Oireachtas Committee on Finance etc., December 13th 2023.

OPENING STATEMENT of The Master of the High Court, EDMUND HONOHAN, S.C.

OPTIONALITY in the DIRECTIVE

Apparently, the Minister has decided NOT to incorporate any of the *optional* measures in ease of distressed borrowers which were suggested by the EU, but this decision is not his to make. It is legislative in nature and Article !5.2 of the Constitution is engaged. In short, it is a matter for the Oireachtas and primary legislation.

Further, the Minister's decision was made, not by himself, but by his officials, acting in line with the pre-supposed authority which relies, for legality, not on formal delegation, but on the "Carltona" principle.

As a Member State of the EU, Ireland's measures to implement a Directive cannot be validly effected by a public servant, however senior. "Carltona" does not stretch that far.

The Committee should know that the general view is that officials in Finance are locked in the mindset of "moral hazard". This is illustrated yet again by (a) by the two year delay in actioning the 2021 Directive (the amendment to the 2014 Directive by Article 28A could even have been fast-tracked as a one-liner, if anyone cared enough), and (b) by the general tone of the questions raised in the public consultation regarding the options. It is there presupposed (but on what authority ?) that Ireland will not respond positively to the suggestions. Lobby groups' fingerprints are plain for all to see.

HARD LAW NOT TRANSPOSED

Of even greater concern is the proposal to treat the "hard law" Directive as transposed fully by creating new "soft law" guidelines coupled with Central Bank monitoring of the "explain or comply" variety.

The Directive requires Ireland to oblige credit purchasers to start offering forebearance. If it's to be a legal obligation, failure to comply must end with a penal sanction.

It is to be noted also that, where the Central Bank is the agency charged with the implementation of the Directive (which will be "directly effective" come the end of this coming December) failure by the Bank to enforce the "obligation" aforesaid will not be shielded from suit or liability, the provisions of the Central Bank Acts notwithstanding.

TITLE TO COLLATERAL

Committee members will have noted the Central Bank's statement (letter to me 9th June '22) that "*questions of title by reference to land registration laws fall outside the competence of the Central Bank*".

Is this a skillset problem, or what ? Surely the prudential remit of the Bank requires detailed overview of balance sheets, of risk management, of capital adequacy ? (Especially for proprietary trading desks.) The bottom line for a bank's loan portfolio shouldn't be audited on the strength of a bank's stated valuation, without checking legal title ? How else do you weigh the risk of contagion ?

Equally concerning for me is the fact that, my correspondence notwithstanding, the Central Bank appears to be uninterested in the topic and unlikely, apparently, to undertake any investigation. The regulator is taking the regulatee at its word, and such naïve ("light touch") supervision is now (apparently) also proposed in respect of credit purchasers and servicers.

[This 'no questions asked' attitude is shared with the CRO, the Land Registry, and the Charities Regulator which rubberstamps the activities of the "charities" which are the shareholders in "orphaned" private capital intermediaries. These agencies all "got the memo". Revenue is an honourable exception.]

UNFAIR TERMS IN CONSUMER CONTRACTS

Statutory Instrument 14 of 2020 designates the Central Bank as a "competent authority" for the enforcement of the EU's 1993 Unfair Consumer Contract Terms Directive in order to ensure compliance with "*laws enhancing the protection of consumers' economic interests*." Who knew ?

Does the Central Bank know, or is it a "RINO" – a regulator in name only !

Here's a question you should put to them: what reason do they consider "valid" for the purposes of subparagraph (j) of paragraph 1 of the Annex of Terms referred to in Article 3(3) of the 1993 Directive, as scoped at subparagraph 2(b) of the same Annex ?

Or, perhaps you could put it more succinctly thus: *Is there ever a "valid" reason for supernormal profits* ?

Here's another one for you: Is it "in good faith" for a loan originator to use the assignment option to sell in market covert (sic) to a connected but unregulated purchaser ? How can a borrower's consent be considered as fully informed ? Shouldn't the borrower at least have an implied call option at the same discounted price ? (Or would that be "too administratively difficult", as we were informed when the portfolio sales were commenced around 2012 ?)

Perhaps the borrower's "blind" consent to assignment is covered by subparagraph 1(p) of the Annex above referred to and, therefore, "unfair" as defined ?

SOME QUESTIONS ABOUT FOREBEARANCE AND PROPORTIONALITY

Compliance with the new Directive will be assessed by reviewing outcomes case-by-case.

1. Will the servicer, and the purchaser, and the originator, all be obliged to complete SFS-style recitals of loan history including pre-assignment facts as recorded on their files ?

2. Will the "financial profile" of the credit purchaser be interrogated ?
(see re Hayes, a debtor, 2017: the credit purchaser *"is not a lender and accordingly the test of unfair prejudice regarding its interest must be seen in the light of investment returns and not the cost of the capital needs of the creditor in the future."* Baker, J.)

3. Will the proportionality be assessed by reference to the face value of the debt, or the book value ?

4. Will the servicer have to fully account for any alleged RSG-style engineering of default ?

5. For the assessment of "proportionality", will the purchaser's cost of funds be adjusted for tax avoidance interest limitation rules ?

6. Should the charitable status of the ownership vehicle of the credit purchaser be subject to revocation if a credit servicer acts without regard to a borrower's rights to fair treatment and proportionate forebearance ? Is the Central Bank competent to override the Charities Regulator on this point, and/or to determine the liabilities of the shadow SPV directors ?

THE "NEW MORATORIUM"

When I wrote to Oireachtas members last month, I described the legal changes as a "New Moratorium", and perhaps I should explain.

The Directive obliges Ireland to require credit purchasers to forebear. It is only when *bona fide* efforts to resolve matters have failed that proceedings to obtain recovery of collateral can commence. Judges need to be told this. It is EU law, but they still need to be told. Will the Oireachtas tell them ?

Edmund Honohan
The Master of the High Court.