

FLAC Policy Briefing on Code of Conduct on Mortgage Arrears

16 February 2009

Overview

The newly issued Financial Regulator's code of conduct on mortgage arrears is deeply disappointing and represents even less protection for consumers than the draft code which the Regulator prepared last month. FLAC is very concerned about a number of issues, the most pressing being:

- Borrowers' interests are clearly not at the centre of this code. There is less protection here than in the initial draft. For instance, to FLAC's knowledge, to date there has been no consultation with consumer interest groups or legislators on this Code. There is no compulsory referral to MABS, this being left to the lender's discretion.
- The code fails to deal at all with many issues concerning borrowers in difficulty, such as in cases where a person voluntarily hands over his/her property to the lender, who will value that property and at what stage?
- The language is vague and ambiguous. This lack of precise language will make it very difficult to enforce this code or investigate alleged breaches.

Main points

Lack of focus on borrowers and the public.

According to Part 2 of the Code, it is issued under the provisions of s.117 of the Central Bank Act 1989. This has implications for both investigations and sanctions (see below) but in addition, s.117 requires codes to be prepared having "regard to the interests of customers and the general public" as well as the interests of the "promotion of fair competition in financial markets in the State".

FLAC can only presume that the interests of financial markets have been met as at least they were engaged in consultation by the Regulator's office prior to the adoption of the code, but there is little or no evidence that the code had regard to the interests of customers and the general public, even in circumstances where this code was produced as part of the package of recapitalisation of the banks by the general public.

Narrow scope

The code only covers “the provision of finance for the primary residence.” It is entirely unclear from the code - as a result - whether those who took out mortgages on their houses to help their children acquire a house, or to help finance their businesses or farms, or had to guarantee their main houses when they took out a business loan will be covered at all.

Vague language

The language of the code is for the most part ambiguous, leaving much to the discretion of the lender. This will make it more difficult to protect borrowers’ interests in the investigation of complaints and much more difficult to impose sanctions.

Thus, Part 1(b) states that the lender “may enforce the mortgage in circumstances where the application of this Code is not appropriate, such as, but not limited to, in the case of fraud or breach of contract other than the existence of arrears”. Whatever about fraud, there are many innocuous breaches of very extensive, closely worded mortgage documents which would allow lenders off the hook under this part of the code. Most mortgage deeds, for example, forbid changes to the property without the consent of the lender. Some require borrowers to keep a deposit in another account. Can even technical breaches of these conditions be enough to mean that the lender does not have to engage with the code?

Focus on problem, not on prevention

Most of the Code comes under the headings of avoiding, handling and addressing a mortgage arrears problem. This in itself leads to gaps. Even within the issues covered, there are no clear, unambiguous guidelines for how communications with a borrower should be handled.

Like everyone concerned with those in difficulty with their mortgages, the Code properly stresses that early contact and constructive dialogue between borrower and lender is best. However, the code fails to require lenders to notify borrowers in trouble of the existence of state funded legal aid services from the Legal Aid Board Law Centres, and only recommends that “where circumstances warrant it”, the lender must refer the borrower for guidance to a local Money Advice and Budgeting Service office (MABS) or to “an appropriate alternative”.

Effectively, the discretion even as to money advice is being left with a lender as to when such a referral should be made and no obligation exists to refer people to legal advice even though borrowers stand at risk of losing their homes.

Six month limit starts from first day of arrears

While the Minister for Finance’s statement on recapitalisation indicated that “repossession action” would not commence for 6 months, the code says that the lender can issue a formal demand “if a third repayment is missed” (part 4c). At this point too, the Code is geared more towards lenders than was the Regulator’s draft

code which was circulated to lenders in January. The draft code would not have permitted a lender to institute repossession proceedings unless there were cumulative arrears of 6 months. The final version of the code allows the lender to issue repossession proceedings *"6 months from the time arrears first arise."* This gives considerably less protection to borrowers.

According to the Financial Regulator's own figures, published in December 2008, there were almost 14,000 mortgage holders in arrears of 3 months or more in June 2008. That number is likely to have risen substantially.

No consultation with consumer interests groups

The Financial Regulator website's says that there was consultation with "relevant stakeholders". The view of stakeholders is narrow in the extreme as there was no effective consultation with consumer rights groups or no public consultation with legislators either.

No provision for negative equity

The question of negative equity, and the problems that flow from this, is only addressed obliquely. Part 6 (d) of the Code reminds lenders that they must inform the borrower that s/he will remain liable for the outstanding debt and all the many costs and interests that can accrue. This is related to borrowers whose homes are in "negative equity". The code fails to address who is to value a house in negative equity and what steps are to be taken to ensure best value for borrowers on the disposal of the property.

Unenforceable provision for dealing with borrowers

FLAC welcomes the sensible suggestions in part 5 of the Code of the options that should be considered by borrowers and lenders when a mortgage is in serious arrears and that "(a)ll genuine cases must be handled sympathetically and positively by the lender" . However, that exhortation is entirely unenforceable in law and the code entirely fails to address a number of important aspects of consumer protection. These matters were already raised in FLAC's submissions to the Office of the Financial Regulator before the issue of the code.

Much of what is in the code is guidance to lenders, depending heavily on their discretion. Thus borrowers who anticipated a stronger regulatory regime particularly for rogue lenders will be disappointed if this document represents the only attempt at statutory regulation of mortgage lenders dealing with arrears.

Additional items not included in the code:

None of the issues below are included in the code. All of them are necessary for the protection of borrowers, particularly borrowers under pressure of losing their homes.

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- The code should oblige mortgage lenders to spell out to borrowers what they can do to avoid the costs of legal proceedings.
 - There is a need for fair and objective standards in and transparent information on how lenders will calculate amounts due to them in the event of voluntary surrender, i.e. where the borrower does not contest a repossession action – how the value of the property will be calculated.
 - Lenders and the Regulator should publish clearly all new and existing charges to customers; all existing charges should be reviewed.
 - Where the rateable valuation of a dwelling is £200 or less, that only Circuit Court scale costs can be added to the overall debt, even if the lender has brought the action in the High Court
 - As regards enforcement, FLAC is concerned at the comparatively weak supervisory and sanctions provisions envisioned for compliance with this and similar code. Thus there is a need for this code to have clear standing in law. It must be widely publicised and rigidly enforced, with alleged breaches investigated promptly and sanctions imposed speedily, subject to a right of appeal to the Irish Financial Services Tribunal. For flagrant abuses, the Regulator should bring criminal proceedings.
 - The code should contain fair and clear procedures on investigation of complaints, with legal advice and representation available to borrowers who make them, including access to civil legal aid/advice where appropriate.

/ENDS

Notes:

1. FLAC prepared a submission on the draft code which is available on our website at: <http://www.flac.ie/news/2009/01/27/submission-on-proposed-code-for-mortgage-arrears/>
2. The code is issued under s.117 of the Central Bank Act 1989. The text of this is cited below:
3. Codes of practice.
117. —(1) The Bank may, after consultation with the Minister, from time to time draw up, amend or revoke, in relation to any class or classes of licence holders or other persons supervised by the Bank under this or any other enactment, one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate.

(2) In drawing up codes of practice the Bank shall have regard to—
(a) the interest of customers and the general public, and
(b) the promotion of fair competition in financial markets in the State.

(3) The Bank may—

(a) require any licence holder or other person supervised by it to provide all relevant information to the Bank to enable the Bank to satisfy itself as to compliance with the code by such licence holder or other person,

(b) issue a direction in writing to such licence holder or other person to comply with practices specified in the direction where this is necessary, in the opinion of the Bank, to secure observance of the code.

(4) (a) Any licence holder or other person supervised by the Bank who fails to provide information in accordance with *subsection (3) (a)* or to comply with a direction under *subsection (3) (b)* shall be guilty of an offence and shall be liable—

(i) on summary conviction to a fine not exceeding £1,000, or

(ii) on conviction on indictment to a fine not exceeding £25,000.

(b) Where a person has been convicted of an offence by virtue of *paragraph (a)* of this subsection and, after the conviction, the failure to provide information or to comply with the direction, as the case may be, continues, the person shall be guilty of contravening this section on every day on which the contravention continues after that conviction and for each such offence he shall be liable—

(i) on summary conviction to a fine not exceeding £100, or

(ii) on conviction on indictment to a fine not exceeding £2,500.

(5) In this section "practices" includes procedures.