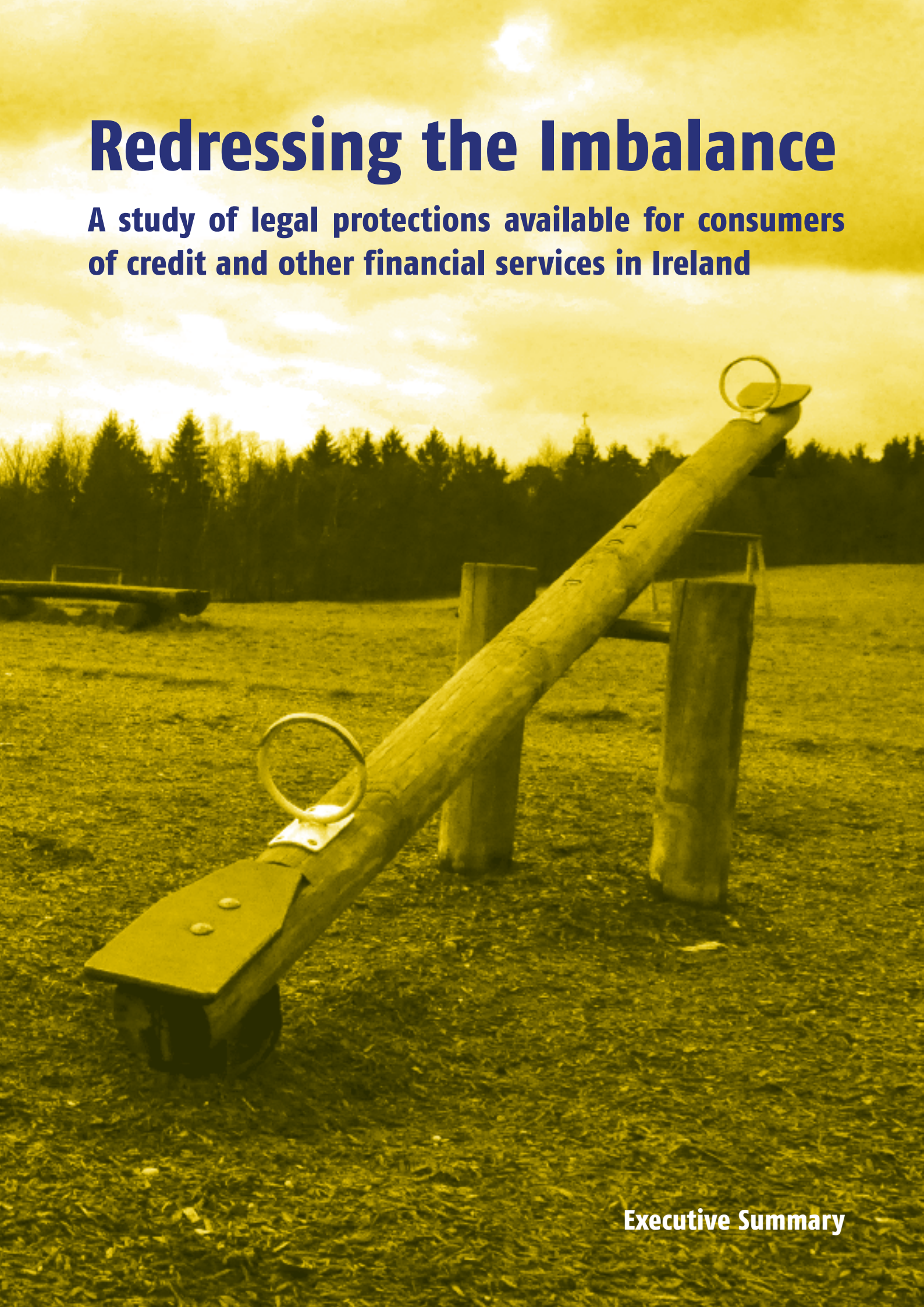
Redressing the Imbalance

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



Executive Summary

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Whilst every effort has been made to ensure that the information in this report is accurate, Free Legal Advice Centres does not accept legal responsibility for any errors, howsoever caused. FLAC would like to acknowledge the financial support provided by the Atlantic Philanthropies, the Iris O'Brien Foundation and the Ireland Funds to this report.

Design and Photography by Sanja Jelic, sanja.at

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flac
promoting access to justice

FLAC, 13 Lower Dorset Street, Dublin 1
Tel: +353-1-887 3600 | LoCall: 1890 350 250 | Fax: +353-1-874 5320
E-mail: info@flac.ie | Web: www.flac.ie
fb.me/FLACIreland @flacireland

Executive Summary

Introduction

FLAC (Free Legal Advice Centres) is an independent human rights organisation which exists to promote equal access to justice for all. For several years, FLAC has been advocating for changes to Irish law that will improve protection for consumers of financial services and credit. Simultaneously, we have campaigned for changes in Ireland's legal framework for handling consumer debt.

Following the enactment in 2012 of new personal insolvency legislation that transformed how the law treats people in debt, it seemed timely to explore corresponding consumer protections in credit provision and financial services. This study is a critique from the consumer perspective of legislative provisions, codes of conduct and complaints resolution mechanisms which purport to protect users of financial services in Ireland and in particular, those using consumer credit and ancillary services.

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

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

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

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

Five research methods were used to gather data relevant to the study. These were: a legislative and jurisprudence re-

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view; documentary analysis of relevant policy documents; administrative data analysis; semi-structured interviews with users of FLAC services (consumers and money advisers); and structured interviews with representatives of relevant statutory bodies (namely the Director of Consumer Protection of the Central Bank, and senior staff of the Financial Services Ombudsman's Bureau).

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

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

1. Working principle of this study

Financial services and the provision of credit in particular are the lifeblood of an open, market economy such as Ireland's. The consumer borrowing money is effectively a risk-taker who contributes to economic activity through the act of borrowing. Though he or she does receive something in return – property, goods or services, now rather than later – there is a cost in the form of interest and no guarantee, particularly in uncertain economic times, that default in payment will not occur and that legal proceedings against the borrower may then follow. In a similar vein, the consumer investor puts his or her funds at the disposal of financial institutions at some risk; and the consumer buyer of insurance, at his or her cost, absolves the State of the potential cost of unforeseen events. The hypothesis or working principle of this study is that consumers, particularly consumers of credit, accordingly require and deserve a high level of protection when they encounter and deal with generally more experienced and better resourced financial institutions. It is far from clear, however, that this level of protection is currently being provided. This work set out to review the evidence, examined from the consumer perspective.

2. This study's basic conclusion

The study concludes that the legal architecture for the protection of consumers of financial services in Ireland and in particular for those using consumer credit and ancillary services, is flawed. These flaws have their genesis at the level of the European Union, where a cumbersome process for agreeing relevant EU Directives can result in such measures being out of date and/or significantly watered down before implementation. The need to establish a single market across the EU has led to the pursuance of a 'maximum harmonisation' agenda. This had led to a situation where establishing common rules across the EU for providers of financial services has taken precedence over the protection of the consumer and where particular national difficulties, such as a country's personal debt crisis, cannot be properly accommodated.

At the domestic level in turn, the interests of the credit consumer in particular have proved over time to be secondary to the interests of other actors – policymakers, the regulatory authorities, and primarily the financial service providers whom they regulate. Examining the legislative and regulatory landscape, it is hard to escape the further conclusion that a disgruntled financial services consumer, and particularly a credit consumer, is not facilitated and empowered by the system so much as discouraged and befuddled by it.

The evidence, however, suggests that it was not always thus. Pre-boom for example, the (1995) Consumer Credit Act (CCA) went considerably further in

some respects than the (1987) European Directive it implemented and contained evidence of progressive thinking. For example, it included rules around the making of housing loans, compulsory default notices, potentially unenforceable agreements and provisions to attempt to address illegal moneylending. Thus, the then EU concept of 'minimum harmonisation' worked, at least to some extent, in favour of the financial service consumer at that time, although many of the Consumer Credit Act's key provisions have, alas, remained unused and untested, and some key deficiencies remain unrectified.

In contrast, during the boom years, against the backdrop of an EU policy shift towards a more market than consumer-driven policy, the Irish authorities adopted a much more 'hands-off' approach to consumer protection regulation; we conclude that this is most plausibly explained by the pursuit of ultimately unsustainable rather than balanced economic growth that resulted in the prioritisation of property-related tax revenues over consumer rights. Instances of 'soft-touch' regulation, in the consumer credit area, involved the failure to put in place a formula to calculate interest rebates for consumers wishing to settle agreements early, to adequately curb excessive interest charges, and to properly regulate the activities of subprime mortgage lenders.

3. Inadequate and convoluted standards of protection

As bust replaced boom, the revised European Consumer Credit Directive of 2008 was, in many ways, inadequate to the changed needs of the time even before it was transposed into Irish law in June 2010. Further, the European Consumer Credit Agreement Regulations (ECCAR) 2010, which implemented the Directive have resulted in some significantly decreased protections (as well as some limited improvements) for credit consumers. The Directive itself – a maximum harmonisation Directive – although agreed before the Global Financial Crisis, was not transposed in Ireland until a considerable period of time after that Crisis had occurred. Particularly regrettable from the consumer standpoint was the scaling down of responsible lending provisions contained in the European Commission's initial draft Directive, issued some six years before the directive was finally agreed and during the heady days of the boom.

Further, the method of transposition of the directive into Irish law, by way of secondary legislation, has in turn resulted in both convolution and complexity. Indeed, it appears to have been driven more by the State choosing to discharge its obligations in the quickest way possible in the midst of a very crowded legislative agenda, rather than by a desire to protect the consumer. Neither piece of legislation – the Consumer Credit Act 1995 nor the European Consumer Credit Agreement Regulations (ECCAR) 2010 – appears to be being monitored or enforced to any significant extent at the time of writing. The relationship between them is difficult to fathom, and no dispensation for leave to continue to apply some of the more 'consumer-friendly' provisions previously implemented in Ireland (following the first Directive) appears to have been sought from the European Union by the Irish authorities.

4. The Central Bank's approach to monitoring compliance

Against this backdrop of piecemeal legislative development, the Central Bank has decided on a distinctive approach to monitoring the activities of financial service providers. This approach is based on devising and enforcing compliance with Codes of Conduct that the Bank itself produces – and clarifies as it sees fit from time to time – and which we conclude have doubtful admissibility in legal proceedings. In effect there are only two parties to such Codes: the Bank, which lays down the Rules, and the regulated provider, which is obliged to adhere to them. Large parts of the Bank's flagship Consumer Protection Code, such as the important rules concerning knowing the consumer and assessing the suitability of the product, do

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not apply to credit agreements at all. This is a consequence of what in FLAC's view is an overly conservative interpretation of the maximum harmonisation objective in that the State has assumed that this Code is part of national law. In addition, Hire Purchase and consumer hire loans are not covered by the Code at all because Hire Purchase companies are still not regulated by the Bank. Similarly, loans offered by credit unions are not covered by the Code either for some unexplained reason, though credit unions are regulated entities.

The end result of incremental, piecemeal development in the consumer credit area is that contrary to popular perception, there is little to prevent many of the irresponsible lending practices which contributed to bringing Ireland to its economic knees from re-occurring in the future and there is a strong sense of policy complacency in this regard. In terms of financial services more generally, we conclude that the Central Bank's approach prioritises putting obligations on providers over conferring rights on consumers (other than the right of the consumer to make a complaint to the Financial Services Ombudsman). The monitoring of compliance with such obligations, through pre-announced Reviews, Themed Inspections, and associated Inquiries and Settlements (the most likely outcome), tends more in FLAC's view towards 'soft-touch' than rigorous regulation – as illustrated by the negligible number of appeals lodged by financial service providers with the Irish Financial Services Appeals Tribunal.

The consequence of investing such authority in the Central Bank is that what is in effect an unelected body currently has the power to decide what protections it believes appropriate in relation to distressed mortgage borrowers in arrears on their family homes – the same body which in our view manifestly failed to act with the necessary urgency during the evolution of the mortgage crisis.

5. Prioritising institutions over consumers

The Central Bank is responsible both for consumer protection and for ensuring the stability of our financial institutions. Each of these things is clearly important, but it is our conclusion that the Bank is prioritising the stability of institutions at the expense of its consumer protection responsibilities in some respects. For example, it has clearly bowed to pressure from mortgage lenders in terms of its clarifications of and subsequent 2013 revision of the Code of Conduct on Mortgage Arrears (CCMA). This has disimproved borrower protections considerably – such as in relation to unsolicited communications, shortening the moratorium on legal proceedings against borrowers in arrears and an inadequate appeals system – disimprovements which may contribute towards putting many family homes at risk of repossession. The ready access to the Central Bank that financial service providers appear to enjoy contrasts sharply with the limited lobby on behalf of financial service consumers, a reality acknowledged by the Bank itself. This imbalance is compounded by a lack of transparency around the operation of the Memorandum of Understanding agreed between the Central Bank and the Financial Services Ombudsman, thus making it difficult to ascertain the extent to which this memorandum is serving the consumer interest.

Even where a consumer perspective is brought to the attention of the authorities, it is FLAC's experience that suggestions and proposals, though examined are seldom implemented, as proved to be the case with our submission on the revised, draft Code of Conduct on Mortgage Arrears issued by the Central Bank in 2013. The consequence of investing such authority in the Central Bank is that what is in effect an unelected body currently has the power to decide what protections *it believes appropriate* in relation to distressed mortgage borrowers in arrears on their family homes – the same body which in our view manifestly failed to act with the necessary urgency during the evolution of the mortgage crisis. We suspect it will be a surprise to many to find the Oireachtas effectively side-lined on an issue as fundamentally important as the protection of family homes, a major social issue at this point in addition to a financial one.

6. Complaints mechanisms for consumers

Within this legislative framework and policy context, much emphasis rests on the consumer himself or herself to pursue any complaint they may have about the conduct of a financial service provider. On the

evidence from FLAC users who responded to this study, the internal complaints processes of certain financial service providers leave a lot to be desired from the consumer perspective. We identified two over-arching issues:

- Firstly, the incapacity of some consumers to even make a complaint in the first place and to then see it through without accessing help from an advocate such as a MABS money adviser; and
- Secondly, negative attitudes towards consumers and obfuscation on the part of some providers.

There was something of a sense of a war of attrition taking place in many instances, with certain providers appearing to act without fear of sanction from the regulatory authorities. By the time many of the respondents interviewed for this research complained to the Financial Services Ombudsman (FSO), they were both angry and frustrated with their respective providers, feelings which may help to some extent to explain the subsequent disillusionment that many felt with regard to the outcome of the Ombudsman's process itself when it failed to right a perceived wrong.

7. User experience of the FSO process

Although the sample is small, it would appear that this study is the first to formally interview users of the Financial Services Ombudsman service. Those who contacted FLAC for assistance – both consumers and money advisers – and who have had experience of using the FSO's processes were remarkably consistent in their views. The overall view was a negative one, and the process appeared from the consumer/advocate perspective to be overly formal, impersonal, onerous and confusing to the extent that many consumer respondents appeared to have become almost completely lost in the process. The backdrop for many complaints was recession-induced financial and associated difficulty, and within this context, the last thing such complainants needed was the additional stress of a demanding process. Opportunities to meet providers face to face were limited or non-existent. Many consumers interviewed regretted the lack of opportunity to question their provider representative directly in the presence of an FSO official by way of an oral hearing. Others wished to engage in mediation but were thwarted by their provider's reluctance, and the FSO reports that overall very few cases are mediated, primarily because the provider refuses to so engage.

Such negative experiences were compounded in some instances by a difficulty in even getting in to the Financial Services Ombudsman process in the first place (principally on account of a 6-year time limit), or by disbelief that at the end of it all what the consumer perceived to be a conservative, pro-provider finding was made. Data contained in FSO annual reports suggests such views may be more widely-spread, given that where a finding is made, only around 1 in 4 is in favour of the complainant and almost 2 out of 3 of these are only partly (or even minimally) upheld, and that average compensation awards appear to have decreased considerably in recent years. Although selected case studies are included within FSO annual reports, there is no database of decisions, a resource which some informants to our study would clearly have found useful if only as a guide to help them frame a complaint – the FSO, however, takes the view that it treats each complaint on its merits and does not operate a system of precedent.

8. Industry and advocate attitudes to the FSO

The financial services industry funds the Financial Services Ombudsman through levies; it is FLAC's sense that sections of the financial services industry appear to be treating the FSO as, in effect, an extension of their complaints departments. The Ombudsman himself has frequently used the media to express his frustration at the repeated practices of some financial service providers, but until September 2013 – when specific legislation was passed in this

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regard – the FSO had been consistently reluctant to publicly 'name and shame' providers whose practices were the subject of repeated complaints to it. In our view, however, there was no express prohibition against it so doing – a point accepted by FSO staff during interview – and the FSO could have opted to expose financial service providers with a poor track record even prior to the enactment of the legislation. Again, it seems to us that the least line of resistance is the conservative approach; the invariable outcome – whether unintended or not – is that the reputation of financial institutions and the needs of the financial system trump the interests of consumer protection. Worryingly, many of the advocates interviewed for this study had clearly formed the view, based on their experiences of the FSO process, that complainants stand little chance of success if they make a complaint; further, that given the demanding and time-consuming nature of the process as they had experienced it, some advisers would be reluctant to advise future clients to go down the FSO route, and would suggest that an alternative be sought if at all possible.

9. Recent improvements and the FSO Mission Statement

On a more positive note, the FSO's complaints process has recently been revised and squared up fully with the Central Bank's Consumer Protection Code in terms of time limits for complaints, which is a welcome development. Its public interface in the form of the website has also been revamped, and is now much more consumer-friendly than heretofore – online complaints are now possible, for example. The FSO's Mission Statement, "to adjudicate on unresolved disputes… in an independent and impartial manner thereby enhancing the financial services environment for all sectors" appears a little curious; however, given that what is at issue is a complaint, not a 'dispute', and that a consumer 'sector' does not exist in the financial service arena, it is our conclusion that the Mission Statement as it stands views the consumer as an equal, failing to recognise the inequality of arms between the financial service provider who *is part* of a sector and a domestic consumer who by and large is acting as an individual. Notably, some respondents to our study considered that it was *their behaviour, not that of the provider,* that appeared to be under investigation once they had made a complaint.

10. Restricted appeals process for borrowers in mortgage arrears

One particular group of consumers are faced with a major barrier in terms of the current complaints architecture; namely, consumers in mortgage arrears, who have had their mortgage declared 'unsustainable' by their providers. Deficiencies within the Code of Conduct on Mortgage Arrears mean that such consumers may first find it difficult to obtain sufficient information to frame an appeal to their provider's Appeals Board. Second, should this internal appeal fail, the borrower may consider referring the matter to the Financial Services Ombudsman. In this case, however, it is clear that though the FSO will examine a failure by a lender to adhere to process, it feels unable to overturn the commercial decisions of lenders to declare a mortgage unsustainable or to offer what a borrower may believe is an unsuitable alternative repayment arrangement. These gaps in normal fair procedure rules leave consumers in mortgage arrears seriously exposed to the potential loss of their family homes in circumstances where such loss may not necessarily be objectively justified; hence it is a matter which requires the urgent attention not just of the Central Bank which, as previously stated, devised and recently amended the Code, but of the Oireachtas itself.

11. Deficiencies in the legislation which established the FSO

Other process deficiencies can, however, only be rectified by amendments to the legislation which established the Financial Services Ombudsman in the first place. For example, we conclude that the statutory requirement for the FSO to act in an infor-

mal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form, may perhaps be well intentioned but is arguably ill thought-out, potentially contradictory and can lead to mixed results for complainants. For example, how the substantial merits of a consumer complaint can properly be considered without having regard to technicality or legal form, when the complaint concerns a provider's alleged breach of statutory rules, is far from clear. Some of the complaints supported by FLAC in the consumer credit area, and discussed at length within this report, are cases in point.

The High Court is currently the sole avenue of appeal for consumers or providers wishing to appeal against decisions of the Financial Services Ombudsman. It is clear from our enquiries that contesting such appeals is taking up a considerable amount of the FSO's time and resources, as it has become the practice of the FSO to act as respondent in these appeals as a matter of course. This may be having a detrimental effect on its overall operations. From the consumer perspective, there are major barriers to bringing such an appeal, namely the technical difficulties of presenting the case the technical difficulties of presenting such appeals in the absence of legal representation and the risk of incurring considerable and possibly unmanageable costs in the event of failure. It was notable that some respondents to our study did not lodge an appeal for this sole reason. There is a further issue here from the consumer standpoint. A complainant dissatisfied with the FSO's decision may believe that in lodging an appeal to the High Court, it will be the conduct of his or her provider that is under the spotlight. However, analysis of a number of High Court judgements involving appeals against decisions of the FSO illustrates that the appeal is more limited than the appellant may believe as the doctrine of 'curial deference' applies. This means that unless the FSO erred in law or its decision was undermined by a serious error or series of errors, it will not be overturned by the High Court.

12. The remit of the FSO

The workload of the Financial Services Ombudsman has increased considerably in recent times, its resources are clearly becoming more stretched, and some of the cases it is required to deal with are becoming increasingly complex. It is funded by levies from industry, and there appears to be a case for an increase in such levies, for example, to enable the FSO to bring in specific expertise to assist it in cases of particular legal complexity, and to adopt a more person-centred approach. One of the factors which might be contributing to the increasing demands on the FSO may be somewhat self-inflicted, however. The decision of the FSO Council to expand the definition of 'consumer' in 2005 has led to a situation where companies with an annual turnover of less than €3 million and partnerships, clubs, charities and trusts fit into the definition of consumer and can also use the FSO process. Complaints from these quarters may take up a considerable amount of time and resources, and in retrospect, the amended definition of 'consumer' may be too wide. There may also be a suggestion that in broadening the definition to this extent, the Council may have exceeded the power delegated to it under the terms of the legislation.

13. Lack of evaluation

Throughout the research process as a whole, we were consistently struck by the lack of evaluation of the various components of the financial service complaints process in terms of their effectiveness for consumers. Furthermore, we frequently encountered an element of complacency in this regard among the various bodies involved. There appear to be no plans for the Central Bank to evaluate, for example, whether providers are meeting the 40-day time limit for dealing with consumer complaints involving the Consumer Protection Code or how the revised Code of Conduct on Mortgage Arrears is impacting on borrowers in terms of lender compliance and outcomes. Similarly, there seem to be no plans for the FSO to enquire into the

views of consumers on the effectiveness of its complaints processes and mechanisms. In light of the results of our enquiries, we believe that there are a number of aspects of the FSO scheme that could usefully be investigated. Examples include attempting to identify why so many consumers do not follow through after making an initial complaint to the FSO; evaluating the reasons why consumers enter into settlements both prior to and post-FSO involvement and consumer views on how findings are categorised. In this regard, for example, the use of a 'partly upheld' category for nominal awards for administrative errors engendered particular concern among some respondents to this study.

14. Overall conclusion

Complaints resolution mechanisms as currently constituted and administered are, FLAC concludes, inadequate for redressing what we believe to be the imbalance between financial service providers and the vast majority of consumers. By the very nature of the services being offered, the provider has a natural advantage in terms of expertise and that advantage is sometimes exacerbated by the welter of technical documentation that is often sent by the provider in the course of responding to the complaint. Often it is only at this point that consumers start to become aware of the difficulties inherent in the process and there is no designated service where assistance can be found for consumers to formulate their arguments at the commencement and during the course of the handling of complaints. Indeed it is worth noting that some of our respondents who believed they were well up to speed in financial matters confessed to finding the going tough in this regard. The absence of an opportunity for the consumer to confront the provider in a live format was also noted.

In addition to the considerable barriers confronting consumers attempting to access and use current statutory complaints and legal procedures, flawed wording in the legislation and what appears on the basis of our sample of cases to be a conservative decision making ethos with limited redress, account for the perpetuation of this imbalance. The route of appeal in the form of the High Court that then faces consumers (or indeed providers) unhappy with the outcome of a complaint is both inaccessible and confusing in its scope, and it would appear that little planning and thinking, either when the legislation was first passed in 2004 or particularly since, seems to have gone into its selection.

It was notable, however, that the over-riding consensus among those interviewed for the purpose of this study was that the concept or idea of an alternative dispute resolution process for financial service disputes outside of the courts is a good one, and there was widespread support for the model itself. A fundamental review and evaluation of the scheme as a prelude to amending the legislation which established the Financial Services Ombudsman, to the process which it administers, and to the appeals process, are all required. The current situation where consumers with complaints are designated as equals to much more powerful and better resourced financial service providers and where they are, in FLAC's view, often unfairly treated as a result, must be addressed.

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Recommendations

A good consumer protection system would safeguard the rights of consumers as well as facilitating the provision of financial services. The rights of consumers are a fundamental part of access to justice which consists itself of the right to adequate protection by the State of its people, the right to fair redress systems where disputes arise and the right to timely and adequate advice and information. This report analyses the protections available to financial service consumers in Ireland and while it concludes

there is much to be done to better protect consumers, nevertheless FLAC is confident that, if the will exists, the necessary adjustments can be made to put an adequate system in place. As one of the respondents to our study said in relation to the FSO:

> I think the model or the process is good, if it worked in the way that it's established to work, it would actually be very good and in that case, then it's a case of making the process known to people in a way that they understand it… and bringing it out there as something that consumers can actually feel comfortable in using.

We now present a number of recommendations to address the various issues and deficiencies highlighted within the report. These are categorised according to the bodies that would primarily be responsible for implementing the particular recommendation made..

A. Matters primarily concerning the European Union

Article 38 of the Charter of Fundamental Rights states that "Union policies shall ensure a high level of consumer protection." In order to ensure this level of protection in relation to consumer credit, the following recommendations are addressed to the European Union and to the Government in its interactions with the Union.

- **A1**. The EU should strongly consider moving from a 'maximum harmonisation' approach to transposing Directives to a 'minimum harmonisation' approach in the area of financial services, and consumer credit in particular. If the EU continues the maximum harmonisation approach, it should allow Member States to retain (and restore) existing national consumer protection standards and to deal with national difficulties that may present themselves.
- **A2.** Provisions in relation to the enforceability of credit agreements, the right to request a copy of the agreement or statement of account, and the right to 'early warning' notice of enforcement by a creditor, should be restored by the Government with the consent of the European Union.
- **A3.** The European Commission should examine consumer lending practices across Member States and then enact legislation to advance responsible lending by all credit granting institutions, with a view to ensuring that consumers enter into agreements that are fair and sustainable and minimise consumer over-indebtedness.
- **A4**. The European Union needs to ensure that legislative proposals and measures in place for the protection of consumers of financial services respond and adapt in a timely way to the changing nature of consumer credit and financial services markets.

B. Matters concerning domestic law reform

From the consumer perspective, law reform is required in three key areas. These are: legal changes to the consumer credit regime, reform of Central Bank Codes, and adjustments to the legislation covering the Financial Services Ombudsman (FSO).

1. Consumer Credit and associated legislative reform:

- **B1.** There is a need for an updated, integrated act which would consolidate all of the existing provisions relating to consumer credit into one piece of legislation, so that lawmakers, users of services and advisers have access to accessible information.
- **B2.** All credit institutions and mortgage lenders should be prohibited from charging excessive rates of credit.
- **B3.** The Central Bank should conduct a review of the interest rates that were charged by high cost credit providers during the boom years, evaluate their impact and the justification for them, with a view to setting maximum interest rates for such providers, including sub-prime mortgage and personal

lenders, Hire Purchase companies, door to door lending companies and licensed moneylenders.

- **B4.** Hire Purchase and consumer hire providers should be fully regulated by the Central Bank of Ireland, in particular by including them within the rules of the Consumer Protection Code.
- **B5.** Consumers should be entitled to know and to apply an objective formula to calculate their interest rebate for early settlement of a Hire Purchase agreement.
- **B6.** Debt collection services should be regulated immediately on a statutory basis with a proper licensing system and a legally admissible code of conduct applying to such entities.

2. Central Bank Codes reform:

Code of Conduct on Mortgage Arrears (CCMA)

- **B7.** The CCMA should be immediately reviewed with input from all political parties, elected representatives and stakeholders with a view to putting in place a more substantive code that better reflects and balances the rights of borrowers and lenders respectively, and avoids repossessions wherever possible.
- **B8.** Express legal status should be conferred on the CCMA by way of a Statutory Instrument or Ministerial Regulation. Examples exist in other areas of Irish law as to how this could be done.
- **B9.** The CCMA should be amended to expressly require each provider to consider all available options in cases of mortgage arrears, and to inform borrowers of the conclusions in relation to each particular option.
- **B10.** The State should establish a truly independent and effective process for appeals arising out of the Mortgage Arrears Resolution Process (MARP) that can rule on the substance of a lender's decision and not just the formalities. An alternative would be the conferring of specific explicit authority on the FSO to carry out a full appeals function, an option which would necessitate an increase in the FSO's resources to enable it to carry out this function.
- **B11.** The CCMA should be strengthened in relation to communications from lenders. It should explicitly acknowledge the vulnerability to pressure and right to privacy of distressed mortgage borrowers. It should provide additional redress mechanisms for borrowers where the lender has exceeded its authority in communications and should provide for stronger sanctions against non-complying providers.
- **B12.** Lenders should not be permitted to commence repossession proceedings against a borrower where there is evidence of unreasonable behaviour or excessive delay on the part of the lender in the MARP negotiation. Where such evidence is available, the moratorium on legal proceedings should be extended.

Consumer Protection Code (CPC)

- **B13.** As the CPC does not form part of Ireland's national law, the State is not precluded by the dictates of maximum harmonisation from applying it to credit agreements and should so apply it immediately.
- **B14.** The terms of the CPC should be extended to apply to Hire Purchase and consumer hire agreements.
- **B15.** The terms of the CPC should be extended to apply to credit union lending as there is no clear rationale for excluding such agreements from its terms.

3. Financial Services Ombudsman (FSO) legislative reform:

- **B16.** A consumer should be entitled to bring a complaint to the FSO either within six years of the impugned conduct, or within two years of the date on which the consumer became aware (or could have become aware) of the detrimental consequences of the conduct, whichever is the later.

- **B17.** Given that the legislation establishing the FSO enshrines mediation as the primary method for dealing with complaints, financial service providers should be obliged to advance convincing reasons for refusal to mediate when requested to do so by the Ombudsman in cases where the complainant has agreed to resolve the complaint in this way.
- **B18.** The requirement for the FSO to act 'in an informal manner' should be amended to reflect the fact that many complaints involve alleged breaches of statutory rules. The requirement to act according to 'equity, good conscience and the substantial merits of the complaint' should remain.
- **B19.** The current 'finding' categories should be amended to more accurately reflect the nature of the finding. More appropriate categories might be as follows: Upheld; Substantially Upheld; Substantially Rejected; and Rejected.
- **B20.** Consumers who wish to appeal a finding of the FSO should be able to bring this appeal to the Circuit Court rather than to the High Court, and appeals should provide for a full re-hearing of the complaint.
- **B21.** The 21-day time limit for filing an appeal against a decision of the FSO should be extended to 60 days.
- **B22.** As a short-term measure, the FSO Council should consider redefining 'consumer' to bring it into line with that of 'personal consumer' used both in the Consumer Protection Code and in the Consumer Credit Act 1995, namely "a natural person acting outside the course of his or her trade, business or profession". In the longer term, a two-tier FSO service – one tier for personal consumers, another for complainants acting in a professional commercial capacity – should be considered.
- **B23.** Communications conducted under the Memorandum of Understanding between the Central Bank and the FSO should be subject to the provisions of Freedom of Information legislation.

C. Regulatory and process reform

Not all the necessary changes will require legislation. Some of the issues which arose in the course of FLAC's research pointed to the need for institutions to alter their own ways of working or their rules. This section focuses on such types of recommendations.

Central Bank

- **C1.** In its monitoring and compliance functions, the Central Bank should have greater regard to primary and secondary legislation rather than relying so heavily on its own Codes.
- **C2.** The Bank should take a more rigorous approach both to inspection and to follow-up. This could include increasing "cold-call" unannounced inspections, specifying time limits for providers to rectify issues noted in Reviews and Themed Inspections, and imposing effective sanctions when providers fail to remedy certain practices or procedures identified through such inspections within certain time limits. This may result in an enhanced role for the Irish Financial Services Appeals Tribunal.
- **C3.** The Central Bank should publish an annual report on its enforcement activities, including the number and type of breaches identified, prosecutions initiated and their outcome.
- **C4.** The Consumer Protection Code should be re-written to make it more readable and thereby more accessible to consumers and to their advisers. In addition, the Code should be renamed to reflect what it really is, namely "A Code of Conduct for the Regulation of Financial Service Providers".
- **C5.** The Central Bank should carry out an annual programme of consumer-oriented research, which would focus on the impacts and outcomes of regulation on consumers. It should further publish such research.
- **C6.** The Central Bank should publish in a coherent and systematic way the fees that it permits lenders to charge

so that such information is readily available to consumers.

- **C7.** The Central Bank should conduct a review of pre-July 2007 Payment Protection Insurance cases with a view to using its regulatory powers to obtain a refund for consumers mis-sold such products.

Financial Services Ombudsman (FSO)

- **C8.** The Financial Services Ombudsman Council should seek the consent of the Minister for Finance to increase the levies payable by financial service providers. This will enable the FSO to carry out its functions in a more consumer-accessible way and allow it to deal with the many complex issues that arise in the course of its investigations, such as those relating to the application and interpretation of statutory rules.
- **C9.** The FSO should commission an independent evaluation of its complaints process. Such an enquiry should incorporate a qualitative methodology to capture the consumer viewpoint and in particular, to explore why so many complainants give up in the course of the complaint. Such a review should also evaluate, from the consumer perspective, settlements which are agreed between the parties.
- **C10.** The FSO should review its current system of redress to ensure that the complaints system accords with the principles of a fair hearing. This would include consideration of the low percentage of oral hearings, the accessibility of the format, and the opportunities for complainants to be fully heard.
- **C11.** Consumers who require assistance in properly articulating a complaint to the FSO should be entitled to access such assistance with State-funded support.
- **C12.** The wording used in findings of the FSO should be reviewed to make it more understandable to complainants.
- **C13.** The FSO should amend its Mission Statement to reflect the reality that what is at issue is a complaint not a dispute; it should further remove the reference to "all sectors" as there is in reality no such thing as a "consumer sector".
- **C14.** The FSO should further break down the information that it publishes to enable the public, as well as the FSO, to track the progress of complaints and their ultimate outcomes. This should include the publication of median compensation awards for each of the three reporting categories, namely investment, banking and insurance. Further, complaints settled 'pre-investigation' should be clearly distinguished from those settled 'post-investigation'.
- **C15.** To advance consistency in decision-making, consumers and their advocates should be given access to any previous decisions that might be relevant to their case. An anonymised, searchable database should also be established and made available to the public.
- **C16.** The FSO should immediately review its practice of automatically taking a full part in every appeal to the High Court, as this greatly increases both the costs of each case and the burden on consumers.

Redressing the Imbalance critically examines the legal protections available to consumers of credit and other financial services in Ireland. It identifies a number of deficiencies and gaps in how such protections are provided. It also suggests that a systemic approach has evolved which has consistently served to prioritise the interests of financial service institutions over those of consumers. The report provides a detailed account of how European-level developments, piecemeal domestic legislation and selective financial regulation have combined to leave many consumers of financial service in Ireland – in particular consumers of credit and distressed mortgage borrowers – particularly exposed. Drawing on the experiences of consumers and their advocates, the study further highlights how such exposure can be compounded by difficulties accessing and using mechanisms ostensibly designed to facilitate the resolution of complaints against providers. The report concludes with a series of recommendations as to how these flaws in the legal infrastructure might be redressed from a financial service user perspective.

flac

promoting access to justice

FLAC, 13 Lower Dorset Street, Dublin 1

Tel: +353-1-887 3600 | LoCall: 1890 350 250
Fax: +353-1-874 5320

E-mail: info@flac.ie | Web: www.flac.ie
fb.me/FLACIreland @flacireland

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