FLAC Supplementary Submission to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach on the 'No Consent, No Sale' Bill 2019

16 April 2019

FLAC Supplementary submission to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach on the 'No Consent, No Sale' Bill 2019

16 April, 2019

Since FLAC's initial submission to the Committee in March, 2019, the Committee has held detailed hearings with the Governor of the Central Bank on March 26th and with representatives of Department of Finance and the Central Bank on April 2nd. A number of written submissions were also made to the Committee, including one from the European Central Bank (ECB) which provided additional context. We also note that that the UN Special Rapporteur on Housing, Leilani Farha has sent a letter to the Irish government, and was critical of the lack of regulation of vulture funds.

There is therefore now quite an amount of information on the public record outlining the rationale for opposing the progress of this Bill.

We would like to use our time to take the opportunity to make a few additional observations to our original submission in light of those discussions as follows:

1. Inequality of Arms:

There is a significant inequality of arms between the lender and borrower. The lender pre-drafts the terms and conditions of the mortgage documentation and the borrower has absolutely no influence on their content. The borrower has no meaningful influence on the content of the terms of the loan, and may be wholly unaware that the lender is reserving the right to sell the loan on to an entity of its choice. Even if the borrower is aware of the provisions, he/she is not in a position to negotiate individually in relation to standard terms. It is unfair to imply into such an agreement an irrevocable consent to the transfer of their mortgage in any circumstances.

An example from one lender's terms is the following:

'The borrower hereby acknowledges the Lender's right, without further consent from or notice to the Borrower to transfer the benefit of this Letter of Offer, the Loan and the Lender's mortgage security (including any life assurance policy or policies) over the Property to any person, company or corporation on such terms as the Lender may think fit, without further consent from or notice to the Borrower or any other person'. Note, there are no triggering conditions here such as the occurrence of arrears, the right is absolute.

It is significant that this is an absolute right, not subject to any preconditions whatsoever, such as specific circumstances arising pertaining to the borrower's situation or the occurrence of a certain level or duration of arrears.

The EU Directive on Unfair Terms in Consumer Contracts, was transposed in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations (SI 27/1995) (as amended). Article 3 of this Directive provides that 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer'. Under the Irish regulations, a term may be referred to the High Court (or Circuit Court) by, amongst others, the Competition and Consumer Protection Commission or the Central Bank, to allow for its fairness to be tested. The fairness and enforceability of such contractual terms has not yet been adjudicated upon by the High Court but are vulnerable to challenge.

2. The constitutionality of the Bill

On the question of constitutionality, it was suggested very strongly by the Department of Finance that it had legal advice from the Attorney General's Office that the Bill was unconstitutional. With due deference to the Attorney's role in our legal system, that office does not determine the constitutionality of legislation. That is the job of the courts, either via a referral by the President of a Bill to the Supreme Court before legislation is passed (under Article 26) or by the High Court following a challenge by an affected party (under Article 15).

Since the boom turned to bust, we have heard repeated warnings about initiating legislation to resolve over-indebtedness that might prove to be unconstitutional. As we set out in our initial submission and as noted by Deputy Doherty at the session on April 2nd, this led to a very cautious Personal Insolvency Act 2012 that provided for no appeal of any kind for borrowers whose insolvency proposal had been rejected by a creditor vote. The result was extremely disappointing numbers as predicted. In late 2015 the Government introduced a limited form of appeal, the effect of which was to allow the courts in specific circumstances to impose a write-down arrangement on a secured creditor against its will. To our knowledge, no credit institution has challenged the constitutionality of the Personal Insolvency (Amendment) Act 2015 since.

Further, lots of different types of contracts are subject to comprehensive statutory regulation for example in the area of employment where the contractual rights of employers are extensively regulated and restricted. There are of course constitutional issues surrounding this Bill that centre around balancing property rights of lenders and the common interest but it is not within the remit of this Committee to decide if this Bill is constitutional. It will, however, decide whether the courts might get an opportunity to do so.

3. The views expressed by the European Central Bank

We are not economists but as we read it, the core message from the ECB, despite the very technical nature of the discourse, is that this draft law if passed may hamper the engagement of Irish banks with the European lending market regulated by the ECB and the ESCB (European System of Central banks). This is likely to mean that the domestic banks will not be able to mobilise pools of mortgage loans to act as collateral to access credit from the variety of sources under Eurosystem credit operations. This will lead to a shortage of liquidity to loan money into the domestic economy. In turn persistently high levels of NPLs will increase the necessity to set aside bank capital to deal with NPL risks and will also to lead to an increased cost of loan capital for credit institutions from secondary market credit sources. This cost, it is suggested will almost inevitably be passed on to the consumer in the form of higher interest rates. To summarise, full participation in the monetary policy operations of the Eurosystem increases funding sources and reduces funding costs for credit institutions. Unsatisfactory participation decreases sources of funding and increases costs of funding.

We note that Deputy Doherty gave an undertaking in the April 2nd debate to revisit the Bill to focus on the sale of loans to vulture funds primarily and to try to address concerns concerning Eurosystem collateral requirements and securitisation. This appeared to reassure the Department of Finance to some extent and that is hopeful.

Secondly, does the ECB understand that the loans that have recently been sold or are been lined up for sale were primarily drawn down in the first decade of this century and are largely unsustainable without a fundamental revision or restructure? This is a legacy problem that was well entrenched long before the single supervisory mechanism (SSM) came into operation in November 2014. The crux of this problem is not that these loans are growing in number, they are diminishing but are been resolved far too slowly.

It might also be noted that the ECB was well established when the reckless lending that gave rise to this problem was created. What measures, it might be asked then did the institutions of the EU, including the ECB, put in place between 2000 and 2008 to prevent the kind of reckless lending that saw unsustainable loans being issued to purchase residential properties at vastly inflated prices in Ireland? Why, for example, did the institutions of the EU neglect to regulate housing loans during this entire period? An important postscript here is that a Mortgage Credit Directive was finally agreed by the institutions of the EU in 2014 which was transposed into domestic law by the European Union (Consumer Mortgage Credit Agreements) Regulations, SI 142/2016 in March 2016. The decision by the Department of Finance to transpose this Directive by secondary legislation deprived the Houses of the Oireachtas of the opportunity to discuss and debate the future regulation of mortgage lending in Ireland.

The loans that are now potentially for sale are limited in number and slowly decreasing but we also wonder, given their fragility, what kind of value they may have as security for the relevant institutions to access credit within the Eurosystem. Selling them on to funds at a significant knockdown may bring in capital that can be used for other lending but it will also crystallise a loss on the balance sheets of those institutions. Ultimately, we would ask whether a law that prevents the sale of such loans without the borrower's consent would actually materially affect access to credit for the domestic banks within the Eurosystem to the degree suggested. Is this more about releasing the domestic banks from the perceived burden and labour costs of having to try to sort out a mess largely of their own creation, a task most of them have approached far too conservatively.

4. What constitutes a non-performing loan?

The principal narrative up to now has been that the sale of loans to funds is justified to reduce the number of NPL's down to a perceived ECB target of 5%. We note however that the ECB provides no working definition of what a NPL is.

It comes as a surprise then to hear during the course of the April 2nd discussion, in an exchange with Senator Conway-Walsh, that the Central Bank states that it is not for it to stop the sale of either a performing or a non-performing loan.

In our initial submission to the Committee, we pointed out some rather curious figures contained in the last quarterly statistical mortgage arrears report from the Bank to end Q.4 2018 as follows concerning PDH (principal dwelling house) loans.

	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%)**

Without labouring the point these figures (our original submission contains a detailed analysis) seem to clearly show that the significant majority of the almost 14,000 loans apparently acquired by ULO's (unregulated loan owners) in the course of Q.4 2018 are performing restructures. Are these considered NPL's or not? If not, what is their sale designed to achieve, given the increased uncertainty for the households involved as to the demands that will be placed upon them in the future?

The Director of Consumer Protection at the Central Bank informed the Committee on April 2nd that there are currently more than 110,000 restructured arrangements on PDH loans. She added that in 87% of those cases the borrowers are meeting the terms of the arrangements and that these arrangements *'are working for those borrowers'*.

How the Bank can be sure of this is unclear as it rarely, if ever, talks to borrowers about their experience. The reality is that the pressure on many households to maintain these payments is acute and causing severe hardship in a number of instances.

In more specific detail, the latest (Q.4 2018) Central Bank figures suggest that there are currently 111,504 restructures of PDH mortgages in place:

- 27,143 of these are split mortgages, a form of restructure promoted by the Central Bank
- 36,895 of these are capitalisation of arrears arrangements
- 13,296 are term extensions
- 19,323 come under the ‘Other’ heading, defined as mainly comprising accounts that have been offered a long-term solution, pending the completion six months of successful payments. This category all includes a small number of simultaneously agreed term extensions and arrears capitalisation arrangements

Together these long-term arrangements amount to 96,657 (87%) of the 111,504 restructures of PDH mortgages. 83,502 of these 96,657 or 86%, are classified by the bank as ‘meeting the terms of the arrangement’.

The Consumer Director went on to tell the Committee that *‘where a loan has been sold by a bank to a non-bank, existing arrangements are honoured’.* In our initial submission to the Committee, we suggested that this assessment was premature, as it was made at a time when there was little evidence to go on, a point made by Deputy Doherty on April 2nd and accepted as a ‘fair point’ by the Department of Finance during the discussion.

A key question, however, is why loans with such long term restructure arrangements in place would be sold on in the first place? If sales of such loans are allowed, what was the point of the extensive Mortgage Arrears Resolution Process (MARP) under the Bank’s Code of Conduct on Mortgage Arrears (CCMA) which the Central Bank actively promoted and which many borrowers (and lenders) knuckled down to comply with, some against their better judgment?

Is it that the ECB considers these performing long term restructures to be non-performing loans? This is not clear from its opinion but, regardless, the Central Bank seems to be of the view that it is not responsible for standing over these arrangements made between the original lender and borrower – thus, the comment form the Deputy Governor that it is not for the Central Bank to stop the sale of either a performing or a non-performing loan.

Towards the end of the discussion on April 2nd, Deputy Burton asked *'what work did the Department carry out in terms of looking at the profile of mortgage holders who are adjudged to be non-performing even though their loans have been restructured and are being paid down'* and we believe that this is a very important question that strikes at the heart of this problem.

5. Report on the Effectiveness of the Code of Conduct on Mortgage Arrears, in the context of the Sale of Loans by Regulated Lenders' furnished to the Minister for Finance and Public Expenditure in 2018.

Firstly, FLAC has recommended that the provisions of this code need to be given legislative force in order to ensure that all rules of the code are expressly admissible in repossession hearings.

Secondly, FLAC does not share the views of the Central Bank expressed in its "Report on the Effectiveness of the Code of Conduct on mortgage Arrears, in the context of the Sale of Loans by Regulated Lenders' furnished to the Minister for Finance and Public Expenditure in 2018.

In the course of its contributions to the April 2nd discussion, the Central Bank reiterated the view, already expressed in the October 2018 report it furnished to the Minister for Finance on the Effectiveness of the Code of Conduct on Mortgage Arrears in the context of the sale of loans by unregulated entities, that existing arrangements must be maintained by ULO's. Specifically, the Director of Consumer Protection stated to the Committee that *'where a loan has been sold by a bank to a non-bank, existing arrangements are honoured. We feel there are many protections in the existing consumer protection framework that keep borrowers in or facing arrears at the core of the process and protected'.*

In brief, we do not share the Bank's confidence and the reasons are outlined in some detail in our original submission. The Bank's view that where the borrower's circumstances have not changed at the point that a review of a long term arrangement takes place, '*regulated lenders and ULO's <u>must comply</u> with the terms of the arrangement in place',* is unduly optimistic.

We do not believe that the relevant rules (42 and 43) in the CCMA necessarily support this position as we fail to see any clear provision there that imposes a specific legal obligation on a lender reviewing an arrangement to continue that arrangement where the borrower's circumstances have not changed. Even if it was to be interpreted that there is such an obligation, its enforceability in strict legal terms under a regulatory Code may be questioned.

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

'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)

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?
We do not believe that it is the nature of funds to sit back patiently waiting for the terms of split mortgages and term extensions to come to an end before deciding what to do next. We believe that they will seek increased payments and will consider repossession proceedings if they do not obtain them. We also believe that a number of the long term restructures (particularly the capitalisation of arrears arrangements whose failure rate is currently over 20%) are under pressure and will come under more pressure in the future.

6. Enhanced protection for Consumers:

Legal protections need to be enhanced for consumers whose loans have already been sold to funds. This Bill can enhance protection for consumers by incorporating the 6 recommendations made in our original submission which for ease of reference are replicated here.

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.

7. Relevant Human Rights Standards and Impact Assessment

We wish to draw the Committee's attention human rights and equality standards that are relevant to this discussion and wholly absent from the presentations made by the Central Bank and the Department of Finance.

- **Public Sector Duty and international human rights norms.**

Economic policy is an exercise of state power and as such is subject to domestic and international human rights norms. It is recognised that public bodies play a key role in enhancing social cohesion. The Public Sector Duty introduced by section 42 of the Irish Human Rights and Equality Act 2014 provides one of the most important national mechanisms for mainstreaming equality and promoting human rights. The Central Bank and the Department of Finance constitute public bodies for the purposes of the public sector duty.

Pursuant to section 42, public bodies are required to consider how they will advance equality for the groups protected under equality legislation and how they will protect the human rights of all citizens in regard to the human rights obligations in the Constitution and in domestic legislation.

The Public Sector duty requires public bodies to consider the human rights and equality impact of their policies, services, procedures and practice and to ensure that the promotion of equality and human rights becomes a core part of the way in which the organisation operates and conducts its business. The Public Sector Duty specifically requires public bodies such as the Central Bank and the Department of Finance to carry out an assessment of the human rights and equality issues relevant to its functions and the policies, plans and actions in place or proposed to be put in place to address those issues.

The Central Bank and the Department of Finance must consider the promotion of equality for, and prevention of discrimination against, groups protected under equality legislation (the Employment Equality Acts 1998-2012; and the Equal Status Acts 2000-2011).

The public sector duty is applicable to those human rights treaties and conventions that have the force of law in the State. Within this parameter, there are a number of human rights standards that have significant relevance, including the rights protected by the Constitution, the European Convention on Human Rights and the EU Charter of Fundamental Rights. All of these instruments also contain guarantees against discrimination, and so the equality rights to be considered in the context of the public sector duty interweave with the human rights standards also applicable. This is most remarkable in the context of the European Equality Directives that fall to be interpreted in light of the Charter of Fundamental Rights. It is also recalled that the Irish Courts and the European Court of Human Rights will also call in aid international human rights treaties to assist with the interpretation of the rights protected under the Constitution and the ECHR.[1]

While the Irish Courts and the European Court of Human Rights are not traditionally associated with the vindication of what are characterised as socio–economic rights, nonetheless, both the Constitution and the ECHR have a role in protecting individuals from instances of extreme deprivation. The Supreme Court accepted that the constitutional values of autonomy, bodily integrity and privacy were engaged in relation to the provision of appropriate accommodation by a local authority to a young girl with disabilities.[2] In a similar vein the European Court of Human Rights found that the very poor living conditions of a Roma community and the neglect of the State in that regard were an instance of degrading treatment within the meaning of Article 3 of the Convention, and also a breach of their right to respect for their private and family life under Article 8.[3] While these cases were extreme instances of deprivation, they are illustrative of the duty on the State to ensure that economic policies and fiscal decision making do not expose individuals to acute deprivation, such as homelessness or extreme poverty. The Charter of Fundamental Rights, which applies where EU law is being implemented by the State, also provides protection for what are titled solidarity rights, related to protection of workers, family and professional life, social security and assistance and a high level of consumer protection.

- **International human rights standards**

Beyond the immediate obligations that arise under the public sector duty, the international human rights obligations of the State are also relevant to the strategic planning of the Central Bank, insofar as it intersects with the obligations of the State in relation to the protection of socio-economic rights.

A key example in this regard, is the obligation in Article 2(1) of the UN International Covenant on Economic Social and Cultural Rights (ICESCR) whereby the State is obliged to use the “maximum of its available resources” to progressively achieve the

[1] See for example judgment of MacMenamin J in *M.X v HSE & Anor* [2012] IEHC 491, see also *Stanev v Bulgaria,* Grand Chamber, 17 January 2012.
[2] *O’Donnell & Ors v South Dublin County Council & Ors* [2015] IESC 28.
[3] *Moldovan & Ors v Romania*, Judgment of 12 July 2005

full realisation of economic, social and cultural rights set out in the Covenant. Such rights pertain to key areas of public service provision: education, housing, water, health and decent working conditions. The UN ICESCR, therefore, places an obligation on the State to ensure that resources spent by the State, in particular via the provision of social protection, are allocated in such a manner to maximise the protection of, respect for and fulfilment of economic, social and cultural rights. Useful guidance was given by the UN Committee on Economic, Social and Cultural Rights in relation to the protection of socio economic rights in the context of the international crisis that pertained in many States from 2008 onwards. While the context has changed part of that guidance is set out here as it remains relevant and provides a template against which any economic policy may be tested to ensure that it does not undermine socially protective measures that underpin the realisation of human rights, and goes towards preserving the core dignity of each individual in the State:

> "……..
>
> *b. the policy is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights;*
>
> *c. the policy is not discriminatory and comprises all possible measures, including tax measures, to support social transfers and mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected; and*
>
> *d. the policy identifies the minimum core content of rights, or a social protection floor, as defined by the International Labour Organization, and ensures the protection of this core content at all times."*[4]

Other significant instruments to which the public bodies should have regard in the performance of their functions, and to which the State has acceded, are the Revised European Social Charter, the UN Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child all of which establish standards for the material and social welfare of the individuals protected.

We note that the Central Bank has committed in its strategic plan to carrying out a detailed assessment of human rights and equality issues relevant to the Central Bank over the period of its Strategic Plan.

[4] CESCR, "Open letter to State Parties regarding the protection of rights in the context of economic crisis", 16 May 2012.

- **The UN General Assembly Guiding Principles on human rights assessment of economic reforms**

Further guidance can be obtained from The UN General Assembly Guiding Principles on human rights assessment of economic reforms which provide that States and other creditors including international financial institutions must carry out a human rights impact assessment before recommending or implementing economic reforms or policies that could foreseeably undermine the enjoyment of human rights.

Human rights impact assessments should seek to identify and address the potential and cumulative impact of measures on specific individuals and groups.

A human rights impact assessment of economic reforms requires a diverse range of both quantitative and qualitative data in order to ensure compliance with the human rights requirement of non-discrimination and that due attention is paid to the situation of groups at risk of marginalisation or vulnerability. It is essential that the indicators used provide information are disaggregated by gender disability, age region, ethnicity, income.

The submission and presentations from the Central Bank and the Department of Finance makes no reference to such any such assessment and it is likely that their views and opinions have been formulated in the absence of such an assessment and disaggregated data.

We have very little information about the people in long-term arrears in terms of gender or age, the extent to which they have disabilities and /or caring responsibilities. Can the Bank and the Department state with accuracy based on quantitative and qualitative disaggregated data what is the likely effect on borrowers of allowing creditors sell to vulture funds without further regulation? Has there been any assessment as to likelihood of borrowers being exposed to acute deprivation such as homelessness or extreme poverty?

Article 2 of the Preamble to the UN Guiding principles states that;

“Obligations under human rights law should guide all efforts to design and implement economic policies. The economy should serve the people, not vice versa”