Submission of the Free Legal Advice Centres (FLAC)

Submission of Free Legal Advice Centres to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach

Pre-Legislative Scrutiny of the General Scheme of the Consumer Protection (Regulation of Retail Credit Firms) Bill

26th March 2021

About FLAC

Free Legal Advice Centres (FLAC) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. FLAC focuses on the use of law as a tool for social change and on the protection of economic, social and cultural rights. FLAC is an affiliate member of FIDH.

In our work, we identify and make policy proposals on the law that impacts on marginalised and disadvantaged people and groups. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free. FLAC was a partner of the JUSTROM programme and recently launched a dedicated legal service for the Traveller community. It also operates a legal clinic for the Roma Community.

It made a submission to the Department of Justice and Equality's consultation on a new National Traveller and Roma Inclusion Strategy, 2017-2020 and to the Commission on the Future of Policing in 2018. It also made a submission to the UN Committee on the Elimination of Racial Discrimination for the examination of Ireland's combined fifth, sixth and seventh periodic report. These submissions are drawn on for the purpose of this submission.

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

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1. The policy rationale for the Bill

in our recent submission to the Committee on the Consumer Credit (Amendment) Bill 2018, we suggested that in examining the issue of potentially capping the rate that licensed moneylenders can charge, it was important to remind regulators and policy makers alike that the market and the forces of competition alone do not always protect the interests of consumers and there are many other types of credit providers, apart from licensed moneylenders, who could do with regulation or closer regulation.

The core subject matter of this proposed Bill – the regulation of all providers and all types of car finance credit agreements – following the Tutty report on the review of the regulation of Personal Contract Plans[1], is a case in point. Thus, FLAC welcomes the Bill's core objective, which we believe is long overdue[2], and welcomes the opportunity to make comments upon the heads of the Bill, and to make further more general observations. In summary, we believe that this Bill does not go near far enough to address the numerous consumer protection issues that arise for often vulnerable consumers in connection with hire purchase and personal contract plan (PCP) agreements and a number of recommendations are made below in terms of additional matters that should be addressed**.**

We also address the wider question of the unnecessary complexity of consumer credit legislation In Ireland, caused largely in our view by a lack of transparency in the transposition of the relevant EU Directives. No more than the many other areas in which FLAC works, robust consumer protection standards when drawing down credit is an important access to justice issue. Access to justice includes access to information about rights and the enforcement of rights and access to an effective remedy when a borrower's rights have been infringed.

2. The technical, legal and drafting aspects of the Bill

Head Number 1 (Title and citation only)

Head Number 2

This head proposes that a provider of Credit, Hire Purchase (including Personal Contract Plans) or Consumer Hire agreements (which it should be said are very rare in practice at this point), who is not already regulated by the Central Bank of Ireland (CBI), will have to be authorised as a retail credit firm. Authorisation of such firms is already provided for under Section 19 of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 (amending Section 28 of the Central Bank Act 1997) which itself has also been amended in

[1] Commissioned by the Minister for Finance, Paschal Donohoe, TD and published in November 2018, it recommended the introduction of *'legislation to ensure that all providers of car finance – whether Hire Purchase (HP) or Personal Contract Plans (PCP) – are properly regulated'.*

[2] At meetings with both Central Bank and Department of Finance officials over many years, FLAC has persistently urged that providers of hire purchase agreements be regulated like other credit providers and that HP agreements should be considered to be credit agreements, like any other form of lending.

the interim in the Consumer Protection (Regulation of Credit Servicing Firms) legislation of 2015 and 2018, amongst other provisions, in what is a very tortuous interwoven set of provisions.

Although the Tutty Report principally focused on the question of regulating providers of car finance credit, offering Hire Purchase (including Personal Contract Plans) and Consumer Hire agreements, it is worth noting here that this head also includes 'credit' generally. Credit is defined as *'a cash loan (whether or not provided on the security of a mortgage or charge over an estate or interest in land), but does not include credit of a class specified in section 3(2) of the Consumer Credit Act 1995'*[3].

This appears to open up a requirement for currently unregulated providers of credit, who may not offer car finance agreements, but do provide other types of loans, for example credit to buy goods, to also apply for and be authorised as retail credit firms. Conceivably, this could and should include firms who offer finance for 'credit sale' type agreements in conjunction with retail outlets selling electronic goods and furniture. Note, for example, one store that is currently advertising:

- Up to €5,000 'Tech Credit' over a 12-month repayment term
- A standard variable interest rate of 11.99%.
- A €15 'application' fee and a €2 'monthly account' fee.
- An annual percentage rate of charge (APR) of 13.96%.
- Total amount payable €5,704.44.

With these offers of credit, the loan is not provided by the store itself, but by an associated company.

The Committee should seek confirmation from the Department of Finance and Central Bank of Ireland (CBI), as to whether it is explicitly intended that such lenders will also be required to become retail credit firms. We would recommend that such lenders should be included.

Head Number 3

This head reserves to the CBI the power to exempt a provider of Credit, Hire Purchase (including Personal Contract Plans) or Consumer Hire agreements from having to be

[3] This requirement to be authorised as a retail credit firm will not apply to credit agreements which are already exempted under S.3 (2) of the Consumer Credit Act 1995 (as amended). This includes, for example, credit agreements provided by credit unions under the terms of the Credit Union Act 1966. Thus, credit unions will not require to be authorised as retail credit firms, even in respect of the personal loans for car purchase that they provide. To our knowledge credit unions do not do provide other forms of car finance credit such as Hire Purchase or Consumer Hire.

authorised as a retail credit firm under Head 2. This power is an existing discretion already assigned to the Bank under s.29A of the Central Bank Act 1997.

It would appear that this power may be exercised by the Bank in three potential scenarios:

- where the total amount or value of the credit provided is such that *'it is reasonable to assume that the borrower will be in a position to negotiate on equal terms* or *obtain appropriate legal and financial advice'* or
- the provider is exempted from being required to hold a banking licence or
- the provider provides credit solely for charitable or public purposes and at a rate of interest or on terms more favourable than those currently available commercially

And where the exemption would not be inconsistent with the proper and orderly regulation of the provision of credit and the protection of customers of retail credit firms.

To provide for regulation under Head 2 and then to immediately provide for a potential exemption under Head 3 requires explanation and clarification. However, it is notable that the General Scheme provides no additional guidance of the likely circumstances in which these exemptions might be potentially applied.

The first scenario looks the most worrying of the three and some context might be sought here. How, it might be asked, would or could the 'total amount or value of the credit' provided to a borrower lead to an assumption that the *'borrower will be in a position to negotiate on equal terms or obtain appropriate legal and financial advice'*?

Note too that the use of the word 'or' in this proposed provision suggests that either of these: 1) the borrower being in a position to negotiate on equal terms or 2) the borrower being in a position to obtain appropriate legal and financial advice, would be sufficient to trigger the exemption.

Even if either of these conditions could be said to apply, how does this justify a decision not to regulate a person or body that appears to be supplying the Credit, Hire Purchase (including Personal Contract Plans) or Consumer Hire agreements, for profit?

The Committee should seek confirmation from the Department of Finance and Central Bank of Ireland (CBI) concerning what exactly is intended by this exemption and the circumstances under which it is envisaged it might be used. In the absence of a cogent justification for its potential use, we would recommend that this exemption be removed.

Head Number 4

This head is a standard type provision that allows any unregulated firm currently operating in the market providing the relevant forms of credit to continue to operate, pending its application for an authorisation within a mandatory three month period. The blanket nature

of this permission is of concern. It does not appear to be subject to any checks and balances or any regulatory controls.

***The continued operation of unregulated firms, pending authorisation, should be dependent on the information that the CBI has to hand on the individual firms and their practices and an assessment of the transparency of their operations and how fairly they treat consumers in terms of issues such as the cost of the agreements they offer. Consumers or their representatives (for example staff of the Money Advice and Budgeting Service (MABS)) should be entitled to object on specific grounds to a particular provider being authorised on an interim basis*.**

Head Number 5

This head obliges the CBI to periodically (at least every six months) collect and publish aggregate data on the types of relevant agreements that retail firms have entered into, including agreements 'provided for the purpose of obtaining a motor vehicle'. It makes sense to gather intelligence about the market and the agreements being offered by the soon to be newly regulated retail credit firms. However, what may be of concern here is the somewhat limited list of enumerated items that information will be gathered on.

***The legislation should provide that information be collected and published by the CBI on a wider span of items. This should include explicitly setting out the range of the relevant credit agreements that information will be gathered and matters such as the term of agreements, details of deposits required as a condition for entering agreements, the range of penalties or interest that may have been charged in the event of a default in payment, and, in the specific case of hire purchase agreements, the extent to which the Hirer's has exercised his/her right to terminate the agreement early under s.63 of the Consumer Credit Act 1995 (as amended). The legislation should set objectives for the CBI to meet having gathered this information, for example, the potential review of authorisations or the authorisation regime and potential legislative reform*.**

Head Number 6

This head removes the CBI's power under Section 2 of the CCA 1995 to prescribe persons or classes of person to be credit institutions under paragraph (e) (only) of the definition of 'credit institution' in that section. It does not remove the CBI's power under paragraphs paras (a) to (d) to prescribe new credit institutions. It would appear that the intention is that this former category (e) of credit institution will henceforth be designated and regulated as 'retail credit firms' within the meaning of Part V of the Central Bank Act 1997.

The head goes on to stipulate that the regulatory status of all retail credit firms (and all credit institutions, as defined) will be dependent on a condition that the APR charged on credit granted to a consumer by such firms and institutions must be less than 23%. This is also currently the cut-off point before a credit agreement becomes a moneylending agreement.

Thus, the definition of moneylender further on in Section 2 of the CCA 1995 specifically provides that it does not include *'a person who supplies money for the purchase, sale or hire of goods at an APR which is less than 23 per cent (or such other rate as may be prescribed)'.*

Ultimately, there is no concrete change here, apart from a specific prohibition on a regulated retail credit firm from charging 23% APR or more on credit. It is hard to see what difference this ultimately makes, as were over 23% APR to be charged by a retail credit firm offering credit, it would require a moneylender's licence.

However, there may be a further problem here that may have been missed by the drafters. As a HP agreement is not considered to be a credit agreement, there is currently, to our knowledge, no obligation on a HP provider to quote an APR or rate of interest for, or in, a HP Agreement in the first place. Thus, how is a potential borrower (or anyone else) to know whether the notional 23% APR limit has been exceeded in a HP agreement offered by a retail credit firm, unless this is corrected?

A review should be carried out by the CBI on the appropriateness of allowing regulated retail credit firms (and indeed regulated credit institutions) to charge a rate of interest up to 23% APR. The APR on an agreement will vary widely, depending on the length of that agreement. The longer the term of an agreement, the lower the APR; the shorter the agreement, the higher the APR. Thus, for example, a borrower will pay a very large amount of interest on a mortgage but the APR will almost always be in single figures. Consideration should be given therefore to different maximum rates for different types of credit agreement. A requirement to quote an interest rate in a Hire Purchase (or Personal Contract Plan) agreement should be introduced and this could be achieved by amending the definition of a Hire Purchase agreement to include that it is a credit agreement.

3. Areas where the Bill might be improved/Possible implications or consequences arising from the Bill

An initial observation under this heading is that this Bill is limited in both its scope and its ambition and this, in our view, reflects a trend of only doing the minimum of what is required in the area of consumer credit legislation, since the progressive Consumer Credit Act 1995, came into operation in May 1996. In this case, the basic intention is to repair flaws that have been obvious in the regulation of providers of car finance products in Ireland for some years.

Thus, on 23rd October 2019, Minister for Finance and Public Expenditure and Reform, Paschal Donohoe TD, announced that he had obtained Government approval to draft legislation to provide that all firms which offer personal contract plan (PCP), hire purchase and other similar credit type agreements to consumers will be required to be authorised by the Central Bank of Ireland as retail credit firms. In this connection, he referenced 'Tutty' report which he suggested *'outlined a number of recommendations to improve the level of consumer protection in relation to the provision of PCP and hire purchase agreements'*. We would suggest that this statement is a little exaggerated, for example, there are very few

recommendations in the Tutty Report to amend the substantive law relating to the provision of Hire Purchase in Ireland.

The Minister went on to suggest that the only recommendation of the Tutty report which could not be implemented within the existing legislative framework was the key one that the relevant provisions of the Central Bank's Consumer Protection Code (CPC), in particular the provisions which require lenders to assess the suitability of the product for the consumer and also the ability of the borrower to repay the debt over the duration of the credit agreement, should be extended to all the providers of hire purchase/PCP agreements to consumers. This was not possible, he suggested, as some of the providers of these agreements currently fall outside the authorisation and full regulatory remit of the Central Bank, and so the Bank is not able to apply its codes to these unauthorised firms.

The short history of how this came about and the potential adverse consequences for consumers are outlined immediately below.

- **Gaps in the regulation of Hire Purchase providers**

The current position that this Bill intends to fix is that Hire Purchase agreements (which are now primarily used for car finance purposes) are regulated by the Consumer Credit Act 1995, but the provider of the finance is not explicitly regulated by the Central Bank of Ireland (CBI). Thus currently, although the agreement is regulated, the provider of the credit is not.

The reasons for this are complex but seem to broadly stem from legal advice the CBI obtained many years ago to the effect that a Hire Purchase agreement is not a credit agreement, because it is a rental of goods only with an option for the Hirer to purchase the goods, which the Hirer can choose to do or not to do. This view seems to have been formed despite the fact that 'credit' is defined in the CCA 1995 as including '*a deferred payment, cash loan, or any other form of financial accommodation;* 'credit agreement' is defined as meaning *'an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation'* and financial accommodation is defined as including *'credit and the letting of goods'.*

A Hire Purchase agreement is defined in the CCA 1995 as meaning *'an agreement for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments; and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the hirer may buy the goods, or the property therein will, if the terms of the agreements are complied with, pass to the hirer, the agreements shall be treated for the purpose of this Act as a single agreement made at the time when the last agreement was made'.* Had that definition stipulated that a Hire Purchase agreement was '*a **credit** agreement for the bailment of goods…..',* it is conceivable that this problem might have been avoided.

The most direct consequence of this gap in the law was that the CBI felt it could not impose the standards of its Consumer Protection Code (CPC) on HP providers since it did not regulate them, or apply the CPC to already regulated entities (such as licensed banks offering HP products as part of their suite of lending) when they were providing car finance through garages authorised as credit intermediaries. Thus, it felt obliged as far back as May 2008 to retrospectively insert a provision in an 'Addendum to the Consumer Protection Code 2006' disapplying that Code by stating that *'this Code does not apply to regulated entities when carrying on the business of entering into hire purchase agreements; or carrying on the business of entering into consumer hire agreements'.*

The same problem of course arises in connection with PCP agreements, which are considered in principle to be a form of Hire Purchase. The Tutty Report (Page 22-23) states that:

> *'There is a range of financial institutions providing PCPs. Many of these are already authorised by the Central Bank as credit institutions or retail credit firms, or are regulated by the Central Bank in Ireland for conduct of business rules, with the main regulation being abroad. However, these financial institutions are not specifically authorised for their PCP activities and there are other PCP providers who do not need authorisation by the Central Bank at all. The Central Bank survey suggests that some 82% of PCP contracts are provided by Irish resident banks with the remainder relating to PCPs advanced by non-bank entities'.*

A second and more significant consequence of this is that it also meant, and still means, that anyone can offer a Hire Purchase or a Consumer Hire agreement, including a garage selling cars, or a company that decides to set itself up to supply these services, and it does not have to apply for an authorisation from the CBI to do so. It does, in theory at least, have to supply a proper written HP agreement that complies with the CCA 1995 – again the agreement is regulated, but the provider is not. However, this does not protect consumers from the risks of exploitation and high charges, with those borrowers who may have a poor credit rating sometimes specifically targeted.

It is frankly incredible that no remedial action has been taken to deal with this issue until now and FLAC has made several attempts over many years with both Department of Finance and CBI officials to have this addressed. Indeed, but for the arrival of Personal Contract Plans (PCP) into the picture, it is possible that this Committee would not have these 'Heads of Bill' before it at all.

Please see below the financial details of one such Hire Purchase agreement offered by an unregulated lender which came to our attention in the course of our work in this area. In this case, the total amount repaid over the five years of the loan was double the 'notional' value of the vehicle when the agreement was drawn down (it should be noted that the stated value of the vehicle can sometimes be exaggerated in the first place).

FINANCIAL DETAILS

Purchase/Cash Price: €11,500
Deposit: €1,000
Balance: €10,500
Charges: €10,770
Total: €21,270
HP Price: €22,270
264 weekly instalments of €80 = €21,120.00
Deposit = €1,000.00
Admin/Car purchase fee = €150.00
Total Cost = €22,270.00

- **Is a PCP agreement a Hire Purchase agreement?**

Personal Contract Plans have been in popular use in Ireland for a number of years now but they are not specifically regulated by name under the CCA 1995 or any other legislation of which we are aware. It appears to be assumed that they are Hire Purchase agreements on the basis that they share to the same core features of HP - rental instalments and a right to purchase or not to purchase the relevant vehicle. However, as this Committee is aware, they also contain some features – larger deposits, guaranteed minimum future value (GMFV), annual mileage limits and servicing obligations – that are not be found in HP.

The Tutty Report (Page 10) has this to say on this subject:

> *'There seems to be general agreement among the organisations spoken to and the Revenue Commissioners that PCPs are hire-purchase products and are covered by the hire-purchase legislation. However, it would seem useful to obtain legal advice to confirm whether PCPs fall within the CCA 1995 definition of "hire-purchase agreement" (or alternatively the definition of "consumer-hire agreement"). If this is not confirmed by the legal advice, the present legislation should be reviewed with a view to enshrining PCPs in legislation, either as part of the hire-purchase provisions or on a separate basis. This would remove any legal doubt about the status of PCPs'.*

Has the legal advice referred to in this extract been sought and obtained and does it confirm this view? There is no indication whatsoever of this in the heads of this Bill. Head No.2 itself does not even explicitly mention PCP and note (c) explaining the Head simply refers to hire-purchase (including PCP) as if they were automatically one and the same.

The Committee should urgently request clarification from the Department of Finance whether legal advice has been sought to confirm whether PCP's fall within the CCA 1995 definition of "hire-purchase agreement" (or alternatively the definition of "consumer-hire agreement) as recommended by the Tutty report, and, if it has, to what extent has that advice been taken into account in the Heads of this Bill.

- **This Bill should have a wider scope**

Even if the legal opinion was to the effect that a PCP agreement is in effect a form of HP agreement from a legal perspective, this would still not, in our view, justify failing to distinguish them from a regulatory perspective, given the significant differences between these types of agreements summarised above.

The Tutty Report (at Page 15) suggests on this question that:

> *'if the existing legislation is reviewed to introduce specific provisions on PCPs, consideration should be given to whether legal provision should be made for additional information to be provided to consumers to cover the complexity of PCPs'*

Page 16 states that:

> *'there are also more binding conditions which must be met by the customer under a PCP, some of which may not be easy to understand, such as the requirement in relation to wear and tear on and damage to the vehicle. There is some evidence that customers may not fully understand or take on board these conditions, even when they have been explained to them and are included in the contract that they sign'.*

There are important matters of consumer information and protection at stake here, which should be dealt with by this Bill. If it is considered that a PCP is a HP agreement, this should be clarified by amendments to the definition of a HP agreement. A provider should be required to state whether a car finance agreement is a Consumer Hire Purchase or a Personal Contract Plan agreement and, in practical terms, the terms of the respective agreements and the product information and warnings that should be provided to potential Hirers should be distinguished in law accordingly.

- **Reform of Hire Purchase law**

As we have suggested above, there has been a trend of doing only the minimum in terms of updates to consumer credit legislation in Ireland for a number of years now and the manner of such implementation (which is commented on further below) has also left much to be desired. The apparent failure to even consider in this Bill that other changes may need to be made to enhance standards of protection for consumers of hire purchase finance may be further evidence of this. It is as if an assumption has been made that all is well with the substantive law applying to Hire Purchase (and Consumer Hire agreements), some 25 years after it was last significantly amended in the CCA 1995.

It is beyond the scope of this short submission to provide a detailed list of perceived deficiencies of the current law relating to Hire Purchase from a consumer protection perspective. However, our experience in working with MABS advisors over a period of years, suggests that the following matters, amongst others, could do with a proper review:

No interest rate quoted – As it currently stands, an entity offering a HP agreement does not have to quote a rate of interest to the potential Hirer. Only the cash price of the vehicle, the number and amount of the instalments and the overall amount to be paid (called the 'Hire Purchase price') have to be set out. This runs against the standard approach that potential borrowers should be able to compare different offers of credit through the use of a common method of calculating the cost of credit.

Additional charges – Some providers charge extra costs – typically 'Administration' or 'Completion' Fees in HP agreements. The cost of credit in HP agreements is high enough as it stands. Consideration should be given to banning such fees.

Issue of Balloon (or bullet) payments – The instalments under a HP agreement do not have to be equal. As a result, a practice developed, particularly from the noughties on, of providing for a substantial lump sum payment to be made at the end of the agreement in order for the Hirer to own the goods. This had two potentially adverse effects for borrowers. First, it made the instalments lower and therefore more affordable during of the agreement and more tempting to sign up for. Second, very few borrowers could then find the large cash lump sum to complete the terms of the agreement and own the vehicle, with the result that many found themselves with no choice but to agree to another HP agreement in order to have transport to go to work.

No rules on Hire Purchase rollovers – The CCA 1995 does not contain any specific rules to deal with the rollover scenario where a Hirer is invited by a garage (or seeks him or herself) to bring a HP agreement to a premature end and enter into a further HP agreement for a more recent vehicle. In some instances, hirers receive little or no value for the payments made (including a deposit) under the first agreement, when entering into a subsequent one.

Enforcement of right to recover goods – The CCA 1995 provides that where at least one-third of the total HP price has been paid by the Hirer, the Owner cannot enforce any right to recover possession of the goods, otherwise then by legal proceedings. In practice, this buys some time for the Hirer in financial difficulty to consider his/her position and get advice/assistance. However, on occasions pressure has been put on Hirers by repossession companies to facilitate a repossession to take place, even where the Hirer does not wish to do so.

Voluntary surrender – The legislation broadly provides that whether a HP agreement is terminated either by the Hirer or the Owner of the goods, the compensation that must be paid by the Hirer cannot exceed the difference between what has already been paid and half the HP price, or, if over half the HP price has already been paid, any arrears of instalments. Some lenders have gone outside the terms of the legislation and suggest that the Hirer 'voluntarily surrenders' the vehicle, where the Hirer is billed for the full amount of the Hire Purchase price, net of the amount already paid and the amount the Owner sells the car for.

Interest rebates – Part V of the CCA entitles a Hirer to a 'reduction in the cost of credit' (i.e. an interest rebate), either when s/he discharges his/her obligations under an agreement early

or where the agreement is terminated early by the Owner. The Minister for Finance, in consultation, is empowered to make regulations to provide for this, but has never, to our knowledge, exercised this power. This should be rectified.

Liability for failure to take reasonable care of goods – Where a Hirer terminates an agreement early and hands back the goods to the Owner, s/he shall, if s/he has failed to take reasonable care of the goods, be liable to pay damages for the failure. In some instances to our knowledge, Hirers have been charged for cleaning and valeting and very minor mechanical issues under this heading, when in law liability is only for failure to take reasonable care and the Hirer has been paying instalments with interest on an asset depreciating in value.

Disabling vehicles the subject of HP agreements – In one Hire Purchase agreement which again came to our attention in the course of recent work, the HP Agreement provided that *'the Owner will install a GPS Tracker and Disabler to the goods and has the right to disable the motor vehicle remotely if the Hirer is in breach of this agreement. For the avoidance of doubt, in breach of this agreement means the Hirer is not keeping up the payments as per schedule'.* There is no provision in the CCA 1995 which either explicitly permits or forbids this practice but such potential draconian powers should be made unlawful

A review of consumer protection standards in relation to the law concerning Hire Purchase agreements should be carried out by the CBI, with appropriate consultation with consumer and debtor advocates. Either this bill or a subsequent Bill should be considered that would address by amendments to the CCA 1995 some of the deficiencies summarised directly above.

4. **Additional comments – Issues concerning the codification and supervision of consumer credit legislation**

It may be that this is beyond the remit of the Committee in terms of the consideration of this Bill, but there is a bigger picture here. In our view, it is a recent history of a failure by successive governments to properly codify legislation relating to consumer credit, compounded by a questionable practice of transposing important EU Directives relating to matters of consumer credit by statutory instrument, thereby bypassing the vital input of the Houses of the Oireachtas and its Committees.

In 2008, following a long gestation period of some six years, a revised 'credit agreements for consumers' Directive was agreed by the institutions of European Union to replace the existing Directives, which had given rise to the introduction of the CCA 1995. The 2008 Directive had to be transposed by 11 June 2010 and it essentially repealed the 1987 equivalent (itself amended in 1990) and updated the information requirements and other entitlements that must be provided by lenders to consumer borrowers in relation to unsecured lending. This Directive did not regulate mortgages. Another significant form of credit not covered by the revised Directive was Hire Purchase lending which continued to be regulated by the Consumer

Credit Act 1995 (as amended). This was because the 2008 Directive itself did not apply to Hire Purchase loans where there was no obligation on the Hirer to purchase the goods the subject of the agreement, and the existing law in Ireland provided that there was no such obligation.

The State chose to transpose the new Directive by way of a statutory instrument - the European Communities (Consumer Credit Agreements) Regulations, SI 281/2010 - with responsibility for the transposition undertaken by the Department of Finance.[4] Instead of merging the new provisions into existing Consumer Credit Act 1995, a large statutory instrument was thus prepared by the Department in conjunction with the Office of the Attorney General. This Statutory Instrument stood separately from the Consumer Credit Act and in a series of quite inaccessible provisions describes the relationship between both.[5]

In 2010, there may have been some justification for secondary rather than primary legislation. The Department of Finance was dealing with a very difficult situation in terms of the public finances and its priorities were focused on the financial system and the financial institutions at the heart of it and this necessitated a heavy legislative agenda. However, we would suggest that the pressure of that situation had somewhat eased by the time the EU's Mortgage Directive, agreed in 2014, came to be transposed in 2016.

Again, however, the Department of Finance took the secondary legislation route and the Mortgage Credit Directive was transposed by the **European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (S.I. No. 142/2016), despite the fact that Member States were allowed a significant amount of discretions in terms of how that Directive was transposed.** Apart from making the already complex even less transparent, transposition of EU directives by secondary legislation may have other undesirable consequences. Although there is an obligation to lay regulations before the Houses of the Oireachtas for 21 days so that members may inspect their content before being signed into law by the relevant Minister or the relevant statutory authority, this seldom leads to any significant debate on their content. The staged parliamentary process in both Houses of the Oireachtas that is required for an Act of the Oireachtas is avoided. Members of the Dail and the Seanad do not get to speak on the legislation, or to enquire into how and why it has been proposed, to submit ideas and to suggest, debate and ultimately vote on amendments. Without this opportunity for scrutiny, the legislature is effectively bypassed.

The single most important purchase that many people in this country aspire to make in their lives invariably needs to be funded by a mortgage. However, it is clear that a mortgage carries great dangers as well as benefits. Thus, the standards that apply to lenders, the protections available to borrowers, the consequences of default for borrowers and the policy direction

[4] The Department of Enterprise, Trade and Employment was the government department originally responsible for the Consumer Credit Act 1995. Note that these regulations were in turn amended in 2012 by European Union (Consumer Credit Agreements) (Amendment) Regulations, S.I. No. 579/2012.

[5] See in particular Regulation 4 entitled 'Relationship of Parts 2 to 7 of these Regulations with Consumer Credit Act 1995'.

and general rules that apply to the mortgage contract should be absolutely clear and devised in a transparent piece of legislation to which directly elected representatives have had an opportunity to contribute. In the wake of the Global Financial Crash (GFC) and the mortgage arrears crisis that followed (and still endures), the transposition of the mortgage credit directive presented an important opportunity to debate important questions of housing policy, banking regulation, access to affordable credit, levels of lending and consumer protection standards. **In our view, there was no apparent justification for corralling a European Union legal obligation that sets the tone for how mortgages are drawn down for decades to come in Ireland into a further large and unwieldy statutory instrument.**

There was and there still is an alternative approach that could be taken here. An opportunity existed to enact one restated single piece of legislation that might have been entitled the Consumer Credit Act 2016 and this option is still available. Such an Act would repeal and/or amend all existing primary and secondary legislation governing consumer credit and clarify the rules, practices and regulatory standards to apply to the different types of credit agreement in different chapters but under one statute[6].

Although this would remain a relatively complex area, simply because there are a number of EU directives and domestic rules that apply, this would at least help to simplify it. For instance, it would be easier to write one comprehensive guide for consumers on their rights and providers on their obligations, rather than trying to explain the array of provisions arising from a series of confusing and sometimes interwoven legislative instruments.

In summary, we believe that the decision to transpose such Directives by statutory instrument is:

- Anti-consumer, in that it further complicates rather than clarifies an already complex set of legislative rules concerning the provision of credit to consumers.
- Anti-democratic, in that it deprived the elected members of the legislature the opportunity to discuss, influence and shape a measure of fundamental importance to the future of lending to consumers in Ireland.

Finally, it might be noted that under these three main pieces of consumer credit legislation, each of which transpose important EU Directives, the Central Bank of Ireland is the competent authority with statutory powers of review, inspection and investigation of lenders and the prosecution of offences summarily. However, it seems to prefer to focus on compliance with the statutory Codes it devises when it comes to matters of consumer credit.

[6] This could incorporate the Consumer Credit Act 1995 (as amended); the European Communities (Consumer Credit Agreements) Regulations, SI 281/2010; the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (S.I. No. 142/2016). Conceivably the Credit Reporting Act 2013 (which did not come start to come into operation until well into 2017) could also be included.

EU Directives on consumer protection should be implemented by primary legislation and the Committee should request a view from the Department of Finance on the feasibility of updating and codifying Consumer Credit legislation in Ireland into one coherent statute. The Committee might also invite the Central Bank to provide an update of its recent activities in terms of the supervision of consumer credit legislation.