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promoting access to justice

THE REVISED CONSUMER PROTECTION CODE – CP 47

FLAC

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Introduction

FLAC welcomes the publication of the revised code and believes that its implementation will mark a significant improvement in the protection of consumers when availing of financial services into the future. However, it is an unavoidable comment that there is a very strong sense of 'closing the stable door after the horse has bolted' about this consultation. Had this more specific focus on consumer protection, creditor due diligence and vigilant regulatory standards been in place at the height of the credit boom, as FLAC and others had campaigned for, it is likely that the effects of the debt crisis would not have impacted as deeply on consumers on low to moderate incomes. The points made in this brief submission focus particularly on the impact of the code in relation to the lending practices of regulated entities, under a number of the various headings set out in the Consultation Paper where views are particularly sought.

Vulnerable consumers

In Chapter 13 of the draft code, a "vulnerable consumer" means a consumer that is vulnerable because of mental or physical infirmity, age, circumstances or credulity. These can include, but are not limited to, the following:

- those with a low level of educational attainment;
- those with a low income;
- those with a high level of indebtedness;
- those with a poor credit history;
- those who do not have English as a first language;
- those suffering from a long term illness or disability or episodic illness;
- those whose mental capacity to make a decision is diminished;
- those that are near, or over the statutory retirement age, are retired from their occupation or are retiring soon;
- those who are recently bereaved;
- those with a substantial sum to invest who have little or no investment experience

The Consultation Paper asks on this issue - 'Do you agree with the indicative list of circumstances that could render a consumer vulnerable that have been included in the definition of 'vulnerable consumer'?

We would firstly question the use of the word 'credulity' in the definition of vulnerable consumer. Credulity, which may be defined as the tendency to believe readily, is not a word in very common usage and is arguably patronising in the circumstances. It might be preferable to replace this word with something which more sympathetically reflects the danger that a consumer may be exploited such as 'lack of relevant experience'. Otherwise the criteria are reasonably comprehensive. However, we would like to see an additional criterion included that would reflect the 'lack of experience' that we suggest should be part of the definition, for example, 'those with a lack of knowledge of financial services'.

The Consultation Paper then asks - 'Do you think that the inclusion of a definition for a vulnerable consumer and the proposals and amendments outlined above will be effective in improving the level of care afforded to vulnerable consumers during the sales process? If not, please outline any further measures you think are necessary.

Page 5 of the draft suggests that '*Consideration of the following provisions would be particularly relevant where a regulated entity recognises a vulnerability in an individual consumer'* and goes on to cite as examples the sections headed Provision of information to the consumer – Verbal Interactions, Power of Attorney, Knowing the Consumer and Suitability respectively. Surely, however, recognition of vulnerability is unlikely to occur without the consideration of such provisions in the first place. In that regard, it is submitted that some of the vulnerability criteria – for example, those persons with a low level of educational attainment, those with a high level of indebtedness, those suffering from a long term illness or disability or episodic illness, those whose mental capacity to make a decision is diminished or those who are recently bereaved - would be difficult for the regulated entity to recognise without a much more onerous (and in some cases it must be said potentially invasive) fact find in the first place than is envisaged under the draft provisions of Chapter 5 on knowing the consumer and suitability. These currently confine the information that must obtained on the consumer at a minimum to categories headed 'Needs and objectives', 'Personal circumstances', 'Financial situation' and 'Attitude to risk' and make no reference to the more specific criteria of vulnerability above.

We would support the introduction of a vulnerable consumer category but if it is to be introduced, it must impose more explicit obligations on regulated entities and must provide for specific adverse consequences for regulated entities where these standards are breached.

Provision of information to the consumer – Verbal Interactions

Chapter 12 on records and compliance currently provides that '*Where there is a verbal interaction with the **consumer** to assist the **consumer** in understanding the product or service on offer, a **regulated entity** must keep a contemporaneous **record** of the detail of such verbal interaction'*.

Will the consumers be invited to agree the written contemporaneous record of the verbal interaction? If not, how can such a record 'verify that such interactions took place' if it is one sided record made and kept by the service provider? What is to stop the service provider from recording something conveniently different from the conversation that took place? Given that it is likely to be labour intensive and therefore may ultimately push up the costs of services to consumers, is this more trouble than it is worth, especially if the service provider will be entitled to rely upon it in any subsequent complaint that a consumer might make?

Knowing the consumer and suitability

It is welcome that the provisions under these headings are being strengthened. However, we would be concerned from a number of perspectives here.

First, will the consequences for a regulated entity that ignores the 'knowing the consumer' requirements and provides a service that does not assess according to the 'suitability' criteria be sufficiently robust and public, in terms of the administrative sanctions programme, to provide a genuine deterrent for other entities from engaging in such breaches of the code?
Second, why are some very common types of lending excluded from the scope of the Code in their entirety; most notably hire purchase and consumer hire agreements and credit union core business? Why, in turn, has the thinking of the Central Bank in deciding upon their exclusion not been elaborated upon in the Consultation paper itself?

Third and to compound these exclusions, it is also submitted that that the usefulness of these provisions is fundamentally undermined in the lending sphere by the exclusion (page 28) of credit agreements to which the new consumer credit regulations apply, because of the maximum harmonisation nature of the consumer credit directive. To summarise, if these provisions remain unaltered, this will mean that the vital checks of knowing the consumer and assessing suitability, in order to prevent unsustainable loans that might result in indebtedness, will not apply to hire purchase agreements, consumer hire agreements, credit agreements (for example, personal loans, credit sales, credit cards and overdrafts) provided by credit institutions and any personal loans offered by credit unions or moneylenders. That does not leave much that is covered by the provisions apart from housing loans, to which the Consumer Credit directive does not apply.

No further elaboration is provided of the Central Bank's thinking in determining that such important provisions of the code cannot be applied to credit agreements covered by the directive. However, the directive does provide that a creditor must assess the creditworthiness of an applicant for a loan and it may be suggested that this strays into the same territory as knowing the consumer and assessing suitability in the Code. This may be the reason the Central Bank has determined that if it includes credit agreements in these aspects of the code, it will go beyond the requirements of the directive and offend the concept of maximum harmonisation.

However, two arguments can be made here to distinguish the code and the directive here. First, the code concerns itself with assessing suitability – factors such as ability to meet the financial commitment involved and experience and knowledge in order to understand the risk – whereas the directive concerns itself specifically with assessing creditworthiness, including on the basis of a consultation of the relevant database and these are arguably different criteria. Second, the code, though described as statutory, is not expressly admissible in legal proceedings and is only subject to the Central Bank's administrative sanctions programme, whereas the transposition of the directive into Irish law is a legally binding obligation arising from Ireland's membership of the European Communities.

We have endured much reckless and unsustainable lending in Ireland over the past decade and proper standards must be in place to prevent a recurrence in the future. It follows that, at the very least, the view of European Commission's view should be sought as to whether the Central Bank is precluded from applying the rules in this section of the code to credit agreements.

Suitability of mortgages

If ever a set of provisions 'missed the boat', it is under this heading. Will these amended provisions reduce the level of reckless mortgage lending in Ireland if or when credit becomes available on a widespread basis again? Much depends on how rigorously they are interpreted and policed by the Regulator/Central Bank and the penalties that will apply in the event of non-compliance.

Much will also depend on how provisions such as *'before offering, arranging or recommending credit to a consumer, a regulated entity must **fully assess** the consumer's ability to service the repayments'* are interpreted. This in turn may also depend on whether a national credit register is developed and how comprehensive the information contained within it will be. Perhaps the creditworthiness provisions in the Consumer Credit directive, insofar as it is a maximum harmonisation measure may also have an impact here.

The question is asked whether a Standard Financial Statement (SFS) should be used to assess the consumer's ability to service mortgage repayments. Our understanding is that despite intentions to the contrary, no agreed SFS has been created as of yet, despite the general use of financial statements in MABS/creditor negotiations, the discussions of the Mortgage Arrears and Personal Debt Review Group and the incorporation of the concept of the SFS in the new Code of Conduct on Mortgage Arrears.

However, it is also arguable that the SFS when it is finally agreed (and the role and agreement of MABS is critical here) is specifically designed to be used primarily as financial evidence in situations of indebtedness and should not be used as a vehicle for assessment of capacity to service a mortgage that has not yet been agreed and where no situation of indebtedness exists. It may be that an applicant for a mortgage who is financially solvent may regard the comprehensive nature of the information envisaged to be included in a financial statement – for example household spending patterns - to be excessive for the purpose of fully assessing capacity to pay.

What additional provisions might be introduced that would result in a greater level of responsible lending? A summary of suggestions here might include;

- the capping of interest rates on mortgages provided by sub-prime lenders,
- the imposition of a requirement on mortgage lenders who are proposing to charge above market rates to a consumer to justify that rate on a case-by-case basis and to demonstrate that an even more rigorous assessment of capacity to pay has been carried out,
- the imposition of a maximum term for mortgages where the potential borrower is approaching statutory retirement age

Review of the intermediary market

It is notable here that the 2008 review of the intermediary market contained no consumer representation. One would have thought that the view of consumer groups might be useful in deciding the future approach to the regulation of intermediaries.

This is especially so in the case of mortgage intermediaries (MI's), some of whom were responsible for arranging reckless and unsustainable housing loans over the past decade, many of which are now resulting in repossession proceedings or voluntary surrender. In turn, in some of these cases, the intermediary's commission was dependent upon the loan application proving to be successful and the commission was deducted from the loan amount advanced to the borrower. The temptation therefore to 'dress up' the applicant's financial capacity is obvious. The previous code simply obliged the MI to sign a declaration to the lender that s/he had sight of all original documentation evidencing ability to repay, but no such obligation was explicitly placed on the lender to do so. How many MI's have had sanctions imposed upon them for their failure to adhere to this obligation?

A further problem here is the ongoing lack of regulation of credit intermediaries by the Central Bank and their continued regulation by the National Consumer Agency (NCA). As outlined above, we are not clear why hire purchase and consumer hire loans are now to be excluded from the code, when our experience is that some of the worst 'selling of credit' practices over the past decade and before took place on the forecourt of garages. If ever a category should be reined in by the 'Knowing the consumer and suitability' requirements, it is credit intermediaries in the form of garages arranging car finance on behalf of finance houses and the car finance divisions of the banks. For example, we have had sight in recent months of several HP agreements with substantial 'balloon' payments, not just at the end of HP agreements but also stitched into agreements at various points along the way depending on the agreement. How this could possibly be in the consumer's interest when title only passes upon the making of the final payment under the agreement is beyond our understanding.

In summary, the new code should apply to all intermediaries involved in any way in the provision of financial services and such intermediaries should be obliged to disclose all relevant information on their arrangements with the regulated entities they act for. They should be obligated to act in the consumer's best interests and to explain in plain English the salient features of products on offer.

Unsolicited contact and payment protection policies

Under this heading, we are not clear why an exception is being made for so called 'protection' policies. Payment Protection Insurance (PPI) policies, for example, offered to borrowers in recent years in conjunction with credit agreements have frequently been far from transparent, both in terms of the information and documentation provided and the charges. In some instances, the insurance provided has been inappropriate or insufficient for the consumer's needs; a deficiency only discovered when a claim is initiated. The standard offer of a refund in these instances is inadequate in our view and does not compensate the consumer for his/her loss of cover in many cases.

In addition, in some cases, the premiums were paid for by loans to the borrower at the same rate of interest as the advanced amount, a practice that should not be permitted. We note that the new provisions on Page 33 of the draft code do not provide for this. Neither do they oblige the regulated entity to offer a separate agreement (as opposed to a separate application form) with separate terms and conditions for the PPI element of the credit deal, a practice that should be mandatory.

In our view, there is a case for not allowing unsolicited contact at all, leaving the consumer free to decide whether s/he wishes to avail of products or services

Arrears handling

We welcome the intent of the improved draft provisions concerning arrears handling and believe that they will form an important addition to the pro-active approach to dealing with arrears cases set out in the Code of Conduct on Mortgage Arrears. We believe that the provision that obliges the regulated entity to inform the consumer where a third party (for example, a debt collection company) is appointed and to explain its role is an important one.

In relation to the provision of contact details at point 3 (i) of the code, we suggest that it might also be useful to provide that the consumer's attention should be drawn to where legal advice may be obtained. It may be that the borrower for example has a legal remedy that s/he is not aware of. Even if this is not the case, information about the consequences of legal proceedings may be helpful in terms of resolving the arrears problem.

A notable and critical omission from the provisions here as far as we can see, compared to the code on mortgage arrears, is the failure to include an obligation on the lender to liaise with a third party nominated by the borrower to act on the borrower's behalf. People in debt can easily be pressurised into making unaffordable payments and this can be accentuated when they do not have a person who has a right to work on their behalf.

Finally, we agree with the provision which restricts the regulated entity from closing a current account where the consumer's overdraft is in arrears. For clarity's sake, we suggest that the prohibition on the closure of current accounts should be extended to a situation where the consumer has arrears on any other type of credit agreement with the regulated entity. For example, we have come across cases where an institution has closed a current account facility where the consumer has a credit card agreement in arrears with the same regulated entity.

Small print

We share the Central Bank's concern about the amount of information that regulated entities include in the small print of advertisements and agree with the proposal that key information must be included in the main body of an advertisement. However, why confine these provisions to advertising alone? Should the code not generally promote the use of plain English in all agreements/products and oblige regulated entities not to lock away important information in the small print of agreements?

Review of the transparency of credit card statement

We support the provisions that would oblige regulated entities to provide a greater level of information in the form of statements on the current position with regard to a variety of credit agreements, particularly with credit cards which have become a source of quickly mounting over-indebtedness for many consumers in Ireland in recent years. However, we would be concerned that this greater level of information might indirectly involve a cost for consumers availing of credit generally and would suggest that a general statement prohibiting this be included in the code.

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