75 BLIAIN AG FREASTAL AR AN BPOBAL
YEARS OF PUBLIC SERVICE

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

Philip R. Lane *Gobharnóir/Governor*

T +353 (0)1 224 6001

Bosca PO 559
Baile Átha Cliath 1
PO Box 559
Dublin 1

www.centralbank.ie

Deputy John McGuinness
Chair
Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach
Leinster House
Dublin 2

Your ref: Ref: I 2018/487

30 May 2018

Re: Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018

Dear Chair

We refer to our recent correspondence and discussions regarding the above legislation, which is aimed at regulating loan owners and, in particular, your letter of 4 May 2018 seeking a written submission on the Bill from the Central Bank.

With these in mind, we have set out the Central Bank's views on the proposed regulation of loan owners and on the above Bill.

In line with our mission of safeguarding stability and protecting consumers, the Central Bank's work on mortgage arrears and Non-Performing Loans (NPLs) spans its consumer protection, prudential supervision, and financial stability roles. Within the remit of the Central Bank's responsibilities, the approach to mortgage arrears resolution is focused on ensuring the fair treatment of borrowers through a strong

consumer protection framework while ensuring banks are sufficiently capitalised, hold appropriately conservative provisions, and have appropriate arrears resolution strategies and operations in place.

Furthermore, the Code of Conduct on Mortgage Arrears (CCMA) provides a strong consumer protection framework to ensure that borrowers in financial difficulty are treated in a timely, transparent, and fair manner by regulated entities. Banks and retail credit firms are required to comply with the CCMA, as are credit servicing firms servicing loans on behalf of unregulated loan owners. A borrower who engages can expect that their specific circumstances will be considered, which is the most effective strategy in identifying whether a sustainable arrangement can be achieved which keeps the borrower in their home. The CCMA includes requirements that arrangements be sustainable and based on a full assessment of the individual circumstances of the borrower and that repossession be used only as a last resort.

Current regulatory framework

Retail credit firms are authorised under Part V of the Central Bank Act 1997 (the '1997 Act'). However, the definition of 'retail credit firm' includes certain specified exemptions, one of which is in relation to credit that was originally provided by another person, a person to whom all or any part of that other person's interest in the credit is directly or indirectly assigned or otherwise disposed of.

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the '2015 Act'), which amended Part V of the 1997 Act, ensures that when a loan is transferred to an unregulated entity, relevant borrowers maintain the same regulatory protections they had prior to the sale. These protections include those provided by the Central Bank's Consumer Protection Code 2012 ('the Code'), the CCMA and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 ('the SME Regulations').

The CCMA applies to a mortgage loan of a borrower, which is secured by his/her primary residence. For the purposes of the CCMA, "primary residence" means a property, which is the residential property the borrower occupies as his/her primary residence in the State, or a residential property which is the only residential property in the State owned by the borrower. Therefore, the protections of the CCMA only apply to buy-to-let mortgages if the residential property is the only residential property in the State owned

by the borrower. For mortgages in arrears that do not fall within the scope of the CCMA (e.g., buy-to-let properties which are not the only residential property in the State owned by the borrower), the provisions of the Code apply where the borrower is a 'personal consumer'[1]. With respect to arrears resolution, the Code requires a lender to seek to agree an approach that will assist the personal consumer in resolving the arrears. Where the borrower is a micro, small or medium sized enterprise, the SME Regulations apply, which include specific requirements that regulated firms must comply with as regards handling arrears and financial difficulties.

Under the current Part V of the 1997 Act (as amended by the 2015 Act), if an unregulated person buys loans from an original lender, then the loans must be serviced by a 'credit servicing firm' who is authorised and regulated by the Central Bank, thereby bringing such firms within the Central Bank's regulatory remit. However, certain activities are expressly excluded from the definition of 'credit servicing', which are essentially ownership activities.

Further information on the current regulatory framework is included in **Appendix 1** to this letter.

The Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018

The Bill proposes to introduce a new regime for 'credit agreement owners'. Essentially, this new regulated activity would be the ownership of credit and the associated activities that are currently contained in the exemption to the definition of 'credit servicing' under the 2015 Act, namely:

1. the determination of the overall strategy for the management and administration of a portfolio of credit agreements;
2. the maintenance of control over key decisions relating to such portfolio, or
3. taking such steps as may be necessary for the purpose of enabling the undertaking of credit servicing by another person or enforcing a credit agreement.

Credit purchasers (similar to any regulated lender) are entitled to make certain commercial decisions in relation to borrowers outside of the regulatory arena. The decisions which appear to be of primary concern,

[1] 'personal consumer', for the purpose of the Code, *'means a consumer who is a natural person acting outside his or her business, trade or profession'*

and which the Bill appears to seek to address, are those in relation to the setting of interest rates and those relating to strategies for dealing with distressed borrowers (e.g. strategies around repossession and the range of options open to borrowers in arrears). This concern arises as the current exemptions from credit servicing cover these type of ownership activities. While these activities are framed as exemptions, they are not in fact exemptions as they are not captured by the definition of "credit servicing" and they are not activities that the Central Bank regulates in respect of any regulated lender.

In its current format, the Central Bank does not believe that the Bill will achieve the stated outcome of addressing the above concerns as it is seeking to regulate ownership matters rather than addressing consumer protection issues.

Even if these activities required authorisation as proposed, the Central Bank does not have the power in regulating the conduct of business of regulated financial service providers to interfere with their strategy and commercial decisions or their legitimate contractual rights. This is not a power the Central Bank has in regulating other lenders, including retail credit firms. It also does not seem appropriate for the Central Bank to have such a power. If lenders could not rely on their contractual rights or make their own commercial decisions within a consumer protection framework, it is likely to adversely affect the provision and the cost of providing credit in the market.

Rather, in regulating lenders' conduct of business, the Central Bank seeks to ensure that lenders comply with relevant conduct of business rules, including, through providing consumers with all relevant information, putting in place a process for the management of a customer's financial difficulties and not exerting undue pressure or influences on customers. These protections are stipulated in the Central Bank's various Codes of Conduct and are applicable to all loans provided to relevant customers as they apply to credit servicers in a situation where an unregulated lender has purchased a loan. In its current format therefore, the Bill does not seem to provide for any additional consumer protection benefits.

If loan owners were to be regulated, the Central Bank believes an amendment to the definition of 'retail credit firm' in the 1997 Act would be the most appropriate option. This would mean that credit agreement owners would be required to be authorised as retail credit firms.

The current exemption to the retail credit firm regime for credit that was originally provided by another person, a person to whom all or any part of that other person's interest in the credit is directly, or indirectly, assigned or otherwise disposed of could be narrowed. The narrowing of this exemption would mean that credit agreement owners would be required to be authorised as retail credit firms and would be permitted to provide credit. In narrowing this exemption, the wording of the category of activity that is captured would also need to be considered to ensure it captures not just providing credit but also holding credit.

The regulation of loan owners within the retail credit firm regime would not lead to regulation of ownership strategies. While there may be advantages from a supervisory perspective in requiring credit purchasers to be authorised (in that the Central Bank would have a role in conduct of business supervision, including the assessment of fitness of probity and supervising the governance and management of the entity), such authorisation would not address the primary concerns of the Bill, i.e., that the Bank should regulate interest rate setting or strategic decisions concerning distressed borrowers.

We understand that the intention of this Bill is not to remove the exemption for passive securitisation SPVs. The Central Bank would be in favour of retaining this exemption for authorisation for securitisation SPVs, as was the intention of the original exemption clause.

We would also note that in accordance with Article 127(4) of the Treaty on the Functioning of the European Union and Article 4 of the ESCB Statute, there is an obligation on national authorities to consult the ECB on certain draft legislative provisions. The framework for such ECB consultations is set out in Council Decision 98/415/EC. Given that the Bill seeks, inter alia, to amend central banking legislation, consideration should be given to the obligation to consult the ECB.

Further technical and drafting comments on the proposed Bill are set out in **Appendix 2** to this letter.

CCMA review

As requested by the Minister for Finance and Public Expenditure and Reform on 8 March 2018, the Central Bank is currently carrying out a review of the CCMA to assess its effectiveness in light of the sale of loan

books by regulated lenders. The purpose of this review is to assess the effectiveness of the CCMA in light of the sale of loan books by regulated lenders in order to ensure that it remains as effective as possible.

The Central Bank intends to issue letters to credit servicing firms, credit institutions and unregulated loan owners (who own loans within the State) reminding them of key legislative obligations applicable to them under legislation and Central Bank Codes.

You will note from these letters **(attached at Appendix 3)** that the Central Bank expects that any notification to consumers of a sale of their loan must include both details of the identity of the loan owner and of the term in their loan agreement, which allows the sale of their loan by the original lender.

In this regard, we note comments made by members of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach of alleged instances of harassing communications towards borrowers in arrears whose loans have been sold to unregulated third parties. We are currently awaiting information of these cases to be provided, which we will then investigate as a matter of urgency, and use to inform the CCMA review.

Other considerations

Amendments to the insolvency regime may also be considered in this regard. In order to strengthen the bargaining power of consumers with credit purchasers, an option could be to consider strengthening the powers of the Insolvency Service of Ireland (ISI). It is important to note that the personal insolvency legislation and the ISI's role is a key requirement to ensure the restoration of insolvent persons to solvency, which can be through sustainable restructures and therefore could be a more appropriate way to address the concerns raised by Fianna Fail. Where a restructure arrangement cannot be found under the CCMA, debt settlement alternatives such as Personal Insolvency Arrangements (PIAs) or bankruptcy are available. Depending on the restructures offered or the PIA terms, additional provisions may be necessary and a review of the personal insolvency legislation or amendments to the personal insolvency legislation may be necessary to address these concerns in addition to any changes the Central Bank can effect.

Yours sincerely

Philip Lane

Appendix 1

Current regulatory framework (additional information)

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 has brought the activity of 'credit servicing' (as defined in that Act) within the regulatory remit of the Central Bank. This means that, where a bank or retail credit firm holds a loan, it is the loan owner that is regulated by the Central Bank. In the case of a loan held by an unregulated loan owner, it is not the loan owner that is regulated. It is the specific activity of 'credit servicing' carried out by the credit servicing firm appointed by the loan owner that is regulated.

'Credit servicing' covers the management and administration of credit agreements which expressly includes, for example, notifying the borrower of changes in interest rates, collecting and recovering payments and managing the process by which a borrower's financial difficulties are addressed and any alternative repayment arrangements are put in place.

In Part V of the 1997 Act, the following activities are expressly excluded from the definition of 'credit servicing', which are essentially ownership activities:

- the determination of the overall strategy for the management and administration of a portfolio of credit agreements,
- the maintenance of control over key decisions relating to such portfolio, or
- taking such steps as may be necessary for the purposes of enabling the undertaking of credit servicing by another person or enforcing a credit agreement.

In addition, the 1997 Act provides that a credit servicing firm cannot take an action, or fail to take an action, on behalf of or on the instruction of an unregulated loan owner, which would be a prescribed contravention if performed, or not performed, by a retail credit firm.

In the context of existing rules in the Code and the CCMA relevant to this matter, the following provisions should be noted:

1. Provision 3.11 of the Code requires a regulated entity to provide at least two months' notice to affected consumers to enable them to make alternative arrangements, before transferring all or part

of its loan book. In addition, Provision 3.11 applies where regulated activities, including credit servicing activities, are transferred to another regulated entity.

2. General Principle 2.6 of the Code requires that a regulated entity must ensure that in all its dealings with consumers and within the context of its authorisation, it makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.
3. The Code provides that regulated entities must not exert undue pressure or undue influence on a customer[2], and also provides for a number of requirements regarding personal visits and contacts with consumers[3], including that the level of contact and communications from the regulated entity, or any third party acting on its behalf, with a personal consumer in arrears, is proportionate and not excessive[4].
4. Under the CCMA, a regulated entity must ensure that the level of communications from the lender, or any third party acting on its behalf, is proportionate and not excessive, taking into account the circumstances of the borrower, including that unnecessarily frequent communications are not made[5]. The regulated entity must also ensure that communications with borrowers are not aggressive, intimidating or harassing[6].

---

[2] General Principle 2.9, Consumer Protection Code 2012
[3] Chapter 3, Consumer Protection Code 2012
[4] Provision 8.13, Consumer Protection Code 2012
[5] Provision 22, Code of Conduct on Mortgage Arrears 2013
[6] Provision 22, Code of Conduct on Mortgage Arrears 2013

Appendix 2

Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018 (the "Bill")

1. Introduction

The Explanatory Memorandum explains that the purpose of the Bill is to "regulate credit agreement owners of mortgage loans and SME loans", which is different to the intent stated in the draft Bill itself. It explains that it extends the provisions of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the "2015 Act") to credit agreement owners. The reference to the 2015 Act is incorrect and this should refer to the Central Bank Act 1997 (which provides for the regulation of credit servicers) (the "1997 Act"). The introduction to the Bill also references "loan owners and sale of loans" – it is unclear how the Bill deals with the "sale of loans", other than in relation to the proposed information requirements set out in the proposed additional sub section (6) to Section 33A of the Central Bank Act 1997.

Overall, the Central Bank has a number of concerns on the drafting of the Bill and would suggest it requires a number of amendments to make it effective and workable. As general points, the Central Bank would note the following:

(a) the importance of ensuring that the provisions of the Bill are consistent with the current legislative and regulatory framework and, in particular, that they do not impair the existing consumer protections in place. We would note, in particular, that this Bill does not take into account the existing retail credit firm and credit servicing firm regimes, which are set out in the Central Bank Act 1997. The retail credit firm regime already provides that lending to relevant borrowers requires authorisation but specifically exempts assignees of credit from this requirement. Likewise, the existing credit servicing regime needs to be considered and in particular the complexities and regulatory difficulties with regulating both the agent and principal as is proposed;

(b) the Bill is unclear on whether loans purchased further to securitisations are captured or not – they appear to be covered by the definition of "credit agreement owner" but then there are provisions which contradict this apparent intention e.g. section 9(b);

(c) a number of the provisions direct the Central Bank to take specific actions in relation to the use of its powers. Such directions by the Oireachtas would interfere with the independence of the Central Bank. In addition, the Central Bank is required to meet various tests and due process requirements in advance of exercising its powers and failure to do so could make use of such legal powers susceptible to legal challenge by a regulated financial service provider. If the Oireachtas decides to provide for the authorisation of additional activities as is proposed, the Central Bank will regulate such activities in accordance with its existing regulatory framework and using all appropriate powers;

(d) certain of the provisions in the Bill seek to amend the Central Bank's codes of conduct. This would not appear legally possible and attempting to do so could render such codes susceptible to legal challenge. If the Oireachtas decides to introduce a new category of regulated activity as is proposed, the codes will be amended by the Central Bank in any event to ensure they capture the new regulated activity. In addition, these provisions relating to Central Bank Codes of Conduct are proposed only for debt management firms, credit servicing firms and/or credit agreement owners. The Central Banks Codes of Conducts apply to all firms regulated by the Central Bank, to impose specific requirements on certain firms and not others providing the same products would create an unlevel playing field.

We would also note that in accordance with Article 127(4) of the Treaty on the Functioning of the European Union and Article 4 of the ESCB Statute there is an obligation on national authorities to consult the ECB on certain draft legislative provisions. The framework for such ECB consultations is set out in Council Decision 98/415/EC. Given that the Bill seeks, *inter alia*, to amend central banking legislation, consideration should be given to the obligation to consult the ECB.

2. Section 1 - Definition of "credit agreement owner"

(a) The new regulated activity of credit agreement owner does not interact with the current regulated activities of being a retail credit firm or a credit servicing firm. The new category of regulated activity (i.e. credit agreement owner) overlaps with both the regulated activities of being a retail credit firm and a credit servicing firm. In addition, the use of "or" in each of the subsets means that it is difficult to determine who requires authorisation as a "credit agreement owner". As crafted, this overlap could cause significant difficulties in terms of determining the applicable regime and also determining responsibilities from a regulatory perspective.

(b) Given that the regimes of retail credit firm and credit servicing firms already exist and cover to a certain extent the relevant activities, it is not appropriate to create a new regime.

(c) The regime as proposed would seem to involve both the authorisation of the "owner" of the credit (under this regime and potentially the retail credit firm regime) and also the servicer (under the credit servicing regime). Regulating both the owner and the servicer (i.e. the principal and the agent) would cause difficulties as it could be difficult to ascertain responsibilities in the context of any regulatory action and it would seem appropriate that the principal as a regulated financial service provider would be responsible for the actions of its agents. Ordinarily, it is only the principal that would be regulated; we understand it was decided previously to regulate the credit servicer purely because at that time it had not been proposed to regulate the principal.

(d) The current drafting is so broad that it will mean that any senior person or board in a bank could have to be authorised as a credit agreement owner given that such a person, for example, could "determine the overall strategy for the management and administration of a credit agreement".

(e) This definition will mean that SPVs that purchase loans further to a securitisation will need to be authorised but this appears to be somewhat contradicted by the proposed amendment in section

9(a) which purports to exempt securitisations and also in the transitional arrangements proposed in Section 5.

Possible Approach – amendment of the existing retail credit firm regime

If loan owners were to be regulated, the Central Bank believes an amendment to the definition of 'retail credit firm' in the 1997 Act would be the most appropriate option as this regime currently regulates the provision of credit. This would mean that credit agreement owners would be required to be authorised as retail credit firms.

We note that the policy intention is to exclude securitised Special Purpose Vehicles (SPVs) from the remit of any new regime. The credit servicing regime could therefore remain in place to the extent that any securitised SPVs use a servicer other than a regulated financial service provider authorised to provide credit.

The retail credit firm regime currently covers a narrower category of persons ('relevant persons') than the credit servicing regime which covers a broader category of persons (i.e. 'relevant borrowers'). SMEs are largely not captured by the definition of 'relevant persons' as this definition is with reference to a "natural person". "Relevant borrowers" captures SMEs but only to the extent that the credit was originally provided by a financial service provider regulated to provide credit. The definition of 'relevant persons' in the retail credit firm regime may therefore need to be broadened if this is the policy objective.

The current exemption to the retail credit firm regime for credit that was originally provided by another person, a person to whom all or any part of that other person's interest in the credit is directly, or indirectly, assigned or otherwise disposed of could be narrowed. The narrowing of this exemption would mean that credit agreement owners would be required to be authorised as retail credit firms and would be permitted to provide credit. In narrowing this exemption, the wording of the category of activity that is captured would also need to be considered to ensure it captures not just providing credit but also holding credit.

3. Section 3 – Amendment of section 1(f)(3) of the 2015 Act

This section amends the 2015 Act which was an act that amended the 1997 Act. The amendment should be to the 1997 Act which is the principal act.

We note that this section permits any firm already regulated by the Central Bank to carry out the business of a 'credit agreement owner'. This section also would require that the Central Bank create a new category of regulated entity.

4. Section 5 – Amendment of section 34 of the 1997 Act

(a) Subsection 2(c) – the Bill sets out the persons regulated under the Bill and while this is a question for the AGO, it would not appear from a legal perspective that a Bank direction could determine when the Bill takes effect or override or amend the provisions of the Bill. In

addition, this appears to contradict the definition of "credit agreement owner" which would include an SPV purchasing loans further to a securitisation. Furthermore, there is no definition of "securitisation" in the Bill. If it is intended that purchasers of loans further to a securitisation are not to be regulated, the Bill should simply provide for an exemption for such persons and a definition included.

(b) Subsection 3 and 4 – it is not clear to us what this means or what this is trying to achieve. This provision would need to be considered in the context of the overall regulatory framework which applies.

(c) Subsection 5 – this section is superfluous as the Central Bank has existing powers to investigate matters in relation to regulated financial service providers. This provision is also inappropriate as it interferes with the independence of the Bank in purporting to direct that the Central Bank take particular actions. In addition, section 45 of the Central Bank (Supervision and Enforcement) Act 2013 requires that certain tests be met in each particular case before the Central Bank can issue a direction under this section and issuing a direction where this is not the case could lead to the imposition of the direction being successfully challenged. It would appear this provision can be deleted and the Central Bank will be entitled to use its direction powers in the ordinary course where the circumstances set out in section 45 apply.

(d) New Section 34(H) – this section is superfluous – it is already contained in the current section 34G(2) and therefore could be deleted.

5. Section 6 – Amendment of section 3 of the Central Bank (Supervision and Enforcement) Act 2013

The proposed new limb to the definition of "customer" in section (d) is unnecessary as the "financial service" is being provided by the credit agreement owner to the borrower. Therefore, the relationship would come within the existing part (a) of the definition of "customer". The inclusion of this additional limb could cast doubt on who is a "customer" in other contexts. In addition, the proposed definition of 'customer' is not consistent with the definition of 'customer' in the Consumer Protection Code 2012.

6. Section 7- Amendment of section 57 of the Central Bank Act 1942

The reference to "Section 57BA of the Act of 1942" is incorrect as this section no longer exists. The Financial Services and Pensions Ombudsman Act 2017 is relevant.

7. Section 8- Amendment of section 33 of the 1997 Act

(a) We would suggest that this section be deleted in its entirety. The Central Bank already has powers in certain instances to require that regulated financial service providers provide information to customers on the sale of loans (including under condition making powers and

regulation making powers under section 48 of the Central Bank (Supervision and Enforcement) Act 2013). Indeed, Provision 3.11 of the Consumer Protection Code requires that when a regulated entity transfers regulated activities to another regulated entity, it must provide at least two months' notice to affected consumers to allow them to make alternative arrangements; inform the customer how continuity of service will be provided and inform the customer that their details are being transferred to the other regulated entity. In addition, Subsection 6(d) requires that the borrower be informed, within 30 days of the loan being sold, of their rights under the CCMA. The CCMA includes a number of communication requirements and therefore a borrower in arrears or pre-arrears would already have been informed of the protections afforded to them under the CCMA.

(b) In general, this section raises significant concerns in relation to Central Bank independence, as it requires the Central Bank to take specific actions i.e. "The Bank shall also impose…" Once an activity is required to be authorised, the Central Bank will consider the regulatory requirements it is appropriate to impose on such activity in accordance with its existing powers.

(c) If this regime were enacted as is, the new subsection 6 in section 33A is unnecessary as the Central Bank already has the power to impose conditions on regulated financial service providers. There is no need for a reference to debt management firms.

(d) Subsections 7 and 8 are not required given that, if the regime were enacted, the credit agreement owners would be "regulated financial service providers" and subject to the various codes as applicable. It would not appear to be legally possible to amend the codes through primary legislation and attempting to do so, could create legal difficulties in respect of such codes. In addition, the proposed amendments only apply to debt management firms, credit servicing firms and credit agreement owners; consequently, an unlevel playing field would emerge as regards the rules applicable to other entities involved in lending.

(e) Subsection 7 appears to require that the CCMA be applicable to all mortgages. The CCMA applies only to borrowers in arrears or pre-arrears on a mortgage loan secured on a borrower's primary residence, as defined, and its requirements provide a framework for arrears management. It would not make sense to apply the CCMA to mortgages which are not in arrears or pre-arrears.

(f) Subsection 8(i) – it is not clear what credit agreements are envisaged here.

(g) Subsection 8(ii) – it is not clear what this provision is designed to achieve as there is no reason why the Consumer Protection Code would not apply and including it suggests an issue.

8. Section 9- Amendment to section 34 of the 1997 Act

(a) The proposed amendment to section 34E(2) is confusing. Section 34E deals with the transitional arrangements for retail credit firms and does not relate to "credit agreement owners".

(b) The proposed amendment suggests that securitisations are to be exempt, however, this is not reflected in the definition of "credit agreement owner". If purchasers of loans further to securitisations are to be exempt, a specific exemption to the regulated activity should be included together with a definition of "securitisation".

(c) Similar comments as the above in relation to the proposed amendment to section 34F(2) – this section deals with the transitional arrangements for credit servicing firms and is not related to "credit agreement owners".

(d) The rationale for the proposed amendment of section 34F(3)(i) is not clear. This will reverse the current arrangement where the agent does not need to be regulated if the loan owner is already regulated. As noted above, it would not seem appropriate to regulate the principal and the agent

and such a form of regulation could confuse responsibilities in relation to regulation and make action on foot of breaches more difficult. A regulated financial service provider that outsources credit servicing functions is already required to ensure compliance with the Consumer Protection Code, and the firm providing these services does not itself have to be authorised and regulated. It would therefore not be necessary or appropriate to regulate the firm providing the outsourced functions.

9. Section 10- Amendment to section 43 of the Central Bank (Supervision and Enforcement) Act 2013

(a) None of the new additions to the definition of "relevant default" are necessarily regulatory breaches or contractual breaches – the current premise of the definition of "relevant default" is that it relates to some form of contractual or regulatory breach. It is not clear therefore how the Bank could have the basis to order redress in such instances.

(b) The new additions included would appear to relate to customer specific issues rather than systemic breaches. The concept of the customer redress powers are for the Central Bank to provide for redress for systemic breaches so including the new provisions could undermine the work of the Financial Services and Pensions Ombudsman and its ability to deal with individual complaints. It would also appear to interfere with the role of the courts in arbitrating on contractual disputes.

10. Section 11- Duties of the Financial Services Ombudsman

This section appears to be unnecessary because, if the regime were to be introduced, then the applicable provisions in relation to a complaint would apply automatically on the basis that the "credit agreement owner" would be a "regulated financial service provider". Therefore, a consumer would be required to make a complaint through the regulated financial service provider's complaints process as provided for in the Consumer Protection Code, and if not satisfied with their response, refer the complaint to the Financial Services and Pensions Ombudsman.

11. Section 12 – Duties of the Bank to publish statistics on loans of micro, small or medium-sized enterprises

(a) Section 12 is very broad in scope in including any loan held by a micro, small or medium-sized enterprise (this includes self-employed under Recommendation 2003/361/EC). For instance, loans

to directors, intra-company loans etc. would be included for all small enterprises. This would appear to go beyond the intention of the Bill.

(b) This section is also detailed and prescriptive in setting out what the Central Bank is required to publish (i.e., in terms of the detail and frequency of what is to be published). This would seem inappropriate having regard to the Central Bank's independence.

(c) Practical difficulties are likely to arise in respect of SME loans held by non-banks. The structure of loans held by non-banks can present significant difficulties for the collection of such data. In many cases, loans are cross-collateralised against a number of properties and straddle personal and business purposes.

Appendix 3

[ ]

[Head of Compliance]

[X Bank]

[ ] 2018

Our ref: [ ]

Consumer Protection Code – General Principle 2.6 and General Requirement 3.11

Dear [ ],

I refer to the above provisions of the Consumer Protection Code (the 'Code') in the context of the transfer of ownership of loans to unregulated entities. You will recall that the Central Bank previously issued guidance on these provisions in December 2015. In addition to that previously issued guidance, you should also note that Provision 3.11 of the Code should be read in conjunction with General Principle 2.6 of the Code. Where Provision 3.11 applies, the Central Bank expects that all affected consumers are informed of both the term in their loan agreement which allows their loan to be sold and the identity and address of the proposed new owner of their loan, at least two months in advance of the transfer to inform the consumer of how continuity of service will be provided to them.

The Central Bank is actively monitoring these matters and reserves its rights in relation to taking any enforcement action pertaining to breaches of the above or any other provision of financial services law. In particular, pursuant to section 52 of the Central Bank (Supervision and Enforcement) Act 2013, the Central Bank may seek a High Court enforcement order to ensure compliance with financial services law in this area.

Yours sincerely,

_____

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

[ ]

[ ] 2018

Name
Address

Our ref: [ ]

Credit Servicing Firms – Key Legal Provisions

Dear [ ],

The attention of the Central Bank of Ireland (the "Central Bank") has been drawn to the nature of communication and correspondence between credit servicing firms/unregulated loan owners and borrowers. With this in mind, the purpose of this letter is to remind all credit servicing firms of key legal provisions contained in Part V of the Central Bank Act 1997 (the "1997 Act"), the Code of Conduct on Mortgage Arrears (the "CCMA") and the Consumer Protection Code (the "Code"):

1. Section 34G of the 1997 Act, and in particular section 34G(1) states:

   "A credit servicing firm shall not, on its own behalf or on behalf of, or on the instructions of, a person who holds the legal title to credit granted under a credit agreement, take or fail to take an action, if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action."

2. Provision 22 of the CCMA states:

   "A regulated entity must ensure that:

   a) the level of communications from the regulated entity, or any third party acting on its behalf, is proportionate and not excessive, taking into account the circumstances of the borrowers, including that unnecessarily frequent communications are not made;

   b) communications with borrowers are not aggressive, intimidating or harassing;

c) *borrowers are given sufficient time to complete an action they have committed to before follow up communication is attempted. In deciding what constitutes sufficient time, consideration must be given to the action that a borrower has committed to carry out, including whether he/she may require assistance from a third party in carrying out the action; and*

d) *steps are taken to agree future communication with borrowers".*

Further, in relation to Provision 3.11 of the Code in the context of the transfer of regulated activities to another regulated entity, you will recall that the Central Bank previously issued guidance on this provision in December 2015. In addition to that previously issued guidance, you should also note that Provision 3.11 should be read in conjunction with General Principle 2.6 of the Code, which requires regulated entities to make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer. Where Provision 3.11 applies, the Central Bank expects that all affected consumers are informed by regulated entities of all relevant material information. In this regard, we expect regulated entities to disclose both the term in their loan agreement which allows the loan to be sold and the identity and address of the proposed new owner of their loan at least two months in advance of the transfer to inform the consumer of how continuity of service will be provided to them. Where a loan is transferred but the credit servicing firm does not change, in order to comply with General Principle 2.6, we expect that the borrower would also be provided with both the term in their loan agreement which allows their loan to be sold and of the identity of the proposed new owner of their loan on a timely basis.

The Central Bank is actively monitoring these matters and reserves its rights in relation to taking any enforcement action pertaining to breaches of the above or any other provision of financial services law. In particular, pursuant to section 52 of the Central Bank (Supervision and Enforcement) Act 2013, the Central Bank may seek a High Court enforcement order to ensure compliance with financial services law in this area.

Yours sincerely,

_____

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

[ ]

[ ]

[ ] 2018

Our ref: [ ]

Unregulated Loan Owners – Key Legal Provisions

Dear [ ],

The attention of the Central Bank of Ireland (the "Central Bank") has been drawn to the nature of communication and correspondence between credit servicing firms/unregulated loan owners and borrowers. With this in mind, the purpose of this letter is to remind you, as an unregulated loan owner, of key legal provisions contained in Part V of the Central Bank Act 1997 (the "1997 Act") and the Code of Conduct on Mortgage Arrears (the "CCMA"):

1. Section 34G of the 1997 Act, in particular section 34G(2) –

   "A person who holds the legal title to credit granted under a credit agreement shall not instruct a credit servicing firm to take or fail to take an action, if the taking of or the failure to take the action would otherwise be a prescribed contravention if a retail credit firm took or failed to take that action."

2. Provision 22 of the CCMA –

   "A regulated entity must ensure that:

   a) the level of communications from the regulated entity, or any third party acting on its behalf, is proportionate and not excessive, taking into account the circumstances of the borrowers, including that unnecessarily frequent communications are not made;

   b) communications with borrowers are not aggressive, intimidating or harassing;

c) *borrowers are given sufficient time to complete an action they have committed to before follow up communication is attempted. In deciding what constitutes sufficient time, consideration must be given to the action that a borrower has committed to carry out, including whether he/she may require assistance from a third party in carrying out the action; and*

d) *steps are taken to agree future communication with borrowers".*

Where an unregulated loan owner is found to have issued an instruction to a credit servicing firm, in breach of Provision 22 of the CCMA, it will be in breach of Section 34G of the 1997 Act.

As you will be aware, section 28(2) of the 1997 Act specifically states that certain activities are not "credit servicing", namely

a) *The determination of the overall strategy for the management and administration of a portfolio of credit agreements,*

b) *The maintenance of control over key decisions relating to such portfolio, or*

c) *Taking steps as may be necessary for the purposes of –*

   i. *Enabling the undertaking of credit servicing by another person, or*

   ii. *Enforcing a credit agreement.*

These activities are not credit servicing activities only insofar as they are not carried out in a fashion that would be a prescribed contravention if a retail credit firm were to take the same action. Further, in relation to part (c) above, only "steps as may be necessary" can be carried out in order to avail of the exemption. If an unregulated loan owner breached this requirement, then it would be an unauthorised credit servicing activity, which would be a criminal offence.

The Central Bank has issued clarification to regulated firms regarding its expectations of them in terms of complying with General Principle 2.6 and Provision 3.11 of the Consumer Protection Code 2012, which requires, inter alia, regulated entities to provide consumers with at least 2 months' notice in the event of a transfer of all or part of its regulated activities. While these requirements do not apply directly to unregulated loan owners, these requirements could be relevant considerations for you in the event of a future sale of loans by you. In this regard, please find enclosed relevant sample correspondence previously issued to credit servicing firms, which sets out the Central Bank's expectations.

The Central Bank is actively monitoring these matters and reserves its rights in relation to taking any enforcement action pertaining to breaches of the above or any other provision of financial services law. In particular, pursuant to section 52 of the Central Bank (Supervision and Enforcement) Act 2013, the Central Bank may seek a High Court enforcement order to ensure compliance with financial services law in this area.

Yours sincerely,

_____

[ ]