FLAC Submission to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach, concerning the 'No Consent, No Sale' Bill 2019 proposed by Deputy Pearse Doherty, TD, Sinn Fein

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Free Legal Advice Centres, March 2019

Free Legal Advice Centres (FLAC) welcomes the opportunity provided by the Committee to make a written submission on this Bill. The correspondence from the clerk on behalf of the Committee seeking submissions sets out a comprehensive list of 20 matters which the Committee would like to see addressed in submissions to assist it with its detailed scrutiny of this proposed legislation. However, due to the inherent time constraints and to pressure of work, it has not been possible for us to address all of these points. What follows below is a summary of what we consider are the most pressing issues that provide the context for this Bill. We are available should the Committee wish to speak in more detail to us on these matters.

Introduction

It is symptomatic of the inequality in the relationship between the parties to a mortgage contract that the small print in the terms and conditions of the loan, drafted exclusively for and on behalf of the lender, generally reserve a right to the lender to sell the loan on to an entity of its choice without consultation. This usually comes as a considerable surprise for many borrowers that they have no control over the sale of the mortgage over their most important asset – the family home. You will rarely come across a case where this potential power in the mortgage contract has ever been explicitly drawn to the attention of the borrower before the loan is drawn down. Instead it lies dormant ready to be invoked at a time of the lender's choosing.

Deputy Doherty's Bill No Consent, No Sale Bill seeks to reverse this contractual power by obliging the lender to seek the borrower's consent to sell on the loan and, for this purpose, draws heavily on a voluntary Code issued by the Central Bank in 1991. Free Legal Advice Centres (FLAC) supports the intention and motivation behind this Bill, but it is clear that a number of loan sales have already been concluded by regulated to unregulated entities and for those borrowers, this Bill comes too late.

In addition then to the protection that the enactment of this Bill will offer borrowers whose loans have not yet been sold, we believe that it is equally critical that legal protections must be enhanced for consumers whose loans have already been or will be in the future sold to unregulated entities, particularly where those loans are already the subject of a long-term restructuring arrangement. FLAC has made recent submissions to the Central Bank in this regard which we set out below. The Committee should also note the report furnished by the Bank to the Minister for Finance and Public Expenditure in November 2018 on 'the Effectiveness of the Code of Conduct on Mortgage Arrears, in the context of the Sale of Loans by Regulated Lenders' 2018 which largely played down fears that unregulated loan owners would seek to deviate from existing payment arrangements. FLAC does not share the Bank's view on the effectiveness of the code.

1. The Central Bank's Code of Practice on the Transfer of Mortgages 1991

This Code provides at Article 1 that *'A loan secured by the mortgage of residential property may not be transferred without the written consent of the borrower'*

> *'This Code of Practice was issued by the Central Bank of Ireland in 1991 to institutions involved in mortgage credit and it is a voluntary code. It may be applied on a voluntary basis by any institution involved in mortgage credit. The Code of Practice applies to a loan secured by the mortgage of residential property. For the purposes of this Code of Practice, residential property is not limited to principal private residences'.*[1]

It is hard to understand why the Central Bank introduced a Code with such protections and then designates compliance with that Code as voluntary, in the knowledge that mortgage contracts generally allowed for unilateral sale by the lender. The No Consent, No Sale Bill seeks to address the pressing need to protect borrowers in difficulty from potentially less favourable treatment at the hands of new and perhaps more ruthless loan owners, by taking the voluntary rules set out in the Code and transforming them into a legally binding obligations by way of primary legislation.

FLAC's experience is that the Central Bank in its approach to consumer protection seems to focus more on creating its own Codes that serve to delineate its regulatory relationship with the entities it regulates rather than provide legally binding rights to consumers. In this regard the Bill takes a far stronger approach and provides consumers with significant and enforceable protection against loan sale.

Further the Courts have in a number of cases commented on the admissibility and status of these codes. In the decision of the Supreme Court in **Irish Permanent PLC and Dunne and Irish Permanent PLC and Dunphy**[2], the Court considered the extent to which alleged breaches by a lender of the rules in the Mortgage Arrears Resolution Process (MARP) in the bank's Code of Conduct on Mortgage Arrears (CCMA) may be relied upon by a defendant borrower in repossession proceedings. Ultimately, the Court held that only in circumstances of non-compliance with the (three month) moratorium on bringing a repossession case following the borrower's exit from the MARP process, should a lender's right to obtain an order for possession be affected. The net effect of this ruling was that other alleged breaches of the CCMA process by lenders are not expressly admissible in repossession proceedings.

Clarke.J (as he was then) on behalf of the court stated the following:

'If it is to be regarded, as a matter of policy, that the law governing the circumstances in which financial institutions may be entitled to possession is too heavily weighted in favour of those financial institutions then it is, in accordance with

[1] www.centralbank.ie.
[2] May 15th, 2015.

the separation of powers, a matter for the Oireachtas to recalibrate those laws. No such formal recalibration has yet taken place'

'In the absence of there being some legal basis on which it can be said that the right to possession has not been established or does not arise, then the only role which the Court may have is, occasionally, to adjourn a case to afford an opportunity for some accommodation to be reached'.

FLAC has recommended that the provision of the code be given legislative force.

It is interesting now to focus again on this passage almost four years later, in light of the recent publication of the Government's **Land and Conveyancing Law Reform (Amendment) Bill 2019** by the Department of Justice**.** That Bill as currently drafted grants to the Circuit Court for the first time the express power to refuse to grant a Possession Order according to set criteria, including the proportionality of making the order, the borrower's efforts to propose and agree a Personal Insolvency Arrangement (PIA) under the Personal Insolvency Act 2012 and the respective efforts of lender and borrower to propose acceptable payment arrangements. It might be emphasised that these criteria will not be triggered unless there is engagement by the borrower, but, in effect, where there is such engagement, this serves as an attempt to recalibrate the law applying to the repossession of principal dwelling houses.

2. Recent loan sales

Following a consumer debt and mortgage arrears crisis of unprecedented proportions, we are arguably now in the final phase - the loan sale phase - and the danger of an acceleration in repossession levels remains.

The purchasers of impaired loans are investment/vulture funds or specially set up special purpose vehicles. Credit servicing firms, regulated under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (as amended), carry out the collection on the loans at the behest of the owner, sometimes acting on the instructions of companies registered in the relevant jurisdiction to act, in turn, on the instructions of very large corporations with no presence in the State. Sometimes the legal owner of the loan is different from the beneficial owner and the world of debt sale is not only labyrinthine but also frequently fast moving, with further selling on and mergers and acquisitions a regular part of a process that can spin out of the knowledge, let alone the control of the borrower.

There were three significant loan sales announced in the second half 2018 and more are contemplated. These comprised:

- PTSB's Project Glas sale of 7,400 PDH loans (including some restructured accounts) to Start/Lone Star announced in early August 2018
- Ulster Bank's proposed Project Scariff sale of 2,300 restructured PDH loans to Cerberus announced in mid-August 2018
- PTSB's proposed sale of some 6,200 restructured PDH loans to Pepper/Glenbeigh announced towards the end of November 2018

3. **Recent figures – PDH loans owned by unregulated loan owners (ULO's)**

A consistent narrative from lenders up to now, in the case of principal dwelling house mortgages, has been that loan sales are necessary for the pillar banks to reduce the levels of non-performing loans on their balance sheets, and that they are acting with the approval of the European Central Bank (ECB) and the Central Bank of Ireland (CBI) in selling these portfolios.

However, it is worth noting that the recently published Q.4 figures[3] from the CBI on mortgage arrears and repossessions show that the bulk of the loans purchased by so called 'unregulated loan owners' during that quarter were restructured mortgages that are performing and that are largely classified as not being in arrears. Specific details of this are provided below.

Unregulated loan owners (ULO's) PDH figures as of end Q.4 2018 from Central Bank reports

	Total	In arrears	2 years + arrears	Restructured	Performing
Q.3 2018	**11,531 (1.6%)**	**6,721 (10.4%)**	**4,784 (17.1%)**	**2,824 (24.5%)**	**1,821 (64.5%)**
Q.4 2018	**25,469 (3.5%)**	**8,735 (13.8%)**	**5,926 (21.5%)**	**15,431 (60.6%)**	**13,910 (90.1%)**

These figures show that ULO's acquired ownership of a further 13,936 loans in the course of Q.4 2018, more than doubling the number they hold. This would appear to account for the bulk of the loans sold in the three loans sales referred to above (which appear to consist of a total of some 15,900 PDH loans in total). However, the Bank merely records the figures and provides no context or explanation for them.

Although ULO's only own 3.5% of the total number of PDH mortgages, they own 13.8% of the number of PDH mortgages in arrears and 21.5% of the number in arrears for over two years.[4] Curiously, however, despite the acquisition of the 13,396 loans in the quarter, the number of loans in arrears held by the ULO's only increased by 2,014 during that period. This number is only 14% of the number of new loans acquired.

The number in arrears for over two years held by ULO's increased by even less over the period, a total of 1,142, approx. 8% of the total of new loans acquired.

On the other hand, the number of restructured loans held by ULO's increased by a total of 12,607. This number is over 90% of the number of new loans acquired (12,607 out of 13,936).

The number of restructures classified as performing increased by 12,089. This number is almost 87% (12,089 out of 13,936) of the number of new loans acquired.

[3] Published March 14th 2019

[4] It might also be noted here that 'retail credit firms' or what might be better known as sub-prime lenders own 59,189 PDH mortgages, 8,144 of which are in arrears, and 3,239 of which are in arrears for over two years.

FLAC believes these figures are surprising but we must take them at face value as they are presented. The following conclusions seem inescapable if these figures are correct:

- The number of loans owned by ULO's more than doubled in the course of Q.4 2018.
- A small percentage of these loans purchased by ULO's were classified as in arrears when sold (14%) and only just over half of those (8%) were in arrears for over two years (the problem category that is the target of the Abhaile scheme for example).
- A very large majority of these were classified as restructured at the point they were sold and a very large majority of those were performing restructures.

Thus, the loans sold on in Q.4 2018 were not in the main problem loans that would appear to have required further remedial treatment as non-performing. On the contrary, many are likely to have been already been restructured under the terms of the Code of Conduct on Mortgage Arrears prior to sale and the rate of performance of these restructures at 90.1% is notably higher than the national average for restructured loans in total. In this regard, the Bank also reports in the Q.4 figures that of the total number of 111,504 restructured mortgages, 86.7% are 'meeting the terms of the arrangement'.

Over the past 5 years the Central Bank and Department of Finance has consistently pointed to the increases in the numbers of restructured mortgages offered by the pillar banks as evidence of its comparative success in tackling and remedying the PDH mortgage arrears problem. However they appear unconcerned about the sale of substantial numbers of performing restructured mortgage loans by these lenders to unregulated loan owners.

At the very least, further information is required to explain what is going on in relation to these sales. In particular, based on the evidence set out above, a breakdown of the profile of the loans sold in terms of the numbers and types of restructuring arrangements is urgently required. The provisions of the 'No Consent, No Sale Bill', if implemented, will allow individual borrowers the power to prevent this trend from continuing.

4. The Central Bank 'Report on the Effectiveness of the Code of Conduct on Mortgage Arrears, in the context of the Sale of Loans by Regulated Lenders' 2018

On November 13th, 2018, the Central Bank furnished its October 2018 'Report on the Effectiveness of the Code of Conduct on Mortgage Arrears, in the context of the Sale of Loans by Regulated Lenders' to the Minister for Finance and Public Expenditure, Pascal Donohoe TD. The Bank's report was commissioned by the Minister *'arising from recent concerns in relation to the sale of loans by PTSB and despite efforts to reassure consumers that the protections are already in place by way of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015*; *I am* *requesting the Central Bank to carry out a review of the CCMA to ensure it remains as effective as possible'.*

In this report the Bank says that it consulted with a number of stakeholders (including FLAC). FLAC has written to the Bank calling into question the nature of this so called 'consultation'[5] and we also have made a number of critical observations on some of the conclusions that the Bank arrived at and presented to the Minister.

An example relevant to this discussion on the No Consent, No Sale Bill, is a very briefly recorded and unattributed stakeholder comment at Page 29 of the report that *'ULO's (unregulated loan owners) should not be able to overturn the original arrangement because of the sale of the loan'.*

In its response to this comment, the Bank states that '*in the context of the Central Bank's ongoing supervisory engagement with firms involved in credit servicing activities, no evidence has emerged to date that such firms are moving borrowers off an arrangement upon review in cases where the borrower's circumstances have not changed. In this regard, regulated lenders and ULO's must comply with the terms of the arrangement in place'.*

FLAC believes this observation misses the point. If no evidence had emerged to date that such firms are moving borrowers off an arrangement upon review, it is largely because, at the point that the Bank carried out its research, there had been few loan sales with substantial numbers of performing long-term alternative repayment arrangements under the MARP/CCMA in place, sold on to ULO's. For example, none of the loan sales referred to above in Section 3 of this submission had actually been completed when the Bank furnished the Minister for Finance with its report.

The Bank then goes on to offer (again at page 29 of the report) further views on the obligations of the loan purchasers under the CCMA when an arrangement comes up for review. In response to a stakeholder view that '*Although an arrangement transfers with the loan when it is sold to a ULO, there is a concern that the ULO may not always offer the same arrangement to the borrower at review stage',* the Bank states that where the borrower's circumstances have not changed, '*regulated lenders and ULO's must comply with the terms of the arrangement in place'.* In contrast, it goes on to suggest that '*where the agreed term of an arrangement ends, borrowers may subsequently be offered a different arrangement from the suite of arrangements offered by the ULO'.*

This suggests that the Bank's view is that both regulated lenders and ULO's are obliged to comply with the terms of an existing arrangement where it can be shown that the borrower has adhered to that arrangement and, upon review, his or her financial circumstances have not changed. However, we do not believe that the relevant rules in the CCMA support this position.

[5] By letter of January 15th 2019

The CCMA provides in Rule 43 that "*A lender must review an alternative repayment arrangement at intervals that are appropriate to the type and duration of the arrangement, including at least 30 calendar days in advance of an alternative repayment arrangement coming to an end. As part of the review, the lender must check with the borrower whether there has been any change in his/her circumstances in the period since the alternative repayment arrangement was put in place, or since the last review was conducted. Where there has been a change in that borrower's circumstances, the lender must request an updated standard financial statement from the borrower and must consider the appropriateness of that arrangement for the borrower."*

In turn, Rule 42 states that *'Where an alternative repayment arrangement is offered by a lender, the lender must advise the borrower to take appropriate independent legal and/or financial advice and provide the borrower with a clear explanation, on paper or another durable medium, of how the alternative repayment arrangement works, including'*:

f) the frequency with which the alternative repayment arrangement will be reviewed in line with Provision 43, the reason(s) for the reviews and the potential outcome of the reviews, where: (i) circumstances improve, (ii) circumstances disimprove, and (iii) circumstances remain the same;

We fail to see any clear provision here that imposes a specific obligation on a lender reviewing an arrangement to continue that arrangement where the borrower's circumstances have not changed and we have asked the Bank to revert to us on this question.

Even if it was to be interpreted that there is such an obligation, we would doubt its enforceability in strict legal terms. Thus, although the preamble to the CCMA states that *'lenders are reminded that they are required to comply with this Code as a matter of law',* the Supreme Court has clearly ruled, as already stated above, that the only term of the Code that may be raised in a borrower's defence in the courts is a lender's failure to adhere to the three month moratorium on repossession proceedings following the borrower's exit from the MARP[6].

Our fears on this question are, in addition, highlighted by the following passage whose substance recurs at a number of junctures in this report:

> *'The Central Bank cannot interfere with the strategy and commercial decisions or the legitimate contractual rights of lenders where such firms are complying with their regulatory and contractual obligations. Regulated entities are entitled to rely on their contractual rights and make their own commercial decisions'.* (Pages 15-16)

[6] See Irish Permanent PLC and Dunne and Irish Permanent PLC and Dunphy [2015] IESC 46 already referred to in Section 2 of this submission.

If it is the case, as the Bank maintains, that it cannot interfere with a lender's (or owner's) contractual rights, how can it impose an obligation on an unregulated loan owner to continue a long term restructured arrangement against its will, where there is no regulatory or statutory obligation to do so? It seems to us that the only way this might be sustainable would be to argue that the alternative repayment arrangement amounts to a contractual variation of the original mortgage before it was sold on, an issue that is very likely to be aired in the courts in the future.

5. Proposals to address this situation

If this Bill was to be passed, it will provide some protection to the borrowers whose loans have not yet been sold by allowing them to block the sale. However, that would not necessarily solve all of the problems of those borrowers. They would still have to deal and negotiate with those lenders and the legal enforceability of any payment arrangements would still potentially be an issue.

The evidence presented in the Q.4 Central Bank figures concerning the nature of recent loan sales to ULO's shows that many loans recently sold are performing restructures but that did not prevent their sale. Legislation that would give a right to the borrower to remain with the current lender would at least maintain the status quo and would conceivably reduce the uncertainty that goes with a sale to an unregulated loan owner.

In terms of loans that have already been sold, we believe that it is likely in the future that credit servicing firms will be instructed by unregulated loan owners to seek to move borrowers whose loans they have purchased off long-term restructured arrangements in the course of the periodical reviews of those arrangements. In FLAC's view, therefore, borrowers whose loans have been already sold should be provided with enhanced protection as a matter of urgency and the 'No Consent, No Sale Bill' might be amended to also include provisions in this regard.

In our submission on the Central Bank's Strategic Plan 2019-2021 made in June 2918, we stated that:

'It would be then manifestly unfair and contrary to natural justice if a long term alternative repayment arrangement that had been negotiated in good faith by the borrower under the terms of a Central Bank Code could potentially be overturned by a vulture fund as a result of the sale of the loan in question. With the significant majority of long term alternative repayment arrangements, the borrower and his or her dependants have made and continue to make considerable financial sacrifices to adhere to the deal. The lender made the decision to offer the arrangement following a financial assessment, not the borrower, and in many instances borrowers reluctantly entered into these arrangements knowing the financial pressure that would result'.

At the end of May 2018, at the invitation of this Committee, FLAC made a preliminary submission on the (then) Consumer Protection (Regulation of Credit Servicing Firms)

(Amendment) Bill 2018 proposed by Michael McGrath TD, Fianna Fail. In that submission, we set out a number of preliminary recommendations for reform of the CCMA, with particular emphasis on its application to credit servicing firms and unregulated loan owners. These recommendations which are set out below (with some amendments) serve as an appropriate reform agenda and might usefully be incorporated into this Bill.

1. (The Bill) should provide that where a borrower is meeting the terms of a long-term ARA, any incoming purchaser of the relevant credit agreement now or in the future is legally bound to abide by that agreement subject to appropriate conditions.
2. In the case of a long-term restructure arrangement where the arrangement is not being met at the point of the loan sale, the loan owner (or the credit servicing firm acting on its behalf) should be obliged to reassess the account under the terms of the MARP/CCMA with a view to putting in place an alternative repayment arrangement, with the borrower retaining his or her other rights under the CCMA.
3. The loan owner (or a credit servicing firm acting on its behalf) should be bound to adhere to the existing rules of the CCMA in terms of reviewing short term arrangements put in place by the previous owner.
4. The bill should place an obligation on an unregulated loan owner to go through the MARP process afresh in respect of PDH mortgages it has purchased where there is currently no payment arrangement in place.
5. There should be a Charter of Rights for borrowers when loans are sold
6. The CCMA should be put on a statutory footing and in any event needs to be amended to provide that a lender should be obliged to carry out the detailed assessment envisaged in principle in Rule 37, and to demonstrate how this was done. Comprehensive information should be provided on the lender's decision making process under Rule 40 and appeal should lie to an independent third party.

Technicalities in the Bill

On a cursory reading of the text, it appears to us that this Bill would require some amendments to take account of provisions that have been introduced since the Central Bank's Code of Practice on the Transfer of Mortgages was proposed in 1991. For example, there are a number of references to the Building Societies and the Building Societies Acts that may no longer be relevant.

It would be preferable that the wording in Section 2 (4) whereby *'each borrower shall be approached individually'* in terms of giving or declining to give their consent to a transfer would be replaced with "all parties to the mortgage must be notified of the propose transfer and all must give their consent"

In Section 3, it should be clarified whether 'the lender' in the third sentence means the transferee or the original lender (or transferor)

In Section 4, the ‘and/or’ in the third sentence might read ‘or’ only. The term ‘seriously in arrears’ in this section needs to be defined.

In Section 5, the requirement to inform the borrower of the *‘relationship, if any, between the lender and the transferee’* is imprecise for legislation. The requirement to provide *‘details of the policies and procedures which will apply for the setting of mortgage interest rates’* is an interesting provision but we wonder whether this a legislative obligation in mortgages generally.

In Section 6, we believe that a number of the provisions set out may have been overtaken by Sections 121 and 126 of the Consumer Credit Act 1995 and provisions of the European Communities (Consumer Mortgage Credit Agreements) Regulations 2016 (SI 142/2016).

In Section 7, the term ‘serious business difficulties’ is interpreted *‘as difficulties of a gravity that the Central Bank determines that lender is failing or likely to fail’.* Some criteria should be set out here as to how the Bank makes this determination.

Constitutionality of the Bill

The constitutionality of the Bill is a matter for the Courts to determine and the view of the Attorney General is also usually sought in relation to the constitutionality of proposed legislation. In FLAC’s experience, the potential unconstitutionality of a provision is regularly raised as an impediment to the progress of socially protective legislation. This is despite the fact that Bunreacht na hEireann provides for two specific mechanisms that allow the constitutionality of legislation to be tested, either before it is enacted or after it has been passed.

Article 26 provides that the President may, after consultation with the Council of State, refer any Bill to the Supreme Court for a decision on the question as to whether that Bill or any of its provisions are repugnant to the Constitution.

Article 15 provides that the Oireachtas shall not enact any law which is in any respect repugnant to the Constitution and that any law enacted by the Oireachtas which is in any respect repugnant to the Constitution is invalid but to the extent only of such repugnancy. Any person with *‘locus standi’* i.e. who can show that they have been particularly affected by an existing piece of legislation, may challenge that measure in the High Court and have it potentially declared to be unconstitutional.

There have been some recent socially protective legislative provisions in the area of debt. For example the Personal Insolvency Act 2012 (as amended) provided for the potential write-down of contractual debt in statutory insolvency arrangements. Creditors had at the outset been allowed to unilaterally decide at a creditors meeting whether to accept or reject an insolvent debtor’s proposed arrangement and no appeal was provided for the debtor in respect of a rejection. This led to very slow progress on resolving cases of over-indebtedness as creditors effectively had a veto. Eventually, amending legislation in early 2016 allowed for an appeal for borrowers to the Circuit Court, but only for those debtors whose Personal Insolvency Arrangement (PIA) proposal included a family home mortgage in arrears.

In practice, this had led to the Circuit Court and particularly the High Court on appeal effectively imposing solutions on creditors against their will, some of which include mandatory write-down of secured debt. To our knowledge, no one has challenged the constitutionality of these amendment provisions to date notwithstanding that some commentators suggested that such write-down was unconstitutional as it effectively infringed upon the property rights of banks and other lending institutions.

All personal rights provided for under the Constitution are subject to the exigencies of the common good, in other words the public interest, and it is notable that many decisions of the High Court under the amended insolvency legislation have very carefully explored the social objectives of the legislation. FLAC has recently drafted and furnished to the Minister for Justice and Equality an amendment to the Law and Conveyancing Act which would allow the courts greater flexibility in dealing with long term arrears. We obtained senior counsels' opinion on the proposed draft and believe that carefully drafted proposals with socially protective aims can be constitutional notwithstanding that such provisions may curtail the rights of creditors. The FEMPI legislation, for example, contained provisions which significantly affected the entitlements of public servants.

The 'No Consent, No Sale' Bill or legislation to put the Code of Conduct on Mortgage Arrears on a statutory basis which imposes stronger obligations on creditors falls into a similar bracket.