Presentation to Joint Oireachtas Committee on Public Service Oversight & Petitions

on

Legal protections for consumers of Financial Services

FLAC

About FLAC

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

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For ***more information***, contact us at

FLAC,
13 Lower Dorset Street, Dublin 1
01-8873600 | info@flac.ie | www.flac.ie | fb.me/flacireland | @flacireland

PRESENTATION TO PETITIONS AND PUBLIC SERVICE OVERSIGHT JOINT OIREACHTAS COMMITTEE

BY NOELINE BLACKWELL, DIRECTOR GENERAL AND PAUL JOYCE, SENIOR POLICY ANALYST

FREE LEGAL ADVICE CENTRES

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1. Introduction

We would like to begin by expressing our thanks to the Chair and the members of the committee for the invitation to come before you today to speak about FLAC's most recent report: 'Redressing the Imbalance'. We have brought along copies of the report and the Executive Summary for your attention.

As you are probably aware, FLAC has campaigned for almost two decades for reform of the law governing personal insolvency and bankruptcy, for changes to the legal system concerning the enforcement of debts in the courts and for a pragmatic approach to be taken to resolving mortgage debt so as to avoid, wherever possible, the repossession of family homes.

A perhaps less well known aspect of our work in the debt and credit arena involves campaigning to improve **legal protection for consumers of credit and associated services** and to strengthen the **systems of complaint and redress for consumers unhappy with the conduct of financial services providers**. This, in summary, is the terrain covered by 'Redressing the Imbalance'. Needless to say, in a short presentation such as this, we can only give an overview and a flavour of what is quite a detailed report running to almost 200 pages.

2. Legal protection for consumers of credit and associated services

The credit boom and bust has obviously caused huge damage to this country, both economically and socially. Clearly, we are not out of the woods yet in relation to the personal debt crisis - the low level of activity under the personal insolvency legislation and the slow rate of progress in restructuring troubled mortgages demonstrate that – but we felt it would be timely in this report to look at lessons from the credit boom and at how a similar fiasco might be prevented in the future.

- **European consumer credit directives**

Our report concludes that the institutions of the European Union did us little favours in terms of the 'maximum harmonisation' approach taken to regulating consumer credit. It took a full six years to agree the revised consumer credit directive and the Commission's plans in 2002 to take a stance on responsible lending were substantially watered down by the time the measure was agreed in 2008. The world of lending changed significantly during this period and it is arguable that the directive was in many respects out of date by the time it was transposed. Member States, however, had little or no flexibility to strengthen standards of consumer protection. It should also be noted, contrary to some opinion, there is actually nothing from a legal perspective to prevent a similar binge of reckless lending happening again. While credit institutions may currently be exercising restraint in terms of lending practices, there is no guarantee that this will continue and we must learn from the harsh lessons of the credit boom.

- **Poor transposition of directives**

The State's transposition of the revised directive also left a lot to be desired as it was transposed hurriedly by statutory instrument. This is compounded by the Central Bank's decision to monitor compliance with its own Codes – soft rather than hard law - rather than to police the Consumer Credit Act 1995 which transposed the first consumer credit directive and the consumer credit regulations of 2010 which transposed the second. In summary, the legislative position is an unholy mess, inaccessible to the very people it is intended to protect and largely unmonitored by the State.

- **The status of Central Bank codes**

In turn, the status of Central Bank codes in terms of legal enforceability is still in doubt. Such codes are neither primary nor secondary legislation and the Oireachtas has no role in devising the terms of such codes. It therefore remains unclear, for example, to what extent a borrower facing repossession of his or her family home before the Circuit Court can argue in his or her defence that the lender has breached the terms of the Code of Conduct on Mortgage Arrears (CCMA).

A further problem with Central Bank codes is that their lack of universal applicability. For example, the Consumer Protection Code, which contains some quite valuable provisions obliging lenders to assess a potential borrower's capacity to service a loan, does not apply to hire purchase finance or loans offered by credit unions and it only partially applies to other forms of credit agreement such as personal loans. Again, the picture for consumers, particularly when borrowing money is clouded and protection is patchy. Whilst this may not have been urgent in the past few years when consumer lending has been slow, it is becoming a more urgent issue as lending begins to increase.

One concrete example might be of use to the members of the Committee - right now a lender/Owner offering a Hire Purchase car finance agreement to a borrower/Hirer is not legally obliged to carry out any checks in relation to the suitability of the agreement for the borrower's needs or the borrower's capacity to service it in terms of affordability. Neither are Hire Purchase finance companies regulated by the Central Bank. This is unacceptable at a time when Hire Purchase lending seems to be making a notable comeback as a form of credit provision.

- **Summary**

To summarise, we suggest that all credit providers should have to observe stronger and legally enforceable rules on credit assessment and responsible lending and consistent obligations to across all forms of credit to provide clear and comprehensible information to borrowers. The cost of borrowing should be properly regulated and monitored and the Central Bank and other regulatory bodies should be more cognisant of the consumer voice and the consumer experience in the reviews and inspections that it carries out and in framing proposals for regulatory codes.

3. **Systems of complaint and redress for consumers unhappy with the conduct of financial services providers**

- **Research relating to the Financial Services Ombudsman Bureau (FSOB)**

The bulk of 'Redressing the Imbalance' focuses on the system of complaint for consumers of financial services (mostly banking, insurance and investment) to the Financial Services Ombudsman Bureau (FSOB). The report conducted a critical analysis of both the operations and procedures of the FSOB and the legislation that was put in place to establish it and recommendations for improvement are made in the

report under both headings. Critically, we also carried out semi-structured interviews (30 in total) with a number of users of the service and their advocates – money advisors working for the Money Advice and Budgeting Service (MABS) - to gauge their experience of making complaints to the FSOB. The catalyst for this research was the apparent dissatisfaction of complainants whom we had supported with complaints in the past and this led us to want to investigate these matters further. We should also emphasise that the people we interviewed were what might be termed ordinary personal consumers – people outside the course of their trade, business or profession when availing of financial services – as opposed to small businesses that also have access to the FSOB scheme.

Before attempting to summarise the research findings, it is important that we stress that we are in favour of having a Financial Services Ombudsman. Alternative dispute resolution mechanisms such as this are generally a good idea in principle and allow consumers to make complaints free of charge, rather than to incur the potential cost of legal advice and representation that raising such matters in the courts might involve. We should also add that senior staff of the FSOB (and indeed the Central Bank) consented to be interviewed for the purposes of the report and both attended the launch. Since the publication of the report, we have had significant engagement with both institutions and, whilst not entirely agreeing with all our conclusions, they have broadly welcomed some of the recommendations and have adopted a constructive approach to the report.

- **Perceived inequality of arms**

The overwhelming response from interviews was the sense that there is a substantial 'inequality of arms' between consumer complainants and the financial institutions whose conduct they were unhappy with. In turn, many felt that the procedures adopted by the FSOB compounded this inequality, focusing primarily on the exchange of documentation and submissions. A number of interviewees, both complainants and money advisors assisting them, confessed to drowning in a welter of technical detail. In this regard, some regretted that they did not have the opportunity to articulate their complaint in an 'oral hearing' type setting. It should be emphasised here that there is no specific place where consumers can obtain assistance to frame their complaints. Neither is there a database of previous decisions that consumers can access to help in the preparation of their complaint. Both these deficiencies should be remedied.

- **No further contact and settlement categories**

A substantial number of complaints seemed to disappear off the radar and there are also a high number of settlements, mostly pre-investigation but also some post-investigation. For example, of 6,245 admissible complaints in 2012, there was 'no further contact' following the complaint in 1,968 (almost one in three) cases and 1,282 (over one in five) were settled. It is clear that the FSOB does not, broadly speaking, know what happens in these cases and, given the inequality of arms referred to above, there is a distinct danger that a number of these cases disappear because consumers give up hope or perceive the odds to be stacked against them or they settle on terms that may not necessarily reflect the validity of their complaint. We should say that the FSOB has undertaken to investigate these concerns in greater detail.

- **Low success rates**

Our examination of the FSOB annual reports also suggests that success rates for complaints whose complaints do proceed to the investigation stage are comparatively low and declining, as is the average amount of compensation awarded. In 2012, for example, 10% of complaints were upheld, 17% were partly

upheld and the remaining 73% (or almost three in every four) were rejected. Incidentally, the fact that their complaint was 'partly upheld' category caused considerable distress to some of our interviewees, who felt that in reality their complaint was largely rejected and that this categorisation and token amount of compensation awarded to them was more of an insult than anything else. We feel that this categorisation of decisions should be reviewed.

Even if a complainant is successful, it would appear that awards are low. For example, the average amount of compensation awarded in the first half of 2013 was down to an average of €1,115 per upheld/partially upheld complaint, down from an average of €3,655 in the first half of 2010.

- **Legislation establishing the FSO**

The FSO is a creation of statute, specifically Section 16 and Schedules 6 and 7 of the Central Bank and Financial Services Authority of Ireland Act 2004, inserting a new Part VIIB into the overarching Central Bank Act 1942. In the course of Redressing the Imbalance, we also examine this legislation from a critical perspective and make some recommendations as to how it might be usefully amended. A summary of some of those recommendations is as follows:

Six year rule

The rule limiting complaints being made to within six years of the conduct complained of is too restrictive and there have been quite a number of proposals also made on this issue to amend the Statute of Limitations 1957, especially by the Law Reform Commission. Regarding complaints to the FSO, this issue has arisen particularly in the context of the alleged mis-selling of Payment Protection Insurance (PPI) and losses sustained on mis-sold Endowment Mortgages. Along the lines proposed by the Law Reform Commission, we would suggest that complaints to the FSO might be brought within six years of the conduct complained of or two years of the date on which the consumer became aware or could have become aware of the conduct complained of.

Low levels of mediated cases

It is clear that although mediation is emphasised in Section 57CA of the legislation as the first method of resolving a complaint, very few cases are dealt with by mediation in reality. We understand that the principal reason for this is the marked reluctance of a number of financial service providers to engage in a mediation process. The legislation should be strengthened to oblige providers to advance convincing reasons why mediation is not appropriate where the consumer has opted for it.

The FSO's basic remit

In performing its functions, 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 and legal form'.* While perhaps well meaning, we maintain that this mandate is confusing and even a bit contradictory. For example, how can the substantial merits of the complaint properly be considered without having regard to technicality and legal form, when as is often the case, the complaint concerns the provider's alleged breach of statutory rules? A remit that required the FSO to simply act according to equity, good conscience and the substantial merits of the complaint might be preferable.

The High Court appeal

Perhaps the most pressing issue in terms of legislative reform is that of the High Court appeal, with an appellant having to bring such an appeal within 21 days of the FSO decision, a very short timeframe that should be lengthened. The prohibitive nature of the superior courts as an avenue of appeal, particularly for consumers who do not have access to legal representation, speaks for itself.

It should also be understood that in a series of decisions, the High Court has somewhat limited the scope of the appeal and this amounts to a further barrier. Effectively, the High Court will not overturn a decision of the FSO unless that decision '*is vitiated by a serious and significant error or a series of such errors'.* Thus, the appeal is not a full re-examination of the merits of the case, as might be perceived by parties appealing.

A further obstacle is the likelihood that if an appeal is not successful, the appellant will face an award of legal costs against him or her, in addition to any legal costs that he or she may incur. In practice, regardless of whether the consumer or the provider appeals, it is the FSO who acts as respondent to the appeal and we would submit that this quite unusual for an alternative dispute resolution body. It is worth noting that the legislation does not impose any such requirement, only suggesting that the FSO may be a party to the appeal. In any case, in practice, the FSO will inform the appellant that it will seek its costs in the event of the appeal not succeeding and with more than one of the interviewees in our research; this was a significant factor in deciding not to proceed with an appeal.

We would submit that the Circuit Court would be a preferable forum of appeal and that the parties to that appeal should be the original complainant and respondent, as is the case with appeals from other alternative dispute resolution bodies such as the Employment Appeals Tribunal, the Labour Court or in some instances the Revenue Appeals Commissioners. The appeal should involve a full rehearing of the complaint.

The FSO should retain the right to be made a party to the appeal but would not automatically be so. For instance, the FSO could decide to respond to appeals by providers on behalf of unrepresented and financially hard pressed consumers. Equally, consumers should be eligible to apply for civil legal aid to assist with an appeal. The savings to the FSO legal budget that might result from not automatically becoming party to an appeal should be used to boost the expertise available to the FSO in terms of original decision making, in order to ensure that appeals might be less necessary.

Thank you very much for your attention