flac
promoting access to justice

Submission to the Department of Finance on Mortgage Credit Directive

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.

You can download/read FLAC's policy papers at http://www.flac.ie/publications/policy.html

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

---

Discretion 1 - Ireland may maintain or introduce more stringent provisions than those contained in the Directive (Article 2.1).

The Directive lays down a common framework for certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property. This framework must be adopted by Ireland.

However the Directive does not preclude Member States from maintaining or introducing more stringent provisions in order to protect consumers, provided that such provisions are consistent with their obligations under European Union law.

Consultation Question 1: Are there more stringent provisions that should be included? If so, what are they and why should they be introduced?

Response

By way of a preliminary remark, we are somewhat at a loss to understand why the revised consumer credit directive, agreed in 2008, was almost entirely a 'maximum harmonisation' measure, yet the mortgage credit directive is broadly a 'minimum harmonisation' measure. Why the inconsistency of approach?

Coming from the consumer protection perspective, we would invariably favour the 'minimum harmonisation' approach, particularly where a maximum harmonisation measure is comparatively weak. We believe that this is much more than an academic matter and we believe that recent history bears this out. For example, it is clear to us that the European Commission was concerned about the question of responsible lending when it first framed Article 9 of the draft consumer credit directive in 2002. Nonetheless, by the time the directive was finally agreed in 2008, that article had been considerably diluted.[1] This dilution, together with the maximum harmonisation approach of the directive, left Member States with no discretion to introduce more stringent standards of credit checking, had they wanted to. This 'one size fits all' approach does not take into account national differences and particularly national difficulties such as Ireland and other countries clearly faced in the boom.

It seems to us that the revised consumer credit directive put the needs of the market and uniformity for the provider before protection of the consumer in this vitally important area. In turn, in the case of Ireland, there was little or no appetite from a regulatory perspective between 2002 and 2008 to put any brakes on the increasingly reckless lending approach of many financial institutions. The resulting personal debt crisis requires no further elaboration and it is evident that

[1] See FLAC's recently published report – *Redressing the Imbalance*, March 2014 – for a fuller discussion of these issues at Pages 8 – 14.

the indebted and the taxpayer, rather than the institutions, have so far borne the brunt of the fallout.

Of course, since the publication of the Consultation Paper, the Central Bank has itself issued a further Consultation Paper (CP87) on '*Macro-prudential policy for residential mortgage lending*'. There is an element of lurching from one extreme to the other about these proposals from our perspective but that may be a matter for another submission. However, it is notable that those proposals confine themselves to the deposit that borrower must build and to the multiples of income that he or she can, in turn, borrow. The missing link is a firm obligation on the lender to establish capacity to service the agreement.

In this context, we think it is welcome that Ireland may maintain or introduce more stringent provisions than those contained in the Directive under the terms of Article 2 (1) and in the area of creditworthiness assessment and associated matters (Articles 18 – 21), we believe that we should introduce such provisions. A reading of these articles makes it clear that the institutions of the European Union may have learnt from the weakness of the revised consumer credit directive in this regard. Thus, in brief, the directive lays down an obligation on providers to conduct a thorough and documented assessment of the consumer's creditworthiness and provides that a credit shall only be made available where the assessment indicates that the borrower is likely to be able to service his or her obligations under the proposed agreement. The assessment will have to be based on information relating to the applicant consumer's income and expenses and other financial and economic circumstances which will have to be appropriately verified.

All this is useful and at least provides a clear framework for lenders to lend responsibly. What is missing from these articles is any mention of consequences for lenders who lend in contravention of these standards. While it would seem that the lending industry is largely 'self-policing' at present in terms of a careful approach being taken to offering credit, there is no guarantee that this attitude will continue in the event of further economic recovery generally and recovery in the property market particularly. We stress that we are not against credit in their form of mortgages or otherwise and understand very well the economic benefits that credit, when properly regulated and assessed, can bring. What we are against is the misery of mortgage related over-indebtedness that could and should be avoided by vigilance and a balanced housing market where private ownership is but one of the tenures available.

Article 38 provides that Member States may lay down sanctions for infringements of national provisions adopted on the basis of the directive, but traditionally, these have usually been potential criminal sanctions that are very rarely, if ever, invoked in the Irish legal system. In our view, therefore, the transposing legislation must go further than the directive by setting out potential civil sanctions for a lender who either does not adhere to the credit assessment or ignores the information that the credit assessment reveals and proceeds to lend nonetheless. In this regard, the Department might examine the National Credit Act 2005 of South Africa.[2]

[2] See FLAC's report 'To No One's Credit' June 2009 – Pages 40 – 41.

This is but one example of an important area where Ireland might consider going further than the directive provides for. Some other examples are provided in the course of this submission and we intend to submit further instances, where appropriate, as the plans to develop the legislation to transpose the directive materialise.

Discretion 2 – Certain transactions within the scope of Directive 2008/48/EC (Consumer Credit Directive) may be exempted (Article 3.3 Paragraph a)

Ireland may decide not to apply Articles 11 (Standard information in advertising), 14 (Pre contractual information) and Annex II (European Standard Information Sheet- ESIS) of the Mortgage Credit Directive to the following transaction:

Credit agreements for consumers, secured by a mortgage on a property, the purpose of which is not to acquire or retain the right to residential immovable property. An example of such transactions would be equity release loans.

Ireland may only not apply the articles above if it applies to such credit agreements Articles 4, 5 and Annexes II and III of the Consumer Credit Directive (Directive 2008/48/EC).

Consultation Question 2: Should Ireland apply the Articles mentioned above from the Consumer Credit Directive instead of the relevant articles from the Mortgage Credit Directive: If so, why?

Response

It would appear that the main distinguishing features between both the advertising and pre-contractual information provisions of the two directives is that, broadly speaking, the mortgage credit directive requires more detail to be provided to the borrower. In addition, in terms of pre-contractual information, the MCD is more explicit about the purpose of this information.

The paper uses 'equity release' loans as an example of the type of transaction that may allow the application of certain articles of the CCD rather than the equivalent provisions of the MCD. As we understand it, equity release involves either a 'Home Reversion' - a sale of a portion of the family home for a cash sum or a 'Lifetime Mortgage' - borrowing a cash sum and offering the home as security against it, with the owners – often a retired couple - remaining in occupancy until their death, and paying interest only on the loan or having a 'rolled up mortgage' when the loan with interest becomes payable upon death.

While the former is not a loan and so may not be not covered by either directive, the latter transactions, in our view, come under one of the existing definitions of 'housing loan' in Section 2 of the Consumer Credit Act 1995 (as amended) – namely s.2 (c) - '*an agreement for the provision of credit to a person on the security of a mortgage of a leasehold or freehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants*'.

Thus, this type of loan is currently regulated by the Consumer Credit Act 1995 and not by the European Communities (Consumer Credit Agreements) (ECCAR) Regulations (SI 281/2010) which transposed the CCD in Ireland and which do not currently apply to housing loans.[3] It would therefore be inconsistent and confusing to have the CCD and not the MCD apply to it.

In any case, this type of borrowing is clearly a very significant decision for any borrower/s, with far reaching consequences particularly in terms of inheritance rights, rights of sale and access to nursing home care, and one not to be taken without the maximum amount of transparent information. No more than many other credit options entered into hurriedly, there are 'equity release' borrowers who have regretted their decision in recent years for a variety of reasons. In this context, it seems appropriate that the stronger MCD pre-contractual rules, in particular the reference to Member States having to specify a time period of at least seven days during which the consumer will have sufficient time to compare offers, assess their implications and make an informed decision, should apply with these types of transaction.

Discretion 3 - 'Buy to Let' transactions may be exempted from the Directive (Article 3.3 Paragraph b)

Ireland may decide that dwellings purchased as 'buy to let' investment may be excluded from the provisions of this Directive.

However Ireland is required to apply an alternative appropriate framework if 'Buy to Let' transactions are exempted.

Consultation Question 3: Should Ireland exempt 'buy to let' transactions and, if so, why? If yes then what alternative framework should be put in place?

Response

We know only too well from the arrears figures issue periodically by the Central Bank that a significant number of buy-to-let mortgages were entered into by borrowers whose capacity to continue to service the loan, particularly in the event of a change in economic circumstances, was very questionable. A buy-to-let too is a long term contract with potentially severe and long lasting consequences in the event of default. Many of these borrowers are not professional landlords and may have received little tangible advice prior to entering into the contract. A mortgage, whether the borrower intends to reside in the property the subject of the mortgage or not, is a secured loan and is sometimes cross-securitised on the borrower's principal private residence, also exposing that borrower to potential loss of the family home. We are also seeing the appointment of receivers and increased rates of repossession in such cases, with serious implications for innocent tenants and knock-on effects for a very troubled housing sector in Ireland.

[3] See Regulation 3 (6)

While there may be concerns expressed by mortgage lenders and indeed some borrowers that the necessity to comply with the directive when it is transposed will push up the cost of credit for this type of loan, we nonetheless suggest that in the context of the often large amounts lent and the implications of default, it is a price worth paying. We simply must prevent another reckless lending fiasco and we cannot rely on self-policing by the credit industry to prevent it occurring. Thus, we suggest that the MCD apply in its entirety to buy-to-let mortgages across the board, even if the borrower allegedly knows what he or she is doing. It is the damage that may be inflicted by hazardous lending and borrowing on our wider society, both socially and financially, that must be prevented.

Discretion 4 – Loans provided on better then commercial terms (e.g. local authority mortgages) may be exempted (Article 3.3 Paragraph c).

Certain types of loans, offered on better then commercial terms, may be exempted from the Directive. Examples of this type of mortgage include annuity mortgages provided by Local Authorities.

If these loans are exempted then an alternative appropriate framework must be adopted to ensure that consumers receive timely information on the main features, risks and costs of such credit agreements at the pre-contractual stage and that advertising of such credit agreements is fair, clear and not misleading.

Consultation Question 4: Should these types of loan mentioned be exempted from the Directive? If so, why? What alternative framework would you suggest?

The current fragile state of many housing loans that were provided by local authorities to borrowers on 'better than commercial terms', to the quite limited extent to which this information is publicly available, is a further illustration of the need for a strong mortgage credit directive and the necessity for it to apply to housing loans issued by local authorities.

In our view, such loans, where they are still available, most certainly should not be exempted. First, they may not necessarily be provided on 'better than commercial terms', for example, many existing tracker mortgages may be cheaper. Second, it is apparent from the difficulties that many of these loans have got into that the capacity of the borrower to sustain the loan in the event of an adverse change in finances was very much open to question. One estimate suggests that towards the end of 2013, €1.2 billion was owed on local authority housing loans and that €247 million (or 20%) of this amount was arrears.[4]

It has also long been our view that the State would be better advised prioritising the construction of new and the repair of old social housing units. Equally, the release of more social housing units through NAMA should be a priority and these should be made available at affordable rents to local

[4] Sean McCarthaigh, Irish Examiner, October 25th 2013.

authority tenants, rather than continuing to arrange housing loans in what was, in effect, the privatisation of the housing market. The recent Budget announcement of a social housing investment programme and subsequent comments by the Minister for the Environment are clear evidence that the Government now accepts that a change of course is needed.

Where such loans are feasible and affordable, the directive when transposed should apply to them in the same way as any other housing loan. In this regard, it is worth noting that the definition of 'mortgage lender' in the Consumer Credit Act 1995 (as amended) effectively includes local authorities in the same way as any other lender when issuing housing loans.

Discretion 5 – Securitised loans provided by Credit Unions or Friendly Societies may be exempted (Article 3.3 Paragraph E)

Credit agreements where the creditor is an organisation within the scope of Article 2(5) of the Consumer Credit Directive (Directive 2008/48/EC) may be exempted. Such organisations would include some Friendly Societies and Credit Unions.

As with discretion 4, if these loans are exempted then an alternative appropriate framework must be adopted to ensure that consumers receive timely information on the main features, risks and costs of such credit agreements at the pre-contractual stage and that advertising of such credit agreements is fair, clear and not misleading.

Consultation Question 5: Should these types of loan mentioned be exempted from the Directive? If so, why? What alternative framework would you suggest?

Response

By way of a preliminary comment, what might be termed the 'special protection' provided to credit unions in Ireland in the form of exemptions from the application of certain consumer protection measures has always mystified us. Examples here included the ongoing non-application in its entirety of the Central Bank's Consumer Protection Code (CPC) 2012 to the lending activities of credit unions and the almost complete exemption from the provisions of the Consumer Credit Act 1995 (eventually remedied when the European Consumer Credit Agreement Regulations 2010 were introduced). Whilst this may have been justified and may continue to be justified in respect of those credit unions who continue to largely operate as 'social lenders' advancing relatively small sums for ostensibly beneficial purposes, it cannot in our view be sustained for those credit unions who arguably departed from their ethos and engaged in large scale unsecured lending for consumer and business purposes during the credit boom. It is clear that this version of 'reckless lending' has contributed to the carnage of over-indebtedness and personal insolvency that is proving so difficult to resolve, particularly in the absence of binding legal obligations on creditors to be pro-active and engage in debt write-down where appropriate.

It is even worth asking in our view whether it is appropriate for a credit union to engage in secured lending in the first place, unless exceptional circumstances exist – for example, loans for business purposes where there is no existing mortgage on the family home. However, there is certainly in our

opinion no apparent justification for exempting credit unions (and friendly societies) from the full range of obligations under the directive when it is transposed.

Discretion 6 – Bridging loans may be exempted (Article 3.3 Paragraph d)

Bridging loans may qualify for an exemption from the application of the Directive. The Directive gives Member States the option of fully exempting them. Bridging loans are a type of short term loan given to consumers typically while waiting for longer term financing such as a mortgage.

Consultation Question 6: Should bridging loans be exempted? If so, why?

Response

There may be a rationale for not applying the directive in full to bridging loans – for example provisions such as full pre-contractual information and/or creditworthiness assessment. However, the scope of the exemption being suggested here is from the entire directive and, should that exemption be availed of, there does not appear to be any obligation on a Member State to introduce more limited consumer protection measures.

As we understand it, bridging loans are comparatively rare at present. Nonetheless, they can carry distinct dangers from the borrower's perspective. For example, homeowners who want to move to a second property but have not yet sold their own may be tempted to seek bridging finance which is generally available only at interest rates considerably above that of longer term housing finance. Subsequent and ongoing failure to sell the current family home can leave a family servicing two mortgages for some time, one at very high interest rate, with all the consequences of over-indebtedness that may follow. Very clear and firm warnings of these possible scenarios must be provided to consumers.

Thus, we would submit that in the absence of a corresponding obligation on Member States to regulate bridging loans in an appropriate manner, the directive should apply in full to them.

Discretion 7 – Member States may ban commissions paid by the creditor to credit intermediaries (Article 7.4)

Where creditors, credit intermediaries or appointed representatives provide advisory services to consumers the remuneration structure of the staff involved must not prejudice their ability to act in the consumer's best interest. In particular, they must not be contingent on sales targets. In order to achieve this objective, Ireland may ban commissions paid by the creditor (Banks) to the credit intermediary (Mortgage Broker).

Consultation Question 7: Do you think that banks should not be allowed to pay commission to brokers? If so, why?

Response

From our perspective, the key considerations here are that any commission paid by a mortgage lender to an intermediary or fees payable by potential borrowers to intermediaries for the successful completion of a mortgage application should be reasonable in amount and transparent in advance, so that the customer is made completely aware of liabilities and relationships. It is also vital that applications to become an intermediary are much more rigorously scrutinised in terms of meeting 'fit and proper person' criteria and once approved, that intermediaries are more tightly regulated than was the case in the recent past.

It does not seem on the face of it, however, logical to put in place an outright ban on the payment of commission from lender to broker as this would mean that the broker would have to impose fees on the potential borrower alone in order to earn a living. Any commission paid must not, however, either directly or indirectly, be passed on to the borrower as an additional cost of credit.

Discretion 8 – Payments by consumers to a mortgage provider or credit intermediary (broker) may be forbidden or restrictions may be imposed until the conclusion of a mortgage agreement (Article 7.5)

Consultation Question 8: Do you think such payments should be forbidden or restricted? If so, why?

Response

We reiterate the points made above concerning transparency of fees, cost and relationships. We are not clear as to why a lender would seek to charge a potential borrower monies in advance of an agreement being concluded, although we note that Section 123 (3) of the Consumer Credit Act 1995 currently appears to allow a lender to potentially charge a borrower for a valuation report produced for the lender on the value of the security, if the application for a loan is approved.

Again, however, an outright ban on payments being made to a broker/intermediary may appear to be counter-productive. For example, it could mean that the broker would only be paid if the application was successful and that might serve to tempt the broker to push a loan application through that might not necessarily be in the long term interest of the borrower. Placing restrictions on upfront payments on the other hand might well be merited. Why, for example, should a potential borrower face any significant imposition of fees where, ultimately, no mortgage offer is made or no offer made is accepted because of unfavourable terms and conditions or rates?

Discretion 9 – Option to include certain warnings about risk associated with credit agreements (Article 11.6)

Ireland may require the inclusion of a concise and proportionate warning concerning specific risks associated with credit agreements.

Consultation Question 9: Are there specific risks that should be included in a warning? If so, why is the warning necessary?

Response

Given that Article 11 concerns practices on advertising, we are assuming that the warning/s referred to here in this context relate to advertising alone. It is questionable to what extent the use of warning notices in advertising or otherwise actually works as a deterrent or to put a brake on consumers availing of housing or other loans. Nonetheless, for example, the Central Bank's Consumer Protection Code (CPC) – Chapter 9 concerning advertising – currently contains a number of such notices in respect of different types of housing loans.

It is likely that the transposition of the mortgage credit directive will lead to the 'disapplication' of the CPC to housing loans. It would be ironic if this led to a reduction in standards. It would seem therefore that this presents a good opportunity to review existing 'warnings' and to update and if necessary develop them to reflect any accelerated risks.

Discretion 10 – Ireland may allow tying of products in certain circumstances (Article 12.2)

Member States must allow bundling practices but in certain circumstances have to prohibit tying practices. However Ireland may provide that creditors can request the consumer, or a family member, or close relation of the consumer to:

- **(a) open or maintain a payment or a savings account, where the only purpose of such an account is to accumulate capital to repay the credit, to service the credit, to pool resources to obtain the credit, or to provide additional security for the creditor in the event of default;**
- **(b) purchase or keep an investment product or a private pension product, where such product which primarily offers the investor an income in retirement serves also to provide additional security for the creditor in the event of default or to accumulate capital to repay the credit, to service the credit or to pool resources to obtain the credit;**
- **(c) conclude a separate credit agreement in conjunction with a shared-equity credit agreement to obtain the credit.**

Consultation Question 10: Should Ireland adopt this discretion? If so, why?

Response

No. No immediate justification for any of the three types of tying practices outlined above occurs to us.

Discretion 11 – Tied products may be allowed where there is a clear benefit to the Consumer (Article 12.3)

Ireland may allow tying practices where the creditor can demonstrate to its competent authority that the tied products offered, which are not made available separately, result in a clear benefit to the

consumers taking due account of the availability and the prices of the relevant products offered on the market.

This discretion would only apply to products which are marketed after 20 March 2014.

Consultation Question 11: Do you think Ireland should allow tied products if there is a clear benefit to the consumer? If so, why?

Response

Yes, potentially. However, we would be rather dubious about how this might be demonstrated in the first place and concerned at how the ongoing benefit of such a tied product would be monitored in changing market conditions.

Discretion 12 – Creditors may be allowed to require consumers to hold relevant insurance (Article 12.4)

Ireland may allow creditors to require the consumer to hold a relevant insurance policy related to the credit agreement. In such cases Ireland shall ensure that the creditor accepts the insurance policy from a supplier different to his preferred supplier where such policy has a level of guarantee equivalent to the one the creditor has proposed.

Consultation Question 12: Should creditors be allowed to require that consumers hold insurance policies relevant to the Credit agreement? If so, why?

Response

In connection specifically with housing loans, this is already partially provided for in Irish law under Sections 126 and 127 of the Consumer Credit Act 1995. Indeed, these sections appear on the face of it to be stronger than what is envisaged under this part of the directive, insofar as it concerns mortgage protection insurance. The text of the Section 126 (1) reads:

> *'Subject to the provisions of this section, a mortgage lender shall 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 on the basis that payments have been made by the borrower in accordance with the mortgage, such sum to be employed in repayment of the principal'.*

Subsection (2) then goes on to set a number of specific exceptions to this rule but the general obligation on the lender is clear - to ensure that life cover is in place for all named borrowers. Thus, this is not an option that the lender may choose to impose upon a borrower as a condition for taking out the mortgage; rather it is a statutory obligation imposed upon the lender.

Regardless of one's view on whether creditors should be allowed to require that consumers hold insurance policies relevant to the credit agreement, it is clear that the dictates of competition and choice dictate that the consumer must be allowed to select their own insurer and this is also reflected in the existing consumer credit legislation as follows;

> ***127.****—(1) A mortgage agent shall not make or offer to make to any person, or arrange or offer to arrange for any person, a housing loan which would be subject to a condition that any financial services, conveyancing services, auctioneering services or other services relating to land which that person may require, whether or not in connection with the loan, shall be provided by the agent or through a subsidiary or other associated body of such agent.*
>
> *(2) Where, in connection with the making or arranging of a housing loan, more than one service is made available by a mortgage agent or one or more of his subsidiaries, the agent shall not, and shall ensure that each of his subsidiaries does not, make the services available on terms other than terms which distinguish the consideration payable for each service so made available; nor shall any of the subsidiaries make the services available on terms other than terms which make that distinction.*

By way of further discussion, it should be noted, however, that problems have arisen as a result of the wording of Section 126. Although it is the lender's obligation to arrange a policy, there is no specific obligation to ensure that the policy is maintained. In practice, the debt crisis has resulted in a number of policies lapsing due mainly to inability to pay, with all the potential adverse consequences that might potentially follow for borrowers and their dependants (and potentially for lenders). Incidentally, this is also the case with building and contents insurance. Although in theory, it is often a term of the mortgage deed that such insurances are maintained, in practice, it would appear that lenders seldom act upon this.

The wording of Article 12 (4) refers to a 'relevant insurance policy' but does not further elaborate. In practice, a number of enhanced policies may be available to borrowers in addition to life cover, including critical illness and redundancy cover. These options are not currently mandatory and are generally not insisted upon by lenders as a condition for drawing down a loan. Of course they also involve the payment of an additional premium on top of life cover and this is obviously relevant to any affordability assessment in terms of the borrower's financial capacity to service the agreement. Equally, straitened financial circumstances may lead such additional policies to also lapse. It should also be said that the phasing out by the State of Mortgage Interest Supplement (MIS) payment for new applicants (from 1/1/14) is also an important factor here. Without this cushion, a borrower facing a shortfall in mortgage payments because of illness or unemployment is much more likely to fall into arrears and face the potential of repossession if no payment protection policy is in place.

On page 2 of this submission, reference is made to the recently published Central Bank Consultation Paper on '*Macro-prudential policy for residential mortgage lending*' and the point is made that saving for a deposit and limits on the multiples of income that might be borrowed are not the only issues that

need to be examined in the context of a responsible lending policy. If the object of such a policy is to generally prevent over-indebtedness and loss of the family home, whilst simultaneously protecting the solvency of financial institutions, payment protection insurance is also an important part of that discussion. So, of course, is the housing crisis generally and the part that the 'privatisation' of the housing market, culminating in the stagnation of new social housing projects, has played in generating that crisis (recent budgetary announcements notwithstanding).

For the moment we feel that the retention of an obligation under the CCA 1995 on mortgage lenders to ensure that life cover is arranged is required. We also feel that in tandem with this, an obligation on the lender to monitor that cover continues to be in place should be imposed. The ever present reality of changing financial circumstances for borrowers, however, must also be acknowledged and to supplement other measures the possibility for borrowers of accessing temporary financial assistance from the State to maintain mortgage protection insurance (in lieu of the departed MIS payment) should be explored.

On balance, we do not believe that lenders should be allowed to impose an obligation on a borrower to take out insurance over and above life cover but we do believe that borrowers should be encouraged to avail of such policies. With this in mind, we feel that the cost of such insurance be examined for its value and competitiveness (for example by the National Consumer Agency). In addition, given the widely publicised misselling of such insurance exposed in recent years, far tighter regulation and monitoring should be in place. Finally, we would also suggest that the existence of such policies effectively reduces the risk of a default in payment form the lender's perspective at no cost to that lender. Accordingly, the possibility of this being reflected in a reduction in interest rate charges under the mortgage should be examined.

Discretion 13 – Non-tied credit intermediaries may be compelled to provide general information to consumers (Article 13.1)

Ireland is required to ensure that clear and comprehensible general information about credit agreements is made available by creditors or, where applicable, by tied credit intermediaries or their appointed representatives. Such information must be available on paper or on another durable medium or in electronic form. In addition, Ireland may provide that general information is made available by non-tied credit intermediaries.

Consultation Question 13: Should Ireland provide that general information is made available by non-tied credit intermediaries? If so, why?

Response

Tied credit intermediary is defined in the directive; non-tied credit intermediary is not. By a process of deduction a non-tied credit intermediary is a person who acts on behalf of creditors generally and not one creditor, a group of creditors or a number of creditors or groups who do not represent the majority of the market. Despite this, it would appear only logical that such an intermediary

should be required to provide such general information concerning credit agreements as he or she has to hand to potential clients or customers.

Discretion 14 – Creditors can be required to include warnings particular to Ireland (Article 13.2)

Ireland can oblige creditors to include warnings which are relevant to our market.

Consultation Question 14: Do you think there are other warnings, relevant to the Irish market that should be included? What would the warnings be?

Response

This directive applies to all credit agreements secured either by a mortgage or another comparable security, subject to the exemptions and/or potential exemptions set out in the rest of Article 3. Non-payment of the loan therefore exposes the borrower to potential loss of the property the subject of the mortgage but in many instances, there are also associated risks. For example, mortgages on family homes in Ireland are generally full recourse so that if the property is repossessed and sells for less, net of costs, than is owed to the lender, there will be a balance owed and that may even result in a claim for judgment for a liquidated sum. In our view, borrowers should be specifically warned of all the potential adverse consequences of becoming involved in a housing loan. Examples might include:

- A warning of potential liability for any shortfall following repossession/voluntary sale/surrender as outlined above, including the possibility of litigation regarding this sum if applicable
- A warning concerning any legal and other costs associated with repossession that may be chargeable
- A warning that a loan, for example a buy-to-let mortgage, is also specifically secured or cross-secured on the borrower's principal private residence. For example, some borrowers have 'all sums due' clauses in their original mortgage contract on their principal residence and if a buy-to-let is taken out with the same lender, the family home may be 'on the hook' for the investment
- A warning that if the borrower/insured does keep up the payments on an insurance policy related to the mortgage that cover may lapse and the consequences for the borrower

Discretion 15 – The European Standard Information Sheet (ESIS) may be required to be supplied before the creditor makes a binding offer (Article 14.4).

The European Standard Information Sheet (ESIS) is a standardised notice that will allow consumers to directly compare different mortgage offers from different banks. Ireland may provide for the obligatory provision of the ESIS before the provision of an offer binding on the creditor (bank).

If Ireland opts for this, then the ESIS shall only be required to be provided again where the characteristics of the offer are different from the information contained in the ESIS previously provided. An example of such a change would be an adjustment in the interest rate.

Consultation Question 15: Should Ireland oblige creditors to provide consumers with the ESIS before the provision of a binding offer? If so, why?

Response

On the face of it, this discretion may be a little confusing. For example, the wording in the consultation question and the wording in Article 14 (4) do not appear to be one and the same. The question asks 'Should Ireland oblige creditors to provide consumers with the ESIS before the provision **of** a binding offer', whereas Article 14 (4) would potentially allow for the obligatory provision of the ESIS before the provision of an offer binding **on** the creditor. The latter would oblige a creditor to issue an ESIS to the consumer but would not bind the creditor to that offer, suggesting that it could be withdrawn. In turn, where the creditor subsequently issues an offer binding on it, it would only have to provide an updated ESIS to the 'non-binding' ESIS where the 'characteristics of the offer are different'.

It seems to us that there is potential for a lot of confusion (and possibly unnecessary cost) here, especially where a consumer is comparing different offers from different creditors, one of the general objectives of this article. The other key point about Article 14 is surely that the consumer, in advance of a loan offer or loan approval, is provided in writing with a clear explanation of the terms of the agreement and is given adequate time to consider that offer and whether to accept it. On balance, it would appear to us that a creditor should only issue an ESIS when it is making an offer binding on it. In turn a reasonable timeframe to accept or reject the offer should be provided to the borrower. In practice, the majority of housing loans begin with loan approval, such approval allowing the borrowers to look for a house to purchase and the funds are only drawn down when an offer for a suitable and affordable property is accepted by the vendors. In fact, the consumer/s may never exercise the loan approval option but must have the security of knowing that loan approval is binding on the creditor for a specific period of time.

Discretion 16 – Reflection period (Article 14.6)

Ireland must specify a time period of at least seven days during which the consumer can compare offers, assess their implications and make an informed decision.

However Ireland must choose that this will either be a reflection period before the conclusion of the credit agreement, or a period for exercising a right of withdrawal after the conclusion of the credit agreement, or a combination of the two.

If Ireland specifies a reflection period before the conclusion of a credit agreement, the offer will be binding on the creditor for the duration of the reflection period and the consumer may accept the offer at any time during the reflection period.

Notwithstanding the above, Ireland may also provide that consumers cannot accept the offer during the first 10 days of a reflection period.

Furthermore, where the borrowing rate or other costs applicable to the offer are determined on the basis of the selling of underlying bonds or other long-term funding instruments, Ireland may provide that the borrowing rate or other costs can vary from that stated in the offer in accordance with the value of the underlying bond or other long-term funding instrument.

Consultation Question 16: Should Ireland specify a reflection period or a right of withdrawal or both? What time period should Ireland specify? Should Ireland provide that consumers can accept the offer during the first ten days of reflection period? If so, why?

Response

The 'credit agreements for consumers' directive (Directive 2008/48/EC) provides for a 14 day period of withdrawal from a (generally unsecured) credit agreement. No waiver of this right is allowed. In principle, the funds the subject of the loan will already have been drawn down by the borrower when the right of withdrawal is exercised and there is even, therefore, provision for the lender to charge interest to the borrower for the time that he or she has had the use of the money when returning these funds.

This directive, however, concerns itself with secured loans, many of which will be agreed solely for the potential purchase of family homes or investment properties. In these cases, as pointed out above, the offer from the lender will generally be in the form of loan approval for a specific period of time and the loan option will generally only be exercised when a suitable property is sourced. It does not seem to make any sense that a right of withdrawal should subsequently be provided for in these types of cases as trying to reverse out of the purchase of real property seems unfeasible in any case from a legal perspective.

In addition, given that the borrower/s does not necessarily have to follow through and exercise the option to draw down the funds and purchase a property, a period of reflection also seems redundant in that it may be argued that the period of loan approval can already act as a period of reflection. A major caveat to these remarks, however, is the speed with which some property transactions were conducted in the worst of the boom years, when consumers with loan approval bought residential properties at home and, in some instances, holiday properties abroad 'off the plans' and with undue haste. We are assured that this will not happen again. Nonetheless, a period of reflection should on balance be provided for from the date of acceptance of the loan offer/approval, if only to act as a potential brake against impulsive and unwise decisions. This could run to 30 days, with a mandatory reflection period of 10 days.

There are, however, other classes of housing loans that will be covered by this directive that are essentially cash loans that will not be used for the specific purchase of real property. We know that during the 'credit boom' many families and individuals raised funds for business purposes (for

example in an unsuccessful attempt to rescue an ailing business), leisure pursuits, house improvements, house purchase deposit for offspring and so forth. This was done on the strength of the security of the title deeds of family homes where there were no existing loan obligations or where sufficient equity existed in the property to act as a security for a loan. These too are mortgages. A period of reflection and/or a potential right of withdrawal becomes much more necessary in these cases, especially where the decision to borrow may be influenced by the kind of financial pressure or familial pressure that may give rise to hasty decisions subsequently regretted. Because of the damage caused to households by some loans of this nature in the past, we would propose here that both a period of reflection and a right of withdrawal would be in place – a 30 day reflection period followed by a 14 day right of withdrawal post drawdown.

Discretion 17 – Ireland may adapt the manner by which pre-contractual explanations are given (Article 16.2)

Ireland must ensure that creditors and, where applicable, credit intermediaries (brokers) or appointed representatives provide adequate explanations to the consumer on the proposed credit agreements and any ancillary services, in order to place the consumer in a position enabling him to assess whether the proposed credit agreements and ancillary services are adapted to his needs and financial situation.

However, Ireland may adapt the manner and extent to which these explanations are given; by whom it is given; to the circumstances in which the credit agreement is offered; the person to whom it is offered; and the nature of the credit offered.

Consultation Question 17: Should Ireland adopt this discretion? How would you suggest it could be achieved?

Response

The obligations envisaged by this article (and Articles 7, 8 and 9) are fine in theory but arguably impractical in practice. As we have already seen to our collective cost nationally, creditor staff, intermediaries or appointed representatives are hardly objective when it comes to selling credit and it is likely that the explanations that would be offered by them would be more of the tick box variety, than any real attempt to place the consumer in a position to assess whether proposed agreements are suitable to his or her needs. Moreover, how would such obligations be monitored to render them meaningful? Our track record in Ireland in this regard is distinctly uninspiring.

In our view, it would be far preferable for the State to invest in an independent and objective service that consumers could access for advice on these issues. Existing state-funded services such as the Money Advice and Budgeting Service (MABS) and the National Consumer Agency (NCA) spring to mind as entities that might be funded and developed to provide the kind of independent assessment and analysis of terms and conditions and risk of default required. Greater investment in consumer education programmes to develop enhanced consumer understanding of financial service products would also be beneficial.

Discretion 18 – Warning relating to information provided by the consumer (Article 20)

Ireland must have measures in place to ensure that consumers are aware of the need to provide correct information when applying for a mortgage and that such information is as complete as necessary to conduct a proper creditworthiness assessment.

The creditor, credit intermediary or appointed representative must warn the consumer that, where the creditor is unable to carry out an assessment of creditworthiness because the consumer chooses not to provide the information or verification necessary for an assessment of creditworthiness, the credit cannot be granted.

Ireland may decide that such a warning is provided in a standardised format.

Consultation Question 18: Should the warning be provided in a standardised format? If so, please provide an example of the format and explain why this should be used?

Response

A standardised warning should be drafted for use on application forms for mortgage related credit and the potential wording of any such warning seems largely self-evident. The question of the potential consequences for the loan where the consumer provides incorrect and/or false information that is subsequently discovered might also be addressed here.

Discretion 19 – Pre contractual information (Article 22.2)

Consultation Question 19: Should Ireland stipulate that the information referred to in the discretion be provided to the consumer in the form of additional pre-contractual information? If so, why?

Discretion 20 – Ireland may prohibit the use of the term 'advice' and 'advisor' (Article 22.4)

Consultation Question 20(a): Should the use of the terms 'advice' and 'adviser' be prohibited as outlined above? If so, why?

Consultation Question 20(b): Should Ireland impose more stringent requirements in relation to the use of the terms 'independent advice' or 'independent advisor'? If so, why?

Response

It would appear according to the terms of Article 22.1 that this discretion in Article 22.2 will only apply where advisory services are being or can be provided to the consumer by the creditor, intermediaries or appointed representatives. Thus, there does not appear to be any explicit obligation to provide such services. Taking these three consultation questions together, we do not

believe as already touched on at Question 17 above that creditors, tied intermediaries or appointed representatives of tied intermediaries should be permitted to portray the information they provide to consumers as part of their statutory functions under the directive as advice, let alone independent advice.

Discretion 21 – Ireland may provide for a warning about specific risk (Article 22.5)

Ireland may provide for an obligation for creditors, credit intermediaries and appointed representatives to warn a consumer when, considering the consumer's financial situation, a credit agreement may induce a specific risk for the consumer.

A specific risk is a risk that would be unique to a particular consumer and their circumstances.

Consultation Question 21: Should Ireland provide for warnings on specific risks? If so, why?

Response

It is not clear to us what kind of risk unique to a particular consumer is envisaged by this article. Nonetheless, where such a risk is identified, it makes sense from a consumer protection perspective that it be brought to the attention of that consumer.

Discretion 22 – Ireland may decide not to apply the requirement that advisory services are only provided by creditors or credit intermediaries (Article 22.6)

In particular, Ireland has the option to allow the provision of advisory services by the following:
(a) Persons carrying providing advisory services where those services are provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude carrying out of those activities or the provision of those services; Such persons, for example, might include accountants or solicitors

(b) Persons providing advisory services in the context of managing existing debt which are insolvency practitioners where that activity is regulated by legal or regulatory provisions or public or voluntary debt advisory services which do not operate on a commercial basis. This would include advice received from the Money Advice and Budgeting Service (MABS) or Personal insolvency practitioners.

(c) Persons providing advisory services who are not creditors or credit intermediaries where such persons are admitted and supervised by competent authorities in accordance with the requirements for credit intermediaries under this Directive.

Consultation Question 22: Should Ireland allow advisory services be provided by those that fall into categories described in (a), (b), & (c) above? If yes, why?

Response

Yes in our view, particularly as none of the above categories would appear to have a vested interest in the credit agreement going through and are likely to be more objective as a result. As already outlined at our response to Question 17, it seems preferable to us that the State invest in an infrastructure that provides independent advice to consumers seeking guidance on the suitability of proposed credit agreements for their needs.

Discretion 23 – Foreign currency loans (Article 23)

The Directive stipulates that an appropriate regulatory framework must be in place for consumers who wish to take out a credit agreement in a foreign currency. If a consumer takes out a loan in another currency, then that currency must be either the currency in which the consumer primarily receives income or holds assets from which the credit is to be repaid or the currency of the Member State in which the consumer either was resident at the time the credit agreement was concluded or is currently resident.

Ireland may specify whether both of the choices referred to above are available to the consumer or only one of them or may allow creditors to specify whether both are available to the consumer or only one of them.

Consultation Question 23(a): Should Ireland allow both choices referred to above or restrict the consumer to one choice? If only one choice should be allowed what one do you think it should be and why?

Alternatively do you think that creditors should be allowed decide what options to offer to consumers? If yes, why?

Furthermore, Ireland may further regulate foreign currency loans provided that such regulation is not applied with retrospective effect.

Consultation Question 23(b): Should Ireland provide for greater regulatory requirements in respect of foreign currency loans? If yes, why?

Response

We have no particular view on these discretions and would not imagine that loans of this nature to consumers are likely to be very common in Ireland.

Discretion 24 – Early repayment of loans (Article 25)

The Directive ensures the right of the consumers to repay the loan early if they so wish. If consumers do repay early they will be entitled to a reduction in the total cost of the credit. This

reduction would consist of the interest and the costs that would have accrued over the remaining duration of the contract.

The following discretions may be applied to the right to repay early:

Ireland may provide that the exercise of the right to repay early is subject to certain conditions. Such conditions may include time limitations on the exercise of the right, a different treatment depending on the type of the borrowing rate or depending on the moment the consumer exercises the right, or restrictions with regard to the circumstances under which the right may be exercised.

Consultation Question 24(a): Should Ireland set conditions on early repayment? If yes, please provide suggestions and your reasons for them.

Ireland may also provide that the creditor is entitled to fair and objective compensation, where justified, for possible costs directly linked to the early repayment but shall not impose a sanction on the consumer. In that regard, the compensation shall not exceed the financial loss to the creditor. Subject to those conditions Ireland may provide that the compensation does not exceed a certain level, or be allowed only for a certain period of time.

Consultation Question 24(b): Should Ireland provide that creditors can charge for early repayment subject to the restrictions outlined above? If so, why?

Where the early repayment falls within a period for which the borrowing rate is fixed, Ireland may provide that the exercise of the right to repay early is subject to the existence of a legitimate interest on the part of the consumer.

Consultation Question 24(c): Do you think Ireland should adopt the above discretion? If so, why?

Response

A consumer proposing to become involved in a credit agreement covered by this directive will generally borrow out of a perceived financial necessity and will generally pay substantial amounts of interest over the lifetime of an agreement. Should that consumer's financial circumstances change during the course of the credit agreement so that he or she is in a position to fully or partially discharge his or her obligations and therefore reduce or eliminate interest payments, that is surely an economic choice which that consumer is entitled to make.
There should in our view, therefore, be no time restriction placed on the exercise of the right to repay early or there should be no restrictions with regard to the circumstances under which the right may be exercised. We would also be opposed to any requirement being imposed on a consumer to prove a legitimate interest in order to be allowed to repay early. In our view, reducing the amount of interest to be paid is in itself a legitimate interest.

The question to be decided here in our opinion is to what extent (if at all) the creditor should be allowed to charge the consumer to exercise this right. It is worth noting that the Consumer Credit Act 1995 currently provides at Section 121 as follows:

> ***121.****—(1) Subject to subsection (3), a borrower may, at any time before the time agreed, repay to the mortgage lender the whole or any part of a housing loan and shall not be liable to pay any redemption fee in relation to the loan or any part of the loan.*
>
> *(2) The exemption from redemption fees in subsection (1) shall not apply to a housing loan in respect of which the mortgage or loan agreement provides that the rate of interest:*
>
> *(a) may not be changed, or*
> *(b) may not be changed over a period of at least one year, or*
> *(c) may not, for a period of at least 5 years, exceed the rate applicable on the date of the making of the said agreement by more than 2 per cent.*
>
> *(3) The exemption from redemption fees in subsection (1) shall apply at any time during the period of the loan at which the period referred to in paragraph (b) or (c) of subsection (2) have elapsed.*

Subsection (6) goes on to define "*redemption fee*" as meaning, in relation to a housing loan, any sum in addition to principal and any interest due on such principal (without regard to the fact of the redemption of the loan) at the time of redemption of the whole or part of the loan.

Our understanding of this is that a mortgage lender is not currently entitled to charge any sum for future interest when a variable rate mortgage is ended early (or any sum on any portion of the capital reduced). Where, however, the borrower's mortgage is on a fixed rate, a redemption fee (including a payment for future interest) may apply. The Act is silent, however, as to how that redemption fee might be calculated.

In our view, if a creditor is to be entitled to 'fair and objective compensation' for early termination by a borrower where the interest rate on the agreement is fixed, it is not sufficiently precise to tie it into possible costs directly linked to the early repayment. The creditor should be required to show that any compensation is for actual loss and such loss must be objectively demonstrated. Compensation should also limited by both time and/or level and this would mirror the approach taken in the credit agreements for consumers directive at Article 16, transposed by Regulation 19 of the European Communities (Consumer Credit Agreements) Regulations (SI 281/2010).

Discretion 25 - Information concerning changes in the borrowing rate (Article 27)

The Directive stipulates that the creditor must inform the consumer of any change in the borrowing rate, on paper or another durable medium, before the change takes effect. The information shall at least state the amount of the payments to be made after the new borrowing

rate takes effect and, in cases where the number or frequency of the payments changes, particulars thereof.

However, Ireland may allow the parties to the credit agreement to agree that the information referred to above is to be given to the consumer periodically. This would occur where the change in the borrowing rate is correlated with a change in a reference rate (such as with a variable rate mortgage). The new reference rate must be made publicly available by appropriate means and the information concerning the new reference rate must remain available on the premises of the creditor and communicated personally to the consumer together with the amount of new periodic instalments.

Creditors may also continue to inform consumers periodically where the change in the borrowing rate is not correlated with a change in a reference rate where this was allowed under national law before 20 March 2014.

Consultation Question 25: Should Ireland allow parties to the credit agreement to agree that the information referred to above can be given periodically?

Response

In our view, consumers should be informed in advance of any change in the borrowing rate in order particularly to ensure that sufficient funds are in the relevant account so that an arrears situation, however small, does not occur.

Discretion 26 – Arrears and foreclosure (Article 28)

Measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated must be adopted as part of this Directive.

Ireland may require that, where the creditor is permitted to define and impose charges on the consumer arising from the default, those charges are no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default.

Consultation Question 26 (a): If creditors are allowed to impose charges should those charges be restricted to the costs incurred by the creditor as a result of default by a consumer?

Ireland may also allow creditors to impose additional charges on the consumer in the event of default. In that case a cap must be placed on those charges.

Consultation Question (b): Should Ireland allow creditors to impose additional charges on consumers who default? If so, what would an appropriate cap be?

Response

It may be argued by many that the 'measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated' are already in place in Ireland in the form of the Central Bank's Code of Conduct on Mortgage Arrears 2013 (CCMA). However, that depends to some extent on what is intended by the word 'measures' in Article 28?

We would contend that measures should mean legally binding legislation and we have argued at some length, particularly in our recent report 'Redressing the Imbalance', that the CCMA, although issued as a Code under Section 117 of the Central Bank Act 1989 does not but should have the force of legislation.[5] Despite two High Court decisions in particular[6], it is in our view that it is still a matter of contention to what extent a Central Bank Code that forms part of neither primary nor secondary legislation is admissible in legal proceedings to repossess family homes. This is particularly the case where the defendant borrower is not alleging that the lender failed to follow the processes laid down by the Code but that it made a substantive decision, such as adjudicating that the borrower's mortgage is unsustainable, that is not warranted by the financial and other personal circumstances that the lender is obliged to take into account.

In Redressing the Imbalance, we have proposed that the CCMA should, in lieu of the Central Bank simply consulting the Minister for Finance under the Central Bank legislation, be signed as a regulation by the Minister and should expressly state that 'this code is admissible in legal proceedings in the courts'. We would then have clarity that 'measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated' are more than a mere aspiration. No doubt some will suggest that the wording of the directive is simply intended to impose non-binding guidance on lenders in the form of encouragement. If this is the case, this is surely an instance where the minimum harmonisation nature of the directive allows us to go further and the evidence suggests that we must. As of the end of June 2014, over 37,000 mortgage accounts on principal dwelling houses have been in arrears for over two years. Almost 10,000 new repossession cases concerning family homes were brought between July 2013 and the end of June 2014. By the end of September 2014, only 80 Personal Insolvency Arrangements (PIA) under the Personal Insolvency Act 2012 have been approved.

On the issue of charges, the CCMA currently provides at Rule 11 that '*lenders are restricted from imposing charges and/or surcharge interest on arrears arising on a mortgage account in arrears to which this Code applies, unless the borrower is not co-operating'.* Our understanding is that this allows a lender to charge the normal contractual rate of interest on arrears but not to impose any additional penalty rate or extra charges. We would suggest that this is broadly in line with the directive's requirement that charges may only compensate the creditor for costs it has incurred as a result of the default, though again we would argue that this rule should have specific legislative effect.

We do not believe that the State should allow a co-operating consumer already in arrears to have additional charges imposed upon him or her.

[5] See pages 57 – 61 in particular

[6] Stepstone Mortgage Funding v Fitzell [2012] IEHC 142 and Irish Life and Permanent v Duff [2013] IEHC 43

Discretion 27 - Credit Intermediaries - Brokers (Article 29)

Credit Intermediaries are generally known as brokers in Ireland

Under the Directive, credit intermediaries must hold professional indemnity insurance covering the territories in which they offer services. If they do not have insurance they must have some other comparable guarantee against liability arising from professional negligence.
Ireland may allow that such insurance or guarantee could be provided by a creditor for which the credit intermediary is empowered to act.

Ireland may also decide not to apply this Article to persons carrying out the credit intermediation activities where those activities are carried out in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the carrying out of those activities (Article 29.8).

Consultation Question 27: Should Ireland allow this insurance or guarantee be provided by creditors in the situations outlined above? If yes, why?

Response

It would appear from reading Article 29 (2) (a) that the discretion to allow creditors to pay the professional indemnity insurance of intermediaries applies to tied credit intermediaries only, which the Consultation paper does not seem to have specifically indicated. Without having particular knowledge in this area, we do not see on the face of it how an arrangement between a creditor and a tied agent that the former pays the latter's professional indemnity insurance would cause a problem. The important point is that both creditors and credit intermediaries both tied and untied are appropriately insured. The suggestion, however, that a creditor may be permitted to pay a tied agent's indemnity insurance may say a lot about that agent's capacity to offer objective advice to consumers under the terms of Article 22 (4).

On balance, we do not see the need for the full terms of Article 29 to be applied to persons carrying out credit intermediation activities where those activities are carried out in an incidental manner in the course of a professional activity, provided that such persons have appropriate insurance cover and are effectively regulated by a regulatory body in respect of all activities including credit intermediation which they carry out.

Discretion 28 – Tied Credit Intermediaries (Article 30.1)

Ireland may allow that tied credit intermediaries can be admitted by competent authorities through the creditor on whose behalf the tied credit intermediary is exclusively acting.
This would mean that a creditor (bank) would be responsible for the tied credit intermediary (a broker who only carries out work for that particular bank) and their actions.

Consultation Question 28: Should banks be allowed to admit, and be responsible for, tied brokers or should the brokers continue to register in their own right with the competent authority (in this case the Central Bank of Ireland)?

Response

Again, without having particular knowledge in this area, it seems to us that if an intermediary, although tied, is a self-employed person in business on his or her own account, he or she should register with the regulatory authority in his or her own right and not under cover of the creditor for whom he or she exclusively acts. In particular, we believe that the 'fit and proper person' criterion for mortgage intermediary applicants needs to be much more rigorously applied than in previous years and this is more likely to be achieved with individual applications.

Discretion 29 – Appointed Representatives (Article 31)

Member States may decide to allow a credit intermediary to appoint appointed representatives.

An appointed representative is a person who works for a credit intermediary (Broker) and who conducts business on their behalf.

Consultation Question 29: Should Ireland allow brokers to employ appointed representatives? If so, why?

Response

The Consultation Paper does not make it clear but we are assuming based on the definition of 'appointed representative' in the directive that such a representative is not envisaged to be an employee of the credit intermediary but yet another self-employed person who would act as an agent of the intermediary. We would be concerned that allowing brokers acting for lenders to recruit further agents to act in turn for them might create unnecessary layers. This could ultimate have the effect of diminishing consumer protection standards, in terms of both the information provided to consumers and in terms of accountability for services rendered.