be a formalised complaints handling process in place in every financial service provider which is easy to access. All staff *should* be aware of it. A senior management person *should* be responsible for ensuring that the complaints handling process works in a fair and proper manner” [*our emphasis added*].

A further section entitled ‘How complaints are dealt with’ on the Financial Services Ombudsman website stated in summary as follows:

- Following initial contact with the FSO, the Complainant had to complete a complaint form to be signed and returned within 14 days and accompanied by any relevant correspondence and documentation
- The form is then assessed to determine whether the complaint falls within the remit of the Ombudsman or whether it should be investigated.

If the complaint is deemed to be within the remit of the FSO

- The complainant will be advised to write to a nominated member of senior management in the Provider concerned stating the complaint as concisely as possible, asking the designated member of senior management to give the matter his/her attention and to issue a **Final Response** letter.
- A copy of the Complaint Form and attachments is sent on that date to the Provider by the FSO.

A Final Response letter must be issued when the complaint has been reviewed by

²⁵⁴. There are exceptions to this in that the definition of an eligible consumer under the legislation is now quite wide and may extend to limited companies and partnerships for example as long as their annual turnover is below a threshold of €3 million.

²⁵⁵. Section 57BX, Subsection (6).

the nominated member in the Provider. This letter outlines the Provider's position in relation to the matter in dispute and must be issued within **25 working days** of request. If the Complainant is not satisfied with the explanation or response made by the Provider, the Complainant must submit the Final Response letter to this office within **15 working days** of the Provider issuing it.

4.2.1.2 The complaints process under the Central Bank's Consumer Protection Code (CPC)

Contrast this with the Central Bank's Consumer Protection Code – either the original 2006 version or the revised 2012 edition – which is far more prescriptive and which, up until September 2013, had not been referenced whatsoever on the Financial Services Ombudsman website. In summary, Chapter 10 on Complaints Resolution in the 2012 Code provides as follows:

- A regulated entity *must* seek to resolve any complaints with consumers (10.7)
- When an oral complaint is received, the provider *must* offer the consumer the opportunity to have the complaint dealt with under the provider's (written) complaints process (10.8)
- A regulated entity *must* therefore have a written procedure for handling complaints. This need only apply where the complaint has not been resolved to the complainant's satisfaction within five business days, provided that this is recorded.
- From there, the procedure must provide for an acknowledgment of the complaint within a further five working days and provide the complainant with a point of contact. The complainant must be provided with a regular update of the progress of the complaint at intervals of not greater than 20 business days. The provider *must attempt* to resolve the complaint *within a total of 40 business days*.
- If this period has elapsed without the complaint being resolved, the provider must inform the complainant of the

likely timeframe for resolving it and must also make the complainant aware that complaint may be made to the 'relevant Ombudsman'.

- Finally within five business days of the completion of the investigation into the complaint, the provider *must* set out in writing the outcome of the complaint and again that the matter may be referred on to the 'relevant Ombudsman'. (10.9) [*our emphasis added*]

4.1.1.3 The inconsistencies between these procedures

Having reviewed and compared these procedures, it was apparent to FLAC that they were not consistent and could conceivably cause confusion in the minds of potential complainants. This was especially the case as the Financial Services Ombudsman website made no mention whatsoever of the obligatory requirements imposed on providers by the Central Bank's Consumer Protection Code (CPC). In the course of our research enquiries and our interviews, particularly with staff of the FSO (but also with the Central Bank), we therefore sought clarification.

The first issue of concern was how a consumer was to satisfy the requirement to initially make a complaint internally to the regulated financial services provider. Specifically we asked whether a consumer, in order to show compliance with this requirement, had to engage with the rules on complaints set out under the Consumer Protection Code before making a further complaint to the Financial Services Ombudsman. This, as we have seen above, allows a provider up to 40 working days to resolve a complaint made by a consumer.

In response it was suggested to us, although not in an entirely convincing way, that the Financial Services Ombudsman would facilitate a complainant even where he or she had not satisfied the requirements set out in the Consumer Protection Code. In these cases, it was explained that the FSO would send out the complainant's complaint form to the provider and allow a period of 25 days for the provider's 'final

response' letter. This information suggested that such complainants could in effect short-circuit the 40-day complaints period set out under the Consumer Protection Code. This would lead to a situation where a provider would have 40 days under the terms of the CPC to resolve a complaint, but if the consumer went directly to the FSO to make his or her complaint – bypassing the internal complaints procedure of the provider – it only had 25 days to provide a final response letter.

A second important question followed from this. Where a consumer had complied with the complaints process in the Consumer Protection Code, thus allowing the provider 40 working days to deal with a complaint, did he or she then have to wait a further 25 working days for the same provider to provide a final response letter once a further complaint has been made to the Financial Services Ombudsman? Surely if a consumer had already exhausted the internal complaints procedure under the terms of the Code, he or she should already have the equivalent of a written final response letter. One would imagine that this would suffice for a complaint to proceed to investigation. When FLAC put this question to FSO staff, however, we received an uncertain response that cast doubt over whether this particular problem had been considered. It was suggested to us, though again not in an entirely convincing manner, that it was routine practice to allow the matter to proceed to the investigation stage where the consumer had already exhausted the provider's internal complaints mechanism under the Code, without the need to wait a further 25 days for the final response. However, there was no mention of this possibility on the website to guide consumer complainants.

4.1.1.4 The potential impact of these inconsistent procedures on complainants

There is much more to these contradictions than dancing on the head of a pin. It is the potential adverse impact of this confusion on the making of potentially legitimate complaints that is the issue at stake here.

In the course of this study it was put to the Central Bank that 40 business days (and possibly longer) was a long time for a consumer to wait to have a complaint investigated by a provider under the Consumer Protection Code. The Bank also seemed to suggest at interview that the actual length that it takes complaints to be addressed by providers under the Code was not being monitored in any particular way by it. In this regard, it should be noted that a number of the consumers whom we interviewed for the purpose of this study who subsequently made complaints to the Financial Services Ombudsman reported that their provider delayed and even obstructed their attempts to first complain through the provider's internal complaints process way beyond the notional 40-day limit. Details of these interviews are in Chapter 5 of this report.

The feedback from these interviews also indicates that making a complaint against a financial institution is already a difficult step for many to take, especially those without access to specific advice to guide them through such processes and who have little expertise in financial matters. A potential complainant may already have been wavering at the point at which his or her complaint is rejected by the provider under the terms of the Consumer Protection Code. What is clear is that should he or she have logged on to the Financial Services Ombudsman website, it would have stated that any further complaint would have involved filling out a complaint form within 14 days and that the provider would have a further 25 working days to produce a 'Final Response' letter upon receipt of the complaint form. It would not have been apparent that he or she could bypass this stage because the internal complaints mechanism of the provider had been exhausted, as suggested by the FSO at interview.

Who can say how many complainants whose initial complaint to the provider under the Consumer Protection Code had been rejected had the impression that the provider had a further 25 working days to issue another final response in answer to a further complaint to the FSO? How many

decided as a result not to make a further complaint? How many potential complaints were shelved by a weary consumer during the 25-day period? The answer is that we do not know. Neither does the FSO. However, we do know, for example, that in almost 2000 admissible complaints (close to one in three) in 2012, nothing further was heard from the complainant after the initial complaint was made to the FSO (see below for more detail).

4.2.2 New complaints rules from September 2013

A letter received by FLAC (amongst others) from the Financial Services Ombudsman dated 16 July 2013 lends weight to the suspicion that both the FSO and the Central Bank recognised that their respective procedures were inconsistent and urgently needed review and amendment. In this letter, the Ombudsman explains ‘The New Approach’ his office will adopt on processing complaints from 1 September 2013. In effect, this approach now makes compliance with the terms of the complaints procedures of the Consumer Protection Code mandatory. The consumer must provide evidence of going through this complaints procedure when he or she fills out the complaint form to the FSO. The further 25-day period that the provider had to issue a final response letter is accordingly now entirely removed.

The Financial Services Ombudsman (and perhaps by extension the Central Bank) is to be commended at least for belatedly making this change which should help to ensure that complaints are dealt with consistently and in a more timely manner. This should also put the emphasis on providers sorting out complaints internally where possible, though the FSO’s latest review of the first half of 2013 laments the lack of desire of many financial service providers to do so. It is a matter of enormous concern, however, that it has taken seven years (the Consumer Protection Code was first introduced in August 2006) for the FSO and the Central Bank to get on the same page in relation to complaints handling. That these changes coincided

with FLAC pointing out the inconsistencies of existing practice in its research enquiries leading to the completion of this study is hardly coincidental. Central Bank staff at interview even commented that the Bank had not been aware that the FSO website contained no reference to the terms of the Consumer Protection Code – this is despite both parties’ assertion that there are regular informal contacts and periodical formal meetings between them in terms of the statutory Memorandum of Understanding (MOU).²⁵⁶

The aim of both the Financial Services Ombudsman and the Central Bank should be to actively encourage consumers unhappy with the provision of financial services to air their grievances and have their rights vindicated. FLAC believes that this would indirectly lead to improved customer service standards on the part of providers. It is hard, however, to avoid the conclusion that this lack of consistency around complaint handling procedures to date, analysed in some detail above, betrays a casual lack of concern for consumers, their rights and their right to complain. It is also arguable that it has sent out a comforting message to providers of financial services that if the organs of the regulatory system cannot organise themselves to agree a common system for complaints handling, they do not have too much to be concerned about.

²⁵⁶ For more detail, see Chapter 3, Section 3.2.4.1.

4.3 Review of recording of outcomes and other issues arising in the FSO Annual Reports

4.3.1 General complaints and outcomes 2006–2012

Table 2: Number of complaints and outcomes as reported by the Financial Services Ombudsman Bureau: 2006–2012.

Year	Complaints referred or outside remit	Complaints within remit	No further contact or amicable resolution	Settled	Findings	Upheld/ partially upheld	Total
2006	480 (11.7%)	3636 (88.3%)	1551 (42.6%)	657 (18.1%)	1428 (39.3%)	472 (13.0% – remit)	4116
2007	524 (11.6%)	4010 (88.4%)	1671 (41.7%)	641 (16.0%)	1698 (42.3%)	378 (9.4% –remit)	4534
2008	764 (15.6%)	4123 (84.4%)	1853 (44.9%)	742 (18.0%)	1528 (37.1%)	417 (10.1% –remit)	4887
2009	896 (14.3%)	5359 (85.7%)	2095 (39.1%)	788 (14.7%)	2476 (46.2%)	922 (17.2% –remit)	6255
2010	1148 (16.6%)	5753 (83.4%)	2424 (42.1%)	886 (15.4%)	2443 (42.5%)	613 (10.6% –remit)	6901
2011	1268 (17.0%)	6196* (83.0%)	2112 (34.1%)	1024 (16.5%)	3040 (49.1%)	828 (13.4% – remit)	7464
2012	1626 (20.7%)	6245 (79.3%)	1968 (31.5%)	1282 (20.5%)	2995 (48.0%)	807 (12.9% – remit)	7871
TOTALS	6706 (16.0%)	35,322 (84.0%)	13,674 (38.7%)	6020 (17.0%)	15,608 (44.2%)	4438 (12.6% – remit)	42,028

Source: Financial Services Ombudsman Bureau, Annual Reports, 2006 – 2012.

*Although the total number of cases within the FSO remit in 2011 was 6196, only 6176 cases appear to have been dealt with that year, when the various categories are added up.

Explanatory note on this table:

The columns on this table should be read from left to right.

- The first column records the year and the last column the numbers of formal complaints within the year in question.
- The second column sets out the number of cases outside the FSO remit in the year, leaving the third column to record the number of complaints dealt with that were within the FSO remit in that year
- The fourth column records the number of complaints where, following the making of a complaint to the FSO, nothing further is heard from the consumer. Up to and including 2009, these complaints were recorded as having been ‘amicably resolved’. From 2010, they are recorded (more accurately) as ‘no further contact’ cases
- The fifth column records the number of settlements of complaints in the year in question
- The sixth column sets out the number of findings following an adjudication by the FSO

- The seventh column records the number of adjudications that result in upheld or partially upheld findings in the relevant year
- In relation to percentages, the ‘no further contact’, ‘settlement’ and ‘findings’ categories (columns four, five and six) together amount to 100% of the complaints within remit (at column three). The numbers of upheld or partially upheld complaints at column seven are expressed as a percentage of the number of complaints within remit (at column three).

4.3.2 Complaint referred or outside remit

Complaints referred onto other agencies or deemed to be outside the Financial Services Ombudsman’s remit have become an increasing feature of the FSO Annual Report. In 2012, for example, of 7871 complaints closed, 1213 were classified as being outside the FSO’s remit alone and this amounts to over 15% of complaints (a

very high total). According to FSO staff, it would appear that the majority of the outside remit cases concern the six-year rule, a limitation of much concern already explored in this study:²⁵⁷

Outside remit is where we decline jurisdiction because they don't fall under the Act and 99% of that is under Section 57 BX (3), the Six Year Rule, so it's a time limit thing. That's the majority of those people...²⁵⁸

Section 57 BZ of the legislation, however, allows the Financial Services Ombudsman to decline to investigate or to continue to investigate a complaint on a number of grounds, not just that the complaint was brought more than six years after the alleged offending conduct. In terms of the 'outside remit' category, for example, there is no information on how many complaints are deemed to be frivolous or vexatious or because they were already the subject of legal proceedings. **It would be helpful if FSO Annual Reports provided a breakdown of these categories in the future.**

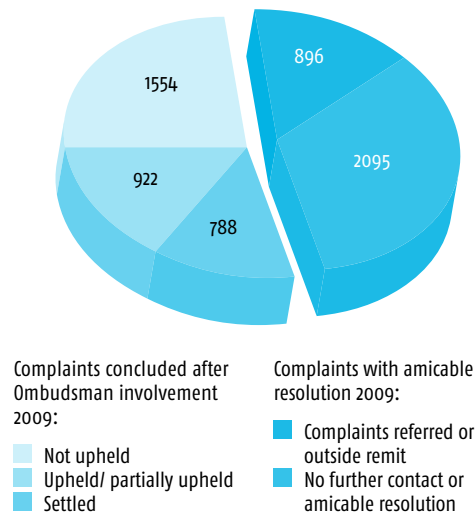
4.3.3 Amicable resolution/no further contact category

The figures from Table 2 in this category suggest that over a seven-year period on average close to **40%** of the total number of complaints made that were considered to be within the remit of the Financial Services Ombudsman did not proceed to either settlement, mediation, investigation or adjudication.²⁵⁹

In the annual reports from 2006 through 2009, these complaints were recorded under the heading of 'amicable resolution' of the complaint. So, for example, the 2009 *Annual Report* firstly records that out of a total of 6255 complaints dealt with that year, 2991 were concluded amicably.²⁶⁰ This included:

- **896** cases that were either **outside the FSO's remit** or were more appropriate to be dealt with by other agencies. (How the FSO could have concluded

Figure 1: FSO Complaint Resolutions 2009



therefore that these were concluded amicably is simply astonishing).

- The remaining **2095** complaints (39%) in this amicable resolution category were said to be **resolved after initial referral to financial service providers.**

In turn, under the heading of 'concluded after Ombudsman involvement':

- **788** complaints (15% of the total of 5359) resulted in either **mediation or a settlement.**
- **922** complaints (17% of the total) were **upheld** following investigation and adjudication.
- The remaining **1554** complaints (29%) were **not upheld** following investigation and adjudication.

Curiously, the 2009 report then adds the 2095 cases in the 'amicable resolution' category that were said to be resolved after initial referral to financial service providers to the 788 complaints that resulted in mediation/settlement and the 922 complaints upheld. This gives a total of 3805 (71%) cases within remit that are recorded as having been 'resolved in the complainant's favour',²⁶¹ which in FLAC's view is a somewhat misleading statement.

These 2095 cases resolved after initial referral amounts to almost *two in every five* of the complaints within the FSO remit in that year, a very high figure indeed. What evidence is there that these cases were actually resolved in the complainant's fa-

²⁵⁷ See Chapter 3, Section 3.2.1. for more detail.

²⁵⁸ Interview with staff of the Financial Services Ombudsman's Bureau, 14 February 2013.

²⁵⁹ Research enquiries with staff of the FSO revealed that in some cases, the Bureau treats a 'complaint' as having been made, even though a complaint form has not at that stage been filled in, as can be seen from the following interview extract:

Once we receive a complaint in writing, you know on say either a complaint form or even a written letter, that, as far as we're concerned, a complaint has been made.

Does logging a complaint involve the filling out of a complaint form?

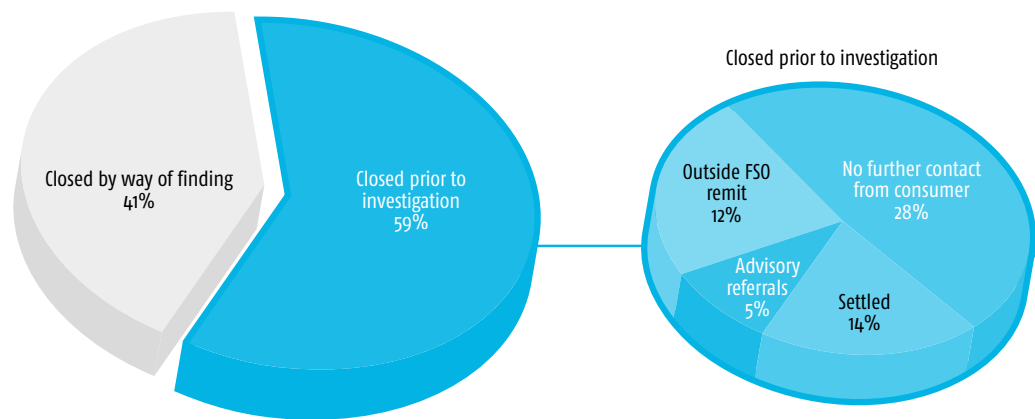
No, the Act says once a complaint is made in writing. So in other words if you write off and say 'I want to make a complaint against such and such', without filling out a complaint form, as far as we're concerned you have made a complaint at that point.

From interview with staff of the Financial Services Ombudsman's Bureau, 14 February 2013).

²⁶⁰ Page 20.

²⁶¹ Financial Services Ombudsman, *Annual Report* 2009, page 21.

Figure 2: FSO Complaints Closed Prior to Investigation 2011



your? The 2009 report contains absolutely no information about how these cases were resolved and we understand from our own enquiries that there was no formal process undertaken to track or enquire into the actual outcome of cases in this category and this remains the case. It would simply appear that after the complaint was sent to the provider, nothing further was heard from the complainant.

It is of course conceivable that a significant majority of these complainants were either offered an acceptable accommodation by their provider in the 25-day period between the provider's receipt of the complaint and its final response, or were happy enough that the provider's final response adequately addressed their complaint that they decided not to pursue the matter further. Equally though, we might ask how many consumers simply abandoned their complaint during the 25-day period or upon receipt of the provider's final response letter because they did not understand the process, felt the odds were stacked against them or grew weary of the bureaucracy, weight of documentation and waiting times and had given up hope of a fair outcome? In FLAC's view, the classification of these cases between 2006 and 2009 as having been 'amicably resolved' might at best be described as overly optimistic and at worst as massaging the figures to show a higher success rate for consumer complaints than might otherwise be justified.

By the time the Financial Services Ombudsman's *Annual Report* for 2010 was published, the recording system had

changed substantially. Complaints are now firstly divided into two broad categories – complaints that are closed **prior to investigation** and those that are closed by way of **finding** and this is a much more helpful classification. So, for example, the 2011 *Annual Report* records that of 7464 complaints concluded, 4424 (59% of total) were closed prior to investigation and 3040 (41%) by way of finding.

Of the 4424 complaints closed prior to investigation, the outcomes were as follows.²⁶²

- 409 (5% of the total number of complaints) were 'advisory referrals', in other words again more appropriate for another agency to deal with. Some 859 (12% of the total) were outside the FSO's remit. These two categories together give a total of 1268 (17% of the total).
- 2112 (28% of the total, 34% of the complaints within remit) cases resulted in **no further contact** from the consumer. (The FSO's classification of what constitutes a complaint is again relevant here – see description above.)
- 1024 (14% of the total, 16.5% of the complaints within remit) cases were **settled** and we assume that this means 'settled prior to investigation' as currently defined by the FSO (see further below).

Thus, complaints that were arguably misnamed as 'amicably resolved after initial referral to financial service providers' were replaced with a more accurate 'no further contact' category from 2010. However,

²⁶² Note that the four categories here only add up to 4404 cases, as opposed to the 4424 classified.

again the number of such complaints is high at 2112 (amounting to 28% of the total number of complaints and 34% of the complaints within the FSO's remit that year). Although the number has declined from 2009, it still amounts to one in three consumers who make a formal complaint and then never make contact again. Again, there is no enquiry into why this happens although staff of the FSO did advise us during interview that the consumer is written to and asked whether he or she wishes to continue to pursue the complaint.

The apparent confusion in how the Financial Services Ombudsman classifies these outcomes is encapsulated in a somewhat bizarre amendment to the 2012 *Bi-Annual Review*. The original published version states at page 13:

40% of complaints are closed prior to investigation because, having submitted a Complaint Form (our emphasis), the Complainant has not responded to further contact from this Office. Therefore, this Office cannot continue the complaint process due to lack of contact from the Complainant.

A revised version of this entry, available on an online version of the 2012 *Bi-Annual Review* now states at page 15:²⁶³

Complaints to this office are closed by two separate means; one by way of Finding issued and the others which are closed before the commencement of the investigation process. 41% of complaints closed prior to investigation are as a result of no further contact from the Complainant after this office has prompted same for requested information to proceed with the complaint, i.e. the Complaint Form.

The former entry suggests that complaint forms have been submitted in these cases but nothing further is then heard from the complainant. The latter implies that some form of initial contact has been made with the FSO by a potential complainant but no formal complaint form has actually been filled out.

4.3.4 Settlement category

In the 2009 *Annual Report*, a total of 788 complaints resulted in a mediation or a settlement and these were recorded under the category of 'concluded *after* Ombudsman involvement', which may have given the impression that the complaint had proceeded to investigation when the settlements took place, but before any adjudication had been made by the investigator to whom the case had been assigned.

The 2012 *Annual Report* on the other hand records 1282 complaints (over 20% of the total number of cases within the FSO remit in 2012) having been *settled pre-investigation*. Page 15 of the 2012 *Bi-Annual Review* states that the settlement figure "highlights the importance of the Complainant approaching the Provider in the first instance with their complaint, in order to give the Provider an opportunity to resolve it, before submitting the complaint to this office". This statement seems to suggest that such settlements take place during the 25 day period between complaint and the final response letter.²⁶⁴

The 2012 *Annual Report*, however, provides no figure for settlements that might occur *post-investigation* at all, with the next relevant category being comprised of 2995 'Findings' (including the surprisingly small figure of five cases dealt with by mediation). It is inconceivable that no cases settle at all during the investigation period once the investigator starts to ask pertinent questions and indeed one of our money advisor interviewees in this study settled a case on behalf of a client during the investigation period.

When presented with this contradiction, *FSO staff essentially accepted that the figure of 1282 settlements actually covers a small number of post-investigation as well as pre-investigation settlements, but that it had neglected to classify them as such.*

It was agreed by FSO staff that it would examine its statistics to distinguish between post-investigation and pre-investigation settlements as explained above for 2012 and provide FLAC with an account. A written response of 7 May 2013 confirmed that of the **1281** settlements (one

²⁶³ Last viewed 31 January 2014.

²⁶⁴ During interview, staff of the FSO Bureau confirmed that for reporting purposes, the Bureau included in its 'closed prior to investigation' category, cases which are 'settled' after a complaint has been made, assigned to an investigator and a summary of complaint and request for information/documentation has been sent to the provider in question by that investigator. It may also be the case that a settlement is reached after the provider has responded to the FSO's requests or after further documentary exchanges have taken place. It is our view that a more accurate reporting term for cases settled at any of these stages should have been settled/closed 'prior to adjudication'. We would contend that only cases settled prior to the sending of a complaint summary/request for documentation to the provider, should have been classified as 'closed prior to investigation'. This is more than mere semantics – it would have enabled the report reader to clearly distinguish between complaints which are settled before the FSO has become actively involved and those which are settled after it has become so – in other words, it would have served to better identify the impact of active FSO involvement in the complaint in question.

Since its establishment in 2005, no independent evaluation of the FSO has been undertaken.

seems to have disappeared in the interim), 240 were settled after the investigation had commenced. The ‘small number’ of pre-investigation settlements was therefore almost one in five in 2012 – undoubtedly a significant proportion.

On the question of settlements, the 2009 *Annual Report* again placed these complaints in a category described as “resolved in the complainant’s favour”, although from 2011 these cases are just recorded as settlements with no conclusion that this equates to success. Although it may appear logical to think of a settlement as beneficial to the complainant, how do we actually know that they were resolved in the complainant’s favour?

A complaint settled by the provider in order to avoid an investigation and adjudication could just as easily be described as having been resolved in the provider’s favour if it meant that the provider thereby escaped more severe consequences. There is as we have noted no monitoring or evaluation of these settlements by the FSO in order to assess their appropriateness to the consumer’s complaint.²⁶⁵ Whilst the FSO has to remain impartial, it is nonetheless difficult for a consumer without access to advice and assistance to know whether a settlement is, on balance, in his or her interest.

4.3.5 Summary

The large number of recorded pre-investigation settlements (although it is now clear that some of these were actually post-investigation), when taken together with the even higher number of cases where the consumer did not indicate at all why the complaint has not been pursued, is a matter of concern. The 2012 figures indicate that when the figure *given* for pre-investigation settlements is added to ‘no further contact’ cases (1282 + 1968 = 3250), more than half (52%) of cases deemed to be within the FSO’s remit and processed in the course of 2012 did not reach the investigation stage.

Although the Financial Services Ombudsman at least no longer categorises these cases as being resolved in the com-

plainant’s favour, our research enquiries also confirmed that no detail whatsoever was sought or provided as to what may have happened in these cases. In our view, there is a fundamental matter of consumer protection at stake here, especially as the consumer frequently brings his or her complaint unassisted and will often perceive the odds to be stacked against him or her. It is of course likely that some consumers’ complaints were weak or misconceived and that some may have been merely ‘chancing their arm’, ready to drop the complaint if it looks like the provider will challenge it. However, given the FSO’s clear remit as the State’s only non-judicial arbiter of complaints by consumers in relation to the provision of financial services, it is unsatisfactory that this trend (averaging 56% of cases from 2006 to 2012) has never been evaluated. Indeed, it is striking that since its establishment in 2005, *no independent evaluation of the FSO has been undertaken*, nor at the time of writing were there any plans to carry out one in the foreseeable future.²⁶⁶

We would suggest that 56% is far too high a proportion not to warrant further enquiry by the Financial Services Ombudsman as to what may have happened in these cases. The contact details of all complainants are available to the FSO. Simple questions could have been asked of all, such as:

- Why did you not pursue your complaint further?
- Were you offered a settlement?
- Could you indicate what settlement you were offered?
- Did you accept that settlement and were you happy with it?
- If you were not happy with it, why did you accept it?
- Did you obtain any independent professional advice prior to accepting it?

²⁶⁵. FLAC understands that in post-investigation settlements, the FSO investigator concerned does record the settlement and does at least confirm that the complainant is happy with it.

²⁶⁶. Interview with staff of the FSO, 14 February 2013.

4.4 Data collection implications of new complaints procedures

As noted above,²⁶⁷ from September 2013 the Financial Services Ombudsman has amended its complaints handling rules and this appears to coincide with concerns raised by FLAC in the course of interviews with both senior staff of the FSO and the Consumer Protection section of the Central Bank that their respective complaint mechanisms were not consistent with one another. Consumers must now first make a complaint using the provider's internal complaints procedure which in turn must comply with the complaints handling rules in the Central Bank's Consumer Protection Code. The FSO will now require a potential complainant to have a referral letter from the provider to accompany the filling out of its own complaint form. Either the provider must have investigated the complaint within 40-working days and not resolved it to the satisfaction of the consumer or the 40-working day period must have passed without the investigation being completed, thereby entitling the consumer to now forward the complaint to the FSO.

As such, the Financial Services Ombudsman will (or certainly should) no longer allow for a 25-day period for the provider to issue a 'final response' letter – the interval during which a very substantial number of cases appeared to have either fell off the radar or were settled between 2006 and 2012 – as the final response will either have issued under the complaint procedures of the Consumer Protection Code or the provider will have failed to achieve the 40-working day target to attempt to resolve the consumer's complaint.

Thus, as well as streamlining the complaints procedures, these changes will also allow for the easier collection of data. In FLAC's opinion, this also presents both the Central Bank and the Financial Services Ombudsman with the challenge of producing much more comprehensive information on complaints handling and complaints trends; further, it provides them with an ideal opportunity to improve

on their analysis. Some elements that might be captured in forthcoming statistical reviews and annual reports might include:

- How many complaints are made under the terms of the CPC annually?
- What is the perceived success/failure rate, in other words, how many are substantially rejected or accepted?
- What is the consumer experience of complaint handling – are consumers broadly happy or unhappy about the process?
- What generally causes consumers to accept or reject the findings of the provider?
- How many regulated financial service providers fail to meet the '40 working days target' to attempt to investigate and resolve a complaint and why?
- To what extent might this be related to the wording of Rule 10.7 (d), which effectively allows for a built-in extension to the 40-day time limit without having to show cause?
- How many of these complaints are then escalated to the FSO without waiting for the provider to ultimately conclude its investigation?
- How many wait for the investigation by the provider to be concluded, whatever time it takes, and then proceed to make a complaint to the FSO?
- Ultimately, what percentage of complaints made by consumers under the Consumer Protection Code end up being referred to the FSO by the consumer and why?
- Once the complaint is made to the FSO, how many of those deemed to be within the FSO's remit and which do not go to mediation are settled by an offer from the provider prior to the investigation actually beginning? (Note here that the revised procedures on the website state that "a timeframe in the region of 6-8 weeks may *apply before formal investigation of the complaint will commence*" [our emphasis added].)

²⁶⁷ See Section 4.2.2.

- How many complaints where an investigation actually commences are settled by an offer from the provider during the course of the investigation?
- What were the factors that influenced consumers to accept (or indeed reject) these offers of settlement?

This is a potentially heavy agenda of course. But many of the interviewees in Chapter Five of this report expressed

strong views and frustration as to how these processes did not work for them. The apparent failure to date by both the Financial Services Ombudsman and the Central Bank to enquire in any substantive way into consumer satisfaction with this complaints infrastructure, coupled with what might be termed the high ‘disappearance’ rates of consumers along the way, makes it necessary to monitor and evaluate their effectiveness from here on out.

4.5 Upheld, partly upheld and not upheld categories

Table 3: Outcomes of cases that proceed to investigation and adjudication as reported by the Financial Services Ombudsman Bureau, 2006–2012

Year	Upheld	Partly upheld	Not upheld	Total Findings
2006	472 (33%)		958 (67%)	1428
2007	378 (22%)		1320 (78%)	1698
2008	417 (27%)		1111 (73%)	1528
2009	922 (37%)		1554 (63%)	2476
2010	442* (18%)	171 (7%)	1830 (75%)	2443
2011	361 (12%)	467 (15%)	2212 (73%)	3040
2012	302 (10%)	505 (17%)	2187 (73%)	2995*
Total	4436 (28%)		11,172 (72%)	15,608

Source: FSO Annual Reports 2006–2012

*Note that the ‘partly upheld’ category was only introduced for Q.3 and 4 of 2010. Some of the 2010 figure of 442 of ‘upheld’ complaints therefore might include partly upheld complaints in Q.1 and Q.2.

*Note this includes five cases of mediation.

In the 2006–2009 Financial Services Ombudsman annual reports, the ‘upheld’ and ‘partly upheld’ categories were not distinguished from each other but this was remedied for the second half of 2010. This may be due to the fact that the ‘partly upheld’ category is set down in the FSO legislation as a distinct outcome and is required to be recorded as such.

This category has certainly given rise to quite an amount of strong feeling amongst the sample of people that we interviewed for the purposes of this research who themselves had made complaints to the FSO. Of the 23 grounds of complaint (made by a total of 17 complainants) reviewed for the purposes of this study, seven had been partly upheld from the perspective of the FSO’s official recording mechanism.²⁶⁸ However, it is clear that in a number of these ‘partly upheld’ cases, the

complainant was very unhappy with the outcome, as it involved a relatively small amount of compensation being awarded for acts of so-called maladministration by the provider, but the rejection of the substantive complaint made by the consumer.

Whilst we cannot say that this is the case with other complainants and this is clearly a very small sample, we would venture to suggest that it may be so in at least a number of instances. Again, FLAC is not aware of any research by the Financial Services Ombudsman to evaluate this. One thing is clear: a partly upheld complaint is also a complaint that is partly (or possibly even substantially) not upheld; given the time, effort and expectation involved in presenting a complaint, the awarding of a small amount of compensation may in the complainant’s eyes amount to a failure rather than a success. One of

²⁶⁸ See Chapter Five for further detail.

our respondents, for example, was seeking to have the outstanding capital sum on a mortgage to be written off because she believed that after the tragic death of her husband through suicide a valid mortgage protection insurance policy was in place and felt that an award of €500 in compensation for ‘maladministration’ seemed more like an insult than anything else.²⁶⁹ As described in Chapter 5, other respondents also took objection to the categorisation of their complaint as partly upheld for similar reasons.

If the small number of complainants we interviewed whose complaint was partially upheld is anything to go by, the ‘partly upheld’ category, which to be fair arises from the legislation rather than being an invention of the Financial Services Ombudsman, gives a misleading impression of

success rates. It is submitted that this category should be revisited and Section 57CI recast generally in terms of outcomes. A suggested starting point for looking at a new classification might be as follows:

- Upheld
- Substantially upheld
- Substantially rejected
- Rejected

It should be stressed here that the FSO is unlikely to be able to adopt this classification of its own volition. As we have seen in the introduction, the legislation itself sets out the three categories of substantiated, partly substantiated and not substantiated and the use of the upheld, partly upheld and not upheld categories in the annual reports and bi-annual reviews is intended to reflect this.

4.6 Success rates generally

It is clear from Table 3 above that from 2006 to 2012, on average fewer than 3 out of 10 complaints that proceeded to investigation and adjudication and which resulted in a finding involved some sort of a successful outcome for the complainant consumer. The figures from the reports for 2010 to 2012 show that the ‘upheld’ category has decreased (down from 12% of findings in 2011 to 10% in 2012) whilst the ‘partially upheld’ category has increased (up from 15% in 2011 to 17% of findings in 2012). In light of the questionable status of the ‘partially upheld’ category as an indicator of success, this is a noteworthy trend.

In terms of the percentages of the overall number of complaints within the FSO’s remit in 2012, the number of upheld cases was under 5% (or one in twenty), with the number of ‘partially upheld’ cases running at 8%.

It is interesting to compare these figures with those published by the UK’s Financial Ombudsman Service (FOS), a statutory body also established under legislation and funded by levies from regulated providers

(and through case fees). The UK Financial Ombudsman reported that in 2011-12, its consumer helpline received 1.26 million enquiries, of which about a fifth (264,000) were referred to adjudicators (of which 222,333 were resolved and 20,540 cases or just under 8% required a formal Ombudsman’s decision). Of the 80% that were not so referred, nearly half are reported as having resolved their problem themselves and of the remainder, nearly 75% were still trying to sort things out while 27% had let the matter drop.²⁷⁰

The FOS records the outcome of a consumer’s complaint as “changed”, meaning that the complaint was upheld, where:

The financial business told the consumer in its final response that it had done nothing wrong – but after the complaint was referred to us, we decided (or the business belatedly accepted) that it had done something wrong after all, or

The financial business’s final response offered the consumer inadequate compensation – but after the complaint was

²⁶⁹ It should be noted that the policy lapsed due to non-payment and the insurer was not arguing that suicide invalidated it. The dispute centred on whether the complainant had been given proper notice that the policy was about to lapse.

²⁷⁰ These data are taken from the *Annual Review* of the UK Financial Ombudsman Service for the financial year 2011-2012.

referred to us, we required the business (or it belatedly agreed) to increase its offer to an appropriate level.²⁷¹

Conversely, the FSO records the outcome of a complaint as “not changed”, meaning that the complaint was not upheld, where:

The financial business had done nothing wrong, or the financial business had done something wrong, but had already offered the consumer appropriate redress (before the complaint was referred to us).

In 2011/2012, 64% of complaints adjudicated upon were upheld (i.e. “changed”), whilst 36% were not upheld (i.e. “unchanged”). Under the UK Ombudsman’s scheme, therefore, the odds of an adjudicated complaint being upheld, as opposed to not upheld, are in the region of 2 to 1.

Rates of success are low and rates of outright success appear to be declining. This can be attributed to a number of factors but it is a matter of pure speculation in the absence of any thorough analysis of decisions in any given year. The absence of a database that can be accessed to examine Financial Services Ombudsman decisions makes this impossible. This is a problem common to several forms of alternative dispute resolution in Ireland, as FLAC has noted in its most recent report on the system of social welfare appeals.²⁷²

Many consumers may of course have weak cases and their complaints may, for example, stem more from financial distress, frustration with the recent behaviour of financial institutions and generally declining standards of living in a deep recessionary environment, than from particular instances of misconduct on the part of regulated financial service providers. On the other hand, FLAC feels that there is a substantial ‘inequality of arms’ problem here. Where are consumers, particularly what might be termed ‘domestic’ as opposed to more ‘commercial’ consumers (a distinction discussed in detail in Chapter 3),²⁷³ going to obtain assistance to frame their complaint appropriately? Where is

the ongoing support to help complainants to make effective submissions, following the provider’s final response letter, or to point out inconsistencies in the provider’s responses to the questions posed by the FSO investigator? How in effect is the consumer to keep up with the exchanges of relevant documentation and the other procedural steps outlined in the description of the legislation in Chapter 3 above?

Again, apart from retaining a lawyer, an accountant or some other financial professional for a fee, there is little available by way of assistance. Civil Legal Aid is simply not available outside of the courts system.²⁷⁴ Interviews with MABS money advisors carried out for the purpose of this research set out in Chapter Five of this report indicate that not only is pursuing and grounding a complaint on behalf of a client a very labour-intensive task in an already busy work schedule, but that in some instances, it also requires a significant degree of expertise that the advisor may not always necessarily be trained to provide.

In this light, the State might therefore consider establishing a support unit for unrepresented personal consumers making complaints to the Financial Services Ombudsman. This is particularly needed given the complexity involved in responding to the submissions of institutions which not only are likely to have expertise but also to command substantial resources. This could be a unit within the FSO office itself, with the appropriate ‘Chinese walls’ in place but it might be preferable to cite it elsewhere, for example, as a unit within MABS or within the National Consumer Agency.²⁷⁵

Support for complainants may not be the only aspect of the problem, however. The small sample of cases into which FLAC has had input, primarily through its work with MABS money advisors but also through its centres and phone line, has given rise to some concern that the decision-making of the Financial Services Ombudsman may err from the legal perspective from time to time. This has resulted, for example, in FLAC supporting two High Court appeals, one where the High Court overturned the FSO decision

271. See UK Financial Ombudsman Service, *Annual Review 2011-2012*, page 71.

272. FLAC (2012) *Not Fair Enough – Making the case for reform of the social welfare appeals system*, Dublin: FLAC.

273. See Section 3.2.5.6.

274. See definition of legal aid, Section 27, Civil Legal Aid Act 1995

275. Both MABS and the NCA already provide an amount of information on financial services issues to consumers.

and the other where the FSO ultimately declined to defend its own decision and did not oppose the appeal. These cases and others drawn from the group of interviewees have already been examined in some detail in the preceding chapter.

4.6.1 Success rates by sector – 2012 figures

Broadly speaking, an eligible consumer may bring a complaint to the Financial Services Ombudsman under three distinct categories of complaint; these are investment, insurance and banking, and this is reflected in the Annual Reports. There is also a fourth miscellaneous category of complaints against non-financial service providers, for example intermediaries who arrange the provision of investment, insurance and credit services but do not directly provide these services themselves. The FSO *Bi-Annual Review* 2013 states that a total of 8121 new complaints were received in 2012 and these broke down as follows (see Table 4):

- 836 (or 10%) concerned investment complaints;
- 3082 (or 38%) concerned banking complaints;
- 4058 (or 50%) concerned insurance complaints;
- 145 (or 2%) concerned non-financial service provider complaints.

A total of 7871 complaints were disposed of in 2012 in the three principal categories. In terms of the number that resulted in a finding, these broke down as indicated in Table 4 below.

Thus, we are not aware of how many complaints in total were made in the investment, banking or insurance categories

respectively and how many of these proceeded to be disposed of by way of a finding. This is potentially important information. We have seen above that large volumes of complaints between 2006 and 2012 resulted in an unexplained ‘no further contact’ from the complainant consumer and a further number resulted in pre-investigation settlements of which there is no recorded detail. It may have been that the trend of no further contact or pre-investigation settlement was more pronounced in one of these three categories rather than another and if that had been the case, why would this have been?

For example, we can see that the investment category resulted in 10% of new complaints in 2012, whereas it accounted for 19% of complaints disposed of by way of finding. Some 50% of new complaints in 2012 were in the area of insurance and it accounted for 51% of findings made in that year. Finally, 38% of new complaints in 2012 occurred in banking and it accounted for only 30% of findings. On the basis of these figures, it may be suggested that fewer banking complaints proceeded to finding than insurance ones and that far more investment complaints, proportionately speaking proceeded to finding than in either insurance or banking. This is of course only the tenuous evidence of one year but it would be worth investigating whether this was replicated in other years and if so, what can be deduced from it?

Table 4: Findings by category for 2012

Category	Investment	Banking	Insurance	Totals
Upheld	41 (7%)	108 (12%)	153 (10%)	302 (10%)
Partly upheld	113 (20%)	156 (17%)	236 (15%)	505 (17%)
Not upheld	414 (73%)	634 (71%)	1135 (74%)	2183 (73%)
Findings	568 (19%)	898 (30%)	1524 (51%)	2990 (100%)

Source: FSO Bi-Annual Review 2013

Note: 7871 complaints within the FSO remit were disposed of in 2012. Some 2990 out of those 7871 complaints (38%) were dealt with by way of a finding. Unfortunately, although the statistics presented by the FSO do break down the findings by category, they do not break down the complaints by category.

4.7 Levels of compensation awarded

Table 5: Levels of compensation awarded by way of finding, by year and main category

Year/Quarter	Investment	Banking	Insurance	Total	Successful	Average
2010 Q.1-2	€740,822	€357,075	€196,088	€1,293,935	354	€3,655
2010 Q.3-4	€806,282	€261,846	€284,253	€1,352,381	259	€5,222
2011 Q.1-2	€731,899	€150,000*	€413,298	€1,295,197	413	€3,136
2011 Q.3-4	€614,403	€102,836	€225,044	€942,283	415	€2,287
2012 Q.1-2	€405,893	€169,464	€214,356	€789,713	447	€1,766
2012 Q.3-4	€580,256	€174,997	€189,252	€944,505	360	€2,623
2013 Q.1-2	€146,148	€100,087	€150,620	€396,855	356	€1,115

Source: FSO Bi-Annual Review 2013, figures taken from Table 3 and Charts 5, 7, & 9.

*The banking compensation figure is missing from the relevant page (page 10) of the relevant report as a result of a printing error. We simply estimate it to be approximately €150,000 because of the size of the entry on the relevant circular chart.

The principal remedy provided to the Financial Services Ombudsman under Section 57CI (4) of the legislation is to award compensation to the complainant. This compensation is limited by regulation to a maximum of €250,000. It is clear, however, that compensation levels are generally quite low and, indeed, the FSO *Bi-Annual Review 2013* consolidates what can only be described as an alarming decrease in the levels of compensation awarded to consumer complainants by way of findings over recent years.

It may be dangerous to attempt to draw any conclusions from the above table. Compensation levels in one quarter may have been boosted by a large complaint that may have resulted in a large compensatory award that in turn may have inflated the average. The number of investment complaints, generally speaking far fewer in number but far higher on average in terms of the compensation awarded, may similarly have distorted averages in a particular period. It appears that the number of complaints and findings in relation to investment matters has declined recently, whereas the numbers of findings in the banking and insurance areas has increased.

Nonetheless, these averaged figures provide for stark reading. From an average compensatory award of €3655 across the three categories in Quarter 1-2 of 2010, the average has decreased by around two-thirds to an average of €1115 by Quarter 1-2 of 2013, the most recent available information at the time of writing. To what might this be attributed, apart from an increasingly conservative approach

to awarding compensation to successful complainants?

Again, the answer is that we do not know and it does not appear (as in the case of a number of other trends identified above) that this is a matter remarked upon by the FSO. Indeed, it is notable that in the Executive Summary to the *Bi-Annual Review 2013* from which these figures are drawn, the report states:

The office has always carefully monitored the outcome of Findings as a measure of performance of the complaint handling of providers.

There is, however, no similar attempt it would seem to monitor the outcome of findings as a measure of the performance of the Financial Services Ombudsman itself. Thus, the worsening outcomes from the consumer complainant's perspective are not even remarked upon, let alone discussed and analysed.

The Ombudsman is on record as criticising both the lack of willingness of some financial service providers to deal pro-actively with complaints so that they are not escalated to his office and the reluctance of these providers to engage in mediation. When you look at the average compensation levels above, it may hardly be surprising. Essentially, the finance industry finances the Financial Services Ombudsman's operation through the imposition of levies. Why would the industry bend over backwards to spend an undue amount of time, resources and finance pro-actively sorting out problems to prevent them going to the FSO when it finances it and

particularly when it is evident that the compensation awarded to an apparently

successful complainant is already low and declining?

4.8 Summary

This review of the complaints procedures used up to recently by the Financial Services Ombudsman and the analysis of recent FSO annual reports makes for worrying reading.

Whilst the FSO together with the Central Bank appears to have resolved anomalies in complaints procedures, the fact that it took seven years to get to that point is very disturbing. In addition, there appears to be little or no desire to get behind the reasons why such a large percentage of complainants who were in the complaints process 'made no further contact' with the FSO. The initial attempt by the service to portray these cases as ones that resulted in an 'amicable resolution' 'resolved in the complainant's favour' is simplistic in the extreme.

In relation to pre-investigation settlements, there seems to have been no attempt to enquire into their adequacy or the reasons why they were accepted. When one considers that many consumers will have made their complaint alone and with no access to professional advice or assistance, this lack of curiosity is also of concern. Again, we are not suggesting that the Financial Services Ombudsman should not be impartial but we are certainly of the view that it should be constantly vigilant and mindful of the barriers and impediments that consumers face when taking on what are certainly perceived in the main to be powerful institutions. This level of vigilance is simply not reflected in the information gathering it has engaged in up to now.

Insofar as it concerns success rates and levels of compensation awarded, the annual reports also make for fairly grim reading. Excluding the 'no further contacts' and the settlements, which we suggest in the absence of detailed research should not be taken necessarily as indicators of

success, the 2012 figures would indicate that there is an approximately one in four chance of some kind of success when the complaint proceeds to a finding. Close to two in three of those outcomes result in partial success. If the feedback we have received from the interviewees (admittedly a very limited number) whose complaint was partially upheld is anything to go by, it is very questionable whether this outcome equates to success in many instances. This means that only one in ten is actually described as (fully) upheld.

Finally, even if the consumer's complaint is upheld or partially upheld, the compensation awarded has generally speaking declined over recent years, culminating in the first half of 2013 in an average award across the three main complaints categories of just over €1100, around a third of the average award for the equivalent period in 2010. Even though it is acknowledged that there may be a number of factors at play here, that there are other potential remedies and that compensation may not either be what all complainants are seeking, this is still very low. It might be termed both an inadequate reflection of the effort and determination required of consumers to bring complaints and an inadequate deterrent against future infractions of standards of conduct by financial service providers.

CHAPTER

**When things go wrong:
FLAC user experiences of the
complaints process**

5.1 Introduction

The findings presented in this chapter are drawn from data gathered from 30 respondents across the country. These were 17 consumers and 13 money advisers who consulted FLAC during 2011 and 2012 in relation to complaints involving a financial services provider where the FSO was involved. On the consumer side, there were four ‘couples’ involved; on the money adviser side, some advisers had dealt with more than one complaint. In seven of the complaints where MABS was acting as a support, both the consumer and their money adviser were interviewed separately.

As regards the consumers involved, Table 6 below describes their overall profile.

The money advisers interviewed were spread across ten different MABS companies located in various regions of the country, as shown in Table 7 below.

Data were gathered principally by way of semi-structured interviews as described earlier. The vast majority of these interviews were carried out in October and November 2012, whilst one was carried out in February 2013. In many instances, respondents provided copies of documentation (such as the written finding) which related to the case(s) in question.

Table 6: Profile of consumer respondents

Characteristic	Number of respondents
Gender (n=17)	
Female	9
Male	8
Age (n=17)	
43 years (median)	
45.7 years (mean)	
Nationality (n=17)	
Irish national	16
Non-Irish national	1
Composition of complainant household (n=13)	
Couple with children	5
Lone parent with children	3
Single	3
Separated	1
Couple	1
Employment status of lead respondent (n=13)	
Employed full-time	5
Unemployed	3
Self-employed	2
Unable to work through ill-health	1
Home Duties	1
Retired	1
Location (County) of lead respondent (n=13)	
Dublin	7
Cork	2
Kildare	1
Galway	1
Westmeath	1
Kilkenny	1

Source: FLAC Consumer Protection Study, 2012–13

Table 7: Profile of MABS respondents

Region	Number of advisers interviewed
Dublin	6
Southern	2
South East	1
West	1
North East	1
Midlands	2
Total	13

Source: FLAC Consumer Protection Study, 2012–13

I was diagnosed with depression that became a big factor; I do believe that the level of stress I experienced as a result of this particular situation was part of that.

Table 8: Complaints by sector

Sector	Number of complaints (n=23)
Insurance	5
Banking	16
Investment	2

Source: FLAC Consumer Protection Study, 2012–13

Table 9: Complaints by product

Product	Number of complaints (n=23)
Insurance	
PPI	2
Life	1
Household contents	1
Critical/serious illness	1
Banking	
Lending	9
Mortgages	4
Accounts	2
Credit card	1
Investment	2

Source: FLAC Consumer Protection Study, 2012–13

Table 10: Complaints by substance

Substance	Number of complaints (n=23)
Insurance	
Mis-selling	2
Renewal/lapse/cancellation	2
Claim handling	1
Banking	
Hire Purchase/Leasing agreements	7
Repayment terms	4
Disputed balances/transactions	2
Maladministration	1
Interest applied	1
Opening and closing accounts	1
Investment	
Mis-selling & misrepresentation	2

Source: FLAC Consumer Protection Study, 2012–13

Table 11: Outcome of the complaints in question

Outcome	Number of complaints (n =23)
Upheld in full	3
Upheld in part	7
Not upheld	6
Settlement agreed	2
Settlement proposed	1
Not entertained (6 year bar)	1
Referral	2
Complaint being considered	1

Source: FLAC Consumer Protection Study, 2012–13

5.1.1 The complaints involved

There were 23 complaints involved in the queries to FLAC reviewed for the purposes of this study. These complaints concerned a range of financial service providers, and in two cases there were two separate providers involved in the same complaint. A total of 12 financial service institutions were involved in these complaints. One institution was involved in six of the complaints, another was involved in three complaints, six were involved in two of the complaints each, and the remainder (4 providers) in one case each.

As regards the sector, product and substance of the complaints reviewed, these are categorised in the Tables below, together with the outcome of the complaint. We have endeavoured to group these complaints in line with the categories used by the Financial Services FSO's office in their annual and bi-annual reports, although in several cases it proved difficult to select a particular category as more than one could feasibly be applied to the complaint in question (issues concerning the categorisation of complaints by the FSO are discussed above in Chapter 4 of this report).

5.1.2 Summary

The review was confined to those who had contacted FLAC at some point during 2011 or 2012 in relation to consumer complaints involving the Financial Services Ombudsman; hence, it does not purport to present a representative or even reflective sample of FSO users. However, all who had been supported either directly or indirectly by FLAC in this regard consented to be interviewed for the purposes of this review. This support had first been sought at various stages of the complaints in question. Of the total of 23 cases reviewed, in eight cases FLAC was approached pre-complaint to the FSO; in six cases, we were approached during the course of the complaints process; and in nine cases, FLAC was contacted after the FSO finding.

The findings, therefore, represent a FLAC user perspective both of the FSO's

scheme itself and of the practices of the financial service providers involved which led to complaints being lodged with the FSO's office in the first instance. The

broader context for the complaints in question is also relevant, and we begin our analysis of the complaints reviewed with a description of this context.

5.2 The context for the complaints to the Financial Services FSO

The complaints described in this report did not arise within a vacuum; there was a context to them, a set of circumstances relevant to each specific complaint. These circumstances are relevant insofar as they provide the context for the complaint itself, for the consumer's engagement with the provider and subsequently the FSO, and for consumer's reactions to the eventual outcome. There are four sets of factors relevant to the complaints reviewed for this report. These are:

- Financial and economic factors affecting the household;
- Personal factors impacting on the individual, including the capacity to make a complaint in the first place;
- Institutional factors, in terms of how the financial service providers in question responded to the complaints that consumers submitted to them;
- Consumers' feelings and expectations at the time of making their complaint to the FSO.

5.2.1 Financial and economic factors

As described above, around two-thirds of consumer respondents (9) were employed, self-employed or retired, whilst nearly a third of such respondents (4) were unemployed or unable to work as a result of ill-health. Financial difficulties were common, however, across categories and in some instances, the complaint directly related to these difficulties. Three cases, for example, involved the accrual of arrears on a credit agreement for the purchase of a motor vehicle, following a change in circumstances. In one such case, arrears had arisen as a consequence of a consumer having to spend a considerable amount of money

on repairs to faults which had developed within a few months of purchase:

They kept ringing looking for their money... I was actually out of work sick and they kept ringing me looking for money, and I said look I'll fix you up when I get back to work, when I had the van I had major problems with it... a clutch went in it, a starter went in it, the spark plugs went in it, they were all a massive cost, I had to get them fixed, I'd say I spent €3,000 of my own money on it... there was problem after problem... it seemed to be one thing after another, every problem was over €1,000, so I had enough then, with them ringing all the time, I went on the half-payments then because my wages got cut in work" (Consumer, male, 42 years, employed, Hire Purchase complaint, part upheld)

Other complaints were made against the backdrop of the accrual of arrears on a mortgage; in two cases, these arrears arose as a direct result of an insurance company decision not to pay out on a related insurance policy, whilst in a further two cases, the economic downturn had resulted in a significant drop in income and thereby the accrual of arrears. One of the latter cases was a complainant with a small business which had prospered during the boom but had suffered a downturn as a result of the recession; in addition, her partner had become unemployed:

I turned this place around, now we've a huge mortgage, my husband had never been out of work, he's a contractor, a hard worker, he's never been out of work till a couple of years ago, now

They kept ringing looking for their money ... I was actually out of work sick and they kept ringing me looking for money

I work 14 hours a day paying debts, that's it, that's our life, we don't have any luxuries in our financial statement, work, work, work, work and more work.

It's just constant worry and stress trying to come up with the money... the worry of that, waiting for someone to come to your door and say we're repossessing your house.

I am sharp when it comes to there's going to be a problem, any money that we have, we put it in here, we turn it around OK, we've no other houses just this one and my business is attached to it... I work 14 hours a day paying debts, that's it, that's our life, we don't have any luxuries in our financial statement, work, work, work, work and more work. *(Consumer, female, 47 years, self-employed, MARP complaint, part upheld)*

5.2.2 Personal factors

Consumer respondents who were experiencing financial difficulties also reported on personal issues that were related in some way to the complaints they had brought against their providers. Ongoing hardship and its impact on the children, coupled with fear of losing the family home, were described by one interviewee:

If I had had the payout, I would have been more comfortable to do what I wanted to do with my children, now it's just a struggle from week to week, they can't understand what they used to get they can't get any more, particularly my oldest son because he would have got whatever he wanted but now it's just why are we poor, are we going to lose our house, because he did actually find one of the letters MABS had sent to me, it's always on his mind, I didn't want him to see it, he was just being nosey... it's just constant worry and stress trying to come up with the money... the worry of that, waiting for someone to come to your door and say we're repossessing your house. *(Consumer, female, 43 years, unemployed, insurance complaint, part upheld)*

Two respondents mentioned relationship breakdown as being a factor which had directly led to their financial difficulties and indirectly to their complaint. In one of these cases, the break-up had led to the complainant taking on a re-mortgage to which a life/serious illness policy was to be linked, and it was the subsequent

non-activation of this policy which (when a serious illness did occur) had led to the complainant facing the threat of repossession. A further respondent referred to the suicide of their partner as being the backdrop to their complaint.

It was noticeable that a majority of respondents (7) were experiencing health problems, principally through stress, which appeared to be related in many cases to the complaint in question. In one instance, this was linked to the taking of a High Court Appeal against the FSO's finding (discussed in detail below), but in most cases it was more associated with the failure to achieve a resolution to their complaint at first through the provider, and latterly by way of the Financial Services Ombudsman. A complainant, who felt particularly badly treated by her financial service provider, commented that when she made her complaint

[a]t around that time, I was diagnosed with depression that became a big factor; I do believe that the level of stress I experienced as a result of this particular situation was part of that. *(Consumer, female, 42 years, unemployed, mortgage complaint, upheld)*

In one case described by a MABS money adviser, the backdrop to a successful complaint to the Financial Services Ombudsman was that an inappropriate investment product had been mis-sold to a person who had received a considerable sum in compensation from the Residential Institutions Redress Board. The adviser in question described the person as being particularly vulnerable to such a practice, and that she would have been unable even to make a complaint without MABS help:

It's very hard particularly for redress clients, because they have this thing about people perceived to be in a place of authority and that kind of stuff. *(Money adviser, Dublin Region)*

In another case, the parental home of the complainant was the subject of the complaint, the home having been left to

I honestly don't think that most people could use these [both creditor internal processes and the FSO] themselves, I think it's way too complicated.

her as a result of a recent bereavement; thus there were particular sensitivities attached to an insurance complaint which related to it. In three cases, complainants were either retired or approaching retirement age, and clearly did not expect at that stage in life to have serious grounds for complaint against financial service providers with whom they had dealt for several years.

The financial, economic and personal context to the Financial Services Ombudsman complaints brought by consumers who have used FLAC services is key to understanding their experiences, perceptions and responses to the outcomes of the process. Other key factors are a person's capacity to pursue a complaint, the nature of the response they receive from their financial service provider when something goes wrong, and their reactions to it. It is to these aspects of the complaints that we now turn.

"Capacity" issues

Both providers' internal complaints processes and the FSO's process itself are predicated on the understanding that a consumer is able to make or bring a complaint in the first instance.²⁷⁶ What was noticeable about the consumers interviewed for this study was that they by and large fitted into three categories: firstly, those who were able to bring a complaint on their own without any assistance from anybody; secondly, those who were able to bring a complaint with the support of another party, such as MABS or a friend/partner/family member; and finally, those who were largely or entirely dependent on the support of MABS who could not have taken a case on their own.

It was evident that those taking complaints without assistance, or with minimal assistance, were often highly educated, professional people used to dealing with copious and complicated paperwork. It was also clear that such respondents believed fundamentally in the merits of their claims, to the point where it had almost become a point of principle, and they were determined and able to see it through. These were people who were also prepared to invest a great deal of time in putting

their complaint both to their provider in the initial stages and to the Financial Services Ombudsman later on. What is interesting is that these respondents recognised they had this ability, and having engaged with the complaints process in its entirety, concluded unanimously that others less capable would be unable to take a complaint without significant support. One respondent who had a complaint with an insurance provider commented:

Myself and my wife are well-educated, we're both in good health thank God, and we're both relatively young, and it took the two of us an awful lot of time and effort to even get them to admit that the policy existed, then we had to go through the whole [FSO] process, anybody who's old, less well educated, not in great health, this would just drive them into the ground. (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

Money advisers interviewed were also asked for their experiences of supporting people through the provider's complaints process and on to the FSO. Many expressed concerns about the capacity of clients to take a complaint in the absence of the support that they provided. The following typifies the views of the advisers interviewed:

I honestly don't think that most people could use these [both creditor internal processes and the FSO] themselves, I think it's way too complicated, I think the letters I've got back have been too complicated, now it's not the Financial FSO so much they're coming from, it's more the response from the other side, but writing an 11-page response to the query I raised, and an awful lot of stuff thrown in about the client's responsibility and an awful lot of stuff making it kind of very woolly, so you couldn't see the wood for the trees to try and pick out the points that we had brought up ... I think it's nearly impossible for a client to deal with it themselves.

You wouldn't have made the complaint without the support of MABS?

No, definitely not.

²⁷⁶. According to the FSO, the onus is on the complainant to put forward their complaint and their remit to remain impartial limits the support they can provide to complainants. Therefore, people perceived to have capacity issues are generally referred to Citizens Information Centres or to MABS. The FSO was unable to provide data on the number of complainants who were assisted with their complaint (by such organisations for example) and the number who were not so assisted.

No exaggeration they really, really harassed me, I never came across anyone like them, ever, and I would never deal with them again...

(Money adviser, South-East Region, mortgage complaint, settlement offered)

Complainants who had been supported by MABS were highly appreciative of the help they had received, and most concluded that they would not have even made the complaint in the first place were it not for the assistance of their money adviser in relation to it. As one respondent, who was experiencing severe health and financial problems, explained:

Well, [named money adviser] is the one with the education, she knows the legal jargon, what you're entitled to and not entitled to, I felt she thought I had a case, she did everything she could for me, but I know I probably would have fell to pieces and not be able to deal with it –

FLAC: You wouldn't have made the complaint without the support of MABS?

No, definitely not. *(Consumer, female, 48 years, unemployed, credit card complaint, settlement accepted)*

I'd try to co-operate with them and I'd get another phone call in the evening ... that made me angry and I hold a grudge about it to this day, they really stressed me out with the whole thing.

5.3 Institutional factors

Respondents, by and large, were not looking for anything out of the ordinary when they first complained to their financial services provider. When asked what they were actually seeking as a complaint resolution, replies included breathing space, more understanding, explanations that they could understand, the return of goods in accordance with their legal rights, the return of money which they felt they had paid out unjustly, that the provider absorb the loss of their own error, acceptance of realistic repayment arrangements, and restitution to put them in the position they believed they would have been in had the provider not been in error as they saw it. Rarely if ever was compensation sought at this stage.

There was considerable dissatisfaction among respondents with the responses to their complaints from the financial service providers in question, and these responses were to be largely expected, given that the consumer respondents to this study had all taken their complaints to the Financial Services Ombudsman. What was striking, however, was the *strength of feeling* evinced in replies to questions about the provider's response to the individual complaints concerned, and in the adjectives that people ascribed to the actions and inactions of these providers. Thus, by the time the complaint reached the FSO, this group of

consumers had, by and large, become both angry and disillusioned with the financial service providers concerned.

Before describing these responses in detail, it is useful to locate these within a broader context of how financial service providers appear to be dealing with complaints in general. In a series of annual and bi-annual reports and in media briefings, the FSO makes reference to particular issues and practices that have come to the attention of his office and are cause for concern. In a press briefing to accompany the launch of its bi-annual report for 2012, the FSO's office expressed concern about a deterioration in standards of complaint handling in general:

The level of complaints received and the outcome of findings are of serious concern. Trends indicate deterioration in complaint handling by Financial Institutions and increased dissatisfaction by consumers across a number of areas. The FSO always encourages Institutions to engage with Consumers to resolve complaints as soon as possible. While 25% of complaints were settled by Institutions, the increase in complaints received and complaints upheld by the FSO shows that Institutions are still not doing enough to engage with consumers at an earlier stage. The alleged mis-selling of PPI products has resulted in a doubling of PPI complaints in 6 months

and trends suggest this increase will continue. Other recent, well-publicised problems in certain Financial Institutions will test Institutions' willingness to address failings at an early stage and show whether or not Institutions are genuinely committed to resolving complaints before referral to the FSO.²⁷⁷

Similar concerns were apparent in the responses of money advisers interviewed for this study when questioned about their experiences in general of responses by financial service providers to clients' complaints and problems. The overall conclusion that may be drawn from these responses is that there can be significant variations in practices between categories of provider, within categories of provider, and even within individual providers themselves. The following are just some examples of inappropriate and inadequate financial service practices that we identified:

- Harassment of consumers;
- Inadequate complaints handling processes;
- Delays and drawing out complaints;
- Inappropriate and unhelpful communications;
- Unwillingness to seek appropriate solutions.

5.3.1 Harassment of consumers

Although not the substance of their complaint, nor referred to in the eventual FSO finding in the cases in question, in two cases, respondents made reference to being harassed by their provider for debt repayment in relation to Hire Purchase agreements which had gone into arrears. In one of these cases the complainant, who was attempting to return the goods in accordance with her statutory right, was subjected to considerable pressure by the provider in question:

To be honest I still to this day I'm annoyed the way [provider in question] dealt with it, I really am, if you rang me at the time of the way they were dealing with it, I'd be able to explain it more, they just, no exaggeration they

really, really harassed me, I never came across anyone like them, ever, and I would never deal with them again... any offer I made they refused and completely ignored my letters, they were just so ignorant, phone calls twice a day and a different person, and I would answer them and I would go through the same process with them every time they rang and explain everything, I'd try to co-operate with them and I'd get another phone call in the evening ... that made me angry and I hold a grudge about it to this day, they really stressed me out with the whole thing. (Consumer, female, 28 years, unemployed, Hire Purchase complaint, not upheld).

5.3.2 Inadequate complaints handling processes

One respondent described the failure by a major institution to respond substantively to a complaint despite numerous requests; his sense was that there was *no proper internal review* of his complaint:

I wrote to the bank, got a formatted letter back 'sorry about that, we sympathise', and I appealed it and the bank didn't respond to four letters and the FSO awarded me 750 euro on that score alone, that's the plus side from my point of view, because the bank didn't respond to four letters *at all* [emphasises 'at all'].

FLAC: What were you looking for from your financial service provider?

Several things, I was looking for an appeal that would be put to a higher level within the bank, every corporation/public body should have an appeal system and does I think, and the bank should have had say if an Assistant Manager wrote to me, a Manager should review the case, that's what I was looking for. (Consumer, male, 68 years, retired, banking complaint, part upheld)

Being passed around from one company employee to another was a common

I was looking for an appeal that would be put to a higher level within the bank, every corporation/public body should have an appeal system and does I think, and the bank should have had say if an Assistant Manager wrote to me, a Manager should review the case, that's what I was looking for.

²⁷⁷ FSO Bi-Annual Review, Press Release, issued 13 September 2012.

Some providers are better than others but there are a couple of notable providers who are appalling really in the way they handle complaints, delays, saying they didn't get letters is a big one you know, generally putting people off rather than trying to help them in their situation.

experience for respondents. Not being able to speak to the appropriate representative was a particular problem here, and this could lead to considerable frustration for the consumer:

FLAC: How did your provider deal with your complaint?

Their response overall was atrocious, that's the very word I would use, I was being put from Billy to Jack, they were telling me then I had to make a complaint to such a person, they got that wrong, it was only when we investigated it further that we got to the right person, the head of customer services,

FLAC: So you feel you were misdirected even within the provider?

I was yeah, even to this day I don't believe that such a person, I can't think of her name now off the top of my head,... there was a certain person in the provider that you had to make the initial complaint to, I can't think of her name but to be honest I don't think such a person exists because I never got a response back from her or her office (*Consumer, male, 34 years, employed, leasing complaint, not upheld*)

Another respondent described counting the days to when the company were obliged to respond, in this case following a complaint to the FSO:

They had 25 days to get back to us and on the 26th day we wrote to them and said you haven't got back, you should have got back to us, what's the story, we wrote to them again on the 31st day, and we received a reply from them on the 35th business day, they were two weeks late getting back to us (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

5.3.3 Delays and drawing out complaints

The time element in taking the complaint through the provider's internal complaints process was an issue raised by both con-

sumer and money adviser respondents. Several months had elapsed in many cases between the making of the initial complaint and final referral to the Financial Services Ombudsman. The responses from money advisers suggest that some providers are slower than others, and that delays can and do deter people from following through on complaints, particularly when a lengthy FSO process (discussed later) is combined with a MARP appeal:

Some providers are better than others but there are a couple of notable providers who are appalling really in the way they handle complaints, delays, saying they didn't get letters is a big one you know, generally putting people off rather than trying to help them in their situation. (Money adviser, Southern Region)

It's very protracted and more so because everybody's losing staff across the board so the FSO at one point had a 3-month waiting list I think that's gone up now, but you wait 12 weeks to get to them, the point where they can send a letter, then it goes back to the appeals board and in the lender they have a backlog, so they delay and they respond when they can and it goes back then to the MABS adviser or to the client so they have to fill in whatever, it's just very, very long and my sense is that the clients are getting bored in the meantime and they just want this headache gone. (Money adviser, Dublin Region)

Getting through to the appropriate person or section within the provider was another issue both for consumers and their advocates. Although MABS had proved to be a vital support for many respondents, the consensus among the money advisers interviewed was that there was no appreciable difference in responses to MABS in general compared with responses to clients prior to MABS becoming involved, as procedures had by and large become more "formalised" across the board. However, there was also a consensus that complaints would be taken more seriously and better expedited by the provider where a MABS

adviser quoted relevant legislation, advocated strongly on the basis of a client's circumstances, had developed a working relationship with a particular individual in the provider in question, or knew from experience who specifically to contact, a point made by one money adviser:

Very often though I would go straight in to the complaints department rather than to credit control, a lot of people have started putting the letter in to 'credit control', so we would be going in to the right team, there's no delay really on the acknowledgement whereas if the complaint goes in to credit control or even a branch department, they have to then pass it up and it delays the process. (*Money adviser, Dublin Region*).

However, in one case involving alleged mis-selling of payment protection insurance, the consumer's contention is that the provider's response went beyond the 'inadequate', and veered into the territory of deliberate obstruction:

I didn't know at the time that there's a 6-year limit, if you have a complaint against a financial institution you've got 6 years and the 6 years was actually up on the 16th August, that's when I got the last letter from [provider] saying they were satisfied that the product was sold correctly and that there was nothing they could do for me

FLAC: So that was 6 years almost to the day, was it?

It was 6 years to the day, the card was activated on the 16th August 2006, and their final letter came the 16th August 2012... they were incredibly polite, incredibly distant, they never put a foot wrong, it's always 'have a nice day' and 'we're doing our best' but there's absolutely no personal touch, you can't get anybody's e-mail, you can't get a direct telephone number, anybody who signed the letters, if I rang up to try and get hold of them, I couldn't get hold of them, it was all done by e-mail, there's a facility on your online account to e-mail them over various things

and they will e-mail you back... they knew, they knew damn well that they were running down the clock, I think I asked for the PPI to be removed and the money refunded, sometime in June, the 26th of June [this year], and it took them to the 16th August, when they knew the clock had been run down and I couldn't do anything, that's when they said oh we're sorry about that. (*Consumer, female, 43 years, on home duties, credit card/PPI complaint, FSO refused to investigate complaint*)

The difference that a helpful provider can make is illustrated in one of the cases reviewed; a representative of a local financial services provider, concerned about a consumer complainant who was in a distressed state in their offices at that particular time, made a call to the local MABS office – this resulted in the complainant receiving MABS' support not just with the complaint itself, but with related financial difficulties.

5.3.4 Inappropriate and unhelpful communications

The *tone and content of communications* with borrowers was a related issue raised by both consumer and money adviser respondents. The advisers interviewed were particularly concerned about clients with literacy difficulties, but even consumers who were highly educated often found it difficult to follow documentation sent to them by their provider in relation to their complaint:

Now I'm telling you, I don't know what degree you'd want, as I say I'm fairly literate, I'm very well read, I'm you know third level, and this one was actually, it would bamboozle anybody, the language, financial, legal, technical was just, and I could say argumentative because like that they said there were gaps in me getting back... and they queried all sorts of things, it was really argumentative, I forget how many arguments were in it but it was *four double pages* [with emphasis], and the

They queried all sorts of things, it was really argumentative, I forget how many arguments were in it but it was four double pages, and the language very obtuse...

I told this guy what happened and this guy just shook his head and says 'there's the door there if you think I'm going to believe that'.

language very obtuse... and as I say, so financially detailed and nit-picking and argumentative that I really, I was beyond words as to how I could reply to it, I felt it totally unjust and I was bamboozled, that's the only word I can use, totally. (Consumer, female, 54 years, employed, mortgage complaint, settlement proposed by provider)

An *implication that the consumer was to blame or at fault in some way* for their complaint arising in the first place was a thread running through several of the interviews. Examples of this reported by respondents were providers denying receipt of a claim (thereby implying it had not been submitted as claimed), denying their representative had said what a consumer alleged that s/he had been told, and maintaining that they had sent correspondence which the consumer denied receiving. In one case a consumer, who alleged a company representative had misadvised him, received the following response when he visited the company's offices in person:

I think I went into the Customer Services... it was one of his (the representative's) colleagues that came down to see me, I told this guy what happened and this guy just shook his head and says 'there's the door there if you think I'm going to believe that'. (Consumer, male, 41 years, unable to work through ill-health, insurance complaint, part upheld)

There were also instances cited by both consumers and money advisers, where incorrect guidance had been given to them regarding the making of complaints to the FSO, which had resulted in the complaints process being further elongated. An example here is a consumer who was told to approach the Financial Services Ombudsman if he was unhappy with the provider's response:

FLAC: Now the incident happened in October 2009 and you didn't go to the FSO until January 2010, is that right?

Yes and I'll tell you why, the bank corresponded with me and eventually said you know you can write to the Financial Ombudsman, I wrote to the Financial Ombudsman in January 2010 and they said no, you need to go through a process with the bank before you can do that, so I had to fill out some details for them, that caused considerable delay

FLAC: So the bank directed you to the FSO and the FSO directed you back to the bank?

Yes, that's the delay. (Consumer, male, 68 years, retired, banking complaint, part upheld)

5.3.5 Unwillingness to seek appropriate solutions

An apparent unwillingness on the part of the provider to seek solutions to an accepted problem, and to appreciate the circumstances a person had found themselves in, was at the heart of two complaints. One of these was a Mortgage Arrears Resolution Process (MARP) case, where the provider had *not engaged* with the borrower at all, and had (as the FSO subsequently found) failed to comply with the provisions of the Code of Conduct on Mortgage Arrears (CCMA):

I asked them would they freeze the interest and let us pay repayment only to clear the debt, I asked them would they write off some of it, I asked them would they give us a moratorium, would they do deferred interest, and I explained on an A4 sheet how bad things were here and put it together with all the information that we were living on... so I got a letter back saying unsustainable, sell or surrender, now that's not good enough

FLAC: Was there any personal contact between the lender and yourself?

No, I did all the contacts, I chased up... and every time I had to repeat myself, every week I used to pay as much as I could every week, and they'd asked me the same questions and I'd say 'well

now look at your notes', I don't ask anyone to do my job yeah, but I nearly had to do their job. (Consumer, female, 47 years, self-employed, mortgage complaint, part upheld).

The further implication here, namely that *the provider's internal process for dealing with such complaints was not all that it should be* (as discussed above), was echoed in another case and described in detail by the money adviser dealing with it on a client's behalf. A chronology of developments in the case in question (again a MARP case), submitted confidentially to FLAC by the money adviser in question for the purposes of this review, suggests that the lender in this instance had not the processes in place to respond appropriately to complaints under the Code of Conduct on Mortgage Arrears:

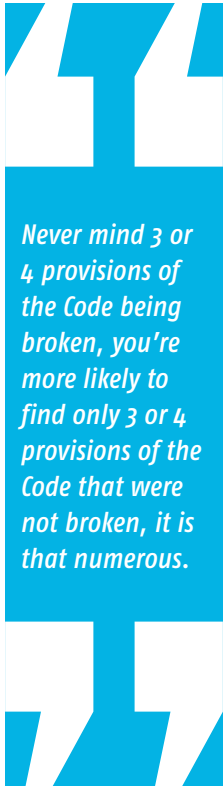
The one thing about this case is the amount of correspondence that was continually going in to them, to continually say guys you are in the wrong here, it's the client that is doing all the co-operation here, it was almost like the lender was going out of its way to make sure the client did not do the right thing... I went through the various provisions and how the bank breached or complied with them in my opinion and FLAC's, never mind 3 or 4 provisions of the Code being broken, you're more likely to find only 3 or 4 provisions of the Code that were not broken, it is that numerous. (Money adviser, North East Region)

In another Mortgage Arrears Resolution Process case, a money adviser reported on what he saw as an inadequate response by a lender who, in the adviser's opinion, had incorporated figures into the associated Standard Financial Statement (SFS) that were unrealistic; thus, in his view, the repayment arrangement proposed by the lender would in all likelihood prove unaffordable and therefore unsustainable:

I dealt with an individual here this morning who had had his MARP

dealt with in about 20 minutes over the phone with the bank... this was a couple of weeks ago and he's been sitting looking at it and he brought it into me here this morning, I went through it again with him and half the expenditure had been left out, I was amazed at the procedure, it consisted of ringing him up, 'we want you to go into the MARP, I'll do this form with you over the phone now', so he supplies answers to a number of questions he was asked and then they send out this form to him, and say 'sign here here and here', so I went through it with him, I re-did it and said to him 'there's about 500 euros of a difference in expenditure there which indicates that far from being able to pay them 500 per month, your expenditure which is not extravagant would indicate that you're not in a position to pay them anything, the problem is if you go and sign that now and send it back to them, you're telling them that you agree these figures are correct, that you can pay this and that puts you in a very difficult situation to put it mildly'. (Money adviser, Midlands Region).

In another case involving completion of a SFS, the money adviser in question referred to the omission by the lender of two essential items of expenditure from the SFS that were on the MABS financial statement that had been submitted to the provider on the client's behalf, namely mobile phone and TV cable payments. The reason given by a company representative to the adviser was that "the underwriters may query this". Examples such as these suggest, at the very least, inconsistencies in terms of compliance with the requirements of the Code of Conduct on Mortgage Arrears.



Never mind 3 or 4 provisions of the Code being broken, you're more likely to find only 3 or 4 provisions of the Code that were not broken, it is that numerous.

We were expecting compensation for them lying and we did expect that there would be some reprimand for them.

5.4 Failure of financial service regulation

What is noticeable from the above narratives is the apparent failure of our consumer protection authorities, and in particular the Central Bank, to adequately protect this (albeit small) sample of complainants from institutional practices which appeared at various times to be inappropriate, unhelpful, confrontational and attritional. We strongly suspect that the institutional practices highlighted are unlikely to be confined to the group of consumers interviewed for our study. The experiences of consumers (and their advocates) interviewed for this study suggest that certain sections of the industry are largely ignoring – both in spirit and in practice – provisions designed for the protection of consumers.

Many of the practices referred to above appear to be contrary to the provisions of the Consumer Protection Code and/or the Code of Conduct on Mortgage Arrears. However, as discussed earlier, such Codes confer responsibilities but not rights; in other words, the Central Bank can use its Administrative Sanctions Procedure against non-complying providers, but the consumer wanting redress has to use the Financial Services Ombudsman's process or the courts if s/he has the capacity to do so. We got the strong sense from several interviewees that some institutions, and some representatives within these institutions, appeared to be operating without fear of reproach from the authorities about the way that they dealt with the consumer complaints in question.

5.5 Consumer anger and disillusionment

As might be expected, given the various scenarios and examples cited above, almost all consumer respondents interviewed were disillusioned with, and sometimes angry at, their providers by the time they complained to the Financial Services Ombudsman. In some cases, these feelings contributed to expectations that the FSO would not just rule in their favour, but that he would admonish the institution in question for its behaviour or practice.

I felt it was unfair and I just felt that somewhere in my awareness was the fact that the Financial Ombudsperson could take this company to task, in some way, out of fairness, maybe that was too much I don't know. (Consumer, female, 54 years, mortgage complaint, settlement proposed by provider)

We were expecting compensation for them lying and we did expect that there would be some reprimand for them, that you can't on the one hand have an industry advertising how if people tell lies they are taking money

out of your pocket, and then go and lie themselves, this went against the whole grain, the essence of what insurance is about. (Consumer, male, 48 years, self-employed, insurance complaint, part upheld)

I wanted my money back, and I wanted somebody to give them a slap on the wrist. (Consumer, female, 43 years, on home duties, credit card/PPI complaint, FSO refused to investigate complaint).

In most cases, however, respondents went to the Financial Services Ombudsman for the primary purpose of restitution – they wanted it to put them back in the position they would have been had it not been for what they saw as the mistake or malpractice of their provider. In a minority of cases, compensation was sought for associated loss of earnings, loss on investment and stress or distress. In the next section, we examine their experiences of the FSO process, together with those of the money advisers interviewed, and explore how in the majority of cases, this process

served to compound rather than resolve the problem at issue.

5.6 Engagement with the FSO process

As described earlier, this synthesis is based on 23 complaints which involved the Financial Services Ombudsman in some way. In terms of exploring the complaints process in detail from a user perspective, we began by seeking the experiences of the consumers and money advisers interviewed in relation to the making of the initial complaint. The findings of this aspect of our enquiry are now presented as follows: the method by which people first heard of the process; what they understood the FSO's role to be and on what basis; what they expected from the FSO and why; the extent of use of, and reliance on, information and materials produced by the FSO about the scheme; how people found the process of actually making the complaint; the assistance (if any) consumers received in so doing; and finally, what they would or would not have done without such assistance.

5.6.1 Finding out about the FSO

The overwhelming majority of respondents consulted for this study first heard about the existence of the Financial Services Ombudsman through their contacts with MABS. In a minority of cases, respondents had become aware of the FSO through correspondence from their provider, through a friend or relative having discussed their problem with them, through the media and through their professional experience. It was noticeable that those taking complaints themselves or with minimal support, tended to know of the FSO's existence independently of MABS, whereas those who depended more on MABS services had by and large only heard that there was such an FSO through MABS. This suggests that there may be many consumers who might remain unaware of the FSO unless they come into contact with

MABS. As a respondent who had assisted a friend to make a complaint commented:

I can draw a picture of my parents, if my parents who are farmers from the West of Ireland had to do this, they'd never proceed with it... my parents would fall at the first step, they don't know how to deal with the process, the paperwork, so the system is screwed from the outset and they're beaten, they probably don't even know the office exists.

The majority of respondents also clearly depended on MABS to advise them of what the FSO's office was all about. In responses to a question about how useful people had found the various materials produced by the FSO, principally the website, very few appeared to have looked at it in any detail. As an aside, in an examination of the website's contents initially undertaken for the purposes of this review (in November 2012), a number of errors were detected on the site, including references to useful organisations which had long ceased to exist under the names specified on the website;²⁷⁸ in addition, there was a distinctly formal tone to the text – these issues have now largely been addressed, the website has been substantially revised, and the material is presented in a much more consumer-friendly fashion. There is, however, a more general issue here. According to some of the money advisers interviewed, although information about a range of consumer rights (including the right to take a complaint to the FSO) is available, it is still not getting through to many people:

The other thing I feel strongly about is that maybe there's not enough information out there on life policies, on

²⁷⁸ For example, there were references to the "Department of Social and Family Affairs" which had been renamed the Department of Social Protection in 2010, and to "Comhairle", which had been renamed as the Citizens Information Board in 2007. The website is now much more user friendly and contains reference to the Consumer Protection Code, which rectifies an omission pointed out by FLAC in our meeting with senior staff in February 2013. The reference to Comhairle, however, remained as at 27/11/2014.

I'd ask them (the Consumer Protection Authorities) to take back their publications and do them again definitely, the ones we would have used (for vulnerable clients) were so easy to understand and now you've to download stuff from the Internet which isn't always practical...

mortgage protection... people are not tuned in to what they're signing for. (*Money adviser, Midlands Region*)

I'd ask them (the Consumer Protection Authorities) to take back their publications and do them again definitely, the ones we would have used (for vulnerable clients) were so easy to understand and now you've to download stuff from the Internet which isn't always practical... they haven't got the booklets now, they're gone... obviously it's cost cutting, but I don't think that's a good saving to be honest, because they were so literacy friendly and easy to understand... it would be nice if the information was still available to Joe Public without a computer... even you would have seen people going into Dame St and even school-kids were brought in, it's a form of education that seems to have gone. (*Money adviser, Dublin Region*)

5.6.2 Perceptions and expectations of the FSO

People's perceptions of the FSO's role also varied, unsurprisingly perhaps given that many knew so little about the office in general before filing their complaint with it; in most cases, people had given little thought at all to this. There was a strong sense, however, that where people had formed perceptions, these were with reference to the meaning they associated with the term 'Financial Services Ombudsman'. The following quotes are examples of these different perceptions; the first illustrates the perception that the FSO would be on their side, as a sort of consumer champion,²⁷⁹ whilst the second indicates a view that the FSO has more of an independent function:

FLAC: Had you heard of the Ombudsman?

I did know he was working for me but I didn't get speaking to him.

FLAC: Do you see his role as working for you?

Well that's it, I do yeah, because I know normally if you go to an Ombudsman you're complaining about your situation, you're asking for a bit of consideration, equality and I would have thought that that's the same here. (*Consumer, female, 48 years, employment scheme, credit card complaint, settled*)

And:

I did feel though, OK, we're on to the Ombudsman now, now it'll get sorted, because it's independent and it's not just the bank trying to cover up their mistakes any more

FLAC: So you had great confidence in the Ombudsman?

I did, yes. (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*)

Although some respondents reported having no expectations at all from the process, others were much more definite about what they wanted the FSO to do, and what they thought would be the outcome in their particular case. In no particular order, the types of expectations that people had when they first approached the FSO were as follows:

- Hold their provider to account;
- Deal with the core issue(s);
- Thoroughly investigate their complaint (which was a common response);
- Take all the facts into account;
- Decide who is "right" and who is "wrong";
- Utter fairness, both in terms of process and treatment;
- That he would probably rule 50-50, 75-25 (i.e. that their complaint would be partly but nonetheless substantially upheld);
- Protect the consumer;
- Look at the matter from the perspective of a reasonable consumer in their given circumstances;
- A personal response;
- Understand where the consumer was coming from;
- Make sure that the small person "doesn't get screwed" i.e. to level an

²⁷⁹ Confusion between the FSO's role and that of the Financial Regulator is also common, according to Senior Staff of the Bureau (Interview, February 2013).

imbalanced playing field and to be “for the people”;

- Get on to the institution and tell them to make restitution;
- Understand the consumer perspective, be understanding and sympathetic.

Taken together, the responses here indicate that people firstly expected the Financial Services Ombudsman to relate to the consumer and to their circumstances, and to recognise that the consumer is at a considerable disadvantage when dealing with a big institution. Secondly, they expected the FSO to carry out an in-depth investigation into the core issue(s) of their complaint, taking all relevant factors into account. Thirdly, that the FSO would operate and rule fairly on the basis of the evidence gathered, and that this ruling would be in their favour, at least to a considerable extent. Fourthly, that the FSO would reprimand the institution in some way for their practice and in so doing would ensure that consumers in general are protected adequately. The expectation that they would ‘win’ and that the provider would be ‘punished’ may help to explain the levels of dissatisfaction among many respondents when neither of these things resulted.

There was widespread acceptance that complaints might take a bit of time to be investigated, as illustrated by the perception of one respondent:

They have an awful lot of complaints, particularly since the Celtic Tiger has gone, they have thousands of complaints going in a month now, which is obviously going to be a slow process. (Consumer, male, 41 years, unable to work through ill-health, insurance complaint, part upheld)

One respondent had canvassed a local contact in the financial service sector, and had a particular perception of the Financial Services Ombudsman as a consequence of the reply from this person when she advised him that she was taking a complaint to the FSO:

‘So that’s great’ he said ‘but don’t hold your breath for the FSO’, number one he said, ‘he’s chocka-block, and number two, they normally go on the side of the institution because people sign for what they get’ and da-di-da-di-da, so that’s what he said, and my answer to that is ‘grand, whatever’. (Consumer, female, 47 years, self-employed, mortgage complaint, part upheld)

Money advisers had generally been positive in encouraging people to avail of the services of the FSO’s office. There was a unanimous view that an out-of-court model, free to the consumer, was (and is) a model that they would advocate for resolving consumer complaints against financial services providers. Typical of the responses here was the following:

FLAC: What about the idea of ADR, the model?

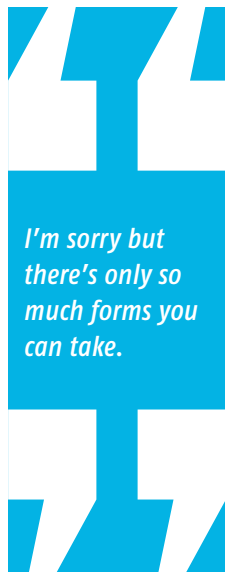
Yes, the out of court approach is a good way to go (Money adviser, Southern Region).

5.6.3 Making the complaint

In six instances, respondents had encountered barriers in making their complaint to the FSO. In two cases, consumers were advised that the 6-year rule (discussed previously in Chapter 3) prevented the Financial Services Ombudsman from looking into their cases; in another two cases (both discussed below), complainants were unhelpfully referred on to other agencies; whilst in a further two cases, complainants were referred back to their provider for a final response letter. One respondent was clearly both confused and frustrated by the further delay that this involved:

What happened was all the contact was basically once I sent off everything to the FSO, I was missing one thing and they wrote back to me and asked for a final submission from my provider, I thought that that was already done but I didn’t really know what they meant by a final submission, it’s not self-ex-

I know normally if you go to an Ombudsman you’re complaining about your situation, you’re asking for a bit of consideration, equality and I would have thought that that’s the same here.



planatory, the words and everything that they use, and the phrases that they use, not everyone would be up to speed with the way they speak or their solicitors speak –

FLAC: Are you talking about the FSO there or the provider?

The FSO.

FLAC: So you had to go back to your provider?

I think in a telephone conversation I had asked for a final submission, I can't remember what that was, I think the final submission was basically a letter from the provider saying that they weren't doing anything more,

FLAC: So it was a final response letter?

Yeah, exactly, a final response letter, I had to get that and I had to furnish it to the FSO and that. (*Consumer, male, 34 years, employed, leasing complaint, not upheld but remitted to the FSO following appeal*)

As regards the Financial Services Ombudsman complaint form, those who had filled this in themselves generally found it to be relatively straightforward, although again it should be borne in mind that these were mainly people used to dealing with documentation in day to day life. MABS money advisers interviewed also had little difficulty with the form for the same reason. There were, however, some issues raised about the form itself in the light of both experience and hindsight. One issue concerned the generality of the form, given that each complaint is unique:

It was very loose, so loose that you didn't really think, you just put down the first thing that came into your head as to what the complaint was, there would have been an awful lot more pressure filling it in if I knew then what I know now, it was 'fill in the detail and send it to us', they were looking for the nature of the complaint, there was no level of detail when I complained, that came later. (*Consumer, male, 56 years, employed, investment complaint, part upheld*).

In this regard, it was notable that several complainants and money advisers chose to attach an explanatory letter to the form, detailing their complaint; as one respondent put it, 'there wasn't enough room on the form, there's a box'. One respondent felt that the facility to file a complaint online would be useful.²⁸⁰ Another raised an issue that may well be relevant to other complainants, namely that of reluctance to go through yet more paperwork having already had the experience of going through a provider's internal complaints process and all the documentation entailed there:

The form was fine, it asks you know... same old forms, same old [expletive] to write down, I'm sorry but there's only so much forms you can take. (*Consumer, female, 47 years, self-employed, mortgage complaint, part upheld*)

There were few comments in relation to the information contained on the FSO's website, and there was a strong sense that this website was not being relied upon by the respondents to our study to any great extent, other than for the purpose of downloading the complaints form. In one case which resulted in a High Court appeal, the respondent in question found the published cases available through the website to be a useful resource. A money adviser, who had been involved in a number of complaints to the FSO, described how the information around kick-starting a complaint could be more specific:

From time to time I would download and say this is how you take a complaint, this is what you need, even how to try and get the final response letter, who do you go to, who is it within an organisation, it is very time consuming, it is a kind of a long process, it's not a case that you write to the person, your contact in that organisation, and look for the final response, it has to be a specified person like this [named person] that I had to write to looking for the final response, sure we didn't know who he was, we had no way of finding out his name except that the FSO must

280. This was an issue that arose during our meeting with Senior Staff of the Bureau in February 2013; an online complaints facility is now available.

have looked it up and said ‘well he’s the nominated person with us’. (*Money adviser, Southern Region*).

Many respondents had been assisted by their money advisers in making their complaint. As mentioned earlier, some respondents would not have filed their complaint at all with the FSO had they not received such assistance. Lack of awareness of the scheme and incapacity to make a complaint (following a family event) were two reasons given by respondents for this:

FLAC: How did you first hear of the Ombudsman?

That was through MABS again, I didn’t really deal with the FSO much, I sent a letter ... but he went against my case.

FLAC: Would you have known the Ombudsman was there without going to MABS?

No, I wouldn’t have known anything to be honest (*Consumer, female, 28 years, unemployed, Hire Purchase complaint, not upheld*)

and

FLAC: Would you have gone to the FSO without MABS?

No, not at that stage, I wasn’t fit to do nothing, well for the first year anyway, I wouldn’t have done anything without MABS. (*Consumer, female, 43 years, unemployed, insurance complaint, part upheld*)

Those who had received help from MABS were asked for their views on what would have happened had they been left to their own devices. One respondent with a Hire Purchase agreement for a motor vehicle (whose claim was subsequently part upheld by the Financial Services Ombudsman), felt he would have been the subject of legal proceedings and would have surrendered the vehicle in question.

Another respondent had actually referred her complaint to the Financial Services Ombudsman before she approached MABS. In this case, a calculation error had been made by the provider some 18

years ago, and the FSO’s office had refused to investigate the complaint as it considered that more than six years had elapsed since the grounds for complaint arose. With MABS’ help, together with technical legal support from FLAC, this respondent was able to argue successfully that the complaint related to how the provider was dealing with the underpayment at the time of the complaint, an argument that the FSO subsequently accepted. What is notable here is that the client in question would have given up without MABS’ (and FLAC’s) support in challenging the initial ruling of the FSO and found this challenge in itself to be an onerous process:

Can I go back then to when we went to the Ombudsman, when I went to see MABS, and I’m looking through the figures, that they thought there was another angle, and the other angle was to ask the Ombudsman to look at not the original error, because they couldn’t go back and look at that, but to look at the manner in which the mortgage company were now treating me, to look at that rather than the original error,

FLAC: So they (the FSO) eventually agreed to take the case on?

Eventually, but not initially, there was one letter back and they needed lots of information and there were a lot of questions, and they eventually said, it was on the third letter, that they eventually said that they would look into it and like you’ve no idea but between photocopying and going down through all this the arguments and everything, they eventually agreed to look at that (*Consumer, female, 54 years, employed, mortgage complaint, settlement proposed by provider*)

In two further cases, reported by money advisers, consumers who made formal complaints to the Financial Services Ombudsman had apparently been referred inappropriately by the FSO to another agency; in one case this was to the National Consumer Agency and in another case it was to MABS itself. In the first case, a client who had gone through a failed busi-



ness, and had an associated range of debts, had an agreement with the mortgage provider under the MARP. This client was having difficulty in getting the money to her mortgage provider, so she had opened up an internet banking facility for this purpose; however, the bank in question withdrew this facility upon discovery of an old account with an outstanding balance. The money adviser directed her to complain to the FSO about withdrawal of a financial service upon which she had come to depend for her mortgage payment to protect the family home.

She came back to me recently and she said 'I did contact the FSO as you suggested, and they referred me to the National Consumer Agency and asked me to make a complaint regarding the situation', then I was even doubting myself, I went onto the National Consumer Agency website, they're just referring her back to the FSO, and I felt like she has an awful lot of debt, she is coping with it very well, she's sending out financial statements to her creditors, the most recent committal order against her husband was struck out, they have had a few instalment orders made against them, but she's dealing very well so she could do without somebody sending her somewhere just for the sake of it... and I'm kind of thinking 'God, is there any point in me referring another client, are they going to doubt me and what I know about it if I refer them (the client) somewhere only to be told oh no, you need to go

somewhere else'. (*Money adviser, Southern Region*)

The same adviser had also received a recent referral from the FSO, in this case a man who had been refused an extension to his forbearance (interest only) arrangement with his lender following an appeal under the MARP. His lender had correctly referred him to the FSO if he wanted to complain about their decision. The complainant was a literate, numerate person who became angry at what he saw as being passed from pillar to post, to the extent that he had subsequently written to his lender complaining that it had mis-referred him to the FSO when it should have referred him to MABS:

So I met this man and he was very frustrated at being referred into the [MABS] service as he wasn't sure what we were going to do for him because he was quite able, quite capable... he was very good with figures, he was able to produce his current expenses, previous expenses and projected expenses, he just kind of said 'I don't know what you're going to do for me', and I said 'well I'm not sure either'... he was really annoyed... he then wrote back to the lender a stinker, referring to their letter where they'd included the address of the FSO where he could refer the matter for adjudication... so he is totally frustrated, he said, 'you know, they're sending me round in circles'. (*Money adviser, Southern Region*).

5.7 The process itself

The consumer and money adviser respondents interviewed had, by and large, found the Financial Services Ombudsman complaints process to be demanding, impersonal, legalistic and convoluted from their perspective. There were relatively few positives at all cited by consumer respondents, even though a considerable proportion

had had their complaints at least partially upheld; some money advisers interviewed were more positive about the process, although these tended to be those who had been involved in a successful outcome at some point; the majority of advisers had not, and it has to be said, they were generally negative in their comments and

in their views based on their experiences. Given that these were all cases where FLAC's assistance had been sought, the findings suggest that the process may contain flaws which only really become apparent when it is applied to complaints that have some degree of complexity to them.

5.7.1 Formality

The formal, business-like nature of the complaints process itself was commented upon by almost all respondents, both consumers and money advisers. Some, used to dealing with matters by correspondence in their professional lives, were comfortable with this type of process and saw the merits in it, although there was recognition that this also had its drawbacks in terms of the lack of a personal touch:

FLAC: How did you find the process itself?

Cold, it was cold, I can understand why it is, they send out the relevant forms or whatever, I can't really comment on what would happen if someone rang up and said 'what do I do now', what kind of response they would get.

FLAC: So you found it cold you said?

Yes, but I can understand why, they can't be seen to be favouring one over the other, it's kind of similar to the Labour Court, they keep both parties informed, nothing is withheld from either side, everybody's given ample opportunity, even after the initial complaint and the responses, they're allowed to respond, if they feel that it is relevant, they will call for an oral hearing, if they feel it is warranted... I have previous experience, background, I'm better equipped than most, I didn't find it particularly onerous. (*Money adviser, Dublin Region*)

and

FLAC: Did you have any phone contact at all with the FSO's office?

No, it was via e-mail, predominantly e-mail, I preferred to have it all in writing anyhow so it would be all doc-

umented, there would be no arguments. (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

In these examples, the respondents in question were clearly comfortable with the method of engaging with a process which involved exchanging correspondence over considerable periods of time, generally months (as discussed below). However, embedded in the implementation of such a paperwork-driven process is the implication that both sides to the complaint are equally at home in using such a process – in other words, it is based on the idea of parity of capability, knowledge and resources between the parties involved.

Several respondents reported difficulties with this type of process from the perspective of the user. These difficulties relate primarily to the volume of paperwork generated by such a process and its nature, the numbers of (financial service) staff involved in drafting responses to consumers, the time and resource implications involved for both consumers and money advisers, and the impact of all the above on complainants. We now consider each of these issues in turn.

5.7.2 The volume and nature of the paperwork involved

The sheer amount of paperwork generated by the FSO process was a frequent theme of both consumer and money adviser interviews. One money adviser reflecting on the process of a MARP case which ended (partly upheld) to a client's satisfaction, concluded that it would be so off-putting for most people acting alone that they would probably not see it through to the end:

FLAC: Were there any potential barriers that you noticed during the process?

To be honest, because it's us and because it's MABS, we're not shocked by the process...it was a very long drawn out, elongated process, now it was as long as it needed to be to be fair, the bank came back with stuff, I came back

I can't imagine a client doing this, I can't imagine anybody sitting at home getting all this correspondence, being absolutely bombarded with it.

with stuff, they (the FSO) sent my stuff to the bank and the bank had to have so many days to respond to the list, then they'd [the bank] go back to them [the FSO], and then they'd [the FSO] come back to me saying this is the response from the bank, and what became kind of tiring towards the end was the last time it came back from the bank, I just didn't revert with anything else, we just said 'ach, there is nothing more we can say, this ping pong is going on'...in the end I said 'for God's sake really', there was probably ten days to respond to the last letter but I didn't.

FLAC: So how long did it take in total to go through the FSO process?

You could say about nine months... I can't imagine a client doing this, I can't imagine anybody sitting at home getting all this correspondence, being absolutely bombarded with it, it's different for me, I could just file it one after another in a file as this is what we do and we have a filing cabinet to hold them, but I can imagine anyone doing this on their own would find it overwhelming probably. (*Money adviser, Western Region*)

The number of exchanges of correspondence was also referred to as "ping pong" by another respondent and as "tennis" by another. This "to-ing and fro-ing" could be prolonged by both sides, but as the quote above illustrates, respondents generally just wanted the matter settled as quickly as possible; one interviewee felt strongly that her lender was deliberately drawing out the process, and that the FSO was doing little to prevent this:

I felt very frustrated that for example, all the lender had to do to draw out the process was to send a letter back saying 'I don't agree', as long as there was information coming in, it went back and forth, so there was no sense that the FSO was actually controlling the process, and the lender could just drag it out as long as they liked...and if the lender is actually, as I felt in my case, looking for reasoning to go for re-

possession afterwards, then dragging it out and keeping you in arrears as long as possible without dealing with you, then that's actually acting against you (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*).

It was not just the volume of paperwork that users found difficult, however. Respondents (even money advisers) found the nature of it could be extremely complicated. Above, we described how one consumer complainant found the language and figures used by her provider to be "bamboozling" – these were contained in a written response by the provider to the Financial Services Ombudsman, which was subsequently forwarded on by the FSO to the consumer for her consideration and response. Her money adviser described how even from her professional perspective, it took a long time (including the seeking of technical support from FLAC) to assist the client to respond appropriately to such communications:

I feel there's too many letters, too much kind of going back and forward, do you want to put a response to this, this is their response, I understand where they are coming from, but from my point of view I would be very reluctant to take a complaint against someone, I would simply need so many man hours to just look at it, and to look at the letters especially, they come in that long and then to draft something, you're looking at two hours sometimes by the time I've read it and looked back at the file, and that was each time (*Money adviser, South East Region*)

5.7.3 Time and resource Implications

In the case of most respondents, it took between 7 and 12 months for a finding to be issued from the date of complaint. As described above, this period is often in addition to the considerable amount of time that complainants had spent trying to resolve their complaints through the

internal processes of the providers. Thus, there could be quite a lengthy period indeed (such as well over a year) between the arising of the grounds for complaint and the final outcome.

In one case, involving disputed withdrawals from a respondent's credit card, the incident in question occurred in October 2009. It took until March 2010 for the provider to issue its final response, and it then took the FSO until September 2010 to commence its investigation; the finding was issued in March 2011. The cumulative period of time involved was described by the respondent in question as "a helluva long time". Complaints took even longer where an appeal was involved, or where there were difficulties in getting the FSO to entertain the complaint in the first instance, as described earlier.

It was also noticeable in two cases that although the FSO had made a ruling, the provider had still not complied with that ruling, and the complaint had therefore continued to drag on. In both cases, consumers were still awaiting receipt of the compensation awarded to them by the FSO weeks after the decisions had been made. In one of these cases, three months had elapsed:

FLAC: What about the final decision, what was that?

The bank were told to pay me 500 euro.

FLAC: Did they do that?

No, that's what I was saying to you, they haven't been in touch with me or MABS since, I haven't even got a letter. (*Consumer, male, 42 years, employed, Hire Purchase complaint, part upheld*).

To a considerable degree, it appeared that the very nature of the process, itself influenced by the requirements of the legislation, was the main reason for such a lengthy process. Two contributory reasons were reported by respondents. The first of these was non-compliance (by both parties) with time limits specified by the FSO for responding to documentation sent to each party at various stages during the process; the second related to resource constraints within the FSO itself, and

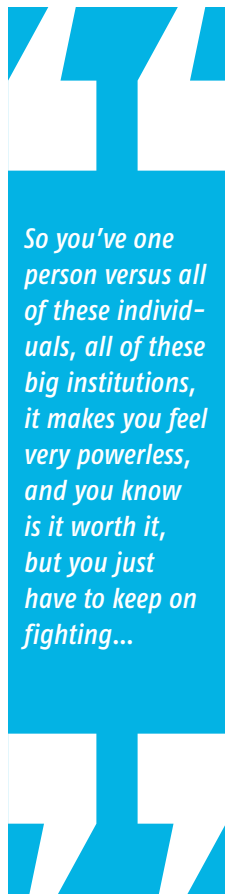
respondents by and large understood and accepted this reality in the current climate:

The telephone calls [to the FSO] would have been mostly 'what's the delay, why am I not getting a response to this', I got back you know 'increased number of complaints, summer holidays', the usual stuff that a Department might give you, genuine, genuine, I don't think they back-burnered my thing ... they said it was going to take longer and I accepted that, I said that's fine, tell me, just give me some type of a ball park, just keep me informed that it's working. (*Consumer, male, 68 years, retired, banking complaint, part upheld*). It's probably like every other service too, the office is probably under-resourced like ourselves, that's probably most of the problem why the process is lengthy, as time goes on in the current economic climate, you'd imagine it's inundated with cases. (*Money adviser, Dublin Region*)²⁸¹

Time and resource implications for money advisers in supporting clients to take complaints through the FSO process were frequently mentioned in the interviews with them. Perusing documents, meetings with clients to discuss and draft complaints and responses, accessing technical support around the complexities of particular cases, and ongoing recording of details of this work for case management purposes, all combined to present a challenge to the most appropriate use of resources. MABS offices and staff are under considerable strain in light of the demand for their services as a result of the economic downturn; many advisers reported a reluctance to become involved in supporting future clients to the same extent on account of the potential impact they feared this would have on meeting other casework demands, and on waiting times for new clients.

It was not just advisers who found the process to be demanding upon them and on their time and personal resources. One respondent, who was helping a friend to take a complaint through the FSO's pro-

281. Senior staff of the FSO reported it to be busy but coping as at February 2013; however, complaint numbers in the early part of 2013 were also reported to be somewhat higher than usual. A related issue here is the trend for policymakers to intermittently broaden the FSO's brief e.g. It is FLAC's understanding that the FSO is to be designated as the body for complaints relating to SEPA (the Single European Payments Area) from February 2014.



cess, described how the process had worn him down to the point where she felt he was on the point of giving up:

In terms of the paperwork side of it, both of us work in an office environment and we're both used to engaging with people in organisations, I've got like a first class honours MBA so in terms of me being able to sit down, analyse it, go through it... look, having an MBA helps with the process, if you don't have business experience or that, you could be stuffed... we were able to keep on top of the paperwork because of our education and because of our jobs, certainly to an extent, but it wears you down, I think he [the complainant] was absolutely worn down, there's just a point where you can't take it anymore, you're doing the same thing over and over again.

Most respondents had only their own time and resources to rely upon or the support of a friend or family member; some had the support of a MABS money adviser, and others had indirectly drawn on the specialist services of FLAC as a back-up to MABS. Thus, there were at most three people involved on the consumer side. In contrast, large numbers of staff in financial service institutions, and indeed the FSO's office, could be involved with just one case. An example here, given by a money adviser to FLAC in a (confidential) chronology of events, was the involvement in a MARP client's case of no less than 8 people at different levels within one financial services provider. In another case, which is still not concluded at the time of writing, a money adviser provided us with copies of letters sent or forwarded to her client from the FSO's office: these letters were signed by 6 different staff members.

5.7.4 Becoming lost in the process

The often protracted and convoluted nature of the process, coupled with the volume and content of responses from provider and FSO, led to many becoming completely lost in the whole process,

unless they had the support of MABS. Typical of the responses in this regard was this one:

FLAC: Were you ever lost in the process?

Oh yeah, the whole time, the whole time, it kind of started off with an actual correspondence with the branch itself, then next thing, there was correspondence, letters, appendices from Head Office, they were coming from [named insurance company] and they were coming from the [named] bank, and all these kind of just names, who are these people, why are they involved, why is there so many people responding to letters and writing letters and referring to other people, so you've one person versus all of these individuals, all of these big institutions, it makes you feel very powerless, and you know is it worth it, but you just have to keep on fighting... so yeah you feel very powerless. (*Consumer, male, 56 years, employed, investment complaint, part upheld*)

A number of respondents mentioned having telephoned the FSO's office at various stages of their complaints and most considered that they had been treated helpfully and with courtesy when so doing. These calls related mainly to queries about the progress of complaints, and about the complaints process itself. A small number had been in telephone contact with the FSO's office in relation to a pending decision, or in relation to their options around having their decision reviewed; in these cases, the responses from the FSO's office were reported as being less helpful.

5.8 Outcomes, reactions and reflections

5.8.1 Reactions to findings

Complainants were satisfied with the eventual outcome of their complaints to the FSO in only a minority of the cases reviewed as a whole for this study – these included those reported by money advisers. Examples here include partly upheld cases concerning faulty goods, and non-compliance with the Mortgage Arrears Resolution Process, and fully upheld cases involving mis-advice on investments, incorrect charging of interest on a payment moratorium, and mis-sold payment protection insurance on a credit card coupled with the selling-on of a debt once an FSO's investigation was in train. People's reactions here were described variously (mainly by the money advisers concerned) as “delighted”, “happy enough”, “thrilled” and “like winning the lotto”.

Most consumer respondents were, however, unhappy with the findings in their case, as these invariably fell short of their expectations as described earlier. In many cases, people were deeply unhappy and terms such as “devastated”, “disgusted”, “frustrated”, “angry” and “insulted” were used to describe their feelings at the outcome. Some money advisers also expressed concerns about the findings in cases with which they had assisted.

There were other factors that contributed to the depth of consumer respondents' disappointment and in some cases, anger. Firstly, where there was a direct contradiction between a consumer's version of events and that of the provider, it was the perception of such respondents that the FSO had tended to come down on the side of the provider, thereby rendering in their minds, their version of events ‘false’. In one case, where the FSO's judgment was that a provider's version of events was more likely to be accurate than the complainant's, the written judgment contained the following sentence:

I should say that I agree to meet people on rare occasions for two purposes – firstly as already indicated to give them

an opportunity to express themselves and secondly, so that I can assess from observation and indeed *‘looking into their eyes’* whether they have been genuine or not.

Another respondent also reported that the Financial Services Ombudsman had tended towards the provider's version of events:

FLAC: What about when there were disputes about fact, different interpretations of things, what happened at those points?

They came down very firmly on the side of the bank...that is my feeling and that is my perception, very strongly, absolutely. (*Consumer, male, 68 years, retired, banking complaint, part upheld*)

In one case, where a provider admitted to having acted improperly, the respondent in question felt strongly that the FSO should have reprimanded the provider involved, rather than merely accepting an apology:

I was furious on two fronts, firstly that he just did not deal with the complaints that were raised [reiterates the core issue], he ignored it, the fact that he felt that an insurance company could lie about the very existence of a policy which is fundamental, without the policy you have no contract... that they could deny that for months and at the end of that they could say they were sorry and he said ‘that's OK’, that to me is the most galling, to me that's condoning that sort of behavior. (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

Some responses implied that respondents' dissatisfaction had been compounded by a feeling that the core or substance of the claim in question had not been thoroughly investigated, and that the FSO's enquiries had veered off on a sort of tangent to the kernel of their complaint. In

I expected them to hold them to account, they replied back very blandly, we did everything we were supposed to do and that was it, that was kind of the depth, it was completely skimming the surface of the situation.

one case, a complainant who had a complaint directly related to what he alleged he had been told by an official in his local bank branch was concerned that the investigation into his complaint had developed more into an investigation of the conduct of a related provider:

FLAC: What about your first contact with the FSO?

I thought they were fine, they told me I also had a dispute with [named insurance company], I'd never considered that, my complaint was with the bank, this compounded matters, from their perspective, the whole case centred around the insurance provider...

FLAC: What was your reaction to the FSO's finding?

Chin dropping to the floor, I just couldn't believe it, especially when I read through and found that the findings bore no resemblance to my initial complaint. *(Consumer, male, 56 years, employed, investment complaint, part upheld)*.

Another complainant, who had been awarded compensation for inadequate standards of customer care, expressed a similar view in relation to the Ombudsman's finding:

He awarded me a further €6,000 to make it up to €7,000 I think for the same problem, but it had nothing got to do with the problem I went to him with... *(Consumer, male, 41 years, unable to work through ill-health, insurance complaint, part upheld)*

There was a belief among some respondents that their complaints would have been more appropriately investigated from their perspective had they been able to contribute to the questions being put by the FSO to the financial service provider in question. An example here is a respondent with a number of complaints about the conduct of her mortgage provider:

FLAC: What did the FSO ask the lender?

To my mind they were very bland questions, what did you do, I'd copied my questions with very detailed questions saying what they hadn't done, yet they didn't actually put any of those questions to the lender on my behalf.

FLAC: Would you have liked to have an input into these questions?

Definitely yes, but they should have been able to read through the information that was given and see through the question dodging, I expected them to hold them to account, they replied back very blandly, we did everything we were supposed to do and that was it, that was kind of the depth, it was completely skimming the surface of the situation. *(Consumer, female, 42 years, unemployed, mortgage complaint, upheld)*

The view implied in this response, that the Financial Services Ombudsman had appeared too ready to take the provider's word on things without probing further, was shared by other respondents. One example here was a lady who had wanted the FSO to explore with the provider "why" they hadn't registered a letter of utmost importance to her circumstances, in that it concerned the imminent lapse of a life policy related to a mortgage (she alleges that she never received it, and neither apparently did her mortgage provider):

FLAC: What were you looking for specifically from the FSO?

I wanted the insurance company to provide me with why the letter wasn't registered, why only the week before he died that they cancelled it, and I didn't get the letter, did they backdate it when they found out he was dead, all these answers, right OK, the premium was lapsed, we didn't pay that much, but I got no letter to say it wasn't, I should have checked my bank account to make sure that there was enough money in there but I didn't, that was my fault, I'll take that, but they should have informed me of this.

FLAC: So you were looking for the 'why'?

And all they said was ‘we did’, that’s like me saying I did and you say you didn’t. (*Consumer, female, 43 years, unemployed, insurance complaint, part upheld*)

5.8.2 Perceptions of the role played by the FSO

We asked respondents who had gone through the entire process how they would assess the FSO’s role in relation to dealing with their complaint. The overwhelming consensus here was that the office had acted less as an investigator of their complaints, and more as a conduit or intermediary between the parties. Respondents used a variety of terms to describe how they saw the office as having discharged its responsibilities. It was described among other things as being ‘an umpire’, ‘a referee’, ‘bureaucratic’ and ‘light touch’ in its approach. Most respondents clearly expected that once they had filed their complaint, they expected that would be the end of their involvement in the matter and that the FSO would take it from there and investigate their complaint thoroughly on their behalf:

FLAC: Were you expecting the Ombudsman to do more?

That’s something I thought the Ombudsman would have done you know, when you make a complaint he’s the one that’s looking into it then, I honestly don’t see what the benefit is of ping-ponging, going back to me with what the provider said and for me to respond to it and then it goes back to them, you know where does that end, and to be honest with you that just seems to me to be prolonging them actually going and doing their job, because in fairness I mean I’ve made a complaint now let him go and speak to the provider or whoever the complaint is against and let them furnish him with the facts (*Consumer, male, 34 years, employed, leasing complaint, not upheld*)

Some went further, and expressed the view that it seemed to them that what was being decided upon in their case was not the practice of the financial service provider, but the behaviour of the complainant:

There is a published code of conduct for financial institutions and it was to that Code that I expected my experience to be held, where I felt the outcome from the findings and the comments made by the FSO was that my behaviour was actually being weighed and balanced and that I was being held to some invisible code that I couldn’t possibly know how to fulfil. (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*)

The consensus among the money advisers interviewed, who between them had dealt with several complaints to the FSO, was that apart from a minority of cases where the FSO appeared to be more positively disposed towards the consumer than the provider, invariably the FSO appeared to them to be more likely to come down in favour of the provider, and this view was shared by and large by their clients:

FLAC: Can you sum up your overall impressions of the FSO scheme?

I think if I was to change something I would make it more consumer-friendly, I would change the ethos of it, to me it’s still very biased and I can totally understand when clients are saying they see it as another financial institution because you’re almost arguing against them as opposed to going to them for some sort of a mediation (*Money adviser, Dublin Region*)

and

FLAC: Were people expecting the process to be more personal?

Yes, that this person was going to be looking independently at the whole thing, and therefore the FSO would surely have direct access to the banks, but wouldn’t be willing to meet with the public, it was like as if the FSO

I think if I was to change something I would make it more consumer-friendly, I would change the ethos of it, to me it's still very biased.

They don't understand fully who they're dealing with, what their decision is going to mean at the end, how it's going to affect people, they don't know me from Adam, I'm just a piece of paper.

was closer to the institutions than to the clients... I don't have a positive from anyone (*Money adviser, Midlands Region*).

5.8.3 The impersonal nature of the process

An underlying theme in many of the interviews was that from the user perspective, the process had been impersonal, and that the user had been treated more as a 'case' or a 'number' than 'a person'. Further, there was a perception that the lack of a personal element to the process favoured the party most comfortable in that space (the provider) and worked to the detriment of the one which did not (the consumer). When people were asked for their reflections on the process overall, it was to the lack of any personal element to it to which they invariably referred:

FLAC: Should there be more personal contact do you think?

Yes, they should make it a public office ... it should be more verbal, more face to face, more open, well in certain cases, like if you have a small dispute with the credit union or something like that, you're not going to sit down with the head boy of the credit union over a 3,000 euro loan, [in his case] we're talking about 108 grand, around 100 grand anyway, it would have paid off half my mortgage, now I'm just about to be evicted from my house...I am dealing with MABS now. (*Consumer, male, 41 years, unable to work through ill-health, insurance complaint, part upheld*)

and:

I didn't see anything in that paper [the FSO's finding] where it expressed sympathy, condolences, not that I was looking for it or wanted it, but you know, we are very sorry that this didn't work out' or 'we tried our best', there was no personal – it was like, de-de-de, I didn't get the answers I wanted...

FLAC: Have you any suggestions or recommendations then?

I think the FSO is letters, and e-mails, there's no direct communication with the actual person that they are dealing with, so they don't understand fully who they're dealing with, what their decision is going to mean at the end, how it's going to affect people, they don't know me from Adam, I'm just a piece of paper, I think if they're dealing with people, especially in a case like that, meet them face to face, get their side, that mediation would have been great between the FSO, me and them, it would have got two sides. (*Consumer, female, 43 years, unemployed, insurance complaint, part upheld*)

5.8.4 Mediation

A preference for coming 'face-to-face' in the presence of a third party (that is, the Financial Services Ombudsman) was raised by a number of respondents, and indeed by some money advisers. There are two ways this can happen as part of the process, as discussed in Chapter 3. The first is by way of mediation, which involves the consent of both the complainant and the financial services provider. This issue was discussed in several of the interviews, and Table 12 below describes the responses by both parties to the FSO's invitation to mediate in these instances:

Table 12: Responses of parties to FSO offer of mediation

Response to FSO offer of mediation	Number of cases (n=10)
Both parties declined	3
Complainant willing but financial service provider refused ²⁸²	6
Financial service provider willing but complainant refused	0
Both parties accepted and mediation took place	1

Source: *FLAC Consumer Protection Study, 2012-13*

In the case that was mediated, this was not undertaken in a face-to-face sense, rather the Financial Services Ombudsman met both parties independently (or 'not in

²⁸² According to the FSO, this is the most common scenario when invitations to mediate are extended by them.

an adversarial manner' as reported in the finding), hence it was more akin to an oral hearing of both parties views, but without the possibility of one party querying the evidence or contentions of the other.

Some respondents elaborated on their reasons for either accepting or declining the mediation option. Those who accepted did so for the primary reason indicated above, namely that they wanted to confront the provider face to face in the presence of an independent party. This was not always an easy decision for people, however:

The Ombudsperson then asked the company if they would be willing to go to I think it's arbitration where, or mediation rather, where I would be present, and somebody from the company would be present and somebody from the Ombudsperson, and the company didn't agree to that...

FLAC: Were you willing to go for mediation?

I was, I said I was willing, now I would have found it intimidating but I still said I would go. (*Consumer, female, 54 years, employed, mortgage complaint, settlement proposed by provider*)

In terms of refusals, there were three reasons given by respondents for unwillingness to take part in mediation. The first reason was a belief, based on previous dealings with the provider, that there would be little point as it would be unlikely to achieve anything; the second was that the complaint rested on interpretation of a point of law and hence, mediation was not appropriate in the case in question; and the third concerned a fear of being intimidated by representatives of the provider:

One thing that stands out for me is the mental capacity of this person, she was offered mediation or a hearing, she would have been in no fit state to go for a hearing, and anyone like her wouldn't go down that road, because the banks and that would have their legal representative in their corner, so that's a no-no... most people would find it

intimidating, she definitely would be intimidated, maybe that's an area that needs to be looked into, people with mental health difficulties, a vulnerability or whatever, they wouldn't be able to go in there and fight their own corner, the financial institutions will have their briefs going in, it's like going into court representing yourself really, at the end of the day. (*Money adviser, Dublin Region*)

In the first two quarters of 2012, according to the FSO's *Bi-Annual Review* (2012), only six cases were mediated upon; the reasons for such a low number are not described, but our research enquiries suggest that such cases are often those where an ongoing relationship between consumer and provider is particularly important to the latter. One possible explanation for providers refusing to attend mediation is that having paid the levy that funds the FSO's office, they see it as a *de facto* external complaints department to which they have already contributed.

5.8.5 An oral hearing

The second face-to-face option is an oral hearing. In the vast majority of cases analysed for the purposes of this review the facts were not at issue, and in only one case was anything akin to an oral hearing held (as described above). In most cases, the issue was the extent to which a provider had, or had not, complied with their various obligations, particularly those imposed by the Consumer Protection Code.

5.8.6 Communicating decisions

In some cases, the finding was sent to the money adviser and in others, directly to the consumer. The rationale for the decision is generally described in the following format: a covering letter explaining that the complaint is concluded (signed by the FSO), followed by (a finding document containing) the background, the complainant's case, the provider's case, the finding, the conclusion, and a statement of the complainant's right to appeal.

The majority of respondents provided us with the written finding that related to the complaint(s) discussed during interview. In the case of money adviser respondents, written finding(s) were provided with the client's permission, and with any identifying details blanked out to preserve confidentiality

Some respondents had clearly found it difficult to follow the rationale for the decision given in the finding. One respondent, who had spent a career in the public service, described the language used as "civil service-ese", and became agitated during the interview at what he saw to be obfuscation and a lack of clarity in the wording of the finding in his case:

FLAC: So your reaction to the finding, had you any idea what the finding was going to be?

No, I didn't no... it's not set out in clear English that 'we're going against you', that's what's wrong with it, you have to interpret what they're saying, why can't they write and say 'you were wrong, the bank was right', OK I'm a civil servant but writing to somebody who isn't, they'd say 'what in the name of God is all that about', you know. (*Consumer, male, 68 years, retired, banking complaint, part upheld*)

Another respondent had a similar difficulty. In his case, it was what he considered to be the legal terminology contained within the decision that had left him befuddled:

The language was like going in front of a judge or a court, for me as an ordinary Joe Soap, I wouldn't have the best of vocabulary, it's not bad but at the same time I wouldn't understand the lingo that they were using in there you know, the – probably legal terms or legal words...

FLAC: So it wasn't clear to you?

Not at all, no, no. (*Consumer, male, 34 years, employed, leasing complaint, not upheld*)

In one case, the Financial Services Ombudsman had found completely in the consumer's favour. However, this turned out to be far from the end of the matter. In the finding, the complainant was requested by the FSO's office to calculate an appropriate amount of compensation relative to the circumstances in question; not knowing where to start, she began by contacting the FSO's office for help:

I only had a three-week period I think to respond to that, and that's when I contacted the FSO because I thought that, OK, well if I have to make a representation for compensation, I don't know anything about that, I'm not a solicitor, I don't have those skills, so I contacted the FSO, the person who was actually dealing with my case, the Assistant FSO I think, and said this to him and he said well, you know, tell us anything and be as detailed as possible, that was as much guidance as I was given, I said what happens when I put this in and he said well, they have to respond, and if they don't take this seriously we'll be on the case. (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*)

The respondent in question then went on to describe how, in the absence of any specific guidance, she began by "googling" 'compensation in Ireland'- this led her to consult documents from the Irish law library on compensation in legal cases, and further to this, she had sought advice from a friend in the legal profession.

I sat down and worked it all out, I asked for an extension which they gave me of a week, so I had 4 weeks, it was incredibly stressful, I had to sit down with every single piece of paper, every single phone call, every letter, three and a half years' worth, assigning a time allocation to it and applying my professional rate, that was the past so I had to also look at the present, the future...that took me the best part of 4 weeks, just to do that, I still have the paper with every 15

minute segment, multiplying it up... taxi and bus receipts.

She then submitted her figure calculated on this basis (which was in the region of hundreds of thousands of euro), the Financial Services Ombudsman sent this to the provider (who proposed a figure of €500) and the FSO finally decided upon a figure of €7,000, which the complainant subsequently appealed.²⁸³ her view was clearly that she had done what she had been asked to do by the FSO, and was now effectively being told that she had done it wrongly:

I had contacted the FSO and followed his instructions, I went back with details of where I had got my instructions, law library documents and what had been included there, plus I'd had a solicitor look it over, as far as I was concerned, I had done exactly what I'd been asked to do.

5.8.7 Categorising complaints

In the 3rd Quarter of 2010, the Financial Services Ombudsman began to record in its database a finding category, 'partly upheld', described as a situation 'where a complaint is upheld but only in part'. As described above, in a considerable number of the cases reviewed for this report, respondents had had their complaints categorised as 'partly upheld'. However, some of these respondents did not agree that such categorisation accurately represented the finding in their case, and were strongly opposed to any implication in the wording of this category that the FSO had found in their favour. In one case, where a complainant was awarded €750 for a provider's repeated failure to respond to him in relation to his complaint, the FSO did not uphold his substantive complaint. His response to his complaint being categorised as 'partly upheld' was as follows:

FLAC: Is 'partly upheld' how you see it in your case?'

No, absolutely not, [respondent seems genuinely shocked by this categori-

zation] I mean I made no claim on the fact that they hadn't responded, I pointed out that they hadn't responded and the results of the fact that they hadn't responded, but I didn't say and I want compensation for this, they [the FSO] gratuitously gave me the compensation for that, it was nothing to do with the substance of what I was complaining about,

FLAC: I'm gathering from what you're saying that you would categorise your complaint as not upheld?

Absolutely (strong emphasis), without a shadow of a doubt, and that thought hadn't struck me until you brought it up, that it says partly upheld, it's not, it's not, like I complained about the letters but not looking for compensation or anything, and if they can put that into a category that says 'look we've found in the consumer's favour', that is not right. (*Consumer, male, 68 years, retired, banking complaint, part upheld*)

Another complainant went further. Referring to an award, again for administrative delay, which was relatively small in relation to the substance of her complaint, this respondent would have preferred to have received nothing at all; as far as she was concerned, the Financial Services Ombudsman had ruled that she, not her provider, was in the wrong:

The correspondence, it took a long time, God, nearly a year and a half I think before they made a decision, I'm not quite sure of that but it was a long time, and a long time with letters coming back, and then it seemed to be the final letter which we weren't expecting but which was 'case closed, closed, gone, give her 500 quid and shut her up.

FLAC: What was your reaction, how did you feel?

I would have rather ripped it up and thrown it in the bin to be honest, but I didn't, I needed it... oh yeah, rip it up and throw it in the bin, that's all it's worth.

²⁸³. This case has since been decided and went against the appellant consumer.

FLAC: Would you almost have preferred to have been awarded nothing?

Get nothing, oh yeah, I'd rather get nothing at all than insult me with 500 quid.

FLAC: How much would you have received if your insurance had paid out?

For the total mortgage, €220,000... but my thing is, why give me anything if I was completely wrong? (*Consumer, female, 43 years, unemployed, insurance complaint, part upheld*).

5.9 The High Court appeals mechanism

Several respondents had contemplated a High Court appeal, but only a minority had actually embarked on one. A small number of clients had in effect 'appealed' the decision of the FSO not to consider their cases at all on the six-year rule ground. Taken together, a review of an FSO decision was either seriously contemplated or sought in the majority of cases reviewed for this study (n =23).

Most respondents had, however, declined to pursue a High Court Appeal, and there were six main reasons given for this: cost, risk of loss, capacity to cope with the process involved, time constraints, unavailability of affordable legal support and the nature of the appeal. Taken together, these factors combined to present an unsurmountable barrier to most respondents in terms of pursuing their case any further.

5.9.1 Financial and other considerations

By far the most frequently cited reason for not pursuing an appeal was that of the potential costs associated with a High Court appeal, and there were two elements to the costs consideration: firstly the cost of engaging a legal representative, and secondly the potential costs involved should the appeal prove unsuccessful, relative to the amount at issue. The following are examples of people's concerns here:

FLAC: Did you consider a High Court appeal?

No, it was the cost, we had a 30,000 claim, a day out in the High Court will cost you 50 grand, if you're going

to claim for a million, you might take a chance on a hundred grand's worth of legal fees, if you're claiming for 30, you're not going to take the chance, it's just a non-runner... (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

and

(A lawyer friend said) you have a very good case but it's a lottery, I said to him so the law's an ass and he agreed with me, I was going to risk 300,000 euro to get 300,000 euro back (*Consumer, male, 56 years, employed, investment complaint, part upheld*).

In another case, a complainant's incapacity, coupled with the perceived financial risks both to him and potentially to his family, combined to give him no option but to decline to appeal to the High Court:

Respondent: When he sent out his final decision, it said at the end, it was in favour of [names provider]; obviously, at first I was disgusted, it was the final appeal with him, the next stage would have been the High Court, himself and [names provider] knew that I was in no state or position to take it to the Court, I was in no health state to go to court, and they knew that...

Respondent's father: Well, financially wise we couldn't take him to court, mainly it was the health but secondly was the financial end of it, we couldn't afford the High Court yeah, if we had

lost the case, we could have lost the house, and possibly my own.

FLAC: The costs, you might have had to meet those?

Respondent: The whole lot, and they don't come cheap, we wanted to and had I had my health, but I was in a bad state of health (*Consumer, male, 41 years, unable to work through ill-health, insurance complaint, part upheld*)

The Financial Services Ombudsman has made it consistently clear that, whenever viable to do so, it will pursue claims for its costs in the event of unsuccessful appeals. Again, this was a factor in respondents' thinking, although in one case, a respondent had weighed up the pros and cons and decided that she had nothing really to lose in appealing:

FLAC: Were costs mentioned by the FSO?

Oh yes, I'll be held accountable for their costs if I'm not successful.

FLAC: Was any figure mentioned?

Oh, I can't remember, I don't think a figure has been put forward, I figure if they're going to take my house, they're going to take my house so I'm going to fight for it, if I'm going to lose my house one way, then I might as well do it this way. (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*)

These were clearly big decisions for people to make. One complainant who decided on balance to go ahead with an appeal, having sought advice from FLAC, provided an insight into the considerations that he had to weigh up before going ahead with his appeal. These considerations were his possible costs, the resources at his disposal, the merits of his case and the legal support available:

FLAC: What considerations did you have about the appeal?

Yeah, it would have been my first time ever taking anything like this, and I can tell you now, it's like you have an angel and a devil on either shoulder and one is telling you 'yeah no, you're definitely

right', and the other one is saying 'what if it falls flat on its back and you're going to end up paying for fees and legal costs and everything else', so that was there, you know, quite a bit of the time, because I mean I'm only on a basic salary, I couldn't possibly be able to afford paying this back, but you know it was talking to FLAC and they basically said that it was a really, really, really strong case,

FLAC: What would you have done without FLAC's support, would you have gone ahead with the appeal?

No, I definitely wouldn't,

FLAC: And why not?

Because I think that it's fear of not knowing what you're getting yourself into, I mean they [FLAC] are professionals, you know what you're dealing with, if I had to go there on my own you can only go so far and the furthest that I would have been willing to go was the FSO, if there wasn't anyone there like FLAC that would have been it, I'd have just rolled over. (*Consumer, male, 34 years, employed, leasing complaint, not upheld*)

Complainants were not helped by the limited length of time they had to make such an important decision, namely 21 days. In one case, the respondent in question described in detail what she went through in trying to access legal support, put together an appeal and submit it within the 21-day limit. It should be noted that this was a respondent who had actually had her complaint upheld by the FSO – her appeal related to the amount of compensation she had been awarded. This is her experience, in her own words:

I had 3 weeks, I was devastated, absolutely devastated when it came through, because I suppose at some level, I was expecting the FSO to make everything right, and I could finally get on with my life and move forward ... I arranged to see the solicitor who had cast her eyes over the finances before, again it was very difficult to track people down over the Easter holidays, to

get the advice that I needed, she felt that there was something wrong in the whole thing, she said look we'll get into this, she then contacted me 24 hours later and said we can't do it, so I was now one week down out of my three weeks, and in the middle of a holiday period looking for a solicitor to explain four years of financial chaos to in the hope that they would represent me in the High Court, I went through I don't know how many recommendations from my friends, everybody was on holiday or not interested, Finally, the week before the deadline with the High Court I went to meet with a solicitor who took all my paperwork, held it for three days and then demanded €2,000 just to read it, so now it was the Friday before I had to make the submission by the Tuesday lunchtime, someone, one of the solicitors I had spoken to had mentioned something about representing yourself at the High Court, I said that well that sounds like something that I shouldn't be allowed to do, I started then trying to get a bit more information about that,

One thing I was aware of was that if I went in there gangbusters with a team of solicitors and barristers and I wasn't paying my mortgage, that would raise huge question marks about, well, 'how exactly are you doing that', and I couldn't afford to pay them anyway... I remember taking the Saturday off completely, thinking 'all right, if you're going to do this, you're going to have to do it yourself and are you ready to do that', so I got up on the Sunday morning and started writing my whole story from start to finish, a friend's husband who is a solicitor gave me the wording for the start and the end of an affidavit, and so I just kept on writing right through until Tuesday lunchtime, he signed it for me, witnessed it for me, and I went ahead and put it in.

This account raises a number of issues which may impact on others contemplating an appeal, namely difficulties in access-

ing appropriate legal support within such a short period, the effort and personal capacity involved in putting together an affidavit (which she described as a "full-time job"), and the negative impact of all of this on a person's well-being (the respondent in question made a number of references to experiencing stress associated with her complaint).

Another respondent, a MABS client whose case involved a point of law which had been a point of contention between consumer advocates and credit providers for some time, was more fortunate in that she was supported in a "test case" by FLAC; hence, as her money adviser explained, she had vital ongoing support:

Now there was a lot of advice given and everything, both from FLAC and ourselves, we didn't just leave her hanging there to make the decision without as much information as she required, she had a number of questions and we made sure they were answered, about procedure in the High Court and so on, would she have to go in and those kind of things. (*Money Adviser, Southern Region*)

The issue of 'curial deference', discussed elsewhere in this report, and the concern that the High Court would in all likelihood 'rubber-stamp' the FSO's decision, was touched on indirectly by a number of respondents. Disillusionment at the process to date was also a factor:

FLAC: An appeal, did you talk about that?

Well now you say that I think [names money adviser] may have suggested that, but it's the expense, I just couldn't, and I was so disheartened like, the FSO and the insurance are they together, so what's the point. (*Consumer, female, 43 years, unemployed, insurance complaint, part upheld*)

and

I went as far as having a High Court date, I had a meeting with Senior

Counsel, he said it's like a football match, you're 1-0 down, you're going in to ask one statutory body to overturn another, the Judge, in the vast majority of cases he usually sides with the Ombudsman, you have a very good case but it's a lottery. (*Consumer, male, 56 years, employed, investment complaint, part upheld*).

5.9.2 The hearing(s)

Two respondents had had contrasting experiences of the High Court appeals process itself. The respondent supported by FLAC and by MABS had little involvement and didn't attend the hearing itself as "I didn't have to and I didn't go". The court found in her favour on the point of law in question. In contrast, the respondent acting as a lay litigant had attended a number of pre-hearings; she described feeling out of her depth and would clearly not recommend her experience to anyone:

I submitted my affidavit, I sent my copies to the FSO and also to the lender, there was an initial hearing that took place, so I had to go in, that was terrifying, I had to go in to a courtroom full of barristers basically and answer

my case, without knowing anything about the processes of court or how it worked or anything... the only way you can go there is if you can afford it, I'm entirely out of my depth there, in fact at my last hearing, I kind of felt that I got hustled by the barrister from the FSO and from the lender and I didn't know what should happen or what the protocol was or anything and I did actually at one point have to say I didn't understand any of that, I guess just having the will to do that is something. (*Consumer, female, 42 years, unemployed, mortgage complaint, upheld*)

A third respondent had also submitted a High Court Appeal, again with FLAC's help, and again on a point of law; in this case, the Financial Services Ombudsman did not contest the appeal, and the matter has reverted back to the FSO for a new finding to be issued. At the time of interview, the respondent was still awaiting for his complaint to be re-dealt with, some 20 weeks after the case was remitted back to the FSO.

In none of the cases reviewed for the purposes of this report did a financial services provider appeal a decision of the Financial Services FSO.

5.10 Final reflections

To conclude, we refer to three additional concerns, highlighted by respondents. The first of these relates to what people would do, or advise others to do, if they had a further complaint about a financial service provider in the future. The second concern relates to a perceived lack of transparency in the way the FSO operates, and the third to a perceived failure to identify systemic issues arising from individual complaints.

5.10.1 Future complaints

A consensus emerged among this cohort of consumers that they would be reluctant

to use the FSO again should a consumer complaint arise. A similar consensus emerged among money advisers in terms of advising future clients with consumer complaints. Typical of the responses here were the following:

Now I have to ask myself now if somebody comes in again to me, 'am I going to put them through that' and that's not right, it's not right that I will decide whether we will go to the FSO or not, am I going to build up their hopes, and I'm trying to weigh that, giving them some hope, against my experi-

If anybody was asking me, I would say take your chance in court after our experience... it's not about being bitter about the outcome, it's about being bitter about the way we were treated.

ence of (the complaint) possibly being declined, and are they better to face reality now than drag it out for another six or ten months... and end up being more hurt, or are we better to tackle it, face it. (*Money Adviser, East Midlands Region*)

and

First, if I had a claim today, I'd go legal, I'd take my chance.

FLAC: So you would ignore the FSO process completely?

I would yes, and if anybody was asking me, I would say take your chance in court after our experience... it's not about being bitter about the outcome, it's about being bitter about the way we were treated. (*Consumer, male, 48 years, self-employed, insurance complaint, part upheld*)

A number of respondents mentioned, at least in principle (and if they could afford it), that they would take a legal route in future and by-pass the FSO altogether. One money adviser described a situation in which a client with an insurance complaint had avoided the FSO, and approached a solicitor; upon receipt of a letter from the solicitor, the provider addressed the complaint speedily to the complainant's satisfaction. The advice of this adviser, to others, based on his experience was:

My response to people at this stage is that if you can manage it, go down and talk to a solicitor rather than going to the FSO. (*Money adviser, Midlands Region*)

5.10.2 Transparency

A number of respondents made reference to what they perceived to be a lack of transparency in terms of the way the FSO had operated. We have already discussed respondents' views of the impersonal or 'behind closed doors' nature of the process, but there were also concerns that the lack of a database of decisions²⁸⁴ was contrib-

uting to an imbalance between providers (used to dealing with the process and presumably familiar with the likely outcomes), and 'first-time' complainants, for whom such information might be of considerable help. As a money adviser pointed out:

Do you know what I really feel is needed though more than anything, I know they have a few cases from the FSO's office on their website, and one of them was one I was trying to rely on to get them to look at this one, but I think there needs to be more precedents, so that will allow someone else to see well this is the way they have dealt with this and possibly even use it, because the way it is, there's too much discretion, with two cases that are very similar you could have two very different decisions... there's nothing really binding here, every case is individual (*Money adviser, South-East Region*)

5.10.3 Systemic issues

A number of consumers and advisers made reference to potentially "systemic" issues that appeared to underlie certain complaints. Two consumer respondents for example had "googled" their complaints on the internet and had found links or threads that suggested several other consumers were in the same boat. Money advisers frequently made reference to what they considered to be systemic issues that they felt needed to be addressed; one money adviser described how the consumer protection framework itself may be contributing to a failure to identify systemic issues from a series of individual complaints:

FLAC: What did you hope for from the case?

What I had hoped with this case was, as the issue was very contentious, that if the FSO ruled in his favour, that would then be migrated in to financial regulation for maybe policy to be issued or guidelines to be issued to the rest of the industry, but unfortunately

²⁸⁴ According to the FSO, it takes a case-by-case approach, deals with each one on its merits, and does not operate a system of precedents.

it took a court case to actually get to that stage... if the FSO makes a ruling, then surely that should be an automatic change in somewhere into clarification of whatever, of interpretation of legislation, whether it gets pushed in for an SI, there seems to be a little bit of a gap... I haven't seen anything go into the FSO and come out on a positive and make any change, I haven't seen

any changes in anything, in legislation because of it, or in practice, now that is a gap because if you want people to make a personal complaint, the Regulator's job as I understand it is to regulate the industry, then surely feeding in from personal individual complaints to the FSO is a good way of dealing with it. (*Money Adviser, Dublin Region*).

5.11 Summary

At the root of the dissatisfaction expressed by respondents to this study was the failure of their financial service provider to address their complaint promptly, professionally and adequately *in the first instance*. We got the strong sense that what was taking place in the majority of complaints reviewed was a war of attrition between provider and consumer, a battle that the provider believed they would win in most cases if the dispute was prolonged enough. It was notable how many respondents (both consumers and money advisers) referred to contemplating giving up at some stage; further, that some providers appeared to be acting with little or no regard to their legal responsibilities or fear of sanction. Disillusionment and anger at the provider had contributed to the placing of considerable expectations on the FSO (but interestingly not on the Central Bank as Regulator), some of which may have been unrealistic but were nevertheless real. These expectations were also underpinned by financial difficulty in many cases; thus, a combination of providers' actions, regulatory inactions and subsequently FSO's decisions, had ongoing consequences on complainants' lives.

Addressing these issues from a consumer perspective requires a policy shift to a greater focus on pre-emptive regulation, enforcement and the creation of effective rights in relation to consumer complaints around financial service provision in general. As regards the FSO specifically, it was notable that the over-riding con-

sensus among this group of FLAC users (both consumers and money advisers) was that the concept or idea of an alternative dispute resolution process for financial service disputes outside of the courts is a good one, and *there was widespread support for the model itself*. The concerns expressed by respondents relate more to the process as they experienced it first hand, many of which relate primarily to the legislation under which the FSO is required to operate. What is required from the consumer perspective is a move to a more person-centred, less bureaucratic model and to one that addresses the inequality of arms between the parties (as opposed to the current one underpinned by treatment of provider and complainant as equals). Also needed is a more accessible appeals mechanism, which enables the complainant to appeal the decision and not the process, without costs being a factor. As a money adviser commented:

I think the model or the process is good, if it worked in the way that it's established to work, it would actually be very good and in that case, then it's a case of making the process known to people in a way that they understand it and having almost an education drive on it, that this is available to you, we are independent, we will mediate, we will look objectively and bring it out there as something that consumers can actually feel comfortable in using (*Money Adviser, Dublin region*).

CHAPTER

**Conclusions and
Recommendations**

6.1 Working principle of this study

Financial services and the provision of credit in particular are the lifeblood of an open, market economy such as Ireland's. The consumer borrowing money is effectively a risk-taker who contributes to economic activity through the act of borrowing. Though he or she does receive something in return – property, goods or services, now rather than later – there is a cost in the form of interest and no guarantee, particularly in uncertain economic times, that default in payment will not occur and that legal proceedings against the borrower may then follow. In a similar vein, the consumer investor puts his

or her funds at the disposal of financial institutions at some risk; and the consumer buyer of insurance, at his or her cost, absolves the State of the potential cost of unforeseen events. The hypothesis or working principle of this study is that consumers, particularly consumers of credit, accordingly require and deserve a high level of protection when they encounter and deal with generally more experienced and better resourced financial institutions. It is far from clear, however, that this level of protection is currently being provided. This work set out to review the evidence, examined from the consumer perspective.



The legal architecture for the protection of consumers of financial services in Ireland, and in particular for those using consumer credit and ancillary services, is flawed.

6.2 This study's basic conclusion

The study concludes that the legal architecture for the protection of consumers of financial services in Ireland, and in particular for those using consumer credit and ancillary services, is flawed. These flaws have their genesis at the level of the European Union, where a cumbersome process for agreeing relevant EU Directives can result in such measures being out of date and/or significantly watered down before implementation. The need to establish a single market across the EU has led to the pursuance of a 'maximum harmonisation' agenda. This had led to a situation where establishing common rules across the EU for providers of financial services has taken precedence over the protection of the consumer and where particular national difficulties, such as a country's personal debt crisis, cannot be properly accommodated.

At the domestic level in turn, the interests of the credit consumer in particular have proved over time to be secondary to

the interests of other actors – policymakers, the regulatory authorities, and primarily the financial service providers whom they regulate. Examining the legislative and regulatory landscape, it is hard to escape the further conclusion that a disgruntled financial services consumer, and particularly a credit consumer, is not facilitated and empowered by the system so much as discouraged and befuddled by it.

The evidence, however, suggests that it was not always thus. Pre-boom, for example, the (1995) Consumer Credit Act (CCA) went considerably further in some respects than the (1987) European Directive it implemented and contained evidence of progressive thinking. For example, it included rules around the making of housing loans, compulsory default notices, potentially unenforceable agreements and provisions to attempt to address illegal moneylending. Thus, the then EU concept of 'minimum harmoni-

Contrary to popular perception, there is little to prevent many of the irresponsible lending practices which contributed to bringing Ireland to its economic knees from re-occurring in the future.

sation' worked, at least to some extent, in favour of the financial service consumer at that time, although many of the Consumer Credit Act's key provisions have, alas, remained unused and untested, and some key deficiencies remain unrectified.

In contrast, during the boom years, against the backdrop of an EU policy shift towards a more market than consumer-driven policy, the Irish authorities adopted a much more 'hands-off' approach to consumer protection regulation; we conclude that this is most plausibly ex-

plained by the pursuit of ultimately unsustainable rather than balanced economic growth that resulted in the prioritisation of property-related tax revenues over consumer rights. Instances of 'soft-touch' regulation, in the consumer credit area, involved the failure to put in place a formula to calculate interest rebates for consumers wishing to settle agreements early, to adequately curb excessive interest charges, and to properly regulate the activities of sub-prime mortgage lenders.

6.3 Inadequate and convoluted standards of protection

As bust replaced boom, the revised European Consumer Credit Directive of 2008 was, in many ways, inadequate to the changed needs of the time even before it was transposed into Irish law in June 2010. Further, the European Consumer Credit Agreement Regulations (ECCAR) 2010, which implemented the Directive have resulted in some significantly decreased protections (as well as some limited improvements) for credit consumers. The Directive itself – a maximum harmonisation Directive – although agreed before the Global Financial Crisis, was not transposed in Ireland until a considerable period of time after that Crisis had occurred. Particularly regrettable from the consumer standpoint was the scaling down of responsible lending provisions contained in the European Commission's initial draft Directive, issued some six years before the directive was finally agreed and during the heady days of the boom.

Further, the method of transposition of the directive into Irish law, by way of secondary legislation, has in turn resulted in both convolution and complexity. Indeed, it appears to have been driven more by the State choosing to discharge its obligations in the quickest way possible in the midst of a very crowded legislative agenda, rather than by a desire to protect the consumer. Neither piece of legislation – the Consumer Credit Act 1995 nor the European Consumer Credit Agreement Regulations (ECCAR) 2010 – appears to be being monitored or enforced to any significant extent at the time of writing. The relationship between them is difficult to fathom, and no dispensation for leave to continue to apply some of the more 'consumer-friendly' provisions previously implemented in Ireland (following the first Directive) appears to have been sought from the European Union by the Irish authorities.

6.4 The Central Bank's approach to monitoring compliance

Against this backdrop of piecemeal legislative development, the Central Bank has decided on a distinctive approach to monitoring the activities of financial service providers. This approach is based on devis-

ing and enforcing compliance with Codes of Conduct that the Bank itself produces – and clarifies as it sees fit from time to time – and which we conclude have doubtful admissibility in legal proceedings.

In effect there are only two parties to such Codes: the Bank, which lays down the Rules, and the regulated provider, which is obliged to adhere to them. Large parts of the Bank's flagship Consumer Protection Code, such as the important rules concerning knowing the consumer and assessing the suitability of the product, do not apply to credit agreements at all. This is a consequence of what in FLAC's view is an overly conservative interpretation of the maximum harmonisation objective in that the State has assumed that this Code is part of national law. In addition, Hire Purchase and consumer hire loans are not covered by the Code at all because Hire Purchase companies are still not regulated by the Bank. Similarly, loans offered by credit unions are not covered by the Code either for some unexplained reason, though credit unions are regulated entities.

The end result of incremental, piecemeal development in the consumer credit

area is that contrary to popular perception, there is little to prevent many of the irresponsible lending practices which contributed to bringing Ireland to its economic knees from re-occurring in the future and there is a strong sense of policy complacency in this regard. In terms of financial services more generally, we conclude that the Central Bank's approach prioritises putting obligations on providers over conferring rights on consumers (other than the right of the consumer to make a complaint to the Financial Services Ombudsman). The monitoring of compliance with such obligations, through pre-announced Reviews, Themed Inspections, and associated Inquiries and Settlements (the most likely outcome), tends more in FLAC's view towards 'soft-touch' than rigorous regulation – as illustrated by the negligible number of appeals lodged by financial service providers with the Irish Financial Services Appeals Tribunal.

The consequence of investing such authority in the Central Bank is that what is in effect an unelected body currently has the power to decide what protections it believes appropriate in relation to distressed mortgage borrowers in arrears on their family homes – the same body which in our view manifestly failed to act with the necessary urgency during the evolution of the mortgage crisis.

6.5 Prioritising institutions over consumers

The Central Bank is responsible both for consumer protection and for ensuring the stability of our financial institutions. Each of these things is clearly important, but it is our conclusion that the Bank is prioritising the stability of institutions at the expense of its consumer protection responsibilities in some respects. For example, it has clearly bowed to pressure from mortgage lenders in terms of its clarifications of and subsequent 2013 revision of the Code of Conduct on Mortgage Arrears (CCMA). This has disimproved borrower protections considerably – such as in relation to unsolicited communications, shortening the moratorium on legal proceedings against borrowers in arrears and an inadequate appeals system – disimprovements which may contribute towards putting many family homes at risk of repossession. The ready access to the Central Bank that financial service providers appear to enjoy contrasts sharply with the limited lobby on behalf of financial service consumers,

a reality acknowledged by the Bank itself. This imbalance is compounded by a lack of transparency around the operation of the Memorandum of Understanding agreed between the Central Bank and the Financial Services Ombudsman, thus making it difficult to ascertain the extent to which this memorandum is serving the consumer interest.

Even where a consumer perspective is brought to the attention of the authorities, it is FLAC's experience that suggestions and proposals, though examined, are seldom implemented, as proved to be the case with our submission on the revised, draft Code of Conduct on Mortgage Arrears issued by the Central Bank in 2013. The consequence of investing such authority in the Central Bank is that what is in effect an unelected body currently has the power to decide what protections *it believes appropriate* in relation to distressed mortgage borrowers in arrears on their family homes – the same body which in our view

The internal complaints processes of certain financial service providers leave a lot to be desired from the consumer perspective.

manifestly failed to act with the necessary urgency during the evolution of the mortgage crisis. We suspect it will be a surprise to many to find the Oireachtas effectively

side-lined on an issue as fundamentally important as the protection of family homes, a major social issue at this point in addition to a financial one.

6.6 Complaints mechanisms for consumers

Within this legislative framework and policy context, much emphasis rests on the consumer himself or herself to pursue any complaint they may have about the conduct of a financial service provider. On the evidence from FLAC users who responded to this study, the internal complaints processes of certain financial service providers leave a lot to be desired from the consumer perspective. We identified two over-arching issues:

- Firstly, the incapacity of some consumers to even make a complaint in the first place and to then see it through without accessing help from an advocate such as a MABS money adviser; and

- Secondly, negative attitudes towards consumers and obfuscation on the part of some providers.

There was something of a sense of a war of attrition taking place in many instances, with certain providers appearing to act without fear of sanction from the regulatory authorities. By the time many of the respondents interviewed for this research complained to the Financial Services Ombudsman (FSO), they were both angry and frustrated with their respective providers, feelings which may help to some extent to explain the subsequent disillusionment that many felt with regard to the outcome of the Ombudsman's process itself when it failed to right a perceived wrong.

6.7 User experience of the FSO process

Although the sample is small, it would appear that this study is the first to formally interview users of the Financial Services Ombudsman service. Those who contacted FLAC for assistance – both consumers and money advisers – and who have had experience of using the FSO's processes were remarkably consistent in their views. The overall view was a negative one, and the process appeared from the consumer/advocate perspective to be overly formal, impersonal, onerous and confusing to the extent that many consumer respondents appeared to have become almost completely lost in the process. The backdrop for many complaints was recession-induced financial and associated difficulty, and within this context, the last thing such complainants needed was the additional

stress of a demanding process. Opportunities to meet providers face to face were limited or non-existent. Many consumers interviewed regretted the lack of opportunity to question their provider representative directly in the presence of an FSO official by way of an oral hearing. Others wished to engage in mediation but were thwarted by their provider's reluctance, and the FSO reports that overall very few cases are mediated, primarily because the provider refuses to so engage.

Such negative experiences were compounded in some instances by a difficulty in even getting in to the Financial Services Ombudsman process in the first place (principally on account of a 6-year time limit), or by disbelief that at the end of it all what the consumer perceived to be

a conservative, pro-provider finding was made. Data contained in FSO annual reports suggests such views may be more widely-spread, given that where a finding is made, only around 1 in 4 is in favour of the complainant and almost 2 out of 3 of these are only partly (or even minimally) upheld, and that average compensation awards appear to have decreased considerably in recent years. Although selected

case studies are included within FSO annual reports, there is no database of decisions, a resource which some informants to our study would clearly have found useful if only as a guide to help them frame a complaint – the FSO, however, takes the view that it treats each complaint on its merits and does not operate a system of precedent.

6.8 Industry and advocate attitudes to the FSO

The financial services industry funds the Financial Services Ombudsman through levies; it is FLAC's sense that sections of the financial services industry appear to be treating the FSO as, in effect, an extension of their complaints departments. The Ombudsman himself has frequently used the media to express his frustration at the repeated practices of some financial service providers, but until September 2013 – when specific legislation was passed in this regard – the FSO had been consistently reluctant to publicly 'name and shame' providers whose practices were the subject of repeated complaints to it. In our view, however, there was no express prohibition against it so doing – a point accepted by FSO staff during interview – and the FSO could have opted to expose financial service providers with a poor track record

even prior to the enactment of the legislation. Again, it seems to us that the least line of resistance is the conservative approach; the invariable outcome – whether unintended or not – is that the reputation of financial institutions and the needs of the financial system trump the interests of consumer protection. Worryingly, many of the advocates interviewed for this study had clearly formed the view, based on their experiences of the FSO process, that complainants stand little chance of success if they make a complaint; further, that given the demanding and time-consuming nature of the process as they had experienced it, some advisers would be reluctant to advise future clients to go down the FSO route, and would suggest that an alternative be sought if at all possible.



The Mission Statement as it stands views the consumer as an equal, failing to recognise the inequality of arms between the financial service provider who is part of a sector and a domestic consumer who by and large is acting as an individual.

6.9 Recent improvements and the FSO Mission Statement

On a more positive note, the FSO's complaints process has recently been revised and squared up fully with the Central Bank's Consumer Protection Code in terms of time limits for complaints, which is a welcome development. Its public interface in the form of the website has also been revamped, and is now much more consumer-friendly than heretofore – online complaints are now possible, for example. The FSO's Mission Statement, "to

adjudicate on unresolved disputes... in an independent and impartial manner thereby enhancing the financial services environment for all sectors" appears a little curious; however, given that what is at issue is a complaint, not a 'dispute', and that a consumer 'sector' does not exist in the financial service arena, it is our conclusion that the Mission Statement as it stands views the consumer as an equal, failing to recognise the inequality of arms between

the financial service provider who *is part of* a sector and a domestic consumer who by and large is acting as an individual. Notably, some respondents to our study consid-

ered that it was *their behaviour, not that of the provider*, that appeared to be under investigation once they had made a complaint.

6.10 Restricted appeals process for borrowers in mortgage arrears

One particular group of consumers is faced with a major barrier in terms of the current complaints architecture; namely, consumers in mortgage arrears who have had their mortgage declared ‘unsustainable’ by their providers. Deficiencies within the Code of Conduct on Mortgage Arrears mean that such consumers may first find it difficult to obtain sufficient information to frame an appeal to their provider’s Appeals Board. Second, should this internal appeal fail, the borrower may consider referring the matter to the Financial Services Ombudsman. In this case, however, it is clear that though the FSO will examine a failure by a lender to adhere

to process, it feels unable to overturn the commercial decisions of lenders to declare a mortgage unsustainable or to offer what a borrower may believe is an unsuitable alternative repayment arrangement. These gaps in normal fair procedure rules leave consumers in mortgage arrears seriously exposed to the potential loss of their family homes in circumstances where such loss may not necessarily be objectively justified; hence it is a matter which requires the urgent attention not just of the Central Bank which, as previously stated, devised and recently amended the Code, but of the Oireachtas itself.

6.11 Deficiencies in the legislation which established the FSO

Other process deficiencies can, however, only be rectified by amendments to the legislation which established the Financial Services Ombudsman in the first place. For example, we conclude that the statutory requirement for the FSO to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form, may perhaps be well intentioned but is arguably ill thought-out, potentially contradictory and can lead to mixed results for complainants. For example, how the substantial merits of a consumer complaint can properly be considered without having regard to technicality or legal form, when the complaint concerns a provider’s alleged breach of statutory rules, is far from clear. Some

of the complaints supported by FLAC in the consumer credit area, and discussed at length within this report, are cases in point.

The High Court is currently the sole avenue of appeal for consumers or providers wishing to appeal against decisions of the Financial Services Ombudsman. It is clear from our enquiries that contesting such appeals is taking up a considerable amount of the FSO’s time and resources, as it has become the practice of the FSO to act as respondent in these appeals as a matter of course. This may be having a detrimental effect on its overall operations. From the consumer perspective, there are major barriers to bringing such an appeal, namely the technical difficulties of presenting such appeals in the absence

of legal representation and the risk of incurring considerable and possibly unmanageable costs in the event of failure. It was notable that some respondents to our study did not lodge an appeal for this sole reason. There is a further issue here from the consumer standpoint. A complainant dissatisfied with the FSO's decision may believe that in lodging an appeal to the High Court, it will be the conduct of his or her provider that is under the spot-

light. However, analysis of a number of High Court judgements involving appeals against decisions of the FSO illustrates that the appeal is more limited than the appellant may believe, as the doctrine of 'curial deference' applies. This means that unless the FSO erred in law or its decision was undermined by a serious error or series of errors, it will not be overturned by the High Court.

6.12 The remit of the FSO

The workload of the Financial Services Ombudsman has increased considerably in recent times, its resources are clearly becoming more stretched, and some of the cases it is required to deal with are becoming increasingly complex. It is funded by levies from industry, and there appears to be a case for an increase in such levies, for example, to enable the FSO to bring in specific expertise to assist it in cases of particular legal complexity, and to adopt a more person-centred approach. One of the factors which might be contributing to the increasing demands on the FSO may be somewhat self-inflicted, however. The de-

cision of the FSO Council to expand the definition of 'consumer' in 2005 has led to a situation where companies with an annual turnover of less than €3 million and partnerships, clubs, charities and trusts fit into the definition of consumer and can also use the FSO process. Complaints from these quarters may take up a considerable amount of time and resources, and in retrospect, the amended definition of 'consumer' may be too wide. There may also be a suggestion that in broadening the definition to this extent, the Council may have exceeded the power delegated to it under the terms of the legislation.

6.13 Lack of evaluation

Throughout the research process as a whole, we were consistently struck by the lack of evaluation of the various components of the financial service complaints process in terms of their effectiveness for consumers. Furthermore, we frequently encountered an element of complacency in this regard among the various bodies involved. There appear to be no plans for the Central Bank to evaluate, for example, whether providers are meeting the 40-day time limit for dealing with consumer complaints involving the Consumer Protection Code or how the revised Code of Conduct on Mortgage Arrears is impacting on

borrowers in terms of lender compliance and outcomes. Similarly, there seem to be no plans for the FSO to enquire into the views of consumers on the effectiveness of its complaints processes and mechanisms. In light of the results of our enquiries, we believe that there are a number of aspects of the FSO scheme that could usefully be investigated. Examples include attempting to identify why so many consumers do not follow through after making an initial complaint to the FSO; evaluating the reasons why consumers enter into settlements both prior to and post-FSO involvement and consumer views on how findings are

The current situation where consumers with complaints are designated as equals to much more powerful and better resourced financial service providers and where they are, in FLAC's view, often unfairly treated as a result, must be addressed.

categorised. In this regard, for example, the use of a 'partly upheld' category for nominal awards for administrative errors

engendered particular concern among some respondents to this study.

6.14 Overall conclusion

Complaints resolution mechanisms as currently constituted and administered are, FLAC concludes, inadequate for redressing what we believe to be the imbalance between financial service providers and the vast majority of consumers. By the very nature of the services being offered, the provider has a natural advantage in terms of expertise and that advantage is sometimes exacerbated by the welter of technical documentation that is often sent by the provider in the course of responding to the complaint. Often it is only at this point that consumers start to become aware of the difficulties inherent in the process and there is no designated service where assistance can be found for consumers to formulate their arguments at the commencement and during the course of the handling of complaints. Indeed it is worth noting that some of our respondents who believed they were well up to speed in financial matters confessed to finding the going tough in this regard. The absence of an opportunity for the consumer to confront the provider in a live format was also noted.

In addition to the considerable barriers confronting consumers attempting to access and use current statutory complaints and legal procedures, flawed wording in the legislation and what appears on the

basis of our sample of cases to be a conservative decision making ethos with limited redress, account for the perpetuation of this imbalance. The route of appeal in the form of the High Court that then faces consumers (or indeed providers) unhappy with the outcome of a complaint is both inaccessible and confusing in its scope, and it would appear that little planning and thinking, either when the legislation was first passed in 2004 or particularly since, seems to have gone into its selection.

It was notable, however, that the over-riding consensus among those interviewed for the purpose of this study was that the concept or idea of an alternative dispute resolution process for financial service disputes outside of the courts is a good one, and there was widespread support for the model itself. A fundamental review and evaluation of the scheme as a prelude to amending the legislation which established the Financial Services Ombudsman, to the process which it administers, and to the appeals process, are all required. The current situation where consumers with complaints are designated as equals to much more powerful and better resourced financial service providers and where they are, in FLAC's view, often unfairly treated as a result, must be addressed.

6.15 Recommendations

A good consumer protection system would safeguard the rights of consumers as well as facilitating the provision of financial services. The rights of consumers are a fundamental part of access to justice which consists itself of the right to adequate pro-

tection by the State of its people, the right to fair redress systems where disputes arise and the right to timely and adequate advice and information. This report analyses the protections available to financial service consumers in Ireland and while it

concludes there is much to be done to better protect consumers, nevertheless FLAC is confident that, if the will exists, the necessary adjustments can be made to put an adequate system in place. As one of the respondents to our study said in relation to the FSO:

I think the model or the process is good, if it worked in the way that it's established to work, it would actually be very good and in that case, then it's a case of making the process known to people in a way that they understand it... and bringing it out there as something that consumers can actually feel comfortable in using.

We now present a number of recommendations to address the various issues and deficiencies highlighted within the report. These are categorised according to the bodies that would primarily be responsible for implementing the particular recommendation made.

A. Matters primarily concerning the European Union

Article 38 of the Charter of Fundamental Rights states that "Union policies shall ensure a high level of consumer protection." In order to ensure this level of protection in relation to consumer credit, the following recommendations are addressed to the European Union and to the Government in its interactions with the Union.

- **A1.** The EU should strongly consider moving from a 'maximum harmonisation' approach to transposing Directives to a 'minimum harmonisation' approach in the area of financial services, and consumer credit in particular. If the EU continues the maximum harmonisation approach, it should allow Member States to retain (and restore) existing national consumer protection standards and to deal with national difficulties that may present themselves.
- **A2.** Provisions in relation to the enforceability of credit agreements,

the right to request a copy of the agreement or statement of account, and the right to 'early warning' notice of enforcement by a creditor, should be restored by the Government with the consent of the European Union.

- **A3.** The European Commission should examine consumer lending practices across Member States and then enact legislation to advance responsible lending by all credit granting institutions, with a view to ensuring that consumers enter into agreements that are fair and sustainable and minimise consumer over-indebtedness.
- **A4.** The European Union needs to ensure that legislative proposals and measures in place for the protection of consumers of financial services respond and adapt in a timely way to the changing nature of consumer credit and financial services markets.

B. Matters concerning domestic law reform

From the consumer perspective, law reform is required in three key areas. These are: legal changes to the consumer credit regime, reform of Central Bank Codes, and adjustments to the legislation covering the Financial Services Ombudsman (FSO).

1. Consumer Credit and associated legislative reform:

- **B1.** There is a need for an updated, integrated act which would consolidate all of the existing provisions relating to consumer credit into one piece of legislation, so that lawmakers, users of services and advisers have access to accessible information.
- **B2.** All credit institutions and mortgage lenders should be prohibited from charging excessive rates of credit.
- **B3.** The Central Bank should conduct a review of the interest rates that were charged by high cost credit providers during the boom years, evaluate their impact and the justification for them, with a view to setting maximum inter-



est rates for such providers, including sub-prime mortgage and personal lenders, Hire Purchase companies, door to door lending companies and licensed moneylenders.

- **B4.** Hire Purchase and consumer hire providers should be fully regulated by the Central Bank of Ireland, in particular by including them within the rules of the Consumer Protection Code.
- **B5.** Consumers should be entitled to know and to apply an objective formula to calculate their interest rebate for early settlement of a Hire Purchase agreement.
- **B6.** Debt collection services should be regulated immediately on a statutory basis with a proper licensing system and a legally admissible code of conduct applying to such entities.

2. Central Bank Codes reform:

Code of Conduct on Mortgage Arrears (CCMA)

- **B7.** The CCMA should be immediately reviewed with input from all political parties, elected representatives and stakeholders with a view to putting in place a more substantive code that better reflects and balances the rights of borrowers and lenders respectively, and avoids repossessions wherever possible.
- **B8.** Express legal status should be conferred on the CCMA by way of a Statutory Instrument or Ministerial Regulation. Examples exist in other areas of Irish law as to how this could be done.
- **B9.** The CCMA should be amended to expressly require each provider to consider all available options in cases of mortgage arrears, and to inform borrowers of the conclusions in relation to each particular option.
- **B10.** The State should establish a truly independent and effective process for appeals arising out of the Mortgage Arrears Resolution Process (MARP) that can rule on the substance of a lender's decision and not just the for-

malities. An alternative would be the conferring of specific explicit authority on the FSO to carry out a full appeals function, an option which would necessitate an increase in the FSO's resources to enable it to carry out this function.

- **B11.** The CCMA should be strengthened in relation to communications from lenders. It should explicitly acknowledge the vulnerability to pressure and right to privacy of distressed mortgage borrowers. It should provide additional redress mechanisms for borrowers where the lender has exceeded its authority in communications and should provide for stronger sanctions against non-complying providers.
- **B12.** Lenders should not be permitted to commence repossession proceedings against a borrower where there is evidence of unreasonable behaviour or excessive delay on the part of the lender in the MARP negotiation. Where such evidence is available, the moratorium on legal proceedings should be extended.

Consumer Protection Code (CPC)

- **B13.** As the CPC does not form part of Ireland's national law, the State is not precluded by the dictates of maximum harmonisation from applying it to credit agreements and should so apply it immediately.
- **B14.** The terms of the CPC should be extended to apply to Hire Purchase and consumer hire agreements.
- **B15.** The terms of the CPC should be extended to apply to credit union lending as there is no clear rationale for excluding such agreements from its terms.

3. Financial Services Ombudsman (FSO) legislative reform:

- **B16.** A consumer should be entitled to bring a complaint to the FSO either within six years of the impugned conduct, or within two years of the date on which the consumer became aware (or could have become aware)

of the detrimental consequences of the conduct, whichever is the later.

- **B17.** Given that the legislation establishing the FSO enshrines mediation as the primary method for dealing with complaints, financial service providers should be obliged to advance convincing reasons for refusal to mediate when requested to do so by the Ombudsman in cases where the complainant has agreed to resolve the complaint in this way.
- **B18.** The requirement for the FSO to act ‘in an informal manner’ should be amended to reflect the fact that many complaints involve alleged breaches of statutory rules. The requirement to act according to ‘equity, good conscience and the substantial merits of the complaint’ should remain.
- **B19.** The current ‘finding’ categories should be amended to more accurately reflect the nature of the finding. More appropriate categories might be as follows: Upheld; Substantially Upheld; Substantially Rejected; and Rejected.
- **B20.** Consumers who wish to appeal a finding of the FSO should be able to bring this appeal to the Circuit Court rather than to the High Court, and appeals should provide for a full re-hearing of the complaint.
- **B21.** The 21-day time limit for filing an appeal against a decision of the FSO should be extended to 60 days.
- **B22.** As a short-term measure, the FSO Council should consider redefining ‘consumer’ to bring it into line with that of ‘personal consumer’ used both in the Consumer Protection Code and in the Consumer Credit Act 1995, namely “a natural person acting outside the course of his or her trade, business or profession”. In the longer term, a two-tier FSO service – one tier for personal consumers, another for complainants acting in a professional commercial capacity – should be considered.
- **B23.** Communications conducted under the Memorandum of Understanding between the Central Bank and the FSO should be subject to the

provisions of Freedom of Information legislation.

C. Regulatory and process reform

Not all the necessary changes will require legislation. Some of the issues which arose in the course of FLAC’s research pointed to the need for institutions to alter their own ways of working or their rules. This section focuses on such types of recommendations.

Central Bank

- **C1.** In its monitoring and compliance functions, the Central Bank should have greater regard to primary and secondary legislation rather than relying so heavily on its own Codes.
- **C2.** The Bank should take a more rigorous approach both to inspection and to follow-up. This could include increasing “cold-call” unannounced inspections, specifying time limits for providers to rectify issues noted in Reviews and Themed Inspections, and imposing effective sanctions when providers fail to remedy certain practices or procedures identified through such inspections within certain time limits. This may result in an enhanced role for the Irish Financial Services Appeals Tribunal.
- **C3.** The Central Bank should publish an annual report on its enforcement activities, including the number and type of breaches identified, prosecutions initiated and their outcome.
- **C4.** The Consumer Protection Code should be re-written to make it more readable and thereby more accessible to consumers and to their advisers. In addition, the Code should be renamed to reflect what it really is, namely “A Code of Conduct for the Regulation of Financial Service Providers”.
- **C5.** The Central Bank should carry out an annual programme of consumer-oriented research, which would focus on the impacts and outcomes of regulation on consumers. It should further publish such research.

- **C6.** The Central Bank should publish in a coherent and systematic way the fees that it permits lenders to charge so that such information is readily available to consumers.
- **C7.** The Central Bank should conduct a review of pre-July 2007 Payment Protection Insurance cases with a view to using its regulatory powers to obtain a refund for consumers mis-sold such products.

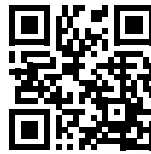
Financial Services Ombudsman (FSO)

- **C8.** The Financial Services Ombudsman Council should seek the consent of the Minister for Finance to increase the levies payable by financial service providers. This will enable the FSO to carry out its functions in a more consumer-accessible way and allow it to deal with the many complex issues that arise in the course of its investigations, such as those relating to the application and interpretation of statutory rules.
- **C9.** The FSO should commission an independent evaluation of its complaints process. Such an enquiry should incorporate a qualitative methodology to capture the consumer viewpoint and in particular, to explore why so many complainants give up in the course of the complaint. Such a review should also evaluate, from the consumer perspective, settlements which are agreed between the parties.
- **C10.** The FSO should review its current system of redress to ensure that the complaints system accords with the principles of a fair hearing. This would include consideration of the low percentage of oral hearings, the accessibility of the format, and the opportunities for complainants to be fully heard.
- **C11.** Consumers who require assistance in properly articulating a complaint to the FSO should be entitled to access such assistance with State-funded support.
- **C12.** The wording used in findings of the FSO should be reviewed to make it more understandable to complainants.
- **C13.** The FSO should amend its Mission Statement to reflect the reality that what is at issue is a complaint not a dispute; it should further remove the reference to “all sectors” as there is in reality no such thing as a “consumer sector”.
- **C14.** The FSO should further break down the information that it publishes to enable the public, as well as the FSO, to track the progress of complaints and their ultimate outcomes. This should include the publication of median compensation awards for each of the three reporting categories, namely investment, banking and insurance. Further, complaints settled ‘pre-investigation’ should be clearly distinguished from those settled ‘post-investigation’.
- **C15.** To advance consistency in decision-making, consumers and their advocates should be given access to any previous decisions that might be relevant to their case. An anonymised, searchable database should also be established and made available to the public.
- **C16.** The FSO should immediately review its practice of automatically taking a full part in every appeal to the High Court, as this greatly increases both the costs of each case and the burden on consumers.

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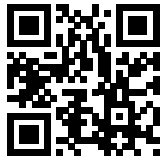


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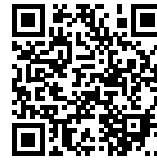
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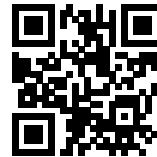
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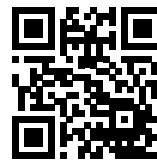
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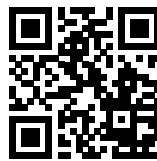
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Appendices

I. Responsible Lending Principles of the European Coalition for Responsible Credit

P1: Responsible and affordable credit must be provided for all.

- a. Credit is an essential for full participation in society.
- b. Banks should not discriminate and should provide real access.
- c. Credit to Consumers and Small Businesses must be supervised.

P2: Credit relations have to be transparent and understandable.

- a. Competitive transparency requires a standardized mathematically correct form of "one-price" disclosure (the Annual Percentage Rate of Charge or APRC).
- b. Social transparency requires a standardized pre-contractual payment plan.
- c. Consumers should be provided with adequate time for reflection and with access to independent advice.
- d. Consumers should have access to independent financial, credit and debt advice.
- e. Both parties in the credit markets have to take part in a mutually productive process of financial education.

P3: Lending has at all times to be cautious, responsible and fair.

- a. Credit and its servicing must be productive for the borrower.
- b. Responsible lending requires the provision of all necessary information and advice to consumers and liability for missing and incorrect information.
- c. No lender should be allowed to exploit the weakness, need or naivety of borrowers.
- d. Early repayment, without penalty, must be possible.
- e. The conditions under which consumers can refinance or reschedule their debt should be regulated.

P4: Adaptation should be preferred to credit cancellation and destruction.

- a. There is a need for effective protection against unfair credit cancellation.
- b. Default charges should be adequate to cover losses only.

P5: Protective legislation has to be effective.

- a. Credit regulation has to cover all non-commercial users.
- b. Credit regulation has to cover all commercial forms of credit provision.
- c. Credit regulation has to cover the whole process of credit extension as experienced by its users.
- d. Credit regulation has to encourage efficient social and economic effects of credit extension.

P6: Overindebtedness should be a public concern.

- a. Profit-driven systems cannot cope with over-indebtedness.
- b. Consumers should have a right to discharge.
- c. Bankruptcy procedures should lead to rehabilitation and not to retorsion.

P7: Borrowers must have adequate means to defend their rights and be free to voice their concerns.

- a. There should be adequate individual as well as collective legal procedures to enforce borrowers' rights.
- b. Critical public awareness is crucial for the development a fair and responsible distribution of credit.

From: www.responsible-credit.net/

II. Interview schedule: FLAC/MABS users

Stress confidentiality and anonymity; ask to have documentation to hand; get written details of decision if possible / synopsis

Introduction

My name is Stuart Stamp, I am an independent researcher (and associate of NUI Maynooth) employed by FLAC for the purposes of this research. The study is an enquiry into the strengths and weaknesses of legal provisions and complaints procedures designed to protect users of financial services in Ireland. The purpose of the research is to identify areas where these provisions and procedures could be improved from the consumer's perspective. The focus of this particular interview is on your experience of the Financial Services Ombudsman process. This interview is confidential and no interviewees will be identified in the final report; we may however use anonymised quotes from these interviews to illustrate particular issues arising from the research. (Seek permission to tape interview to ensure accuracy of data).

1. Personal information of complainant

- Client ID (for reference purposes)
- Gender
- Age
- Location (urban/rural)
- Household composition
- Labour force status (employed FT or PT / self-employed / unemployed/ unable to work / retired/ home duties)
- Ethnicity/nationality
- Type of complaint (banking, payment, credit, insurance, investment, savings)
- Date complaint made to the Ombudsman (month/year)
- Date complaint concluded by the Ombudsman (month/year)
- Date of appeal/decision if relevant (month/year)

2. Pre-complaint stage

- What was the source of your dispute with the particular financial service provider? (probe – details)
- How did your FSP deal with your complaint? (probe – helpful or not)

- What if anything could your FSP have done differently?
- What were you looking for specifically from your FSP?

3. The initial complaint: Making the initial complaint to the FSO

- How did you first hear of the Ombudsman? (probe– details)
- Have you any particular comments on the various materials produced by the Ombudsman (e.g. website/ leaflets)
- What was your experience of making the initial complaint to the Ombudsman? e.g. was the complaints form easy to fill in?
- Was the Ombudsman's office helpful to you in terms of making the actual complaint? Any way could they have been more helpful or not? (e.g. was any telephone support was provided by the Office to help you make the initial complaint?)
- Did anyone else help you make your complaint (e.g. MABS/FLAC)? In what way(s)? What would you have done without their help?
- What were you looking for specifically from the Ombudsman?
- What did you expect to happen when you complained to the Ombudsman?
- How long did you expect the whole process to take?(now we will move on to look at what actually happened...)

4. The process: How the complaint was dealt with by the FSO

- Can you take me through what happened once you actually made the complaint to the Ombudsman? (probe documentation, chronology, time taken for responses etc)
- Can you recall what specific communication(s) you received with regard to your complaint and when (e.g. from the Ombudsman/your FSP)?
- Did you understand what was happening at all stages of the process? (probe – Were you lost at any stage? When particularly? What would have helped?)

5. The outcome of your complaint

- How long did it take for you to get a decision from the time of your initial complaint?
- How was this decision communicated to you?
- What was the Ombudsman's final decision in your case? (probe- if case stopped short of a decision, what happened?)
- What was your reaction to the Ombudsman's decision (probe- were you satisfied with the decision/outcome- why, why not)?
- Have you any documentation that might be useful to our study?

6. Taking things further

- What options were open to you following the Ombudsman's decision?
- How did you find out about these?
- Why did you take a particular option(s) over the others (probe –considerations/ barriers)?
- What was the outcome of the High Court Appeal (if you pursued one)
- What was your experience of the HC process (if an appeal was lodged)?
- Have you any particular suggestions or recommendations that you would make, based on your experiences of the HC?

7. Overall impressions of the FSO scheme

- How did you feel at the end of the process?
- Any positives re the Ombudsman's scheme?
- Any negatives re the Ombudsman's scheme?
- In retrospect/hindsight, were your expectations of the Ombudsman realistic do you think? Your considered reflections?
- Have you any suggestions that you would make for improving the Ombudsman's scheme?
- Have you any final comments?

Many thanks for your co-operation in our study.

III. Interview schedule: MABS advisers

Stress confidentiality and anonymity; ask for anonymised documentation; get written details of relevant cases/decisions if possible/synopses

Introduction

My name is Stuart Stamp, I am an independent researcher (and associate of NUI Maynooth) employed by FLAC for the purposes of this research. The study is an enquiry into the strengths and weaknesses of legal provisions and complaints procedures designed to protect users of financial services in Ireland. The purpose of the research is to identify areas where these provisions and procedures could be improved from the consumer's perspective. The focus of this particular interview is on your experiences of the Financial Services Ombudsman, Financial Regulator and National Consumer Agency. This interview is confidential and no interviewees will be identified in the final report; we may however use anonymised quotes from these interviews to illustrate particular issues arising from the research. (Seek permission to tape interview to ensure accuracy of data).

1. ADR. What is your view of Alternative Dispute Resolution schemes (such as the Financial Services Ombudsman -FSO) in general? (good idea or not? advantages and disadvantages of ADR?)

2. Complaints about – Financial Service Providers (FSP). How do you find the *response of FSPs to consumer complaints* in general? (Any difference where MABS is involved?)

3. FSPs and the FSO. How have you found the *response of FSPs* in cases where complaints to the *Ombudsman* are involved?

4. FSO specifically. Your experience of the Ombudsman's scheme specifically:

- What *types of complaint* are referred to the Ombudsman in your experience? (e.g. banking, payment, credit, insurance, investment, savings)?

- What has (generally) *happened* by the time the client approaches you/MABS?

- Could you describe *your role* in supporting clients in Ombudsman referrals – what is involved?

- Is your involvement *welcomed/discouraged* by the Ombudsman would you say (probe)?

- From your experience, how would you describe the *approach of the Ombudsman* to the complaints it receives?

- What about the Ombudsman's complaints *process* itself—have you any comments on this from your involvement as a money adviser?

- What is your experience in terms of the *outcome(s)* of complaints to the Ombudsman?

- What are your *overall impressions* of the Ombudsman scheme?

5. Clients and the FSO –the client's experience

- Would you describe your *clients' experiences* of the FSO as positive or negative? Why?

- Are there any *particular issues* for clients in terms of the Ombudsman's scheme? (probe – forms, support, time limits, evidence, documentation)

- Have you any experience of the *appeals* process/ the High Court?

- Again, are there *particular issues for clients in respect of appeals?* (e.g. costs, formality)

6. Recommendations/suggestions

- Are there any particular *suggestions or recommendations* that you would make based on your experiences of the Ombudsman's scheme?

- Have you any suggestions based on your experience of the *appeals* process?

- How *equipped* are you to support clients through the Ombudsman process? Any suggestions as to how you might be enabled to provide more support to consumers (e.g. more training/awareness/better links with the FSO)?

7. Financial Regulation in general

- What *dealings* do you have with the Financial Regulator (e.g. MARP, Consumer Protection Code, CCA, CC Regs)?
- How would you *describe* your experience of these dealings?
- Are there any improvements/amendments you would like to see made in terms of *financial regulation*?

8. The National Consumer Agency

- What *dealings* do you have with the NCA (e.g. around credit intermediaries/pawn-brokers/consumer education)?
- How would you *describe* your experience of these dealings?
- What is your view of the NCA's *role* in terms of the provision of consumer information/education on personal finance matters?
- Are there any improvements/amendments you would like to see made in terms of consumer *information/education*?

9. Concluding remarks

Any final *comments*?

Anything specifically *we should be focusing on* in this study?

Many thanks for your co-operation in our study.

IV. Interview schedule: Central Bank

Context

- How important is consumer protection for the Central Bank and what changes do you intend to implement e.g. with regard to enforcement?
- Over-indebtedness underpins many complaints we reviewed – please could you describe any training undertaken by staff in this regard?

Transparency

- Should the Central Bank be subject to Freedom of Information legislation? (please explain why/why not)

Complaints processes

- Is too much emphasis placed on the consumer to follow through on their complaint? (we would have concerns from our review about the capacity of many to do so)
- Consumers' experiences we have identified included: delays, dealing with a range of representatives at different levels, and finding communications difficult to understand – in some instances, a war of attrition seemed to be taking place. What is your response to such reports?
- The length of time involved can be off-putting for consumers e.g. 40 days+ (Consumer Protection Code) plus 25 days+ (Financial Services Ombudsman). Are there any proposals to integrate/reduce these periods?

The Consumer Protection Code

- Please describe your view on the enforceability of the CPC in legal proceedings?
- How do you monitor/enforce time-limits for dealing with complaints?
- Is the "attempt to investigate and resolve within 40-days" provision strong enough and what evaluation has been undertaken into its effectiveness in practice?
- Please describe use of the Administrative Sanctions Procedure in relation to the CPC? (e.g. number of Examinations. Settlements, Inquiries, imposition of penalties and appeals to the Financial Services Appeals Tribunal).

- Please describe the extent of follow-up to your CPC themed inspection in 2012, and the outcome of such follow-up in terms of resolving the issues identified?
- Have you any plans to address any gaps in the Code e.g. in relation to hire purchase/consumer hire providers?
- Why, after a broad consultation process, and on what basis, have you "amended" without formally amending, provision 3.3.7 regarding unsolicited personal visits?
- Please could you advise whether anybody checked with the European Commission whether the CPC could be applied to all credit agreements, as the Code is arguably not a legally binding piece of legislation?

The CCMA and the MARP

- Consumers' experiences included creditor unwillingness to seek solutions, insertion of inaccurate/inadequate figures on the SFS, delays in responding, and apparent organisational deficiencies. Do you have any proposals to address such issues?
- As part of your review of the CCMA, please confirm if any/what information has been sought from the FSO and provided by it?
- In addition, please confirm what information has been sought from/provided by consumers who have used the MARP?
- Is there an agreed protocol with the FSO for fast-tracking mortgage arrears cases (please explain why/why not?)
- Please describe use of the Administrative Sanctions Procedure in relation to the CCMA/MARP? (e.g. number of Examinations. Settlements, Inquiries, imposition of penalties, and appeals to the Financial Services Appeals Tribunal).
- Please describe the monitoring that has followed on from your themed inspection in 2011 to ensure providers adhere to the strict requirements of the CCMA, and the impact of such monitoring?
- Our understanding is that the FSO does not consider he has the power to overturn the decision of a lender's ASU and Appeals Board under the MARP not to offer any particular repayment arrangement. What is your position on this issue?

The Memorandum of Understanding (MOU) with the FSO

- Please could you describe how effective the MOU has proved to be in practice from your perspective?
- Please could you confirm how many issues have been reported to you by the FSO, the outcome of these reports, and the number of look-backs?

Relationships with other organisations

- Do you have any proposals to improve co-ordination between yourselves and other bodies (e.g. NCA, MABS)?
- Please confirm if the levies that fund the FSO are collected by yourselves and then remitted to the Bureau?

Consumer credit legislation

- The Consumer Credit Act 1995 applies in some instances and the European Communities (Consumer Credit Agreements) Regulations 2010 in others. Do you think that this 'architecture' is confusing to consumers? Does it cause difficulties for yourselves?
- Please describe how compliance with the above legislation is monitored. How many prosecutions have been taken and/or succeeded under the above legislation, and under what provisions were these taken?
- Is any state body currently overseeing the the European Communities (Consumer Credit Agreements) Regulations 2010 and if not, please could you explain why not?

V. Interview schedule: FSO staff

Review: legal protection for consumers of financial services in Ireland

These questions arise principally from a review we have been carrying out in recent months into the adequacy of legal protection for consumers of financial services in Ireland. As part of this review, we have interviewed a number of FLAC users who have contacted us in relation to complaints which have involved the Financial Services Ombudsman.

Part 1 – Context for complaints

1. The complaints procedure appears to be predicated on the consumer both having the capacity to make and to follow through with their complaint. Given that we would have concerns about many people's capacity in this regard based on our review, do you think that this is a reasonable assumption?
2. Many of the complaints reviewed were made against a backdrop of consumer financial difficulty, although this rarely formed the actual substance of the complaint. Does your staff receive any awareness training in this regard and if so, could you please specify the nature of such training?
3. Given the steady increase in complaints that you have received since your establishment, coupled with the impact of the economic downturn, do you feel that you currently have sufficient resources and staff numbers to cope with the workload?

Part 2 –Public awareness, transparency and trust

4. It is our understanding that under the terms of the Consumer Protection Code (CPC), regulated financial service providers must attend to complaints within 40 business days of receipt. Could you clarify please why there is no reference on your website to the complaints handling rules for regulated financial service providers contained in the Central Bank's Consumer Protection Code?
5. Consumer respondents we interviewed as part of the review heard about the existence of the FSO in various ways, but most commonly through their involvement

with MABS. Have you undertaken any research regarding how people heard about your service and if so, please could you summarise the results for us?

6. Aside from using it to download the complaints form, the website appeared to be rarely relied upon by respondents to our review. Have you had any feedback into the usefulness of the information contained on your website and if so, could you please describe this to us?
7. We have noted references on your website (accessed 10th January 2013) which are somewhat out of date (e.g. in the Useful Links section). Please could you comment on this finding?
8. There was a suggestion that a database of decisions, publicly available, would assist complainants in terms of framing their complaint. We note that such a development is under consideration by the UK Financial Ombudsman Service. What do you think of this idea?
9. Do you think that the Ombudsman's office should be subject to Freedom of Information as we understand to be the case in the UK? Please could you explain why/why not?
10. In their 2012 Annual Report, the UK Financial Ombudsman Service published demographic data on, for example, the age, gender, ethnic background and location of their service users, together with their socio-economic status and occupational background, correlated to the types of complaints made. Please could you confirm whether you collect any such data, or plan to do so in the near future and if so, how?
11. Again, in their 2012 Annual Report, the UK Financial Ombudsman Service published the findings of research they had undertaken into the extent to which people trusted their service, and would recommend it to others. Again, please could you confirm whether you collect any such data, or plan to do so in the near future and if so, how?
12. Your strategic plan for 2012-14 contains reference to an initiative "which will allow the Ombudsman name institutions when it

is in the public interest. In this regard it is heartening to hear that proposals are under consideration." Please can you clarify what constraints you have in this regard, and further, could you please update us with regard to these proposals?

Part 3 – The complaints process

13. We understand that it is a pre-requisite to accessing the FSO that a complaint must first be made to the regulated financial services provider under its internal complaints procedure. Can you confirm this please?
14. Will a consumer, therefore, be redirected to do this first before being allowed to fill out a complaint form for the purposes of a complaint to the FSO?
15. Assuming that the consumer has exhausted the internal complaints procedure of the provider and fills out a complaint form to the FSO, can you again please confirm that he or she must still wait at least a further 25 working days for the provider to issue a 'Final Response' letter following receipt of that complaint form, before the matter can proceed to investigation?
16. Many respondents interviewed for our review felt that their provider had already taken an extremely long time to consider their complaint by the time they complained to the FSO. In this context, do you think that this further (25 day) delay is fair to the consumer?
17. Do you have any information on the effect that these delays might have on consumers failing to further pursue their complaints?
18. Once they have filed a complaint form with yourselves, could you confirm please whether the consumer has still to write separately to the provider outlining his/her complaint, when according to your website, the FSO already sends the complaint form to the provider? If yes, please could you explain why?
19. In terms of making the actual complaint itself, some respondents to our review found the complaint form to be inadequate, and there was often a preference to attach an explanatory letter, rather than use the form on its own. Have you received any feedback in this regard and if so, could you please give details?
20. Many respondents to our review reported becoming lost in the complaints process. This was associated with the volume of documentation, its content (particularly the nature of responses forwarded on from providers), the amount of documentary exchanges that took place, and the length of the process as a whole. What is your response to these concerns?
21. Some respondents to our review were unhappy that they did not get the opportunity to confront their provider "face to face", and to question their representative in the presence of the Ombudsman's investigator. What is your response to this view?
22. Could you confirm please how many oral hearings were held in the past twelve months, and whether these tended to involve any specific type(s) of complaint?
23. In terms of face to face opportunities during the process, several respondents to our review requested mediation but their providers refused. Given that there were only 6 cases mediated upon in the first two quarters of 2012 (according to the Financial Services Ombudsman's Bi-Annual Review 2012), can you please offer any explanation for such a low level of 'mediated' cases?
24. Several respondents to our review felt that it had taken a considerable length of time for their complaint to the FSO to be concluded. Can you please indicate the average time it takes for a case to proceed from the filing of the complaint form to adjudication?
25. Several money advisers interviewed commented on the amount of time and resources required to support clients appropriately through the complaints process. Do you think that this further illustrates the difficulties for complainants acting on their own?
26. Some respondents to our review had difficulty understanding parts of the text of decisions, and the actual finding in some instances – for instance, who was deemed to be 'right' and who was 'wrong'. What is your response to such difficulties?

Part 4 – The Appeals Process

27. A number of our consumer respondents explained that they could not avail of the

- High Court appeals avenue, principally on the grounds of financial cost. Do you think that this is fair?
28. Do you have any information on consumers deciding not to bring appeals that they would otherwise have pursued but for this reason and if so, could you provide us with details please?
 29. Our understanding is that a succession of High Court judges hearing appeals has concluded that the appeal is not a 'de novo' hearing and that the court 'must apply the deference which arises from the reluctance to interfere with specialist bodies'. Do you attempt to explain the restricted nature of the appeal to potential appellants and if not, please could you explain why not?
 30. Our understanding is that you make it clear to appellants (whether consumers or financial service providers) that if their appeal is unsuccessful, you will pursue an award of costs against them if that appeal does not succeed. Do you believe that this is fair, especially when the appellant is a consumer who does not have legal representation (again, please can you explain why)?
 31. Can you tell us please how many appeals were brought by consumers against decisions that you had made which were subsequently withdrawn prior to hearing?
 32. Can you tell us please how many appeals were brought by financial service providers against decisions that you had made which were subsequently withdrawn prior to hearing?
 33. Do you have any specific detail on the amount of money spent by your office opposing appeals in terms of legal costs since 2005 and if so, could you please advise us of this figure?
 34. Can you indicate please how many appeals have been brought against your decisions since 2005 that you have not ultimately opposed?
 35. Our understanding is that in some of these instances, the matter is remitted to you for review and that these appellants have to join the waiting list for the matter to be reconsidered. Can you confirm if this is the case and if so, could you please explain why?
 36. If this is the case, do you believe that this is warranted or fair in the context of consumers, given the further substantial delay involved?
 37. Generally speaking, would you favour a more accessible and simplified appeals procedure and if so, please could you explain why?
 38. Do you have specific ideas about what you would like to see put in place instead of the current High Court process, and if so, please could you describe these?
- Part 5 – Mortgage Arrears Resolution Process (MARP) complaints**
39. Two respondents to our review reported asking your office if there was a specific MARP complaints form that they should use in this context, and being advised in response to use the general complaints form. Given the particular issues involved in relation to mortgage arrears, could you explain please why there is no separate claim form for MARP complaints?
 40. Do you fast-track MARP complaints, given the particular issues involved in relation to mortgage arrears, and please could you explain why/why not ?
 41. Please could you confirm if it is your position that you cannot (or will not) overturn the decision of a lender under the MARP not to offer any particular repayment arrangement?
 42. Could you clarify please why there is no discrete reporting category (in your annual reports) for complaints concerning the MARP?
- Part 6 –Systemic complaints and relationships with other agencies**
43. A number of respondents to our review (and particularly some of the money advisers interviewed) made reference to individual complaints being, in their view, symptomatic of systemic complaints. In this regard, how effective has the Memorandum of Understanding or MOU (between yourselves, the Central Bank and the Pensions Ombudsman) proved to be from your perspective?
 44. Please could you confirm how many systemic issues you have reported to the Central Bank under the MOU?

45. Please could you confirm the outcome of such reports under the MOU, in particular the extent to which the Central Bank ordered regulated financial service providers to look through their files and provide similar remedies?
46. In two cases reviewed, complainants reported being unhelpfully referred on by yourselves to other agencies (in one case to MABS and in another to the National Consumer Agency). How would you respond to such reports?

Part 7 – Recording and categorisation of complaints (e.g. in FSO annual reports)

47. Do you think that the manner in which the outcome of complaints was recorded from 2006 –2009 accurately reflects the reality of success/failure rates for consumers?
48. Please could you explain why complaints said to be ‘resolved after the initial referral to the financial service provider’ were included in a category of ‘resolved in the complainant’s favour’?
49. Please could you explain why the basic method of recording the outcomes of cases up to 2009 was changed for the 2010 and 2011 reports?
50. Did your office then and does it now have or seek to have any information on the actual outcomes of complaints where no further contact was made by the consumer post-complaint?
51. In the case of settlements, did your office then and does it now have any information on the actual outcomes of settlements? For example, are settlements proposed to unrepresented consumers screened for their suitability?
52. Please could you explain the difference between the ‘no further contact’ category and the ‘settled’ category in the 2011 Annual Report, as both are recorded as cases closed prior to investigation?
53. Into what category do settlements that occur during the course of the FSO investigation fall, as there is no category for them in the 2011 Annual Report?
54. Could it be that the settlement category here actually reflects cases settled prior to adjudication rather than prior to investigation?
55. The legislation (as amended) provides for an eligible consumer to make one (or more) of three different types of complaints. Please could you explain why the division of complaints (within remit) in the Annual Reports does not initially follow this legislative format?
56. Some respondents to our review were unhappy at their complaint being categorised as “partly upheld”, as they felt that the substance of their claim had not been upheld at all. Please could you advise whether you have undertaken (or propose to take) any evaluation into consumers’ reactions to outcomes and if so, how?
57. If such an evaluation has been carried out, please could you confirm the key findings in this regard?
58. Is it possible to identify the number of complaints which relate specifically to the Consumer Protection Code and if so, could you please specify the number of such complaints in 2012?





Redressing the Imbalance critically examines the legal protections available to consumers of credit and other financial services in Ireland. It identifies a number of deficiencies and gaps in how such protections are provided. It also suggests that a systemic approach has evolved which has consistently served to prioritise the interests of financial service institutions over those of consumers. The report provides a detailed account of how European-level developments, piecemeal domestic legislation and selective financial regulation have combined to leave many consumers of financial service in Ireland – in particular consumers of credit and distressed mortgage borrowers – particularly exposed. Drawing on the experiences of consumers and their advocates, the study further highlights how such exposure can be compounded by difficulties accessing and using mechanisms ostensibly designed to facilitate the resolution of complaints against providers. The report concludes with a series of recommendations as to how these flaws in the legal infrastructure might be redressed from a financial service user perspective.



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