Opening Statement by FLAC to the Oireachtas Committee on Finance, Public Expenditure and Reform and Taoiseach in relation to the detailed scrutiny of the private members No Consent, No Sale Bill, 2019.

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Thursday, 18 April 2019

I want to thank the committee for inviting us to make a written submission, which we furnished in March 2019 and to address it today in relation the important issues raised by this Bill.

We note the recent submissions that have been made to this committee, in particular on the 2nd of April, and the opinion furnished by the European Central Bank.

We do not intend to reiterate our submission but wish to draw the Committee's attention to the following points.

Inequality of Arms:

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

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

> '*The borrower hereby acknowledges the Lender's right, without further consent from or notice to the Borrower to transfer the benefit of this Letter of Offer, the Loan and the Lender's mortgage security (including any life assurance policy or policies) over the Property to any person, company or corporation on such terms as the Lender may think fit, without further consent from or notice to the Borrower or any other person'.*

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

The EU Directive on Unfair Terms in Consumer Contracts, was transposed in this jurisdiction by the European Communities (Unfair Terms in Consumer Contracts) Regulations (SI 27/1995) (as amended). Article 3 of this Directive provides that 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it

causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer'. The fairness and enforceability of such contractual terms has not yet been adjudicated upon by the High Court but are vulnerable to challenge.

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

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

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

In the course of its contributions to the April 2nd discussion, the Central Bank reiterated the view, that existing arrangements must be maintained by ULO's[1]. Specifically, the Director of Consumer Protection stated to the Committee that

> *'Where a loan has been sold by a bank to a non-bank, existing arrangements are honoured. We feel there are many protections in the existing consumer protection framework that keep borrowers in or facing arrears at the core of the process and protected'.*

The Bank's view that where the borrower's circumstances have not changed at the point that a review of a long term arrangement takes place, '*regulated lenders and ULO's must comply with the terms of the arrangement in place',* is not supported by the relevant rules (42 and 43) in the CCMA. We fail to see any clear provision there that imposes a specific legal obligation on a lender reviewing an arrangement to continue that arrangement where the borrower's circumstances have not changed. Even if it was to be interpreted that there is such an obligation, its enforceability in strict legal terms under a regulatory Code may be questioned.

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

[1] Already expressed in the October 2018 report it furnished to the Minister for Finance on the Effectiveness of the Code of Conduct on Mortgage Arrears in the context of the sale of loans by unregulated entities.

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

If it is the case, as the Bank maintains, that it cannot interfere with a lender's (or owner's) contractual rights, how can it impose an obligation on an unregulated loan owner to continue a long term restructured arrangement against its will, where there is no regulatory or statutory obligation to do so?

What constitutes a non-performing loan (NPL)?

The principal narrative up to now has been that the sale of loans to funds is justified to reduce the number of NPL's down to a perceived ECB target of 5%. The ECB opinion to this Committee does not provide a definition of non-performing loans.

The last quarterly statistical mortgage arrears report from the Bank to end Q.4 2018 as follows concerning PDH (principal dwelling house) loans seem to clearly show that the significant majority of the almost 14,000 loans apparently acquired by ULO's (unregulated loan owners) in the course of Q.4 2018 are performing restructures. The Director of Consumer Protection at the Central Bank informed the Committee on April 2nd that there are currently more than 110,000 restructured arrangements on PDH loans. She added that in 87% of those cases the borrowers are meeting the terms of the arrangements and that these arrangements *'are working for those borrowers'*.

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

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

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

Are these considered NPL's or not? A key question, however, is why loans with such long term restructure arrangements in place would be sold on in the first place? If sales of such loans are allowed, what was the point of the extensive Mortgage Arrears Resolution Process (MARP) under the Bank's Code of Conduct on Mortgage Arrears (CCMA) which the Central Bank actively promoted and which many borrowers (and lenders) sought to comply with. Is it that the ECB considers these performing long term restructures to be non-performing loans?

We note the comment from the Deputy Governor that it is not for the Central Bank to stop the sale of either a performing or a non-performing loan.

Enhanced protection for Consumers:

Legal protections need to be enhanced for consumers whose loans have already been sold to funds. In addition to putting the Code of Conduct on Mortgage Arrears Code on a statutory basis, this Bill can enhance protection for consumers by incorporating the 6 recommendations made in our original submission which for ease of reference are replicated here.

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

Relevant Human Rights Standards and Impact assessment

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

Section 42 of the Irish Human Rights and Equality Commission Act 2014 requires all government departments and statutory bodies like the Central Bank to consider in the performance of their functions how they will advance equality for the groups protected under the equality legislation and how they will protect the human rights of all citizens[2].

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

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

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

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

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

[2] in regard to the human rights obligations in the Constitution and in domestic legislation and with regard to human rights treaties and conventions that have the force of law in the State.

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

We note that that the UN Special Rapporteur on Housing, Leilani Farha has sent a letter to the Irish government, and was critical of the lack of regulation of vulture funds.

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

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

Myself or my colleague Paul Joyce, FLAC’s Senior Policy Analyst are happy to answer any questions you may have.

FLAC would also be open to attending this committee again or meet with any individual members and discuss these issues. Thank you.