**TITHE AN OIREACHTAIS**

**An Comhchoiste um Airgeadas, Caiteachas Poibli agus Athchóiriú, agus Taoiseach**

# Tuarascáil maidir le Grinnscrúdú Mionsonraithe ar an mBille um Chosc ar Dhíol gan Toiliú, 2019

**Iúil 2019**

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**HOUSES OF THE OIREACHTAS**

**Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach**

# Report on Detailed Scrutiny of the No Consent, No Sale Bill 2019

**July 2019**

**32-FPERT-023**

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## 1. CHAIRMAN'S FOREWORD

For some time, the Committee has been concerned about the serious negative impact arising from the sale of mortgages on homes by financial institutions to third parties. The Committee has received evidence that such sales can weaken the position of a borrower and increase the prospects of the repossession of a home where arrears have accumulated on the home loan. The Committee is of the opinion that the financial institution that provided the home loan in the first instance may be best placed to assist families who are experiencing mortgage difficulty in the long-term and in a manner that is sustainable and best for society as a whole. Furthermore, the sale of the mortgage without the consent of the householder causes unwarranted uncertainty and distress for the householder and their family.

Having considered the evidence that was presented to the Committee in the course of the detailed scrutiny of the No Consent, No Sale Bill, 2019, the Committee considers that it is possible to enhance consumer protection and at the same time to strike a fair balance with the interests of others in a manner that is consistent with the Constitution. While further work in relation to the Bill needs to be undertaken, I believe that the Recommendations of this Report are an attempt to make progress on this important issue in a prudent and balanced manner.

The Committee looks forward to considering the Bill at Committee Stage in due course.

John McGuinness T.D.
Chairman

12 July, 2019.

## 2. UPDATED PROCEDURAL BASIS FOR SCRUTINY

On 15 January 2019, new procedures governing detailed scrutiny of private Members Bills came into effect. The procedures are governed by new Standing orders Standing Orders 148A, 148B, 148C and 148D. These are the procedural basis for the process leading up to this report.

As of 15 January, Order for Committee no longer automatically follows Second Stage of Private Members' Bills, and Committee Stage of such Bills may only be ordered following detailed scrutiny of the Bill or an agreement of the Business Committee that scrutiny may be waived.

The next step to progress the Bill occurs when the sponsor requests that the relevant Select Committee undertake scrutiny or seeks a waiver from the Business Committee. The relevant Select Committee may decide to undertake scrutiny on a PMB jointly with Seanad Members but is not required to do so.

At the conclusion of the scrutiny process and in accordance with the relevant Dáil Standing Orders, the Select Committee will separately send a message to the Dáil recommending whether the Bill should proceed to Committee Stage or not.

## 3. INTRODUCTION

On 31 January 2019, the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach was notified that Second Stage consideration of the No Consent No Sale Bill 2019 was concluded by Dáil Éireann. At its meeting of 5 February 2019, the Committee agreed to a request from Deputy Pearse Doherty, as sponsor of the Bill, to undertake scrutiny in accordance with DSO 148D.

As part of its detailed scrutiny of the Bill, the Committee sought written submissions from a number of stakeholders, including the Department of Finance and the Central Bank of Ireland, and it received written submissions from a number of other bodies and organisations. The Committee consulted with the Office of the Parliamentary Legal Advisor (OPLA) and sought and received an opinion from the European Central Bank (ECB). It also received a briefing paper commissioned by the Oireachtas Library and Research Service to assist it in its consideration of the Bill, and held public hearings with stakeholders.

An examination of the material received by the Committee is contained in this report.

## 4. THE RATIONALE FOR THE BILL

The stated purpose of the Bill in the explanatory memorandum accompanying the Bill on presentation is to place onto lenders a statutory obligation to seek and receive the explicit consent of borrowers whose loan they wish to sell to a third party, an obligation contained in the Central Bank's Code of Practice on the Transfer of Mortgages.

The Committee notes that the voluntary Code of Practice was issued by the Central Bank of Ireland in 1991 to institutions involved in mortgage credit. The Committee further notes that the voluntary Code applies to a loan secured by the mortgage of residential property, is not limited to principal private residences and is not mandatory but can be applied on a voluntary basis by any institution involved in mortgage credit. In 2012, the Minister for Finance in a parliamentary reply stated that: "Notwithstanding its voluntary nature, I expect that best practice dictates that the Code be applied by all institutions to all classes of residential property."

**Mortgage numbers by type and percentage of arrears end of Q1 2018 versus end of Q1 2019[1]**

| | **2018** | **2019** |
|---|---|---|
| Private Residential Mortgages | 728,575 | 726,089 |
| Number in Arrears | 71,833 | 62,834 |
| Arrears Percentage | 9.9% | 8.6% |
| Mortgages for buy-to-let | 121,029 | 111,665 |
| Number in Arrears | 22,545 | 19,671 |
| Arrears Percentage | 18.6% | 17.6% |

[1] Central Bank of Ireland, Residential Mortgage Arrears & Repossession Statistics: Q1 2018 Summary and Central Bank of Ireland, Residential Mortgage Arrears & Repossession Statistics: Q1 2019 Summary

Free Legal Advice Centres (FLAC) stated that –

- there was an "inequality of arms" between lenders and borrowers, in that borrowers have no meaningful input to the terms of loan contracts. Even though a borrower may be aware of terms allowing the sale the loan (these terms being in effect standard), the borrower was not in a position to meaningfully negotiate individual terms. Therefore, it was unfair to imply irrevocable consent to the transfer of the person's mortgage in any circumstances.
- The EU directive on unfair terms in consumer contracts states 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. In light of this, FLAC believes that these clauses are vulnerable to challenge.
- FLAC does not share the views of the Central Bank that existing mortgage arrangements must be maintained by Unregulated Lending Organisations ULOs.
- Although the Code of Conduct on Mortgage Arrears (CCMA) seems to be legally enforceable, it is neither primary nor secondary legislation. To their knowledge, there had not been a single sanction imposed on a lender under the code.
- They recommend that the CCMA be given legislative force so that all parts of the code were made admissible in repossession hearings.
- Although reducing the amount of non-performing loans (NPLs) to a perceived target level of 5% had been the "principal narrative up to now", there is no definition of what actually constitutes a NPL, and the ECB opinion to the Committee did not provide a definition of non-performing loans. Section 42 of the Irish Human Rights and Equality Commission Act 2014 requires all Departments and statutory bodies to consider in the performance of their functions how they will

advance equality for the groups protected under equality legislation and how they will protect the human rights of citizens. It noted that the Central Bank had committed in its strategic plan to carrying out detailed assessments of human rights and equality issues relevant to its function, but no detailed human rights assessment had been carried out in respect of the issue.

- Legal protections need to be enhanced for consumers whose loans have already been sold to funds.

The Irish Mortgage Holders Organisation (IMHO) stated that –

- Sales of mortgages to ULOs had come about through banks not offering suitable restructuring options to borrowers. The sales are as a result of incompetence on the part of banks in not offering realistic restructures to customers in mortgage arrears.
- A State-supported system is pitching citizens against each other with misleading commentary about the effects on interest rates if a Bill such as the No Consent, No Sale Bill is passed, including references to both the low number of repossessions and on their ineffectiveness.
- The Bill was extremely important in applying pressure on banks to create meaningful restructuring options – rather than their inactivity to date.
- Banks had been resistant to writing-down debt for borrowers but had shown willingness to write down debt for ULOs when making sale of loans.
- It disputed the idea that ULOs were willing to make deals as they had already received a write down on the purchase of loans. By way of example, it provided evidence to the Committee of two cases where ULOs had refused to accept modest write-downs on mortgages in order to affect the sales to the *iCare Approved Housing Body* under the Mortgage to Rent Scheme.
- ULOs want to take the family home, sell the home and leave with a profit.
- The Bill is needed to provide security to distressed borrowers. It is an essential tool in helping families in mortgage arrears as we are facing

an avalanche of loan sales to ULOs over the coming 12 months and these families face a very uncertain future.

- The Code of Conduct on Mortgage Arrears is a voluntary code. It does not require debt solutions to be offered, and ULOs do not offer any solutions at all. Families are more likely to lose their homes when dealing with ULOs.

The Department of Finance state that -

- The Bill is a "cut and paste", with some minor amendments, of the outdated voluntary *Code of Practice.* The background to the issuing of the Code of Practice by the Central Bank in 1991 was that mortgage customers were offered free shares in their building society which gave them the right to vote on the conversions of building societies to public limited companies. Additionally, securitisations were becoming more prevalent during the 1980s and 1990s. If the member's mortgage was sold to a third party or had been securitised, the mortgage customer lost the right to vote on conversions.
- The Code of Practice required that borrowers must consent to their mortgages being transferred and the lender was required to provide a statement containing sufficient information to enable the borrower to make an informed decision. The Code of Practice was issued as a voluntary code (as opposed to the other Central Bank Codes of Conduct issued under Section 117 of the Central Bank Act 1989). Consequently, the Central Bank's regulatory powers, including the use of its Administrative Sanctions powers, do not apply to the Code of Practice.

The Central Bank has stated that it is of the view that the voluntary Code of Practice is not appropriate in the modern financial environment, and certainly not in statute. Furthermore, the Central Bank informed the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach that they intend to remove the voluntary code as they view it as redundant.

## 5. THE EXISTING STATUTORY FRAMEWORK AND ITS EFFECTIVENESS

The Department of Finance described the current regulatory framework as including:

- The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015
- The Consumer Protection (Regulation of Credit Servicing Firms) Act 2018
- The various statutory Central Bank Codes of Conduct, including:
    - the Code of Conduct on Mortgage Arrears (CCMA) and
    - the Consumer Protection Code (CPC)
- The Land and Conveyancing Law Reform (Amendment) Bill 2019.

The Central Bank of Ireland recently carried out a review of the effectiveness of the CCMA with regard to loan sales by regulated lenders and published a report entitled "Report on the Effectiveness of the CCMA in the Context of the Sale of Loans by Regulated Lenders".[2] The CCMA review sought the views of consumer representatives and advocates working to assist borrowers in financial difficulty, as well as statutory bodies and industry stakeholders. The findings of the review can be summarised as follows:

(1) Credit Servicing Firms (CSFs) acting on behalf of Unregulated Lending Organisations (ULOs) and Banks both have suitable Mortgage Arrears Resolution Frameworks (MARPs) in place in line with the CCMA[3]

(2) When a loan is sold to a ULO, existing arrangements with borrowers are being maintained, during the term of their arrangement. However once the arrangement has expired, the borrower may not be offered the same arrangement if the ULO does not offer that arrangement.[4]

(3) Over the period Q1 2016 to Q1 2018, banks put in place approximately a 50/50 split in terms of long-term and short-term arrangements, and Retail Credit Firms (RCFs) put in place mainly long-term arrangements, while arrangements put in place by ULOs were approximately two-thirds short

[2] L&RS Briefing Paper page 20
[3] Report on the Effectiveness of the CCMA in the Context of the Sale of Loans by Regulated Lenders, page 6
[4] Report on the Effectiveness of the CCMA in the Context of the Sale of Loans by Regulated Lenders, page 7

term. However, fewer mortgage accounts in arrears held by ULOs had restructuring arrangements in place (approximately 19%) when compared to banks (approximately 40%).

(4) There was no material difference in the number of properties taken into possession between banks and ULOs during that period, and the data showed that ULOs are not more likely to initiate repossession proceedings than RCFs and are only slightly more likely to take them than banks (55% for ULOs and 49% for banks in the 720 Days Past Due (DPD) arrears category). In this regard, the report stated that "bearing in mind that RCFs and ULOs are holding a significantly higher proportion of PDH [Private Dwelling House] accounts in arrears, there is no material difference in the level of repossession activity at this time by RCFs and ULOs, compared to banks."[5]

The Committee notes the view of FLAC however that: "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."

Evidence to the Committee from the Central Bank of Ireland, was that from a regulatory protection perspective, protections and what the CBI expects of firms, bank or non-bank, are the same whether a person's loan is with a bank or non-bank, adding that

> "[The CBI] will be increasingly intrusive in our supervision based on the increasing prominence of the retail credit firms to make sure that is the reality. As has been mentioned and is already the case today, the retail credit firms are writing business in the State today. We expect that in the business being written and the business being bought, the individual borrowers are treated in exactly the same way and are subject to the same protections."[6]

[5] ibid

[6] Mr Ed Sibley Deputy Governor CBI at meeting of JCFPERT 2 April 2019

The Department of Finance stated that the current regulatory framework addresses any consumer protection issues that could arise", stating that "the Government and the CBI are both strongly of the view that the current regulatory framework provides sufficient protections to consumers whose loans are being sold". The Department also notes that –

> "more generally, most loan agreements include a clause that allows the original lender to sell the loan on to another firm. When a loan is sold on to another regulated entity, the relevant Irish and EU consumer protections continue to apply".

In relation to the review of the CCMA specifically by the Central Bank, the Department states that –

> "The Report …. found that for borrowers who engage with the process, the CCMA is working effectively and as intended in the context of the sale of loans by regulated lenders.

The Central Bank has strengthened, where necessary, the Code of Conduct for Mortgage Arrears ('CCMA') to ensure that the regulatory framework remains fit for purpose and continues to ensure the protection of consumers in their dealings with regulated firms. The Central Bank conducted an analysis of the CCMA and found no evidence that there was a material difference in the level of repossessions between banks, retail credit firms and unregulated loan owners.[7] However, FLAC stated that the new owner of the loan would not have to honour the obligations of the original lender.

The Government also stated that there are a number of schemes and approaches in place to help those in mortgage arrears difficulties, including the Money Advice and Budgeting Service (MABS), the Abhaile Scheme, the Insolvency Service of Ireland (ISI) and the Mortgage to Rent Scheme.

The Department's submission also referred to inspections of a retail credit firm, two credit servicing Firms and a bank conducted by the CBI which involved gathering and analysis of data relating to arrangements being considered and being put in place by banks, retail credit firms and unregulated loan owners and

[7] Department of Finance Submission

also ascertained whether they were more or less active in relation to repossessions. The CBI found that the CCMA is working effectively and as intended in the context of the sale of loans by regulated lenders. They also found no material difference in the level of repossession activity."

It must be taken into account that since the Central Bank the number of loan sales has more than doubled with, in the second half of 2018 alone, PTSB's Project Glas sale of 7,400 PDH loans (including some restructured accounts) to Start/Lone Star, Ulster Bank's Project Scariff sale of 2,300 restructured PDH loans to Cerberus announced in mid-August 2018 and PTSB's sale of some 6,200 restructured PDH loans to Pepper/Glenbeigh announced towards the end of November 2018.

## 6. POSSIBLE UNINTENDED CONSEQUENCES

The Department of Finance asserts that the Bill will have the effect of essentially ending the ability of banks to sell their non-performing loans (NPLs).

Specifically, the Department asserted[8] that enactment of the Bill is likely to result in:

- higher mortgage interest rates for customers, particularly those with standard variable rate mortgages,
- reduced availability of mortgage lending overall, with stricter conditions,
- a potentially severe restriction in Irish banks' capacity to access Eurosystem credit, particularly in a crisis or at times of market stress (total monetary policy lending to Irish domiciled institutions rose to €140 billion towards end of 2010 - approximately 40% of this was borrowed using collateral from mortgage based securities),
- institutions losing the ability to use securitisations, in all its forms,
- increased repossessions by banks as their ability to reduce NPLs through sales will be severely reduced,
- a reduction in new entrants and less competition in the Irish mortgage market,
- significantly reducing the value of the State's shareholding in the banks – a cost ultimately to be borne by the taxpayer.

It expressed the view that a Money Message was required in relation to the Bill.

[8] Department of Finance submission, page 1.

In its observations on the Bill, the Central Bank of Ireland states that -

- A strong consumer protection framework is in place for borrowers of mortgage loans, providing rules with which regulated firms operating in Ireland must comply by law. The Bill will not offer new or existing borrowers any additional consumer protections and it could result in consumer detriment arising from an increase in interest rates and/or a decline in mortgage availability.
- The intention of the Bill is to place the voluntary Central Bank Code of Practice on the Transfer of Mortgages (1991) on a statutory footing. The Central Bank is of the view that the voluntary Code of Practice is not relevant or appropriate in the current regulatory and financial environment, and intends to revoke it.
- The restrictions imposed by the Bill would hinder the continued recovery of the banking system and by reducing the ability of the banking system to absorb adverse shocks in the future. Ultimately, the additional cost arising as a result will be faced by households and businesses in Ireland.
- Restricting the ability of banks to address non-performing loans (NPLs) effectively will have an adverse impact on the health of their balance sheets, especially in future times of stress. While there are various methods through which banks can deal with NPLs, the option to sell portfolios of loans (subject to strong consumer protection rules) is important. As part of the Single Supervisory Mechanism, the Central Bank requires Irish banks to reduce NPLs in a sustainable way. The Bill will significantly constrain the ability of banks to engage in portfolio sales (whether of performing or non-performing loans) and reduce the ability of the banking system to deal with any future macroeconomic downturn and the accompanying deterioration in asset quality.
- Actual, or even perceived, constraints on the ability of banks to deal effectively with NPLs can have adverse implications for their cost of funding, especially in times of stress. Creditors typically require higher interest rates to fund banks with riskier balance sheets, for example

because of elevated NPLs. The higher cost of funds will be passed on to consumers.

- The enactment of the Bill in its current form will also hamper the ability of banks to tap market-based sources of financing using mortgages as collateral, such as mortgage-based securitisations and covered bonds.
- Access to such forms of finance helps diversify the funding base and achieve lower funding costs, relative to issuing unsecured bonds. Constraints on banks' ability to mobilise and use mortgages as collateral to raise funding through these market-based channels has the potential to limit the availability, or increase the cost, of mortgage credit.
- The Bill will also constrain access to Central Bank funding using mortgage-related securities as collateral.
- The high share of NPLs on the balance sheets of domestic banks has contributed to higher interest rates on lending to households and businesses relative to European norms.
- The ability of Banks to restructure balance sheets and avail of Central Bank liquidity is essential to be able to absorb shocks. The Bill will mean that the banking system will be more likely to become impaired in future times of stress and less capable of providing credit to households and businesses, amplifying – rather than absorbing – shocks.
- Because it would limit access to secured funding, the Bill could discourage any new lenders from entering the mortgage market because of concerns about the legal framework. This could contribute to higher interest rates to the detriment of the Irish economy.
- During Scrutiny hearings, responding to the Bill's author's questions about the nature of the Central Bank's concerns and whether amending it to remove limitations on preventing genuine securitisations would ease these concerns, Deputy Governor Mr. Ed Sibley stated "We were asked for our view of the Bill as drafted and that is the view we have given. If there was an ability to carve out eurosystem funding and wider securitisation, covered bonds and so on, that would address many of the concerns we have. I am not sure, however, that is so simple to do. In the example of Permanent TSB, it carried out securitisation through what was effectively a sale. Getting into the detail to make that happen would be a challenge but

it is one of our most significant concerns with the Bill, although Mr. Madouros might comment further."

- The Committee notes that the Bill's author has stated that the Bill's intention is not to prevent genuine securitisations, and will seek to amend the Bill to reflect this intention.

In its observations on the Bill, the ECB states that -

- For credit institutions to issue certain financial instruments or to create security over pools of credit claims, residential mortgages must be transferred or capable of subsequent transfer. The Bill would render the type of asset transfers required to utilise these financial instruments and techniques effectively impossible for Irish credit institutions. All of these instruments and techniques are essential, both in relation to performing and non-performing loans, for the funding and, thus the day-to-day functioning of the Irish banking sector.
- The presence of significant volumes of non-performing loans (NPLs) on credit institutions' balance sheets reduces the ability of those institutions to fulfil their function as providers of credit to the real economy, and hampers the operational flexibility and overall profitability that are indispensable to a well-functioning banking sector. It is essential that financial institutions can transfer NPLs off the balance sheet.
- A thorough impact assessment of the Bill has not been carried out
- The Bill would have significant adverse effects on Irish credit institutions' ability to participate in Eurosystem monetary policy operations, as well as on their funding situation and capacity to properly manage their balance sheets. This would restrict their liquidity, particularly during times of stress. This would result in additional costs being passed on to other borrowers, a significant impact on mortgage pricing and availability, and even an increase in NPLs, all of which are likely to have an adverse impact on the level of lending in the economy, financial stability, Irish taxpayers, and ultimately the Irish economy.
- The Bill would need to balance the development of effective secondary markets for the assets of credit institutions (which the ECB strongly favours) against the need to protect consumers.

It is not clear whether the draft law applies retrospectively to transfers of mortgages which took place prior to the enactment of the draft law. Hence, the draft law may raise issues of legal certainty in respect of the validity of such transfers.

The Committee notes the observation of the European Central Bank that the draft law is being introduced without the benefit of a thorough impact assessment. In view of this fact and given the seriousness of the potential implications of the Bill as raised by a number of stakeholders during the scrutiny phase, the Committee recommends that –

> A detailed independent impact assessment be undertaken before the decision is made on whether the Bill is to proceed to Committee Stage, and
>
> The independent impact assessment should analyse the potential impacts the Bill may have on:
>
> a. consumer protection issues pertaining to the mortgage market;
> b. interest rates charged to mortgage holders in general and other borrowers;
> c. the banking system as a whole including the ability of banks to access funding;
> d. the availability of credit in the economy;
> e. any other matter considered relevant.

## 7. FINANCIAL IMPLICATIONS

### Procedural considerations

Standing Order 179(2) of Dáil Éireann provides that Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, cannot be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government. Such messages are commonly referred to as Money Messages.

In evidence to the Committee, the Department of Finance expressed the view that a Money Message was required in relation to the Bill.

The Committee notes that neither it nor the Department has a formal role in relation to the application of Standing Order 179(2) but that the preliminary assessment of the Public Bills Office is that the Bill does not involve the appropriation of revenue or other public monies. The Committee further notes that a final determination will be made after the Committee has reported.

The Department of Finance and the Central Bank state that the Bill would have the potential effect of increasing interest rates for consumers and reducing the availability and level of lending in the economy, with adverse effects on financial stability, Irish taxpayers, and ultimately the Irish economy. The Department also states that it could significantly reduce the value of the State's shareholding in the banks – a cost ultimately to be borne by the taxpayer.

### Sectoral and wider economic impacts

The Committee notes that a detailed impact assessment of the Bill has not been carried out; this hindered the Committee in considering the Bill.

**Costs arising from the enactment of the Bill**

The submissions of the Department of Finance, the Central Bank of Ireland and the European Central Bank refer to the potential costs that may arise from the Bill, including in terms of higher interest rates on loans for all borrowers, and consumers generally, and a reduction in the value of the State's shareholding in the banks. However, a detailed assessment in this regard, or in relation to the cost of implementation of the provisions of the Bill (by financial institutions and the Central Bank) has not been carried out.

## 8. CONSTITUTIONAL AND OTHER LEGAL CONSIDERATIONS

### The Constitution

Legal advice available to the Committee is that it is clear from case law that, where the Oireachtas does intend to retrospectively interfere with vested rights or pre-existing rights, such as pre-existing mortgage arrangements, clear statutory language is called for to elucidate the intention to interfere with such rights; and that, as Section 2(1) does not clearly state an intention that it would apply retrospectively to pre-existing mortgage arrangements, it should be assumed that, as currently drafted, it can only have effect in respect of mortgage agreements entered into after the Bill's enactment. On this basis, the Committee is of the opinion that section 2(1) as currently drafted does not appear to present constitutional difficulty.

The Central Bank also stated that most loan agreements include a clause that allows the original lender to sell the loan on to another firm. It follows that the Bill is in conflict with contractual rights or the lender or loan owner, while, in the Central Bank's view, not strengthening the consumer protection regulatory framework.

The Committee is of the opinion that if the Bill proceeds to Committee Stage, section 2(1) should be amended to put the intentions of the Oireachtas in respect of the retrospective application of its provisions beyond doubt. The Committee wishes to draw particular attention to the fact that, if the Bill is to be amended so as to be retrospective in its effect, the change in the law will impact upon an established property right; and that there are concerns that this may be an infringement of the Constitution's property rights guarantees unless it can be brought within the limitation on the Article 43 property right, namely that it was necessary for the "exigencies of the common good" or whether it could be justified on the basis of "social justice", and that this represented a proportionate balance of constitutional rights.

Accordingly the Committee recommends that –

(1) any amendment that might be brought forward proposing that the Bill would have retrospective effect should be carefully drafted so as to strike a proportionate balance of constitutional rights in order to be compatible with the Constitution, and

(2) the Houses of the Oireachtas should satisfy themselves, in the course of scrutiny of the Bill, that the balance proposed can reasonably be considered proportionate.

European law

Legal advice available to the Committee is that there are two provisions within the Bill that are incompatible with EU law, viz:

(1) Section 6(i) conflicts with the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 as these Regulations permit the charging of a fee in certain circumstances when paying back a fixed rate mortgage loan early, and

(2) Section 7 conflicts with the European Union (Bank Recovery and Resolution) Regulations 2015 as these Regulations provide that it is the ECB that is now responsible, in its role as direct supervisor of significant banks in the Eurozone, for making any failing or likely to fail assessment for significant institutions.

The Committee agrees with the assessment that these can be categorised as technical drafting deficiencies that can be remedied by way of amendment rather than a basis for finding the Bill as a whole incompatible with EU law. On this account, the amendments are included in Appendix 1 (Apparent Drafting Errors).

Other provisions that appear to require amendment

A statement of apparent drafting errors brought to the attention of the Committee is set out in Appendix 1. The Committee notes that the Bill as currently drafted uses the terms "mortgage on residential property", "residential mortgages" and "housing loan" inconsistently and/or interchangeably; that only the latter term is defined in the Bill; and that the term "housing loan" is not used in the remainder of the Bill. Ambiguity in relation to intended meaning would

have the potential to cause confusion on the part of borrowers and lenders alike and would almost certainly give rise to litigation. For the sake of completeness, these matters are included in Appendix 1 (Apparent Drafting Errors).

The provisions of the Bill also duplicate legal obligations that arise under –

a. the Consumer Protection Code 2012 (provision 3.11 provides that a regulated entity must notify the Central Bank immediately and provide a consumer with a least 2 month's notice before transferring all or part of its loan book to another entity)

b. the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, which ensures that consumers whose loans are sold to another firm maintain the same regulatory protections they had prior to the sale, including under the statutory Codes of Conduct issued by the Central Bank

c. the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, which ensures that all transferees of credit are now entities regulated by the Central Bank, so that loans cannot be transferred to an unregulated entity.

This could lead to confusion as to which obligations apply or are being applied to the loan transfer.

Sections 8 to 10 purport to provide for the appropriate administrative and legal arrangement for compliance and enforcement of the provisions of the Bill. However, they do not correctly confer enforcement powers on the Central Bank as intended. Instead, an amendment to Schedule 2 of the Central Bank Act 1942 is required so that this Bill would be listed in Part 1 of that Schedule as a "designated enactment" (which could be enforced by the Central Bank under its administrative sanctioning regime contained in Part IIIC of the Central Bank Act 1942.

## 9. CONCLUSIONS AND RECOMMENDATIONS

The Committee considers that there is a need for borrowers to have strong level of protection in relation to the sale of mortgages on their housing by financial institutions. This level of protection needs to be balanced with the reasonable needs of the financial sector and the broader economic interest.

The provisions contained in the Bill are a possible approach that would afford borrowers additional rights in this regard.

However, the Committee notes the positions advanced by the Department of Finance, the Central Bank and the European Central Bank in relation to the level of protection already afforded to borrowers, and the potential adverse consequences that the Bill would have on the financial sector and the broader economy. It also notes the potential impact that the Bill may have on property rights under the Constitution.

The Committee is of the opinion that the Bill should proceed to consideration at Committee Stage.

The Committee is of the opinion that before the decision is made on whether the Bill shall proceed to Committee Stage, a detailed independent impact assessment be undertaken as recommended in *6. Possible Unintended Consequences* (above).

The concerns in relation to the constitutionality of the Bill, as well as the drafting other legal issues that arise (identified above), need to be addressed as the Bill proceeds to Committee Stage.

The Committee calls on the Minister for Finance to report back to the Committee no later than 30 September 2019 on the serious issues highlighted by IMHO and FLAC in front of the Committee and to outline potential remedies for these issues. Specifically, the Minister needs to respond to the following issues:

1. the statement that there is no legal obligation on a purchaser of a mortgage loan to retain an Alternative Repayment Arrangement even if the borrower has kept up their payments under that arrangement and there has been no change in the borrowers circumstances, and
2. the fact that documentation surrounding a mortgage loan is not automatically transferred to the new buyer of that mortgage loan, and
3. the fact that the Code of Conduct on Mortgage Arrears is not enshrined in primary or secondary legislation.

The Committee calls on the Central Bank of Ireland to report back to the Committee no later than 30 September 2019 on the regulatory approach they are taking in relation to previously unregulated loan owners which are now regulated under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, including their plans for on and off site inspections, and the approach they are taking to enhance consumer protections in this area.

# APPENDICES

## Appendix 1

### Apparent Drafting Errors

| | |
|---|---|
| Section 1 | The definition of "*borrower*" uses the term '*housing loan*', which is then in turn not defined.<br><br>The term "*Central Bank*" is not used in legislation; "*Bank*" means the Central Bank of Ireland is used.<br><br>The scope of the definition of "*lender*" appears to be far too wide and beyond the intended scope of the legislation. The entities captured by the definition would also be beyond the usual competence of the Central Bank who regulates 'regulated financial service providers'[9] as per the Central Bank Act 1942. |
| Section 2 | Section 2(1) refers to "*a residential property*". '*Residential property*' is not defined and it is questionable whether the intention of the legislation is to only apply to the holders of one so-called '*residential property*'.<br><br>Section 2(3) requires lenders to provide a "*clear explanation"* without setting out what that might entail. This provision would also need a consequential definition of '*building society*'.<br><br>Section 2(4) uses the phrase "*reasonable time*" which is too vague. This type of provision really calls for a time period to be set so as to progress the obtaining of consent from borrowers in order to be practical. |
| Section 4 | Section 4 uses "*and/or*" which should not appear in legislation as it lacks clarity. Presumably there should be a comma after paragraph (b) so that the sentence below then applies to what has been provided for before it. This provision is a copy out of paragraph 3 of the Code, but it neither appropriate for the Code or for this Bill. |
| Section 5 | Section 5 refers to the "*transfer of the borrower's mortgage*". There is ambiguity here as in section 2 the legislation had been speaking of a '*loan secured by the mortgage of a residential property*' being transferred. |

[9] See Section 2 of the Central Bank Act 1942, as amended.

| | |
|---|---|
| Section 6 | Section 6 presents a few technical drafting errors. The first is the reference in the chapeau to "*a transfer agreement pursuant to this Act*" but there is no such thing provided for under the Act.<br><br>Paragraph (i) conflicts with the European Union (Consumer Mortgage Credit Agreements) Regulations 2016[10] as these Regulations permit the charging of a fee in certain circumstances when paying back a fixed rate mortgage loan early. Therefore, this paragraph would be incompatible with EU law in this regard.<br><br>Paragraph (iii) contains an ambiguous reference to "*insurance*"; this is presumably home insurance, but in legislation this should be specified.<br><br>Paragraph (iv) requires the transferee to "*adhere to the principles of section 26 of the Building Societies Act 1989*". The transferee is already required to adhere to these principles by operation of law.<br><br>Paragraph (v) refers to "*relevant authorities*", which is not defined and therefore it is not clear who this is captures. There is a similar issue with the term "*mortgage statistics*", where it is again not clear what this means. |
| Section 7 | Section 7 uses the phrase "*a lender is failing or likely to fail*" and provides that the Central Bank will determine this circumstance. However, such a determination would conflict with EU law as it is the ECB that is now responsible, in its role as direct supervisor of significant banks in the Eurozone, for making any failing or likely to fail assessment for significant institutions[11]. |
| Sections 8 to 10, inclusive | Sections 8 to 10 in their entirety should be deleted form the Bill as they are not the correct method by which to empower the Central Bank. This is discussed in greater detail in the analysis provided under the last heading '*Are appropriate administrative and legal arrangements necessary for compliance and enforcement of the provisions of the Bill included?'.* |

[10] S.I. No. 142/2016

[11] See S.I. No. 289/2015 - European Union (Bank Recovery and Resolution) Regulations 2015

**Appendix 2**

**Correspondence from the European Central Bank**

Correspondence from the European Central Bank

**Appendix 3**

## Orders of Reference

### a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

(1) The Select Committee shall consider and report to the Dáil on—

(*a*) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and

(*b*) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—

(*a*) Bills,

(*b*) proposals contained in any motion, including any motion within the meaning of Standing Order 187,

(*c*) Estimates for Public Services, and

(*d*) other matters

as shall be referred to the Select Committee by the Dáil, and

(*e*) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and

(*f*) such Value for Money and Policy Reviews as the Select

Committee may select.

(4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

(*a*) matters of policy and governance for which the Minister is officially responsible,

(*b*) public affairs administered by the Department,

(*c*) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,

(*d*) Government policy and governance in respect of bodies under the aegis of the Department,

(*e*) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

(*f*) the general scheme or draft heads of any Bill,

(*g*) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,

(*h*) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

(*i*) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,

(*j*) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (*d*) and (*e*) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

(*k*) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—

(*a*) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,

(*b*) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(*c*) non-legislative documents published by any EU institution in relation to EU policy matters, and

(*d*) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

(*a*) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,

(*b*) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(*c*) at the invitation of the Committee, other Members of the European Parliament.

(8) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—

(*a*) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(*b*) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select.

**b. Scope and Context of Activities of Committees (as derived f Standing Orders) [DSO 84; SSO 70]**

(1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and

(2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.

(3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and

(4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].

(5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(a) a member of the Government or a Minister of State, or

(b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request

made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

(6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

**Appendix 5**

**Membership of the Joint Committee**

**Members of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach**

**Deputies:**

John McGuinness T.D. (FF) (Chairman)

Peter Burke T.D. (FG)

Joan Burton T.D. (Lab)

John Deasy (FG)

Pearse Doherty T.D. (SF)

Michael McGrath T.D. (FF)

Paul Murphy T.D. (Solidarity-PBP)

**Senators:**

Gerry Horkan (FF) (Vice-Chairman)

Paddy Burke (FG)

Rose Conway-Walsh (SF)

Kieran O'Donnell (FG)

**Appendix 6**

**Written Submissions**

**Links to Written Submissions received**

- Central Bank of Ireland
  Part (a)
  Part (b)
  Part (c)
- Department of Finance
- Free Legal Advice Centres (FLAC)
  FLAC Supplementary Submission
- Financial Services Ireland
- Irish Mortgage Holders Organisation (IMHO)
- MABS
- Irish Debt Securities Association (IDSA)
- Social Justice Ireland
- Banking and Payments Federation of Ireland (BPFI)
- New Beginning
- Brendan Burgess (Chartered Accountant and founder of Askaboutmoney.com)