NO CONSENT, NO SALE BILL 2019 [PMB]

WRITTEN SUBMISSION ON BEHALF OF NEW BEGINNING

20th MARCH 2019

INTRODUCTION

New Beginning is authorised by the Central Bank of Ireland to provide Debt Management Services in the State and has aided and advised borrowers continually since 2011. These services include representing borrowers in their engagement with lenders (both banks and funds).

NB is also engaged with the Personal Insolvency system.

NB has in-house lawyers and a partner law firm and provides representation to clients in Court both in the context of repossession proceedings and under the Personal Insolvency Act.

From our extensive experience in the sector we are confident of the following:

- There have been minimal home repossessions in the State since 2008 and there is no reason to expect a change to this pattern.
- The protections available to borrowers are robust and effective and apply equally to loans on bank and non-bank balance sheets.
- Borrowers whose loans are transferred or sold to non-bank lenders are not placed at any disadvantage and are, in some cases, advantaged.
- The transfer and sale of non-performing loans to non-bank lenders is a necessary part of the process of remediation of banks and borrowers post the crisis in 2008.
- The No Consent No Sale Bill, if enacted, will make no positive contribution to a resolution of the arrears crisis nor will it assist borrowers in difficulty.
- The No Consent No Sale Bill will, if enacted, have seriously negative consequences for the banking system, both now and into the future; for the taxpayer as investor in the banking system; and for borrowers generally, with a particular disadvantage accruing to the less well-off population hopeful of acquiring homes into the future.
- Public debate around the issue of sale of loans has been one sided and often marked by wild assertions which have no evidential basis.

PART A: POLICY AND LEGISLATIVE ANALYSIS

THE 'POLICY ISSUE' AND THE POLICY LEGISLATIVE CONTEXT

It is assumed that the problem sought to be addressed in the Bill relates to a perceived disadvantage suffered by borrowers whose loans have been sold to non-bank lenders.

There has been extensive commentary around perceived disadvantage accruing to borrowers whose loans have been sold to non-bank entities much of it couched in extreme terms.

It is true that the sale of loans to non-bank entities has increased in recent times and is likely to continue over the coming months and years.

There is no evidence to support the existence of the underlying issue the Bill seeks to address – that is, that borrowers whose loans are sold to funds are disadvantaged.

The primary disadvantage postulated by opponents of non-bank lenders is that they are primarily interested in a repossession and sale of the underlying property. This is not true and is not borne out by the evidence. As a matter of fact, a remediated and now performing loan is a more valuable asset than a property.

It follows that the business model of the fund is as follows:

- Acquire non-performing loans
- Remediate the non-performing loan to a performing loan
- Sale or securitisation of the performing loan

Repossession exists as a last resort and only where the borrower has failed to co-operate or where a resolution is not deemed possible.

In 2018 the Central Bank reported on the effectiveness of the Mortgage Arrears Resolution Process as it applied to Unregulated Loan Owners (ULO) and Retail Credit Firms (RCF).

The primary findings were as follows (emphasis added):

- 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.

- Both regulated lenders and Credit Servicing Firms (CSFs) acting on behalf of ULOs continue to put in place arrangements for borrowers who engage with this process.

- **There is no evidence that the CSFs inspected did not seek to engage with borrowers in arrears**. The inspected CSFs have frameworks in place to support engagement with borrowers in arrears, as required by the Report on the Effectiveness of the CCMA in the context of the Sale of Loans by Regulated Lenders Central Bank of Ireland Page 7 CCMA.

- **The Central Bank did not identify any material breaches of the CCMA by these firms**.

- **Where a loan is sold to a ULO, existing arrangements with borrowers are honoured by RCFs/CSFs (acting on behalf of a ULO) until the agreed term of the arrangement comes to an end.** Borrowers may then be offered a different arrangement from the suite of arrangements considered by the RCF/CSFs (acting on behalf of the ULO), within the MARP framework.

- **There is no evidence that borrowers whose circumstances have not changed are being moved off existing arrangements by CSFs (acting on behalf of ULOs) during the term of the arrangement**.

- **On average, ULOs are considering more arrangements within their suite of arrangements under the CCMA compared to banks and RCFs**. In terms of the actual arrangements being agreed with borrowers, banks and RCFs are putting in place a more diverse range of arrangements than ULOs.

- RCFs and ULOs account for a significantly higher proportion of accounts in arrears and in the 720 DPD category. This could account for differences in the range of arrangements that ULOs are actually putting in place.

- Over the period Q1 2016 to end Q1 2018, banks put in place a 50/50 split between temporary and permanent arrangements (referred to in this Report as short-term and long-term arrangements respectively). RCFs put mostly long-term arrangements in place, while two-thirds of the arrangements put in place by ULOs were short-term.

- Based on the number of properties taken into possession by banks, RCFs and ULOs over the period Q1 2016 to end Q1 2018, there is no material difference in the level of repossession activity by ULOs compared with regulated lenders. Of borrowers in mortgage arrears with no restructure arrangement in place, 47 per cent are deemed not co-operating by their regulated lender or CSF (acting on behalf of a ULO). This increases to 67 per cent for cases within the 720 DPD category. In order to avail of the statutory safeguards available through the CCMA and the MARP, engagement between borrowers and regulated lenders or CSFs is critical.

In fact, as per the report of the Central Bank, it appears that borrowers whose loans are transferred are in a better position than defaulting borrowers whose loans remain on the balance sheets of the banks.

In any event, and as a matter of law, a borrower whose loan has been sold or transferred is entitled to the same protections as existed before the transfer or sale and has access to the same resolution mechanisms.

Borrowers have the same rights under the Central Bank's Code of Conduct on Mortgage Arrears and have full access to resolutions available under the Personal Insolvency Act.

Where there no disadvantage suffered by borrowers it is difficult to see what the problem or issue is that the Bill seeks to address. One is therefore forced to conclude that there is no actual problem sought to be addressed and that the promulgation of the Bill is for political purposes.

While politics is a matter for politicians it must be noted that legislation of the sort contained in this Bill can have unintended consequences and could do serious harm to either the intended beneficiaries of the Bill and/or to the wider community more generally.

What is the current policy and legislative context, including are there any proposed Government Bills or general schemes designed to address the issue? Have there been previous attempts to address the issue via legislation?

There have been a wide range of legislative and other measures adopted to address the issue of mortgage arrears in general. Those measures apply equally to borrowers whose loans are held on the balance sheets of banks and non-banks alike.

The terms of MARP are well understood.

However, the development of the Personal Insolvency regime and, in particular the jurisprudence developing under section 115A of the PIA Act 2015 provides very powerful protections to home owners whose loans are in default and who co-operate with the system.

Since the beginning of this year the High Court has handed down a series of judgements where the Courts are now applying a very borrower favourable interpretation of the Personal Insolvency Act with the specific intention of protecting home owners by directing the restructure of loans on a sustainable and long-term basis.

If a borrower can sustain a loan based on the current market value of the home, payable over the longest period feasible and at the lowest reasonable interest rate, a Court will

enforce such a regime on the lender (bank or non-bank alike)– even against the lender's wishes.

The irony is that borrowers whose loans are with non-bank lenders are in a better position than those whose loans are with banks.

This is because the primary defence a lender can have to an order under section 115A of the Personal Insolvency Act is that the terms are unfairly prejudicial to it.

However, as the funds have acquired loans at discount (and will not reveal the nature of the discount) they are less able to make an argument of unfair prejudice as a result of which the order under section 115A cannot be resisted.

This Bill could therefore have a negative effect on the operation of section 115A.

Is there a wider EU/international context?

Assume the European Central Bank, as regulator of the financial system, would need to be consulted given the potential downside / systemic risk for the system if the Bill were enacted.

IMPLICATIONS AND IMPLEMENTATION OF THE BILL'S PROPOSALS

POLICY IMPLICATIONS / IMPLEMENTATION

How is the approach taken in the Bill likely to best address the policy issue?

No advantage will accrue to borrowers in arrears and in fact, the Bill would be detrimental to both borrowers in arrears and the borrowing population in general.

Where banks are prevented from selling loans (which will be the effect of this Bill) there will be adverse effects on the banking system in general which will, at the very least, result in less and more expensive credit available to a new generation of home buyers.

The inability to sell loans will inevitably deter new entrants into the market with concomitant negative effects on competition in the market place.

At present the few entities providing home loans in Ireland operate in an oligopolistic market. Only competition can reduce the adverse consequences for consumers. The Bill in question will make competition in the market far less likely.

Irish borrowers are paying excessive interest rates on home loans in comparison with other EU borrowers. This is due to a combination of lack of competition in the market and the

difficulty in enforcing against defaulting borrowers both of which factors will be exacerbated by this Bill.

What alternative and/or additional policy, legislative and non-legislative approaches were considered, including those proposed by the Government and what, does the evidence suggest, are the differences between and the merits of each?

It is true that certain borrowers have unsustainable loans which will as matters stand result in the loss of the home. This is suboptimal – though in some cases necessary.

The approach thus far to put in place protections for borrowers and to force lenders to look at resolution options has been very successful. Over 110,000 mortgages have been restructured.

The Personal Insolvency system is a unique system which provides Irish borrowers with the most robust protections in the world.

A growing Mortgage to Rent regime – especially that part supported with private capital is also very welcome.

There is also a market for long term 'patient capital' which may yet emerge.

There are borrowers whose age militates against long term restructures. Many people who borrowed in 2007 were in their 40s or 50s at the time meaning they are now in their 50s or 60s.

The whole basis of mortgage lending is payment over long periods of time.

A patient form of capital might allow interest only or other reduced payments over the very long term which would give sustainability to this group.

It is important to understand that banks cannot provide this type of capital. Their prudential rules provide that loans should be repaid within term.

A new alternative provider of capital could acquire these loans and then permit the borrower to remain in occupation paying interest only over the long term matching a demand for long term low returns in the market place.

This Bill will make this solution less possible or even impossible.

Each borrower needs to be addressed individually and provided with a wide range of often highly subjective information – such as the likely effect on them of the transfer. Any borrower can object so that the sale of a portfolio of loans is rendered impossible.

Other resolution mechanisms can be developed but will only be developed by funds or non-bank lenders.

Again, ironically this Bill would seriously impair this possibility for no benefit whatsoever.

Are the Government sponsored Bill (or General Schemes) which are related to and /or broadly aim to address the same issue? Are there merits in combining them?

No

What are the specific policy implications of each proposal contained within the Bill (environment / economic / social / legal)?

There is a single proposal in the Bill which may have the following implications if enacted:

Economic

By making it impossible for banks to sell non-performing loans the consequences will include:

- Damaging the viability of banks and thereby undermining the State's investment in them with negative consequences for the tax payer
- Curtailing competition in the sector with negative consequences for future borrowers and home owners especially around interest rates and terms of lending
- Increasing the hegemony of the pillar banks to almost monopolistic position with negative consequences for borrowers generally
- It is also possible that the effect of this Bill would be to inhibit the process of securitisation. This is a system whereby banks and funds can refinance income streams from a loan book to create further funds to invest by way of more loans. This would need to be explored in detail as an impact on the ability of banks to gain access to capital could have serious effect on the viability of banks into the future and on their models with obvious consequences for the economy more generally.

Social

- Restricting lending to enable home ownership has a greater negative effect on the less well off in society leading to greater inequality. At present it is cheaper in cash terms to borrow than to rent. For example, a home in Dublin 24 valued at €250,000 would, if a 95% LTV mortgage was provided at 3% over 30 years cost €1000 per month. The same home will cost €1900 per month to rent.
- It is an established fact that access to home ownership has both a positive and equalising effect on society – something that this Bill would undermine without making any positive contribution. This would be more acute if the effect of the Bill has a more systemic effect on the banking system as described above.
- If the Bill presents a systemic risk to the financial system, it is possible that banks would require further support from the State. This would be highly controversial as

it would inevitably involve transfer of funds from socially desirable aims (hospitals, schools and the like) to supporting banks.

Legal

- It is possible that the Bill is unconstitutional in seeking to interfere in private contracts on an ex post facto basis. This is particularly true when it is so difficult to point to any economic, social or other benefit that arises from the Bill.
- If enacted it is likely that the Bill by reason of the vagueness of its terms require substantial interpretation from the Courts leading to unnecessary and expensive litigation.

Has an impact assessment (environmental/ economic /social / legal) been published (by Government or a third party) in respect of each proposal contained within the Bill?

No and this would be very necessary before enacting this Bill given the systemic risk it might pose to the banking system.

Could the Bill, as drafted, have unintended policy consequences, if enacted?

Yes, as referenced above.

Has the Committee taken due consideration of the opinion of the European Central Bank (ECB) on the Bill, if applicable?

Unknown but very necessary.

How would the Bill, if enacted, be implemented?

Very unclear

Are there appropriate performance indicators which the Department, or whoever is ultimately charged with implementing the Bill, can use to assess the extent to which it meets its objective? Does it include formal review mechanisms?

No

COST EVALUATION

Will there be enforcement or compliance costs?

Yes

What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer?

The enactment of this Bill will have a serious effect on the banking system. Given the exchequers ownership in AIB, PTSB and BOI it is likely that the investment will be undermined.

Without further analysis it is difficult to be definitive but there is at least a chance that the Bill would adversely affect the Banks' funding mechanisms – which could challenge the viability of those institutions in a more general way. At the very least this will impair their ability to lend into the economy with consequent adverse implications for activity and tax revenue.

Put simply the Bill could have very far reaching and negative implications for the financial system, as a whole.

Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?

No

PART B – LEGAL ANALYSIS

Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?

There must be questions over the constitutionality of the Bill. In effect it overrules a long standing right to sell debt which has been extant since 1877. In addition, in each mortgage document there is likely an agreement whereby the mortgagee can assign its right.

Where the legislature intervenes in private contracts of this nature there must be good reason to do so and a general provision of wide reach is more likely to be found in beach of the Constitution.

Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)?

Not applicable

Is there ambiguity in the drafting which could lead to the legislation not achieving its objectives and/or to case law down the line?

The Bill suffers from serious ambiguity such as to make the operation of the Bill unclear. It would be very likely that such a Bill if enacted, and assuming it were to pass the test of constitutionality, that it would be subject to multiple suits in which a Court would be required to interpret its meaning.

Based on a high-level review on the Bill I note some issues with the Bill below in red.

Interpretation

Section 1.

In this Act—

"borrower" means a person, or where there is more than one person, each of such persons, to whom a lender advances a housing loan;

What if one borrower agrees to a transfer and the other does not? Does it require unanimity?

"Central Bank" means Central Bank of Ireland;

"lender" means any regulated financial service provider within the meaning of the Central Bank Act 1942 or any company, partnership, business or other entity engaged in the provision, management or administration of dwelling house mortgage loans;

Why are entities engaged in the management of loans being defined as lenders?

"Minister" means the Minister for Finance.

Conditions for the transfer of residential mortgages

Section 2.

(1) A loan secured by the mortgage of a residential property shall not be transferred without the written consent of the borrower.

What does the word transfer mean? For example, if a bank was intending to restructure its corporate nature or if a bank was acquired it may mean that the loan in question would be

the subject of a transfer from one entity to another. Does this mean that section 2(1) is invoked? This would have huge implications for lenders in the State. It is noted that there is an exemption for transfers within a Group – though this is vague.

It seems also that the intention is that this Bill will apply to both Principal Private Residences and to Residential Investment Properties or investment properties.

(2) When seeking consent from either an existing or a new borrower the lender must provide a statement to the borrower containing sufficient information in order to make an informed decision.

What does the phrase sufficient in this context mean and who determines whether the information is sufficient this?

What is an informed decision in this context?

(3) The statement provided pursuant to subsection (2) must be approved in advance by the Central Bank and shall include:

(i) a clear explanation of the implications of a transfer including with respect to the borrower's membership status where the lender is a building society;

and

(ii) how the transfer might affect the borrower.

Is this not hugely subjective and vague?

Why isn't this fleshed out in the Bill itself? If it was it is highly likely that it would be established that there is no effect - which would then render the whole purpose of the Bill defunct.

Who determines what the affect might be? Is this open to challenge in the Courts?

(4) Each borrower shall be approached individually and shall be given a reasonable time within which to give or decline to give their consent.

What is the meaning of the word approached? What happens if consent or non-consent is not forthcoming?

Lender to act as agent of transferee

Section 3.

In circumstances where a consent is being sought under this Act and it is intended that there may be an arrangement whereby the original lender will service the mortgage as an

agent of the transferee, the lender shall confirm that the transferee's policy on the handling of arrears and in the setting of mortgage interest rates will be the same as that of the original lender, and that the original lender will handle arrears as its agent.

It is very unclear as to what policy on handling arrears and setting interest rates means and whether it is intended that this can change over time. For example, is the transferee entitled to its own policy after a period of time or does it need to be the same as the original lender for the duration of the loan and how is this to be determined?

Loss of control

Section 4.

Where the lender in the ordinary course of business would no longer have control in relation to:

(a) the setting of interest rates; and/or

(b) determining the conduct of relations with borrowers whose mortgage payment are seriously in arrears.

The lender must seek the borrower's consent notwithstanding any previous consent the borrower has given.

This is presumably to cover the usual situation where the borrower has already given consent to the transfer at the date of executing the contracts in the first place.

Information to be provided by the lender

Section 5.

A lender who is seeking the consent of a borrower to the transfer of the borrower's mortgage pursuant to section 2 of this Act shall provide the borrower with the following information:

(i) the name and address of the intended transferee, and of any holding company applicable;
(ii) the relationship, if any, between the lender and the transferee;
(iii) a description of the intended transferee and of its business, including how long it has been in operation, and details of its involvement in the management of mortgages;

(iv) details of the policies and procedures which will apply for the setting of mortgage interest rates and for the making of repayments if the transfer takes place;
(v) confirmation that in the absence of a specific consent the existing arrangements will continue to apply.

The obvious difficulty with this section is that the intended transferee will not exist when the consent of the borrower is required before the transaction can take place. An intended transferee would have agreed pricing for example – how can this be achieved when the vendor does not a power of sale?

Terms of transfer agreement

Section 6.

The terms of a transfer agreement pursuant to this Act shall require the transferee to:

(i) allow transferred mortgages to be redeemed without charging a redemption fee, unless permitted under section 6 of the Building Societies Act 1989;
(ii) continue any existing mortgage protection insurance arrangements;
(iii) allow the borrower arrange their own insurance;
(iv) adhere to the principles of section 26 of the Building Societies Act 1989 where applicable;
(v) provide to the relevant authorities the mortgage statistics previously provided by the original lender

Exemptions

Section 7.

In this section "serious business difficulties" shall be interpreted as difficulties of a gravity that the Central Bank determines that a lender is failing or likely to fail. The provisions of this Act shall not apply to:

(i) a transfer connected with the making of further advances to the borrower;
(ii) a transfer of engagements in whole or in part effected under Part X of the Building Societies Act 1989;
(iii) a winding up effected under Part XII of the Building Societies Act 1989;
(iv) a transfer within the same group or a transfer arising from serious business difficulties, where the lender satisfied the Central Bank that, in the circumstances, the application of this Act would not be appropriate and that the transfer is being affected on terms which are just and equitable and which a borrower would reasonably be entitled to expect.

Would there not be serious implications for a lender if the Central Bank was required to make a finding that a lender is failing or likely to fail? How could this be

done without fatally undermining the institution and perhaps causing a run on any deposits it holds or on the system in general? If this is the case it makes the exemption impossible to operate with serious consequences for the system in general.

Are there serious drafting deficiencies or technical drafting errors (e.g. incorrect referencing to Acts etc.)?

See above

Are there potential unintended legal consequences which may stem from the PMB as drafted?

See above

Are appropriate administrative and legal arrangements necessary for compliance and enforcement of the provisions of the Bill included? (e.g. if draft Bill contains a prohibition, whether the necessary criminal sanctions - including the class of fine - are included).

This would appear to be a matter for the Central Bank under the Bill.

CONCLUSION

It is respectfully submitted that the Bill suffers from fundamental flaws in:

1. The wrong it seeks to remedy does not exist nor is there any evidence that it exists. If anything, the evidence is to the contrary. It should be noted that the Bill as drafted applies both to homes and to investment properties.

2. There are negative consequences to interfering in the banking system by making the transferring or assigning of loans effectively impossible. This will have implications for the State's investment in the banking system, for pricing around new loans, for investment in the economy in general and for social cohesion - where a large group of young and less well-off people will be cut off from home ownership.

3. It may be that the consequences of the Bill are more far reaching for banks' access to funding that might appear at first sight. If the Bill has the effect of preventing securitisation that, in turn, may have adverse effects on the financial system itself with obvious negative implications for the economy and the exchequer.

4. The Bill would likely have an adverse effect on the introduction of new and creative forms of resolution to impaired loans.

5. The operation of the Bill, were it to be enacted, would be hugely problematic with highly individual and subjective criteria being applied to what are commercial decisions. It would make the sale or transfer of impaired loans impossible.

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