SUBMISSION TO THE RETAIL BANKING REVIEW

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1. Focus of this Submission

1.1 At policy level, a clear willingness has been displayed towards ensuring the existence of an optimal framework for a flourishing retail banking sector in the State.[2] It is in the context of this willingness that this Submission is made,[3] which largely falls within Q 12(b)[4] and Q 21[5] of the Retail Banking Review Public Consultation.[6] While it is appreciated that this Submission is of greater length that may initially be viewed as desirable, this degree of detail is included so that relevant background information is provided (see, eg, paras **[4]** (background relating to lenders under the current regulatory regime) and **[5]** (the main current credit-related legislation, regulations and Codes)) and applicable issues appropriately highlighted. This is with a view to pressing, primarily in the interests of consumers, SMEs and retail lenders of all forms, the imperative for streamlining and consolidation of the existing regulatory framework applicable to consumer and SME credit.

1.2 From a consumer protection perspective, recent important regulatory developments have occurred in the State expanding the authorisation and some related conduct of business requirements applicable to the provision of credit. These have included the expansion of the financial services regulatory regime to encompass indirect credit and BNPL consumer hire and hire-purchase arrangements (including personal contract plans (PCPs)).[7] Legislation is currently before the Oireachtas for the purposes of facilitating the imposition of a cap on borrowing costs under high-cost credit/moneylending arrangements.[8] A proposed senior executive accountability regime applicable to the financial services sector is also currently before the Oireachtas,[9] with its objective to: 'achieve better outcomes for consumers, to improve the sustainability of the financial system and to drive higher standards of behaviour and governance in financial services firms'. [10]

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[2] See *Statement of Strategy for 2021-2023* (Department of Finance, 2021) which includes the strategic policy goal of ensuring a 'well regulated, sustainable banking and financial sector'. Policy areas in which the Department of Finance has committed to deliver as referred to in the Statement include: 'shaping future banking and financial services policy so as to best suit a modern vibrant economy that supports innovation and sustainability'. In addition, the current whole of government strategic plan grounding *Ireland for Finance* to 2025 (Government of Ireland, January 2022) 17 identifies as a core strategic goal the development and enhancement of the operational environment for the international financial services sector in Ireland.

[3] In addition to addressing measures which could improve consumer and SME protection in the credit arena, this Submission also advocates, where relevant, for a limitation in the application of certain aspects of the existing or proposed regulatory framework which either increases - or has the potential to increase - outside acceptable market norms, risks for retail lenders in conducting their business. Examples are the statutory cause of action given to all customers against regulated financial services providers for breach of an enormous range of financial services legislation under s 44 of the Central Bank (Supervision and Enforcement Act) 2013, which, it is submitted, is too widely cast (see para **[10]**). See also **Appendix E** in relation to the application of certain aspects of Part 4 of the Consumer Rights Bill 2022 to financial services and, under Part 6 of that Bill, the prohibition in all circumstances of a contractual term excluding or hindering the consumer's right to exercise a legal remedy, which may have unintended consequences including precluding any restrictions on the exercise by a consumer of set-off.

[4] Q 12(b) asks what the main risks to consumers are in the area of consumer credit - see *Retail Banking Review Public Consultation* (Department of Finance, May 2022).

[5] Q 21 asks for the bringing to the attention of the Department of Finance any other issues relevant to the Terms of Reference - see *Retail Banking Review Public Consultation* (Department of Finance, May 2022). Specific tasks in the *Retail Banking Review Terms of Reference* (Department of Finance 16 November 2021) which are relevant to this Submission include a consideration of: (a) the current landscape for the provision of retail banking services in Ireland; (b) the business model for retail banking in Ireland including regulatory requirements in the context of wider EU and international banking developments; (c) the post Brexit financial landscape, including any new banking entrants; (d) potential consequences for consumer protection (including for existing and future customers and for vulnerable customers); and (e) options to develop the mortgage market, including the need to make the Irish market more attractive to new entrants.

[6] See also para **[9]** dealing with the regulation of SME lenders, referred to in Q 11 of the Retail Banking Review.

[7] See Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022, commenced with effect from 16 May 2022. A reference in this Submission to any legislation, regulation or statutory code is a reference to the relevant measure as amended.

[8] Consumer Credit (Amendment) Bill 2022 (22 June 2022).

[9] See General Scheme of Central Bank (Individual Accountability Framework) Bill 2021 (Department of Finance, July 2021).

[10] *Report on Pre-Legislative Scrutiny of the General Scheme of the Central Bank (Individual Accountability Framework) Bill 2021* (Joint Committee on Finance, Public Expenditure and Reform and Taoiseach, April 2022) 8.

1.3 **Nevertheless, an integral element of a thriving framework for the retail banking sector is a conduct of business[11] regulatory regime for consumers[12] and SMEs[13] that is up to date in reflecting technological advances and the manner in which financial services business is conducted, relatively coherent, does not impose conflicting requirements, is not excessively complex and has at least some degree of transparency for the audience it seeks to protect.**

1.4 **It is submitted that the current conduct of business regulatory regime in the State has some way to travel before it can be shown to embrace these elements.** (See, eg, para **[7]** of this Submission dealing with the disparate strands of regulatory requirements currently applying to the making of a consumer mortgage loan; for particularly complex and/or conflicting regulatory provisions, see also **Appendices A-C**.)

'Outcomes-focused' conduct of business financial services regulation

1.5 The stated regulatory trend is to place a far greater emphasis on 'outcomes-focused' regulation, than had been the case in the past, reported to have involved a 'regulatory philosophy emphasising process over outcomes'.[14] The Central Bank has been clear that it views compliance as the minimum standard and that regulated entities need to move - and demonstrate that they have moved - 'beyond the minimum legal requirements … to delivering meaningful outcomes for consumers' that are in their best interests.'[15] This of course is predicated on compliance by regulated firms with applicable rules - as would be the minimum expected in a State that values the rule of law. But if these rules are imposed under a conduct of business regime that is at least in some respects fragmented, labyrinthine, conflicting and siloed - as set out further in this Submission - then this minimum expectation may not in fact be borne out in reality. Moreover, a regime of this nature may encourage a degree of mechanistic 'box-ticking', thereby potentially contributing to poor consumer outcomes.

1.6 For senior management of regulated firms, these issues assume added relevance in light of the proposed imposition of a legal duty on persons providing senior executive functions to take reasonable steps to avoid their firm committing a breach of financial services legislation in relation to the areas of the business for which they are individually responsible and the proposed extension of the administrative sanctions regime to breaches of this duty.[16] Moreover, it is proposed that under the Consumer Rights Bill 2021, an implied contractual term will be incorporated into consumer service contracts (which is proposed to extend to contracts in the

[11] This Submission deals primarily with the regulatory framework in the State relating to the *conduct of business* of cash lending from lenders (other than money lenders/high-cost credit providers, credit unions and An Post) to consumers and SMEs - ie, the regulatory framework governing the direct engagement between lenders and customers in these categories - rather than authorisation requirements imposed on regulated firms for prudential reasons.

[12] Where referred to in this Submission, a 'consumer' is generally a natural person acting outside his or her trade, business or profession. The wider category of 'consumer' to which the Consumer Protection Code 2012 (CPC 2012) applies is any natural or legal person but limited to a corporate entity having an annual turnover (on a group or stand-alone basis) of €3 million or less in the previous financial year. The CPC 2012 also includes credit-specific provisions applicable to 'personal consumers', being a natural person acting outside his or her business, trade or profession.

[13] Where referred to in this Submission, an 'SME' in broad terms falls within the category of a small and medium enterprise employing fewer than 250 persons with an annual turnover up to €50 million and/or a balance sheet value up to €43 million, taking appropriate account of linked or partner enterprises.

[14] *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008 - A Report to the Minister for Finance* (Governor of the Central Bank, May 2010), para 1.9.

[15] *Consumer Protection Outlook Report* (Central Bank of Ireland, February 2016) 14.

[16] See General Scheme of Central Bank (Individual Accountability Framework) Bill 2021 (Department of Finance, July 2021).

financial services sector) that the trader supplies the service in accordance with any applicable laws.[17]

1.7 **Now over 25 years after the enactment of the Consumer Credit Act 1995 - which was in itself an innovative piece of legislation involving protections going well beyond those that were required by the underlying Directives it implemented[18] - the State should grasp the opportunity for a 'best in class', streamlined and consolidated reformed consumer/SME credit regulatory framework.[19] This could act as a calling card both for existing and potential new entrants as to the reasoned and orderly manner in which the State imposes – in accordance with EU law and subject to other applicable constraints – clear and meaningful conduct of business regulatory requirements on incoming and existing banks and financial services firms in the sector that are aligned with strong consumer outcomes. Such an approach should, ultimately, reduce the costs that may be expected to inevitably arise from navigating the current over-complicated framework.**

2. Implementation of EU consumer credit measures by way of secondary legislation

2.1 To a certain extent, the piecemeal nature of the current regulatory regime relating to consumer credit arises from a trend in the transposition into Irish law of EU Directives dealing with consumer law by way of secondary legislation - ie, by way of Ministerial regulation - pursuant to the European Communities Act 1972, [20] rather than by way of primary legislation. The two main legislative consumer credit conduct of business measures emanating from the EU in recent years - being the Consumer Credit Directive 2008[21] and the Mortgage Credit Directive 2014[22] - were each implemented into Irish law by the EU Consumer Credit Regulations 2010[23] and the EU Mortgage Credit Regulations 2016,[24] respectively.

2.2 There had been some scrutiny by the Oireachtas of the EU measures ultimately culminating in the Consumer Credit Directive 2008 and the Mortgage Credit Directive 2014. For example, in 2008, the then Oireachtas Joint Committee on European Affairs reviewed in detail a European Commission White Paper relating to the integration of EU residential mortgage markets which

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[1o] See Consumer Rights Bill 2022 (1 June 2022), s 81(c). For further comments in relation to the Consumer Rights Bill 2022 and its potential impact on financial services, see **Appendix E**.

[18] When transposing the Consumer Credit Directive 1987, the opportunity was taken by the State to impose consumer protection standards in areas not covered by the Directive, such as those relating to housing loans, communications with consumers and the provision of notice prior to taking enforcement action. Moreover, the most formidable weapon in the artillery of remedies available under the Consumer Credit Act 1995 (CCA 1995) is that of unenforceability of the underlying credit agreement should what is viewed as fundamental information-related requirements of the CCA 1995 be contravened. This remedy was not provided for in the Consumer Credit Directive 1987 and was imposed under the CCA 1995 as an additional national protection. In addition, the Consumer Credit Directive 1987 excluded from its ambit credit agreements involving amounts less than 200 ECU or more than 20,000 ECU; these monetary limits were not reflected in the scope of credit agreements to which the CCA 1995 applies.

[19]The imperative for consolidation of consumer credit requirements has been pressed for some years - see *Redressing the Imbalance. A study of legal protections available for consumers of credit and other financial services in Ireland* (FLAC, 2014), para 1.3.3.4, p 14-15 and B1 p 179, the principal author of which is P Joyce, Senior Policy Researcher. See also Barrett, 'The New Consumer Credit Regulations' (2011) 10(1) Hibernian LJ, 61-81.

[20] See European Communities Act 1972, s 3(1).

[21] CCD 2008 (Council Directive 2008/48/EC) (CCD 2008 or Consumer Credit Directive 2008).

[22] Mortgage Credit Directive (Council Directive 2014/17/EU) (MCD 2014 or Mortgage Credit Directive 2014).

[23] (SI 281/2010) (CCR 2010 or EU Consumer Credit Regulations 2010). The implementation of the CCD 2008 into national law by way of Ministerial Regulation was suggested to be because of a crowded legislative agenda - see *Redressing the Imbalance. A study of legal protections available for consumers of credit and other financial services in Ireland* (FLAC, 2014) 14, the principal author of which is P Joyce, Senior Policy Researcher.

[24] (SI 142/2016) (MCR 2016 or EU Mortgage Credit Regulations 2016).

preceded the Mortgage Credit Directive 2014, ultimately culminating in a report of the Committee to the EU Commission.[25]

2.3 It is also the case that full public consultations were held by the Department of Finance relating to the Consumer Credit Directive 2008 and the Mortgage Credit Directive 2014 in advance of their transposition.[26] (The Consumer Protection Code 2012 was also preceded by a full public consultation, as was its predecessor, the Consumer Protection Code 2006[27]). Nevertheless, these consultations primarily related to the national discretions permitted by the Directives.

2.4 It appears that that the implementation of the Consumer Credit Directive 2008 and the Mortgage Credit Directive 2014 by virtue of secondary legislation did not involve the type of substantive analysis as to how the respective legislative measures worked together with the existing consumer protection regulatory framework which should be expected were these measures to progress through, and be enacted as, an Act of the Oireachtas, preceded as relevant by analysis by an expert group or body such as the Law Reform Commission.

<u>Policy underlying implementation of Mortgage Credit Directive 2014 by way of overlay</u>

2.5 Because of the societal importance of mortgage lending in the State, a particular focus of this Submission is the fragmented regulatory regime for consumer mortgage lending, referred to in more detail in para **[7]** and **Appendices A-C** of this Submission.

2.6 By way of background, the decision to implement the Mortgage Credit Directive 2014 by way of an overlay to the existing consumer credit regime arose from a policy objective of the State to ensure that its transposition did not disrupt the existing mortgage market; another aim was to minimise transition impact in terms of changes to existing practice as far as possible. At the time of its implementation, the Department of Finance stated that the implementation of the Directive by way of the EU Mortgage Credit Regulations 2016 would ensure that:

> 'any existing Irish legal or regulatory provision governing relevant credit agreements for the protection of consumers and which does not conflict with a particular provision of the Mortgage Credit Directive 2014 or EU law more generally will continue to remain in place. This will maintain existing consumer protections while also limiting the financial and disruption costs associated with complying with the Mortgage Credit Directive 2014's requirements.'[28]

2.7 Thus the EU Mortgage Credit Regulations 2016 were issued as a standalone measure by way of statutory instrument rather than seeking to integrate its requirements with the existing mortgage lending regime in overarching legislation. Although such a measure was called for by consumer advocates,[29] it did not occur for reasons including that the transposition of the Mortgage Credit

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[25] This involved the Joint Committee inviting and receiving submissions from parties including the Financial Regulator, the Department of Finance, the Irish Bankers Federation and Financial Services Ireland which were subsequently discussed at two public meetings in July 2008. See *Report of the Joint Committee on European Affairs* (Houses of the Oireachtas; November 2008) (Dáil Éireann Debate Vol. 668 No. 2) concerning the White Paper on Integration of EU Mortgage Credit Markets.

[26] See *Consultation Paper on the Consumer Credit Directive* (Department of Finance, March 2009). In relation to the MCD 2014, see *Directive on Credit Agreements for Consumers relating to Residential Immovable Property: Public Consultation* (Department of Finance, September 2014), *Directive on Credit Agreements for Consumers relating to Residential Immovable Property: Proposed course of action following public consultation* (Department of Finance, July 2015) and *Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016).

[27] For the public consultation preceding the CPC 2006, see *Consultation Paper CP10: Consumer Protection Code* (Financial Regulator, February 2005) and *Consumer Protection Code Public Response to CP10* (Central Bank of Ireland, December 2005). For the public consultation culminating in the issuance of the CPC 2012, see *Review of Consumer Protection Code: Consultation Paper CP47* (Central Bank of Ireland, 2010), *Second Consultation on Review of Consumer Protection Code CP54* (Central Bank of Ireland, 2011) and *Feedback to CP54 - Review of the Consumer Protection Code* (Central Bank of Ireland, 2011).

[28] *Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 18-19.

[29] See *FLAC, Annual Report 2016* (Free Legal Advice Centres, 2016) 22: 'In February, FLAC made a submission to the Department of Finance that the Mortgage Credit Directive … should be transposed into Irish law through a full Act of the Oireachtas rather than by statutory instrument. FLAC suggested that taking the statutory instrument rather than primary legislation route would

Directive 2014 by way of Ministerial regulation would be more time efficient, would minimise the existing legal and regulatory changes in the area to those required by the Mortgage Credit Directive 2014 and would not preclude the Oireachtas, consistent with the requirements of the Mortgage Credit Directive 2014 and EU law more generally, from considering further legislative initiatives if considered appropriate in the future.[30]

2.8 While the policy rationale seeking to minimise disruption to the existing mortgage market may in itself be sound - and at a particular time owing to pressures on the legislative agenda, it may not be practicable to implement EU requirements by way of legislation - **the trade-off for this approach is its contribution towards the overly complex and, at times, dissonant nature of the existing current regulatory regime for consumer mortgage lending. The absence of transparency inherent in such a regime is particularly striking, relating as it does to what is likely to be the most important long-term financial commitment an individual will enter into in their lifetime: the purchase of their home.**

3. Recognition that some degree of complexity inherent in consumer credit regime

3.1 It is also accepted that in the context of Ireland's status as an EU Member State, a degree of complexity will always be inherent in the consumer and, to a lesser extent, SME credit regime. This arises from a relatively steady flow of EU Directives requiring national implementation having an impact on, in particular, consumer credit, the texts of which themselves result from a consensus between the differing interests of 27 Member States and may not in certain respects take account of, or have relevance to, the domestic retail banking environment in the State.[31] Added to this are the extremely detailed guidelines impacting on conduct of business in the consumer (and, at times, the SME) credit arena issued by the European Banking Authority (EBA) - which, in contrast to the European Central Bank (ECB), holds a consumer protection mandate - in relation to matters such as creditworthiness, loan origination, arrears, non performing exposures, product oversight and governance, outsourcing and complaints[32] and ECB (European Central Bank) guidance relating to non-performing loans. [33]

3.2 As a related point, the current whole of government strategic plan grounding *Ireland for Finance* to 2025 identifies as a core strategic goal the development and enhancement of the operational

deprive elected members of the legislature of the opportunity to discuss, influence and shape a measure of fundamental importance to the future of lending to consumers in Ireland as well as further complicating an already complex set of legislative rules concerning the provision of credit to consumers. FLAC was disappointed in March when the Mortgage Credit Directive was eventually transposed into Irish law by ministerial regulation.'

[30] For the full list of reasons why the MCD 2014 was implemented by way of Ministerial Regulation, *see Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 3.

[31] Nevertheless, a distinction may be drawn between those Directives that are *minimum harmonisation* in nature and those that are *maximum harmonisation* measures. In the case of a largely *minimum harmonisation* measure - an example of which is the Mortgage Credit Directive 2014 - while Member States must implement the minimum standards set out in the Directive, they are permitted to maintain or introduce more stringent requirements, provided these are consistent with their obligations under EU law. In the case of a *maximum harmonisation* measure in the context of consumer protection - an example of which is the CCD 2008 - uniform rules are imposed on Member States in relation to particular matters, who may not, via the enactment of national laws, either reduce the level of protection for consumers or increase it in respect of those matters. So there is more room for manoeuvre for the State when implementing into national law a *minimum harmonisation* measure such as the Mortgage Credit Directive 2014. That said, a strong argument may be made that the disapplication of certain of the existing consumer credit protections under national law to credit agreements that are subject to the CCR 2010 (implementing the CCD 2008) has been unnecessary – see **Appendix F**.

[32] See EBA Guidelines on Creditworthiness Assessment 2015 (Mortgage Credit Directive 2014) replaced with effect from 30 June 2021 by the EBA Guidelines on Loan Origination and Monitoring 2020, EBA Guidelines on Arrears and Foreclosure 2015 (Mortgage Credit Directive 2014), EBA Guidelines on the Management of Non-performing and Forborne Exposures 2018, EBA Guidelines on Product Oversight and Governance Arrangements for Retail Banking Products 2015 and EBA Guidelines on Outsourcing Arrangements 2019 and Joint EBA/ESMA Guidelines on Complaints-Handling for the Securities and Banking Sectors 2018.

[33] ECB Guidance to Banks on Non-Performing Loans 2017.

environment for the international financial services sector in Ireland. The plan makes the following point, which is of relevance also when addressing conduct of business relevant to consumer and SME credit:

> 'Developing and enhancing the operational environment needs a specific approach which differs from that needed for other themes in the action plan. By their nature, action measures that focus on policy and legislation have a deeper and broader reach than action measures under other themes. They are often complex, requiring engagement with organisations in Ireland and in the European Union, and requiring assessment from a range of perspectives, including constitutional law, EU law, national policy objectives, budgetary implications, risk assessment, and consideration of who will benefit and who may be disadvantaged, including investors and consumers.'[34]

4. Nature of lenders under current regulatory regime

4.1 By way of background, in general terms (unless the criteria set out below are met) direct lending to *individuals* is a regulated activity requiring the lender to be authorised by the Central Bank. Originating a loan to a *corporate (or an LLP)* as a standalone activity does not require the lender to be so authorised. Because of the authorisation regime applicable to consumer lending in this jurisdiction, lenders of consumer credit are likely to be regulated and may take one of the following forms:

(a) European Central Bank (ECB)-licensed or European Economic Area (EEA)-authorised deposit-taking banks - ie, *credit institutions*. This category includes EEA authorised banks exercising passporting rights to lend in the State on a branch or cross-border basis;

(b) *retail credit firms*, being non deposit-taking originators of credit to natural persons.[35] Exclusions from the retail credit regulatory regime include where the individual borrower satisfies the criteria to elect to be treated as a professional client for MiFID purposes. The most relevant criteria for exclusion of a loan from the retail lending regime are that the individual has carried out significant transactions on the relevant market at an average frequency of 10 per quarter over the previous four quarters *and* his or her financial instrument portfolio, including cash deposits and financial instruments, exceeds €500,000.[36] While this carve-out - which clearly will apply to a limited category of individual borrowers - is more likely to apply to a business borrower than a consumer borrowing for personal needs, where these thresholds are not met, lending to natural persons for business purposes will require the lender to be regulated as a retail credit firm. In the usual course, because of the nature of the thresholds, direct lending to *consumers* by a firm that is not a

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[34] *Ireland for Finance* to 2025 (Government of Ireland, January 2022) 17, See also *Report on the Effectiveness of the Code of Conduct on Mortgage Arrears in the context of the Sale of Loans by Regulated Lenders* (Central Bank of Ireland, October 2018) 15-16: '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. The Central Bank seeks to ensure that regulated entities comply with relevant statutory conduct of business rules, including by requiring regulated entities to put in place a process for the management of arrears, provide borrowers with all relevant information and not exert undue pressure or influence on borrowers. The power to adjudicate on individual lender decisions rests elsewhere in the national policy framework.' See further *Feedback Statement on CP98 - Increased Protections for Variable Rate Mortgage Holders* (Central Bank of Ireland, February 2016) 6 : 'The increased transparency measures are not intended to interfere with the contractual relationship between the parties or the commercial decision of regulated entities as to how to construct their variable rate mortgages.'

[35] Retail credit firms were brought within the regulatory remit of the Central Bank with effect from 1 February 2008 (s 19 of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 which amended Pt V of the Central Bank Act 1997). At that time, the 'credit' to which the retail credit regulatory regimes applied was secured or unsecured cash loans. With effect from 16 May 2022, the scope of the retail credit regulatory regime has been expanded to include directly or indirectly providing credit to, or entering into a consumer-hire agreement or hire-purchase agreement with, an individual (subject to limited exceptions). Similar changes have been made in respect of credit servicing activities requiring authorisation as a credit servicing firm. See Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022.

[36] As the professional client categorisation under MiFID is allocated in the context of entering into investment activities, it does not sit entirely easily with a proposed lending transaction. For example, when assessing the transactions carried on by the client, what is the 'relevant market'?

bank is likely to be a regulated activity requiring the firm to be regulated as a retail credit firm. Currently 17 retail credit firms are registered in the State; and

(c) *credit servicing firms*, being a firm which holds the legal title to credit or engages in loan-ownership activities or loan administration business, where the credit has been granted to:[37] (i) a natural person within the State (subject to the carve-outs outlined above); or (ii) *only* where the credit has been originated by an authorised lender such as a licensed bank, an SME. If a firm's credit servicing activities relate only to corporate SME credit which has been acquired from an unregulated entity, it is not required to be authorised as a credit servicing firm. Currently 17 credit servicing firms are registered in the State, with an additional 5 availing of transitional authorisation status.

While *credit institutions* are subject to an EU authorisation regime, with the licence/authorisation issued by the European Central Bank, the authorisation of *retail credit firms* and *credit servicing firms* is subject to a domestic regulatory framework, with the Central Bank the direct supervisor.

5. Current convoluted and fragmented consumer conduct of business regulatory regime

5.1 It is difficult to identify a sound rationale for the current convoluted and fragmented conduct of business regime in the State relating, in particular, to consumer credit, which includes primary and secondary legislation and Central Bank issued codes and regulations.

Primary legislation relevant to consumer credit conduct of business

5.2 The most notable enactment dealing with conduct of business requirements referable to consumer credit is the *Consumer Credit Act 1995*, which applies to a broad range of consumer credit agreements, including housing loans - ie, secured residential mortgage loans. If a lender does not comply with the provisions of Part III of the Consumer Credit Act 1995 relating to credit agreements and their form and content (other than in respect of current accounts, credit cards and housing loans), the lender is not entitled to enforce the credit agreement or any related guarantee or security given by the consumer or guarantor.[38] While a court may (in specified circumstances) decide that the agreement is enforceable, this discretion does not extend to a breach of s 30 which specifies general requirements relating to the contents, execution and issuance of credit agreements.[39] Thus, for agreements within its scope, a breach of s 30 inexorably results in the unenforceability of any credit agreement to which the breach relates together with the related security.

5.3 Section 30 of the Consumer Credit Act 1995 does not apply to secured mortgage loans within the scope of the EU Mortgage Credit Regulations 2016 (as it does not apply to housing loans). While the requirements of s 30 do apply to unsecured personal lending in amounts between €200 and €75,000 within the scope of the EU Consumer Credit Regulations 2010, should they be

[37] Note that EU Directive 2021/2167 on credit servicers and credit purchasers (24 November 2021) - requiring authorisation of credit servicers (not owners) - will require to be implemented into national law effective December 2023. This Directive applies only to *non-performing* loans acquired from licensed credit institutions. Because it extends beyond consumer and SME credit to all borrower credit, non-performing loans to *larger corporates* will also be within scope of the regime.

[38] CCA 1995, s 38.

[39] S 30 requires: (a) the credit agreement (and any related guarantee) to be in writing and signed by the consumer and all other parties to the agreement and a copy of the credit agreement to be sent to the consumer (and a copy of any guarantee and the credit agreement to the guarantor) by the lender within 10 days of the making of the credit agreement (or guarantee, as applicable) (s 30(1) of the CCA 1995); (b) the inclusion in the credit agreement of a statement in relation to the cooling off period (s 30(2) of the CCA 1995); and (c) the inclusion in the credit agreement of the names and addresses of all contracting parties and costs or penalties payable on default (s 30(3) of the CCA 1995).

contravened, the credit agreement remains enforceable by the lender.[40] However, contravention of these requirements in relation to a *guarantee* of credit to which the EU Consumer Credit Regulations 2010 applies will result in unenforceability of the guarantee and any security given by the guarantor, notwithstanding the continuing enforceability of the underlying credit agreement.[41]

5.4 **Reflecting the landscape in which it was passed, the Consumer Credit Act 1995 does not reflect the current digitalised environment in which financial services business is conducted. It does not refer to the concept of communication by 'durable medium'[42] - which generally includes email - and its communication requirements refer to communications on paper via sealed envelope.[43]**

5.5 Wider primary legislation also relevant to consumer lending includes the *Consumer Protection Act 2007*[44] and, when implemented, the *Consumer Rights Bill 2022*. While the Consumer Rights Bill 2022 currently before the Oireachtas seeks to overhaul the general scheme for statutory contract law as between traders and consumers, it is possible that this legislation may add to an additional layer of complexity to an already convoluted regulatory landscape in the financial services sector. **It is submitted that, in particular, those general provisions of the Bill set out in Part 4 thereof dealing with the supply of a service – which unlike other provisions of the Bill, does not implement EU legislation - should be further examined against retail banking services such as credit, payments, general banking, investment and pensions and the main sector-specific legislation applying in those areas to identify the net benefit, if any, provided by the application of Part 4**. Observations in relation to the application of Part 4 of the Consumer Rights Bill 2022 to financial services are set out in **Appendix E**.

5.6 Also relevant to highlight in a consumer credit context is the very wide redress remedy provided under the *Central Bank (Supervision and Enforcement) Act 2013*, effective from 1 August 2013, which provides for a statutory cause of action on the part of a customer[45] of a regulated financial service provider who suffers loss or damage arising from the provider's failure to comply with any obligation under financial services legislation (see further para **[10]** below).

<u>Secondary legislation relevant to consumer credit conduct of business</u>

5.7 Secondary consumer credit-related legislation in the State, primarily implementing EU Directives, include the following:

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[40] CCR 2010, reg 4(2). The effective date of the CCR 2010 is 11 June 2010. Examples of credit agreements where a breach of s 30 of the Consumer Credit Act 1995 may give rise to the unenforceability of the credit agreement include where a consumer credit agreement is made on or after 13 May 1996 for a fixed sum or revolving credit (other than a housing loan, overdraft or credit card facility), which is either effective: (a) after 11 June 2010 for an amount of less than €200 or exceeding €75,000; or (b) before 11 June 2010.

[41] CCR 2010, regs 4(2) and 4(4) and CCA 1995, s 30(1) and s 38.

[42] 'Durable medium' is generally defined along the following lines: 'any medium that enables a consumer to store information addressed personally to the consumer in a way that renders it accessible for future reference for a period of time adequate for the purposes of the information and allows the unchanged reproduction of the information.' See, eg, CCR 2010, reg 6(1).

[43] CCA 1995, s 45(1). In fact, this provision itself represents an updated position - with effect from 1 August 2013, s 45(1) dealing with restrictions on written communications was amended by s 77 of the Central Bank (Supervision and Enforcement) Act 2013 so that these requirements were imposed in relation to communications 'on paper', rather than, as had previously been the case, communications 'in writing'. This amendment followed a commitment by the State to the European Commission that: 'Section 45 will be amended to recognize electronic communications relating to credit agreements in the same way as written, ie, hard copy paper communications, are currently recognised.' See Bank of Ireland State Aid Decision No 546/2009 C(2010) 4963 final (European Commission, July 2010), Annex II, item(b)(1)(a)(iii).

[44] Implementing the Unfair Commercial Practices Directive (Council Directive 2005/29/EC).

[45] Customer' (which term includes a potential customer or former customer) is widely defined for the purposes of the 2013 Act as any person to whom the regulated financial service provider provides or offers financial services or who requests the provision of such services or a borrower within the scope of the credit servicing regime.

(a) *EU Consumer Credit Regulations 2010*,[46] which apply to credit agreements taking effect from 11 June 2010 that are not secured on real property involving credit in amounts between €200 and €75,000. While in general the provisions of the Consumer Credit Act 1995 relevant to credit agreements are disapplied to agreements within the scope of the 2010 Regulations, certain provisions of the Act continue to apply to them.[47] In addition, certain requirements of the Consumer Protection Code 2012 apply to a credit agreement falling within the scope of the 2010 Regulations; and

(b) *EU Mortgage Credit Regulations 2016*, which apply to consumer credit under credit agreements coming into effect on or after 21 March 2016 that is secured by a mortgage over residential property, whether or not the secured property is the consumer's principal residence or that of any other person. The EU Mortgage Credit Regulations 2016 apply also to consumer credit not secured on residential property for the purposes of buying or retaining property rights, a much more limited category. Many of the requirements of the Consumer Credit Act 1995 and the Consumer Protection Code 2012 continue to apply to activities that are subject to the EU Mortgage Credit Regulations 2016.

5.8 Other secondary legislation of wider application that is also relevant to consumer lending includes the:

(a) *EU Unfair Contract Terms Regulations 1995,*[48] proposed to be revoked and replaced by Part 6 of the Consumer Rights Bill 2020 (when enacted). The effect of the Regulations is that a term that is determined by a court to be unfair is not binding on a consumer. Where the unfair term has been relied on, the lender may be obliged to make restitution to the consumer affected. While in a financial services context the Irish courts have not found a consumer contractual term to be unfair under the Regulations, they have been utilised by the Central Bank in two high-profile administrative sanctions proceedings in 2020 and 2021 in respect of two banks relating to their tracker mortgage loan dealings with consumers. In each case, contravention of the 1995 Regulations was one of the regulatory breaches in respect of which the bank was reprimanded and fined, one involving a total fine exceeding €18 million, with the second involving a total fine of almost €38 million.[49] Thus the EU Unfair Contract Terms Regulations 1995 have the potential to afford extensive

[46] The European Commission has proposed that the CCD 2008 be repealed and replaced by a Directive dealing with additional matters such as application to crowdfunding credit services, adapting of disclosure rules to enhance understanding where information is provided to consumers via digital devices, tightening of creditworthiness obligations and promotion of consumer financial education. See Proposal for a Directive of the European Parliament and of the Council on Consumer Credits COM/2021/347.

[47] See CCR 2010, regs 4(2) and 4(4) and CCA 1995, s 30(1) and s 38.

[48] (SI 27/1995), which implemented the Unfair Terms in Consumer Contracts Directive (Council Directive 93/13/EEC).

[49] The breach of the EU Unfair Contract Terms Regulations 1995 identified in each instance was a failure to ensure that contractual terms were drafted in plain and intelligible language - see EU Unfair Contract Terms Regulations 1995, reg 5(1). See *Enforcement Action Notice: KBC Bank Ireland plc reprimanded and fined €18,314,000 by the Central Bank of Ireland for regulatory breaches affecting tracker mortgage customer accounts* (Central Bank of Ireland, September 2020) and *Enforcement Action Notice: Ulster Bank Ireland DAC reprimanded and fined €37,774,520 by the Central Bank of Ireland for regulatory breaches affecting tracker customers* (Central Bank of Ireland, 25 March 2021). A breach of the EU Unfair Contract Terms Regulations 1995 did not feature in the recent administrative sanctions imposed on Allied Irish Banks plc and EBS DAC. Although a failure to provide clear mortgage documentation to customers was cited in the statement relating to EBS DAC, referring to the receipt by customers of: 'documentation with unclear terminology about their mortgage entitlements, including whether customers could revert to their tracker mortgage interest rate after a fixed term expired', this was dealt with as a breach of applicable General Principles of the CPC 2012, rather than the EU Unfair Contract Terms Regulations 1995. See *EBS DAC reprimanded and fined €13,400,000 by the Central Bank of Ireland for regulatory breaches affecting tracker mortgage customers* (Central Bank of Ireland, 23 June 2022) and *Allied Irish Banks plc reprimanded and fined €83,300,000 by the Central Bank of Ireland for regulatory breaches affecting tracker mortgage customers* (Central Bank of Ireland, 23 June 2022).

protections to consumers and, in turn, present a significant risk area for providers of financial services in terms of regulatory and reputational and other conduct risk; and

(b) *EU Distance Marketing Regulations 2004*, which have particular relevance in an increasingly digital environment.[50] The 2004 Regulations apply to contracts for financial services, including the provision of credit, between a supplier and a consumer concluded after 15 February 2005 under an 'organised distance lending scheme' entirely at a distance - eg, over the internet, via the telephone or by post - where up to and including the time of entry into of the credit agreement, the parties have not been simultaneously physically present. Should, in response to the social distancing measures arising from the COVID-19 pandemic, a lender have put in place structural arrangements, such as staffing and IT measures, to enable the conclusion of credit agreements with its consumer base exclusively via distance means, appropriate measures to ensure compliance with the Distance Marketing Regulations 2004 needed to be taken. If the information-relation requirements set out in the Regulations are not complied with by a lender, the contract is unenforceable, although a judicial discretion exists to decide otherwise.[51]

<u>Central Bank issued codes and regulations relevant to consumer credit conduct of business</u>

5.9 The stated mission of the Central Bank is:

> 'serving the public interest by maintaining monetary and financial stability while ensuring that the financial system operates in the best interests of consumers and the wider economy'.[52]

The Central Bank is supported in its consumer protection responsibilities by a statutory Consumer Advisory Group which advises the regulator on the performance of its functions and the exercise of its powers in relation to consumers of financial services.[53]

5.10 Historically, the Central Bank issued its conduct of business requirements by way of Codes issued on a statutory basis.[54] The more recent trend is for the Central Bank to publish conduct of business requirements by way of regulations issued under s 48 of the Central Bank (Supervision and Enforcement) Act 2013 and it has stated that the revised requirements issued after the review of the Consumer Protection Code 2012 has been completed (see paras **[5.11(a)]** and **[8.2]** below) will be incorporated in such regulations.[55]

5.11 Central Bank-issued codes and regulations relevant to consumer credit conduct of business include the following:

(a) *Consumer Protection Code 2012,* which applies, in general, to the regulated activities of regulated entities operating in the State and so has wide application. The General Principles set out in the Consumer Protection Code 2012 apply to such activities as they relate to

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[50] (SI 853/2004), which implemented the Directive concerning the distance marketing of consumer financial services (Council Directive 2002/65/EC). The European Commission proposes repealing the 2002 Directive to deal with matters requiring modernisation such as the impact of, and enhanced consumer protection required arising from, digital communications, the strengthening of withdrawal rights and the enhancement of enforcement - see proposed Directive concerning financial services contracts concluded at a distance COM(2022) 204.

[51] Distance Marketing Regulations 2004, regs 6(6) and 9(5).

[52] *Central Bank of Ireland Annual Report 2021 & Annual Performance Statement 2021-2022* (Central Bank of Ireland, 2022) 3.

[53] Central Bank Act 1942, s 18E(1) and (5).

[54] Primarily under s 117 of the Central Bank Act 1989.

[55] Under s 48 of the 2013 Act, the Central Bank is empowered to make regulations: 'for the proper and effective regulation of regulated financial service providers' relating to a wide range of matters.

'customers',[56] including those availing of SME lending, [57] with much of the other general requirements of the Code relating to 'consumers' and credit-related provisions of the Code applying to 'personal consumers'. The Consumer Protection Code 2012 in its current form has statutory force - as recognised by the Code itself, it is binding on regulated entities. A substantive review by the Central Bank of the Consumer Protection Code 2012 is currently underway, which has been described as a 'complex, multiannual project [requiring] extensive stakeholder consultation and deliberation of policy and legislative issues'[58] (see also para [**8.2**]);

(b) *Code of Conduct on Mortgage Arrears 2013,* effective from 1 July 2013, which applies to the treatment by regulated entities operating in the State of natural persons in, or facing, arrears on mortgage loans secured by their primary residence in the State (which includes the only residential property in the State owned by the borrower). The Code may apply to business borrowings incurred by an individual if at the time the loan was made, it was secured on his or her primary residence; and

(c) *CB Housing Loan Regulations 2015*,[59] which apply to loans secured or to be secured by a mortgage over residential property in the State made by regulated financial service providers to consumers[60] on or after 9 February 2015. The loan-to-income ratio (affordability) requirements of the Regulations apply solely to loans for the purposes of a residential property which the borrower uses or intends to use as his or her principal home. The loan-to-value ratio (deposit) requirements of the CB Housing Loan Regulations 2015 apply also to loans relating to buy-to-let properties and it is in this latter context only that the requirements apply to corporate entities, sole traders and partnerships (provided they or any group of which they form part do not exceed a €3 million annual turnover threshold).

6. Primary area of complexity: interplay between primary legislation, secondary legislation and Central Bank-issued requirements

6.1 It is submitted that the primary area of complexity in the consumer credit regime emanates from the interplay between each of (a) the Consumer Credit Act 1995; (b) the EU Consumer Credit Regulations 2010; (c) the EU Mortgage Credit Regulations 2016; and (d) the Consumer Protection Code 2012. **The interplay between these requirements is not harmonious, resulting in an excessively complex, and at times contradictory, web of requirements. The unsatisfactory consumer credit framework that is currently in place involving disparate - and, in some**

[56] 'Customer' is widely defined in the CPC 2012 to mean any person to whom a regulated entity provides or offers to provide a product or service the subject of the Code and any person who requests such a product or service.

[57] Certain categories of consumers are within the scope of the requirements of the CPC 2012 but have been excluded from the SME Regulations 2015. For example, the CPC 2012 continues to apply, as relevant, to the following entities where they fall within the definition of 'consumer' – including a corporate whose annual turnover, on a stand-alone or, as applicable, group basis, does not exceed €3 million in the previous financial year - although they have been excluded from the SME Regulations 2015: (a) regulated financial service providers authorised to provide credit; (b) multi-lender credit - which includes syndicated and club credit facilities; and (c) credit to special purpose vehicles, which are characteristically involved in complex structured transactions. The Central Bank has stated that the exclusions from the CPC 2012 will be considered as part of the forthcoming wider review of the Code. See *Feedback to CP96 Review of the Consultation on the Authorisation Requirements and Standards for Credit Servicing Firms and Consequential Amendments to Statutory Codes* (Central Bank of Ireland, December 2015) 15-16.

[58] *Consumer Protection Outlook Report 2020* (Central Bank of Ireland, March 2020) 11 and 21. See also Consumer Advisory Group (CAG) Minutes of Meeting (10 March 2022) 2.

[59] (SI 47/2015) (CB Housing Loan Regulations 2015).

[60] In this context, a 'consumer' is an individual acting outside his or her trade, business or profession or where its annual turnover, on a stand-alone or, as applicable, group basis, does not exceed €3 million in the previous financial year, a sole trader, partnership or corporate.

cases, counter-intuitive - protections applying under separate regulatory measures does not facilitate the taking of a coherent regulatory approach in the consumer credit area.[61]

6.2 **Practically, while a fragmented and, at times, dissonant, regulatory regime may be capable of being navigated by banks well versed in complex regulatory requirements and with institutional knowledge of the interplay between the respective measures as they were introduced and have evolved, this may not be the case for smaller and more recent market players including retail credit firms and credit servicing firms.**

6.3 For example, the Court of Justice of the European Union (CJEU) has confirmed that restructured credit comes within the scope of the EU Consumer Credit Regulations 2010;[62] as similar definitions apply, the EU Mortgage Credit Regulations 2016 would similarly apply to restructured mortgage credit (even where the loan was initially advanced before the effective date of the Regulations, being 21 March 2016), such as rescheduling of the repayment instalments involving a deferral of their payment. Without the necessary background or depth of resources, it may be difficult for non-bank lenders firms to navigate and apply the, at times, conflicting regulatory requirements arising. Nevertheless, it has been a long-expressed policy objective of the State that consumer borrowers should retain the same conduct of business statutory protections, irrespective of the identity of the lender/holder of the loan. Thus the imperative for consumer protections remains, whether the regulated lender is a bank, a retail credit firm or a credit servicing firm.[63]

6.4 **Further data as to the extent to which retail credit firms and credit servicing firms (and indeed the banks) comply with both those consumer protection conduct of business requirements emanating directly from the Central Bank such as the Consumer Protection**

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[61] FLAC has made the point that what it describes as the 'ad-hoc, disjointed nature of legislative development in the financial services area' has caused difficulties not just for consumers and their advocates but also for the Central Bank, with this having: '… undoubtedly contributed for example to a decision by the Central Bank to focus its regulatory attentions in the area of consumer credit less on adherence with primary and secondary legislation, and more on compliance with its own Codes of Conduct.' See *Redressing the Imbalance. A study of legal protections available for consumers of credit and other financial services in Ireland* (FLAC, March 2014) the principal author of which is P Joyce, Senior Policy Researcher, para 1.3.4, 19 and para C1, 181.

[62] *Verein für Konsumenteninformation v INKO, Inkasso GmbH* Case C-127/15 ECLI:EU:C:2016:934. When implementing the CCD 2008, while the State had the discretion to permit the application of less extensive requirements of the Directive in the case of a rescheduling arrangement where the borrower was in arrears, unlike 18 other Member States, it elected not to avail of this discretion - see *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48/EC on credit agreement for consumers* COM(2020) 963 final (European Commission, November 2020). However, the benefits of the application of some of the requirements of the CCR 2010 to restructured credit, such as the provision of the full pre-contractual information (SECCI) in a distressed scenario where those requirements have not been adapted to a distressed loan, are not immediately apparent.

[63] Unlike a retail credit firm, a credit servicing firm is not authorised to carry on a business of the *origination* of loans. It may, then, be argued that the conduct of business requirements of the CCA 1995, the CCR 2010 and the MCR 2016 do not apply to credit servicing firms as non- credit originating lenders, potentially deriving from the definitions of 'creditor' in the 1995 Act and the 2010 and 2015 Regulations as 'a person who *grants … credit* … in the course of … trade, business or profession' and 'credit agreement' as an agreement 'whereby a *creditor grants or promises to grant* to a consumer credit…' (Emphasis added). Nevertheless, the conduct of business requirements under the CCA 1995, the CCR 2010 and the MCR 2016 arising during the term of the credit agreement or at the agreement's termination or expiry are intrinsically linked to the business of credit servicing – ie, the holding of the legal title to, or conducting of management and administration activities concerning, in-scope loans acquired or serviced by credit servicing firms - including notification of interest rate changes, provision of statements, handling of arrears and enforcement. Compliance with these requirements is also mandatory under s 34G(1) of the Central Bank Act 1997 requiring parity of conduct of business obligations as between direct lenders (such as retail credit firms) and credit servicing firms. The effect of recent changes to the CCA 1995 is that all retail credit firms are now subject to the fee-approval regime provided for under s 149 of the 1995 Act (see s 10 of the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 amending the definition of 'credit institution' in s 2 of the CCA 1995). However, credit servicing firms are not currently subject to this fee approval regime as they do not come within the definition of 'credit institution' under the CCA 1995. Again, in light of the objective as to parity of consumer protection obligations, the rationale for this may be questioned to the extent that credit servicing firms impose fees under restructuring arrangements with borrowers for loans acquired by them.

Code 2012 and primary and secondary legislation including the Consumer Credit Act 1995, the Consumer Protection Act 2007, the EU Mortgage Credit Regulations 2016, the EU Consumer Credit Regulations 2010 and the EU Distance Marketing Regulations 2004 may be helpful in identifying how these requirements are being complied with in practical terms, the degree of difficulty arising in navigating the contradictions between those regimes and any ensuing gaps in consumer protection. It may also be worthwhile examining how the very detailed guidelines issued by European supervisory authorities such as the EBA in relation to matters including creditworthiness, loan origination, arrears, non-performing exposures, product oversight and governance, outsourcing and complaints have been integrated in lenders' systems, procedures and practices.

7. Example: conduct of business framework for consumer mortgage lending

7.1 An example of the opaque nature of the existing regime may be found in the conduct of business framework for conventional consumer mortgage lending made in in the State. The making of a consumer loan today involving a mortgage over a residential property involves the application of the following separate strands of regulatory requirements, which in some instances do not easily co-exist:

(a) the *EU Mortgage Credit Regulations 2016.* In addition to applying to consumer credit secured on residential property - and unlike the housing loan provisions of the Consumer Credit Act 1995 - *unsecured* consumer credit is subject to the 2016 Regulations where a loan to a consumer is made for the purpose of buying or retaining real property. The 2016 Regulations deal with matters including advertising, tying and bundling practices, insurance, provision of general and, by way of the European Standardised Information Sheet (ESIS), personalised pre-contract information and 'adequate explanations', the annual percentage rate of charge (APRC), pre-contractual disclosures relating to interest rates, restrictions on the imposition of fees and charges, disclosure of fees and charges, responsible lending, including the undertaking of creditworthiness assessments and requirements concerning the disclosure and verification of consumer information, property valuations, warning statements, foreign currency loans, reflection and cooling-off periods, provision of information during the term of the loan, early repayment, retention of appropriate records, arrears and proceedings for possession,[64] standards for provision of advisory services, dispute resolution, financial education of consumers, principles-based conduct of business obligations, payment of remuneration, staff knowledge and competence and consequences of breach of the Regulations. The Central Bank is the competent authority in the State for performing the functions provided for under the Mortgage Credit Directive 2014;[65]

[64] By way of an example of the requirements imposed on lenders under the MCR 2016, see the obligation under regs 29(5) and (6) thereof - going beyond the Code of Conduct on Mortgage Arrears 2013 - requiring where, after possession proceedings, an outstanding debt remains, the lender to put in place measures to facilitate repayment of the outstanding debt by the consumer. At a minimum, these measures must have regard to guidelines on a reasonable standard of living and reasonable living expenses for debtors as issued by the Insolvency Service of Ireland and must also be such as to not reduce the debtor's assets to a level below that statutorily set out in s 26 of the Personal Insolvency Act 2012. This is a statutory requirement of which lenders need to be particularly aware where proceedings for possession are taken in respect of residential property secured under credit agreements with consumers coming into effect on or after 21 March 2016, requiring lenders to put in place a repayment arrangement for the remaining outstanding debt, reflecting the specific criteria outlined in the MCR 2016.

[65] MCR 2016, reg 6.

(b) *Part IX of the Consumer Credit Act 1995* dealing with housing loans (except as amended in a very limited way by the EU Mortgage Credit Regulations 2016[66]). Housing loans under the 1995 Act are a wider category of credit than that subject to the 2016 Regulations, extending beyond *consumer* mortgage lending to lending to a natural person *for business purposes* that is secured by a mortgage over the borrower's principal residence or that of his or her dependants. Housing loan-specific requirements of the 1995 Act relate to matters including early repayment, valuation reports, insurance, costs of legal investigation of title, mortgage protection insurance, prohibition on linking of services, warning on loss of home, duties of lender to supply documents and information, endowment loans, disclosure of fees, interest rate and penalties, advertising and the protection of borrower on a winding up;

(c) those *general provisions of the Consumer Credit Act 1995* dealing with the provision of cash loans that continue to apply to secured mortgage lending (some of these provisions have been disapplied to housing loans under the Consumer Credit Act 1995 itself). Those obligations that continue to apply deal with matters including the advertising and offering of financial accommodation, matters arising during the term of the agreement including the entitlement of the consumer to plead available defences (including set off) against any assignee of the lender, restrictions on written communications, visits and telephone calls, miscellaneous matters including restrictions as to the use of inertia selling, a prohibition on purporting to exclude or restrict liabilities or rights, the disclosure of information to a consumer relating to a consumer's financial standing, the correction of incorrect information concerning a consumer and obligations on 'credit institutions' to notify customer charges. The Central Bank has particular functions under the Consumer Credit Act 1995, including to keep under general review practices related to any of the obligations imposed under these general provisions of the Act (and under Part IX referred to above dealing with housing loans);[67] and

(d) *Consumer Protection Code 2012*: applicable *mortgage loan*-specific, *credit-specific* and *general* provisions relevant to 'customers', 'consumers', 'consumers who are individuals' and 'personal consumers', except as disapplied (in a limited way) to mortgage lending to which the EU Mortgage Credit Regulations 2016 applies by a July 2016 *Addendum to the Consumer Protection Code 2012.* Extensive and detailed *mortgage-loan* and *credit-specific* provisions included in the current version of the Consumer Protection Code 2012 deal with matters such as general requirements,[68] the provision of information,[69] knowing the

[66] The notice of important information required to be included in credit agreements for housing loans under the CCA 1995 and the provisions of the CCA 1995 dealing with the calculation of the APR for housing loans have been disapplied for credit agreements that are subject to the MCR 2016. See regs 44(2) and 18(9) of the MCR 2016.

[67] CCA 1995, s 8(1)(a).

[68] *Mortgage-loan* related *general* obligations imposed under the CPC 2012 include the maintenance of a publicly accessible register of current mortgage intermediaries and the notification to the Central Bank of the termination of the appointment of a mortgage intermediary. *Credit-specific general requirements* imposed under the Code include a prohibition on offering unsolicited pre-approved credit to a personal consumer, increasing a personal consumer's credit limit only with his or her consent, giving to a personal consumer a right to pay a charge relating to the provision or arrangement of a loan separately, rather than including it in the loan and obligations relating to payment protection insurance.

[69] *Mortgage-loan* specific obligations included in the CPC 2012 relating to the *provision of information* include those relevant to mortgage loan switching, the publication on the lender's website of the currently available mortgage interest rates, the provision of information relating to variable interest rates, the required information to be included in the mortgage loan offer document such as the mortgage loan amount, the applicable interest rate, the mortgage loan term, the possibility of a new interest rate when the mortgage loan is drawn down and the length of time for which the mortgage loan offer is valid and the provision of the redemption figure for an existing mortgage loan within 5 business days of request. *Credit-specific information-related* obligations included in the Code include those related to the effect of missing any of the scheduled repayments, the provision of reasons where a personal consumer's formal application for credit is turned down, the provision in the credit agreement of a worked example of an early redemption charge for fixed rate loans, provision of information to the guarantor, provision of an indicative comparison for a loan consolidating existing credit and requirements where it is proposed to incorporate a charge into the amount advanced to a personal consumer.

consumer and suitability[70] and post-sale information,[71] arrears-related[72] and advertising[73] requirements. Additional extensive *general provisions* of the Code also apply in these areas[74] which extend beyond credit, together with those relating to errors and complaints resolution and requirements relating to records and compliance.

7.2 Consumer advocates such as FLAC have been urging the consolidation of the current consumer protection conduct of business framework for some time. **For as long as these 'statutory thickets' remain,[75] so too will the unnecessary navigation of the current tangled regulatory regime for all those interested in seeking to answer what is, in itself, a simple question: what obligations actually apply?**

7.3 Examples of particularly complex and/or conflicting regulatory provisions are set out in the **Appendices** to this Submission, as follows:

(a) Notification of changes in interest rates – **Appendix A**;

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[70] *Mortgage-loan* specific obligations included in the CPC 2012 relating to *knowing the consumer and suitability* include verification of supporting documentation before providing a mortgage loan to a personal consumer, matters relevant to the making of a mortgage loan application, assessment of the reasonableness of the supporting information provided, sight of original valuation report, conducting of stress testing as part of the assessment of mortgage lending affordability, requirements relating to interest-only and variable rate mortgages loans, application of the know-the-consumer and suitability obligations and matters relevant to the mortgage loan drawdown process. *Credit-specific knowing the consumer and suitability* requirements imposed under the Code include an obligation to assess affordability on the basis of the personal consumer's personal circumstances and financial situation and the undertaking of further affordability and suitability assessment on the advance of additional credit to a personal consumer.

[71] *Mortgage-loan specific post-sale information requirements* included in the CPC 2012 include information relating to variable rate mortgage loans (other than those based on tracker mortgage interest rates) at least annually, movement between interest rates based on a ratio of Loan-to-Value, inclusion in any notification of a change in the mortgage interest rate of the revised repayment amount required under any agreed revised repayment arrangement, increase in a variable interest rate on a mortgage loan, applicable interest rate in respect of fixed rate mortgage loans 60 days prior to the expiry of the fixed interest rate period, where a movement of a personal consumer from a tracker mortgage interest rate is proposed, requirements in relation to a one-month reflection period (which may be waived) and enabling a personal consumer consider an incentive on a mortgage loan. *Credit specific post-sale information requirements* imposed under the Code include those relating to the provision of an annual statement containing specified information, at least 30 days' advance personal notification to a personal consumer of any increase in the loan interest rate (with an exception for mortgage loans provided on the basis of a tracker mortgage interest rate) and notification to the guarantor of any change in the credit agreement terms.

[72] *Mortgage-loan specific arrears-related* requirements of the CPC 2012 include notification requirements where a third full or partial mortgage loan repayment is missed (applicable only to mortgage lending to a personal consumer that is secured on property other than his or her primary residence - eg, a second home, such as a holiday home).

[73] *Mortgage-loan specific advertising requirements* of the CPC 2012 include those relating to the advertising of residential mortgage loans, debt consolidation mortgage loans, variable rate mortgage loans and interest only mortgage loans. *Advertising requirements* imposed under the Code referable to *credit* include those applying where an advertisement includes an annual percentage rate, the inclusion of a warning statement for a fixed rate loan and the inclusion of a comparison in the case of an advertisement for the consolidation of two or more debts.

[74] *General matters* dealt with in the CPC 2012 applying to dealings within the scope of the Code by regulated firms with all *customers* (which includes consumers) are set out in the General Principles to the Code. *General miscellaneous* requirements applying to dealings by regulated firms with consumers include the provision of reasonable arrangements to vulnerable consumers, prohibition of the use of a misleading name for a product or service, processing of all instructions from or on behalf of a consumer properly and promptly, dealings with a person who is acting for a consumer under a power of attorney, prohibition of exclusion or restriction of any legal liability or duty of skill, care or diligence to a consumer, prescribed form of warning statements, notification of the amendment or alteration of the lender's services, the cessation of operations, merger or transfer of the lender's business or the closure, merger or change in its branch location, bundling and contingent selling, the payment of remuneration, conflicts of interest and duties relating to personal visits and contact with consumers. *General provisions* set out in the CPC 2012 referable to the *provision of information* to consumers include obligations to provide information by way of terms of business as to the regulatory status and regulated activities and products of the lender, use of the word 'broker' by an intermediary, intermediary disclosures and display of information relating to charges. *Knowing the consumer and suitability* requirements set out in the CPC 2012 referable to consumers include gathering and recording of appropriate information, recording of material changes to the consumer's circumstances, certification, by the consumer of the accuracy of information, assessment of suitability and preparation of statement of suitability. Post-sale information requirements referable to dealings by lenders with consumers including provision of any material change to the lender's terms of business to each affected consumer and provision of charges-related notifications.

[75] *Dimond v Lovell* [2000] UKHL 27.

(b) Tying practices – **Appendix B**; and

(c) Unsolicited personal contact – **Appendix C.**

7.4 **Appendix D** deals with the submission that, within the constraints of EU law, statutory criteria should be specified as to what constitutes 'consumer' buy-to-let lending to which the protections of the EU Mortgage Credit Regulations 2016 and other consumer-specific protections apply - ie, when is a buy-to-let borrower acting by way of business and when is such a borrower acting as consumer?

7.5 A wider question also arises as to whether, within the constraints of EU law, additional statutory criteria should be established in relation to *who constitutes a consumer* – ie, an individual acting outside his or her trade, business or profession - for other purposes in a financial services context but in the interests of space, this is not dealt with in this Submission.

7.6 Recommendations in relation to two other regulatory matters - being, what is asserted to be the *unnecessary disapplication* of certain consumer protection aspects of the existing regulatory framework to credit that is within the scope of the EU Consumer Credit Regulations 1995 and a legislative anomaly arising in relation to the *application of the housing loan provisions of the Consumer Credit Act 1995 to business lending*, in accordance with the legislative intention - are set out in **Appendix F**.

8. Approach for streamlining and consolidation of consumer/SME credit regulatory framework

8.1 Should the decision be taken to do so, the manner in which the current consumer/SME regulatory framework is substantively consolidated - and, in particular, the interplay of responsibility in this regard as between the Department of Finance and the Central Bank of Ireland – will require to be determined. From a legal perspective, any repeal of primary legislation such as the Consumer Credit Act 1995 should itself require primary legislation. Moreover, a strong argument can be made for the scrutiny by the Oireachtas - and, in light of the impact of such measures on borrowers in the State, meaningful pre-legislative scrutiny - of any measures to streamline and consolidate the consumer/SME credit framework.[76] **There are certainly strong arguments for the existence of a single consolidated Act of the Oireachtas incorporating those requirements contained in the Consumer Credit Act 1995 which it is determined should remain on the statute books in conjunction with the required subject matter of the EU Consumer Credit Regulations 2010 and the EU Mortgage Credit Regulations 2016. Any such Act could deal with credit-specific conduct of business requirements relevant to personal credit, hire purchase and leasing and mortgage lending. Such an Act could potentially go beyond those credit-specific requirements to also incorporate the required provisions of the EU Distance Marketing Regulations 2004.**

8.2 The interplay of any such enactment with Central Bank-issued Codes and regulations is a central issue. As mentioned, the Central Bank has initiated a comprehensive review of the Consumer Protection Code 2012,[77] in respect of which it proposes to publish a discussion paper and engage with stakeholders to 'ensure the Code remains fit for purpose for the years ahead' and 'examine the role of consumer protection in supporting a well-functioning financial system and the balance of key aspects such as trust, innovation, and predictability'.[78] As is evident from para **[7]**,

[76] An Act of the Oireachtas could also impose conduct of business obligations on unregulated firms, should this be relevant.
[77] *Central Bank of Ireland Annual Report 2019 and Annual Performance Statement 2019-2020* (Central Bank of Ireland, 2020) 19.
[78] *Central Bank of Ireland Annual Report 2021 & Annual Performance Statement 2021-2022* (Central Bank of Ireland, 2022) 62-63.

extensive credit and mortgage-loan specific provisions are included in the current version of the Consumer Protection Code 2012. It may be anticipated that the requirements proposed to be imposed under revised regulations will not be any less extensive, while taking account of fundamental developments in the financial services landscape such as increased digitalisation.

8.3 **Whether it is ultimately decided that credit (including mortgage lending) -specific consumer protections be included primarily in one consolidated Act of the Oireachtas, in the Central Bank-issued regulations proposed to replace the Consumer Protection Code 2012 or in a combination of the two, the opportunity for revised regulatory requirements to, in as far as is achievable, seamlessly interact with each other should be embraced.**

8.4 **Moreover, while some of the existing statutory requirements are required to be in place as a matter of EU law - on the basis that they implement EU Directives into national law - this is not always the case. The rigorous examination of existing requirements on the statute books for the purposes of retaining those provisions that meaningfully contribute to consumer protection and fair consumer outcomes[79] (without adverse implications including, eg, an increase in complexity in the level of detail included in credit documentation[80]) - and jettisoning or limiting those that do not[81] - would itself be a powerful contributor to the protection of retail banking consumers in the State and should also greatly enhance the effective conduct of business by lenders in the sector.**

8.5 In conjunction with this exercise, the opportunity could be taken for extensive guidelines to issue for regulated firms in relation to key areas of potential ambiguity. Unlike the position for guidelines issued by the Competition and Consumer Protection Commission (CCPC), general statutory recognition is not afforded to guidelines issued by the Central Bank - eg, in respect of the Consumer Protection Code 2012.[82] In contrast, under the Consumer Protection Act 2007, guidelines issued by the CCPC to traders concerning

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[79] For example, see the obligation of the Central Bank under s 149(12) of the CCA 1995 to: (a) keep under general review the terms and conditions applying to the provision of services by credit institutions (as defined in the 1995 Act) to customers (not just consumers) - in respect of making and receiving payments, providing foreign exchange facilities, providing and granting credit, maintaining and administrating transaction accounts including issuing statements and any other prescribed service; and (b) require a credit institution to discontinue or refrain from the use of those terms and conditions that are, or are likely to be regarded as, 'unfair'. This provision would appear to favour the use by credit institutions of contractual terms and conditions that operate fairly for a consumer and so be a protection worth retaining (subject to the regulatory position as to the limits of its functions - see fn [**34**]). That said, matters requiring clarification in relation to this provision include the criteria for establishing unfairness, its application beyond 'credit institutions' (which includes licensed banks and retail credit firms) to terms and conditions utilised by credit servicing firms and its interplay with the EU Unfair Contract Terms Regulations 1995.

[80] See **Appendix E**, para [**E1.4**].

[81] For example, although extensive disclosure obligations are one of the mainstays of the current consumer protection regime and are an established feature of legislation emanating from the EU, the inherent limitations in over-reliance on the provision of information as a consumer protection measure has been consistently highlighted by legal commentators - see eg, Donnelly 'The Revised Consumer Protection Code: Expanding the Scope of Financial Services Regulation' (2012) 19(1) CLP 3. Albeit important, making full disclosure of material information will not fully address the 'information asymmetry' between a consumer and a regulated entity or ensure that the consumer makes a rational transactional decision. 'Papering' a consumer with exhaustive technical terms and conditions is of no assistance - and in fact has been suggested to interfere with an adequate assessment of the salient terms - unless the consumer absorbs and understands the information provided. The Law Reform Commission has pointed out that: 'A considerable body of literature exists outlining the limitations of information provision as a form of consumer protection, particularly in consumer credit markets', - see *Consultation Paper Personal Debt Management and Debt Enforcement* (LRC CP 56 - 2009) (Law Reform Commission, 2009), para 254. The provision of excessive information has been described by Advocate General Hogan in *Mikrokasa SA v XO* Case C-779/18 ECLI:EU:C:2019:1146, para 58 as having the potential to be 'counterproductive.' Presumably in light of these concerns, the Central Bank has been explicit that firms need to 'go beyond tick-box and disclosure' to ensure that information concerning the risks and benefits that is likely to influence their transactional decisions is fully understood by consumers so they are in a position to make informed decisions - see *Central Bank publishes Consumer Protection Outlook Report - Press Release* (Central Bank of Ireland, February 2015). See also *Consumer Protection Outlook Report 2015* (Central Bank of Ireland, 2015) 11.

[82] Limited statutory recognition appears to be contemplated in the insurance sphere in relation to any guidance included in a statutory code of practice - see Consumer Insurance Contracts Act 2019, s 6.

consumer welfare or protection are admissible in evidence in any court proceedings and the guidelines may be taken into account in determining a question arising in those proceedings.[83] Similar provisions should be enacted in relation to guidance issued by the Central Bank.[84]

8.6 There is also merit in making available for consumers up-to-date and plain English summaries concerning their statutory and regulatory entitlements in relation to issues of particular importance such as interest rate variation provisions and personal contact from financial services providers.

9. Regulation of SME lenders

9.1 The Retail Banking Review notes (at Q 11) that the Central Bank is not currently required to license or regulate certain non-bank providers of credit to the SME sector and asks whether it would be advantageous if all providers of credit to this sector were regulated by the Central Bank.

9.2 By way of background, the banking business of a *credit institution*, being a deposit-taking lender, is regulated as a whole. Thus all of the credit origination activities of a credit institution are subject to regulatory supervision and associated conduct of business requirements, whether the borrower is a natural person or has legal personality, such as a corporate entity.

9.3 In contrast, the initial granting of credit by way of cash loan to a corporate or LLP borrower by way of stand-alone activity is not in itself a regulated activity, with authorisation as a *retail credit firm* triggered when originating credit to *natural persons*, subject to limited exceptions (see para [**4.1(b)**]). A natural person falling within this category may be acting as a consumer (ie, outside his or her trade business or profession) or for business purposes.

9.4 Authorisation as a *credit servicing firm* is triggered where a firm holds the legal title to credit or engages in loan-ownership activities or loan administration business, where the credit has been granted to:

(a) a *natural person* subject to limited exclusions; or

(b) *only* where the credit has been originated by an authorised lender such as a licensed bank, an SME.

The policy rationale for the regulation of credit servicing activities in respect of loans falling within category (b) - being SME loans originated by a regulated lender - is so that SME borrowers whose loans were initially advanced by regulated firms such as banks and were subject to the requirements including the Consumer Protection Code 2012 and the SME Regulations 2015 do not lose the benefit of these protections where the loan is sold.

9.5 Unlike the Consumer Protection Code 2012, the SME Regulations 2015 are not expressed to be

[83] See Consumer Protection Act 2007, s 90(5), referring to guidelines issued under s 90(1)(a) of the Consumer Protection Act 2007.

[84] Guidance issued by the Central Bank in relation to the CPC 2012 includes *Guidance on the Advertising Requirements of the CPC 2012* (Central Bank of Ireland, 2013), *CPC 2012 Guidance* (Central Bank of Ireland, December 2012; re-issued May 2021, primarily to incorporate guidance concerning the inclusion of intermediary commission disclosure obligations). A strongly worded 'health warning' which it appears is intended to preclude formal evidential reliance on the guideline by regulated firms is included in the latter document in the following terms: 'Please note that this document is for information purposes only. It does not amend or alter the 2012 Code and does not form part of the 2012 Code. This document does not constitute legal advice and should not be used as a substitute for such advice. The Central Bank does not represent to any person that this document provides legal advice. It is the responsibility of all regulated entities to ensure their compliance with the 2012 Code. Nothing in this document should be taken to imply any assurance that the Central Bank will defer the use of its enforcement powers where a suspected breach of the 2012 Code comes to its attention.'

limited in their application to 'regulated activities'. However, there would not appear to be a basis for the application of the 2015 Regulations to activity that is not regulated by the Central Bank - eg, the origination of loans to corporate entities as a standalone activity.[85] This means that the Central Bank does not supervise - and the Consumer Protection Code 2012 and the SME Regulations 2015 do not apply to - unregulated activities engaged in by a non-bank lender, even if the lender is regulated in respect of certain of its other activities.[86] Non-exhaustive examples of *unregulated activities* of a non deposit-taking lender include where:

(a) a retail credit firm lends directly to a corporate or LLP borrower;
(b) an entirely unregulated firm lends directly to a corporate or LLP borrower;
(c) a credit servicing firm acquires an SME loan originated by an unregulated lender; and
(d) an entirely unregulated firm acquires an SME loan originated by an unregulated lender.

9.6 While the answer to the question as to whether all providers of credit to the SME sector should be regulated by the Central Bank is a matter of policy, where a cash loan to a corporate SME borrower is originated by an unregulated lender or a retail credit firm, the Consumer Protection Code 2012 and the SME Regulations 2015 do not apply, whether on day one or should the loan be transferred to another firm (other than a bank). To have such a difference in protections does appear to merit debate from the perspective of the position of corporate SME borrowers availing of credit, particularly in light of identified trends in the SME lending market, including the increased role being played by non-banks, including retail credit firms, in financing Irish businesses.[87]

9.7 From a regulated lender standpoint, it has been contended that the obligations imposed under the SME Regulations 2015 on entities such as banks in relation to matters such as contact with customers, provision of information, response times, independent reports and alternative arrangements severely disadvantage those lenders relative to unregulated finance providers (and trade creditors).[88] Interestingly, the view of the Credit Review Office appears to be that it would be difficult for those lenders that are not bound by the SME Regulations 2015 to justify departing from the standards set out in the Regulations.[89] This perspective, although potentially helpful from the perspective of an SME corporate borrower because it may reflect a policy view (at least in some quarters), does not alter the fact that as matters stand, no legal obligation is imposed on unregulated entities (or on regulated entities), in each case, with respect to their unregulated business, to comply with the requirements of the SME Regulations 2015 (or the

[85] The SME Regulations 2015 were issued under s 48 of the Central Bank (Supervision and Enforcement) Act 2013, which empowers the Central Bank to make regulations for the proper and effective regulation of 'regulated financial service providers'. A 'regulated financial service provider' includes: 'a financial service provider *whose business* is subject to regulation by the [Central] Bank … or … supervision by the ECB'. (Emphasis added). The business of an authorised credit institution is supervised as a whole; thus lending to corporate entities by a credit institution is a regulated activity and subject to the CPC 2012 and the SME Regulations 2015 (unless otherwise excluded). In contrast, specific activity of retail credit firms and credit servicing firms is subject to regulation by the Central Bank under the Central Bank Act 1997 and it is this specific regulated business that, in turn, is subject to the CPC 2012 and the SME Regulations 2015.

[86] See, by analogy, the reported view of the Central Bank (prior to the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022) that it was not empowered to impose the requirements of the CPC 2012 with respect to unregulated hire purchase activities carried out by firms authorised by the Central Bank to provide other financial services, pointing out that even if this were possible, such an application of the requirements could: 'easily be circumvented by such regulated persons restructuring their hire purchase/PCP activities into a separate legal entity which would not require authorisation from the Central Bank', a point that applies equally here - see *Review of Regulation of Personal Contract Plans Commissioned by the Minister for Finance* (MG Tutty, September 2018) 27.

[87] See *Retail Banking Review Public Consultation* (Department of Finance, May 2022), s 7.3.3.

[88] See, eg, the *Bank of Ireland submission on Consultation Paper CP91* (App A, 10-11). See also the CP91 submission made by the Banking & Payments Federation Ireland.

[89] *Information Note SMEs that have had Loans sold on - what every SME needs to know* (Credit Review Office, Spring 2020), s 4.

Consumer Protection Code 2012).

10. Section 44 of Central Bank (Supervision and Enforcement) Act 2013

10.1 Another issue that merits consideration when considering the retail banking landscape in the State is the parameters of the statutory cause of action afforded to 'customers' of regulated financial services firms - a wider category than 'consumers' - under s 44 of the Central Bank (Supervision and Enforcement) Act 2013. This remedy, which has not to date been substantively tested before the Irish courts, provides a customer of a regulated financial service provider, with effect from 1 August 2013, with a statutory right of action against that provider in respect of loss or damage suffered by the customer arising from the provider's regulatory breach.[90]

10.2 This is a distinct cause of action which will not require the surmounting of the legal hurdles necessary to successfully establish a cause of action in negligence or arising from breach of contract which have been incrementally developed over decades and apply in carefully calibrated circumstances.

10.3 While s 44 may be viewed by customers as a helpful consumer protection - although it extends beyond consumers – from a risk perspective, the effect of this statutory cause of action is to extend the reach of regulatory requirements beyond both the regulator/regulated firm dynamic - involving, on breach of regulatory rules, the imposition on regulated firms of fines by the regulator and, potentially, a redress programme - and recognised remedies under common law. Section 44 allows claimaints to seek to recover loss directly against the financial services firm for breach of an enormous range of statutory requirements. This remedy may be argued with some force to be too widely drawn.[91]

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[90] S 44 of the Central Bank (Supervision and Enforcement) Act 2013 provides that: 'A failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure.' The statutory cause of action set out in s 44 was not included in the Central Bank (Supervision and Enforcement) Bill 2013 as initiated and was introduced by the then Minister for Finance (and passed without discussion) as amendment no 48 at Central Bank (Supervision and Enforcement) Bill 2011: Committee Stage (Select Sub-Committee on Finance debate, 24 April 2013).

[91] For example, it is well established at common law that in the usual course, no advisory relationship exists between a bank as lender and a customer as borrower. This is reflected in the MCR 2016 where an obligation to assess suitability of a mortgage loan is not imposed on lenders under the Regulations unless the lender is providing advisory services - ie, providing personal recommendations to a consumer in relation to a credit agreement, which it is made clear, is a separate activity from the granting of a credit - see MCR 2016, reg 23(4)(b). In contrast, in the case of mortgage lending and other loans exceeding €75,000, a full-scale suitability obligation is imposed on lenders under the CPC 2012, even if the personal consumer has specified the product and the product producer by name and has not received assistance from the regulated entity in the choice of either (see the disapplication of the 'execution-only' exemption in s 5.24(i) and (ii) of the CPC 2012.) This continues to be the case for mortgage loans within the scope of the MCR 2016.

In the case of lending, an assessment of, and other rules relating to, *affordability* are necessary and important in all circumstances and should be the subject of a statutory obligation (although whether a failure to do so should permit a statutory cause of action under s 44 for breach is another matter). Similarly, where an advisory relationship exists between the regulated entity and the personal consumer or, potentially, in the event of qualitative engagement between the parties concerning the choice of the product or service, an assessment as to whether the product or service meets the personal consumer's needs and objectives, his or her personal circumstances and financial situation and is line with the personal consumer's attitude to risk is appropriate – see Chapter 5 of the CPC 2012. However, in other circumstances - eg, where the extent of engagement is limited - it is questionable whether it is appropriate to impose these full-scale suitability and 'knowing the consumer' obligations on a regulated entity.

By way of counter argument, it may be claimed that it is preferable to err on the side of caution by imposing more rather than less regulatory requirements on regulated entities, particularly in light of recent conduct issues such as those related to tracker mortgage loans. Nevertheless, where a personal consumer is not relying on a regulated entity's advisory expertise or where qualitative engagement has not occurred between the parties, a concern is that the suitability-related obligations become a 'tick-box' exercise. A risk then arises of this approach percolating to scenarios where suitability-related obligations are truly required and where compliance with these obligations is more meaningful. (See in contrast *Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)* Release 20 (Financial Conduct Authority, June 2022) 4.7A.2 R, where 'reasonable steps' to establish suitability are required only where the lender is providing advice to the customer.)

10.4 The following additional high-level points may be made in relation to the extent of this statutory cause of action:

(a) a claimant under s 44 may include a retail borrower taking out a mortgage loan, a high-net-worth individual acting in the course of business or a large corporate client. The equivalent statutory remedy in the UK applies, in general, only to private persons (unless specifically so prescribed[92]) - essentially individuals, including sole traders, and other entities not acting for business;[93]

(b) under s 44, a customer may seek to recover loss directly against the financial services firm for breach of statutory requirements including the Consumer Protection Code 2012 and extending to the very widely drafted General Principles thereof.[94] The equivalent UK remedy does not apply to breaches of the high-level Principles for Business (similar to the General Principles set out in the Consumer Protection Code 2012) and involves other exemptions, including the possibility for the Financial Conduct Authority to determine that the remedy does not apply to particular rules, an entitlement it routinely exercises; [95] and

(c) financial services firms are precluded from seeking to exclude their liability under s 44 pursuant to s 3.8 of the 2012 CPC, which prohibits a regulated entity excluding or restricting any legal liability or duty of care to a consumer which it has under applicable law or under the Consumer Protection Code 2012 (except where legislatively permitted).

10.5 There are some factors that might reduce the sizeable potential risk exposure of regulated firms under this statutory remedy including English authority which draws a distinction between *procedural* breaches of rules such as those related to the obtaining of information – which are regarded in this context as incidental, with the crucial point being whether the product is suitable for the claimant - and substantive breaches such as those relating to suitability.

10.6 In addition, procedurally, a claim by a borrower against a lender for a regulatory rule breach under s 44 may be made by way of counterclaim in legal proceedings taken by the lender against the borrower to recover the loan amount due. Standard retail and corporate loan contract provisions restrict a borrower from exercising set-off – thus precluding a borrower from seeking to rely on a set-off of the borrower's proposed counterclaim for breach of statutory duty against the lender's claim for the loan amount owing. However, the Consumer Rights Bill 2022, should it

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The effect of s 44 of the Central Bank (Supervision and Enforcement) Act 2013 is that a breach of the extensive suitability obligation can ground a cause of action on the part of a consumer claiming loss arising from a breach by a regulated lender of the CPC 2012, including the suitability obligations, where no advisory duty of care has been assumed by the lender or qualitative engagement has occurred between the parties.

[92] Financial Services and Markets Act 2000, s 138D(4).

[93] See Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2256/ 2001), reg 3(1).

[94] The General Principles of the CPC 2012 are as follows (where a regulated firm is providing credit under credit agreements falling within the CCR 2010, only General Principles 2.1 to 2.4 and 2.7 to 2.12 apply): 'A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it: 2.1 acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market; 2.2 acts with due skill, care and diligence in the best interests of its customers; 2.3 does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service; 2.4 has and employs effectively the resources, policies and procedures, systems and control checks, including compliance checks, and staff training that are necessary for compliance with this Code; 2.5 seeks from its customers information relevant to the product or service requested; 2.6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer; 2.7 seeks to avoid conflicts of interest; 2.8 corrects errors and handles complaints speedily, efficiently and fairly; 2.9 does not exert undue pressure or undue influence on a customer; 2.10 ensures that any outsourced activity complies with the requirements of this Code; 2.11 without prejudice to the pursuit of its legitimate commercial aims, does not, through its policies, procedures, or working practices, prevent access to basic financial services; and 2.12 complies with the letter and spirit of this Code.'

[95] See s 138D(2) and (3) of the Financial Services and Markets Act 2000. For an example of the exercise of this right, see *Mortgages and Home Finance: Conduct of Business Sourcebook Release 20* (Financial Conduct Authority, June 2022), Sch 5 (Rights of action for damages). Other exceptions are provided for - see s 138D(5).

be enacted in its current form, will impose an outright prohibition on the purported contractual imposition of restrictions on set-off on consumers (as narrowly defined). Included in a 'blacklist' of terms that are prohibited as unfair in all circumstances under the Consumer Rights Bill 2022 (1 June 2022) is a clause that has as its object or effect: 'to exclude or hinder a consumer's right to take legal action or exercise a legal remedy'.[96] This would extend to any prohibition on the exercise of set off rights by a consumer borrower. It is submitted that the impact of such a proposal on standard retail lending provisions such as set-off should be fully debated before any legislation to this effect is enacted (see also **Appendix E**, paras [**E.1.11]-[E.1.15]**), and the breadth of the statutory remedy under s 44 examined.

Nora Beausang
7 July 2022

[96] Consumer Rights Bill 2022 (1 June 2022), s 132(1)(d).

Appendix A

Notification of changes in interest rates

Advance personal notification of interest rate change under EU Mortgage Credit Regulations 2016

A1.1 The regulatory position in relation to changes in interest rates on consumer lending is fragmented and far from straightforward. In summary, where a loan to a consumer is within the scope of the EU Mortgage Credit Regulations 2016, *advance personal notification* to the consumer of *any change* in the borrowing rate is required, although no minimum period within which the notification must be made is prescribed. The minimum information to be set out in the notification includes the amount of the payments to be made after the new interest rate takes effect and details of any changes in the number or frequency of payments.[97]

30 days' advance notification of interest rate increases under Consumer Protection Code 2012

A1.2 The Consumer Protection Code 2012, which applies in conjunction with the EU Mortgage Credit Regulations 2016, requires at least *30 days' advance personal notification* to personal consumers of *any change* in the loan interest rate subject to specified exceptions (referred to below) for:

(a) tracker interest rate mortgage lending; and
(b) reference rate based non-mortgage lending.

Required notification details include the date from which the new rate applies, details of the old and new rate, the revised repayment amount and general information where the rate change constitutes a change in variable interest rates.[98]

A1.3 An example of a scenario where the minimum 30 days' advance personal notification requirement applies under the Consumer Protection Code 2012 is where a lender proposes to increase its *standard variable mortgage interest rates*. Under separate guidance, the Central Bank has clarified that the notice period does not apply to notification to consumers of interest rate *decreases*. [99]

A1.4 In light of the fact that the Consumer Protection Code 2012 is a statutory code, with which regulated firms must comply as a matter of law,[100] this more stringent minimum 30-day notice period should be complied with by lenders in the circumstances provided for in the Code, even where the loan is within the scope of the EU Mortgage Credit Regulations 2016.

Tracker rate exemption under Consumer Protection Code 2012 not reflected in EU Mortgage Credit Regulations 2016

A1.5 For *tracker interest rate mortgage loans*, the minimum 30 days' advance notification is not required under the Consumer Protection Code 2012, with the prescribed personal notification of *a change* in the underlying rate being tracked required to be made to personal consumers as soon as possible, and no later than 10 business days after the lender becomes aware of the change.[101]

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[97] EU Mortgage Credit Regulations 2016, reg 28(1).
[98] Consumer Protection Code 2012, s 6.6 (as amended by *Addendum to Consumer Protection Code 2012* (Central Bank of Ireland, July 2016) and *Addendum to Consumer Protection Code 2012* (Central Bank of Ireland, June 2018)) and s 6.7.
[99] *CPC 2012 Guidance* (Central Bank of Ireland, December 2012) 11, s 3.9, clarification included with effect from 22/12/2011.
[100] Central Bank Act 1989, s 117(1).
[101] Consumer Protection Code 2012, s 6.7(a).

A1.6 However, where the tracker interest rate mortgage is within the scope of the EU Mortgage Credit Regulations 2016, *advance personal notification* of any change in the borrowing rate is still required. Although the EU Mortgage Credit Regulations 2016 apply to credit agreements entered into on or after 21 March 2016 and new tracker rate-based mortgage loans had ceased to be on offer in the Irish market at this stage, these requirements apply to any restructured tracker mortgage loan agreements entered into from 21 March 2016. [102]

Exemption from advance notification under EU Mortgage Credit Regulations 2016: capital markets auction

A1.7 An exemption from advance notification applies under the EU Mortgage Credit Regulations 2016 where changes in the rate are determined by way of 'auction on the capital markets', in which case the lender must, in good time before the auction, inform the consumer of the upcoming procedure and provide an indication of how the borrowing rate could be affected.[103] This provision has little relevance in an Irish context and appears to have been inserted to reflect the position arising in relation to certain adjustable rate loans in Denmark, where the rate change is determined annually by way of auction on the capital markets and where the lender will not know the final rate until the auction has closed, at which time the new rate will have entered into force.[104] The exemption does not, for example, apply, to the determination of the interest rate on the main refinancing operations of the ECB determined by the ECB Governing Council, being the rate tracked by many tracker interest rate mortgages in the Irish market.

Reference rate national discretion permitted under Mortgage Credit Directive 2014 not adopted

A1.8 The Mortgage Credit Directive 2014 did permit as a national discretion the ability to permit parties to agree in the credit agreement that the information concerning a change in borrowing rate is to be given to the consumer periodically where the change is correlated with a change in a 'reference rate' (which is not defined), the new reference rate is made publicly available by appropriate means and the information concerning the new reference rate is kept available in the lender's premises and communicated personally to the consumer together with the amount of new periodic instalments[105] - eg, by way of bank statement. However, the decision arising out of the Mortgage Credit Directive 2014 Consultation was not to exercise this discretion,[106] with it considered 'a desirable principle' that notification be given to consumers of 'each change in the borrowing rate and of the consequent mortgage payment obligations etc'.[107] Thus, notwithstanding that the policy focus appeared to be on the requirement to notify, rather than notification before the change took effect, advance personal notification of any change in the borrowing rate is required under the EU Mortgage Credit Regulations 2016. The implementation of this requirement in, effectively, all circumstances appears anomalous, given that for mortgage lending under the Consumer Protection Code 2012, an exemption from the requirement to provide to personal consumers at least 30 days' advance notice of a change in interest rate applies where interest is calculated on the basis of a verifiable tracker interest rate.[108] However, because of the more stringent requirements of the EU Mortgage Credit Regulations 2016, pre-notification

[102] See para **[6.3]**.
[103] MCR 2016, reg 28(2).
[104] *EMF Position Paper on the Commission's Proposal for a Directive on Credit Agreements relating to Residential Property* (European Mortgage Federation; May 2011) 11.
[105] MCD 2014, art 27(2).
[106] *Directive on Credit Agreements for Consumers relating to Residential Immovable Property: Proposed course of action following public consultation* (Department of Finance, July 2015) 19.
[107] *Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 36.
[108] CPC 2012, s 6.7(a).

of changes in the borrowing rate as required by the EU Mortgage Credit Regulations 2016 applies to such lending.

A1.9 Where credit is priced on the basis of a publicly sourced tracker rate over which the lender has no control - rather than a rate which the lender itself administers - it may be difficult for a lender to comply with the requirement for advance personal notification to the consumer of any change in that rate under the EU Mortgage Credit Regulations 2016.

Reference non-mortgage rate exemption permitted under Consumer Protection Code 2012

A1.10 For non-mortgage lending that is based on a 'reference rate' (which is not defined in the Consumer Protection Code 2012), where specified conditions are met, including that the new reference rate is made publicly available by appropriate means, *no personal notification* of the change is required under the Consumer Protection Code 2012.[109] However, where the non-mortgage loan is within the scope of the EU Mortgage Credit Regulations 2016 - ie, consumer credit not secured on residential property for the purposes of buying or retaining property rights - advance personal notification will still be required.

Consumer Rights Bill 2022: advance notification indicated

A1.11 For new consumer retail loan agreements within the scope of Consumer Rights Bill 2022 when enacted, the effect of some language changes appears to be that should a lender wish to avoid designation of an interest rate variation clause as presumptively unfair in line with the 'grey list', the term should provide for *advance notice* of any interest rate variation to be given to the consumer,[110] which may similarly give rise to operational issues for lenders.[111]

Notification of interest rate decrease not required under Consumer Protection Code 2012 but is required under EU Mortgage Credit Regulations 2016

A1.12 Under separate guidance issued by the Central Bank, it appears that personal notification of *any decrease* in the interest rate is not required to be made in advance under the Consumer Protection Code 2012.[112] However, where the loan is within the scope of the EU Mortgage Credit Regulations 2016, *advance notification of 'any change'* in the interest rate is required under the Regulations.[113]

[109] CPC 2012, s 6.7(b).
[110] Compare the Consumer Protection Bill 2022 (1 June 2022) Schedule 5, Part 2, s 2 - which removes the reference to the alteration of interest or charges 'without notice' - with the EU Unfair Contract Terms Regulations 1995, Schedule 3, s 2 (b).
[111] Irrespective of whether these changes are included in the measures as enacted - but particularly so, should this occur - in light of the strong focus on transparency in both the 1995 Regulations (as interpreted by the CJEU and, in recent administrative sanctions engagement, by the Central Bank) and as formalised in the Consumer Protection Bill 2022 as a contributor towards an assessment of fairness, the likely focus of lenders in seeking to avoid designation of their interest variation clauses as unfair will be on transparency.
[112] See *CPC 2012 Guidance* (Central Bank of Ireland, December 2012) 11, s 3.9, clarification included with effect from 22/12/2011.
[113] MCR 2016, reg 28(1).

Appendix B

Tying practices

Prohibition of tying practices under the EU Mortgage Credit Regulations 2016

B1.1 The EU Mortgage Credit Regulations 2016 prohibit a lender from engaging in what is termed a 'tying practice', where a lender sells or offers to sell to a consumer a credit agreement in a package with other distinct financial services where the credit agreement is not made available to the consumer separately.[114] Under a tying practice, the credit agreement is not available to the consumer without the other financial product or service.

Permitted exemption to the prohibition: feeder account

B1.2 When the Mortgage Credit Directive 2014 was implemented, a national discretion was exercised by the State, with the EU Mortgage Credit Regulations 2016 permitting a lender to request a consumer to open or maintain a payment or a savings account for specified purposes related to the loan – ie, where the only purpose of the account is to:

(a) accumulate capital to repay the loan;

(b) service the loan;

(c) pool resources to obtain the loan; or

(d) provide additional security for the lender in the event of default.[115]

However where the loan is also a housing loan under the Consumer Credit Act 1995 – which includes consumer mortgage lending - because of an outright prohibition on tying practices under the Consumer Credit Act 1995 (see para [**B1.4-B1.5**] below), this exception is moot.

Permitted exemption to the prohibition: clear benefit to the consumer

B1.3 An additional national discretion was exercised by the State permitting an exemption to the prohibition on tying practices under the EU Mortgage Credit Regulations 2016 relating to products marketed after 20 March 2014.[116] In these cases, a lender may engage in a tying practice where it can demonstrate to the Central Bank that the tied products offered on similar terms and conditions and which are not made available separately, result in a clear benefit to the consumer, taking due account of the availability and the prices of the relevant products offered on the market.[117] The Central Bank may, in order to protect the interests of consumers, specify (and in this case must publish, in a form considered appropriate by it) the conditions, including time limits, that it considers appropriate, which must be complied with by the lender.[118] In the absence of such published conditions, the onus is on the lender to show that the tied products are of clear benefit to the consumer. Given that a breach of this requirement by a lender is a criminal offence,[119] this is not a responsibility to be borne lightly. For transparency and

[114] MCR 2016, reg 13(1).
[115] MCR 2016, reg 13(2). This exemption was the subject of a national discretion under art 12(2)(a) of the MCD 2014. See *Directive on Credit Agreements for Consumers relating to Residential Immovable Property: Proposed course of action following public consultation* (Department of Finance, July 2015) 10-11. See *also Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 25-26.
[116] MCR 2016, reg 13(5). This exemption was the subject of a national discretion under art 12(3) of the MCD 2014 - see *Directive on Credit Agreements for Consumers relating to Residential Immovable Property: Proposed course of action following public consultation* (Department of Finance, July 2015) 11. See also *Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 26.
[117] MCR 2016, reg 13(3).
[118] MCR 2016, regs 13(4) and 13(6).
[119] MCR 2016, reg 13(8).

consistency purposes, the Irish representative association for banks in Ireland has sought a standardised format for demonstrating clear benefit to the consumer.[120] However where the loan is also a housing loan, in light of the requirements of the Consumer Credit Act 1995 set out below, this exception is largely moot.

Outright prohibition on tying practices under the Consumer Credit Act 1995

B1.4 Part IX of the Consumer Credit Act 1995 dealing with housing loans - which includes mortgage lending within the scope of the EU Mortgage Credit Regulations 2016 - imposes an outright prohibition on tying practices.[121] Thus, tying a housing loan to a feeder/security (or any other) account is prohibited under the Consumer Credit Act 1995, as is tying a housing loan to a product or service marketed after 20 March 2014, even where a clear benefit to the consumer can be shown.

B1.5 In the absence of any clarification of the point in the EU Mortgage Credit Regulations 2016,[122] a lender engaged in secured mortgage lending within the scope of the 2016 Regulations is obliged to abide by the more stringent prohibition set out in the Consumer Credit Act 1995. In this regard, it is notable that breach of the prohibition on tying practices set out in the Consumer Credit Act 1995 is the only indictable offence under Part IX of the 1995 Act specific to lenders.[123]

Disapplication of Consumer Protection Code 2012 tying restrictions to EU Mortgage Credit Regulations 2016 lending

B1.6 For completeness, restrictions relating to the linking of services are included also in the Consumer Protection Code 2012, the bulk of which have been disapplied to activities within the scope of the EU Mortgage Credit Regulations 2016.[124] Certain requirements of the Consumer Protection Code 2012 relating to *bundled* products - being the packaging of two or more distinct products into a bundle, where each of these products can be purchased separately from or through the regulated entity (and which are not subject to the outright prohibition on tying practices set out in the Consumer Credit Act 1995) - continue to apply to EU Mortgage Credit Regulations 2016 activities, where relevant.

[120] See *BPFI response to the Department of Finance Consultation* (Banking & Payments Federation Ireland; October 2015) 9-10.
[121] CCA 1995, s 127(1) prohibits a mortgage agent - which includes a mortgage lender - from making or offering to make a housing loan to any person which would be subject to a condition that any financial services, conveyancing services, auctioneering services or other services relating to land which that person may require, whether or not in connection with the loan, are to be provided by the lender or its subsidiary or other associated body.
[122] While reg 11(3) of the MCR 2016 provides for the primacy of Pt 4 of the Regulations (which includes reg 13 permitting the exemption from the prohibition on tying practices where clear benefit exists for the consumer) in the event of conflict with Pt II of the CCA 1995, Pt II deals with advertising only and the prohibition on tying practices in the CCA 1995 is set out in s 127 thereof (included in Part IX of the 1995 Act, dealing with housing loans). The only reference to s 127 of the CCA 1995 in the MCR 2016 is in reg 13(7) thereof which provides that a third-party insurance policy selected by the consumer must be accepted by the lender provided that it is comparable to that proposed by the lender and is stated to be without prejudice to (inter alia) s 127 of the CCA 1995. No reference is made elsewhere in the MCR 2016 to the outright prohibition on tying practices in the CCA 1995.
[123] CCA 1995, s 12(2)(d).
[124] CPC 2012, s 3.17-3.19, of which only s 3.18(b) and (d) may continue to apply to MCR 2016 activities. See *Addendum to CPC 2012* (Central Bank of Ireland, July 2016) Part 2.

Appendix C

Unsolicited personal contact

C1.1 The area of unsolicited personal contact – ie, contact to which the consumer has not consented - is clearly an important area of consumer safeguarding and an issue of considerable commercial significance for lenders (as evidenced by the fact that the provisions governing contact with consumers elicited more discussion during the consultation process leading up to the Consumer Protection Code 2012 than any other single topic). [125]

C1.2 In order for a consumer to work out the protections to which he or she is entitled, and for a lender to identify the obligations to which it is subject, requirements including the following (with (a) – (c) applying together, including to credit within the scope of the EU Consumer Credit Regulations 2010 or the EU Mortgage Credit Regulations 2016; (d) applying in the case of arrears secured on an individual's primary residence; (e) applying in the case of distance financial contracts and (e) having general application), need to be navigated:

(a) *Consumer Credit Act 1995* the effect of which is that (subject to an exception for the service of legal proceedings) any *unsolicited visit or telephone call* a to a consumer's *place of work* may occur only as a 'last-ditch' effort following the failure of all reasonable efforts to make contact and where the consumer also lives there. For all locations, an *unsolicited visit or telephone call* (which would include a call to a consumer's mobile telephone number) may not occur between 9.00 pm on any 'weekday' - defined under the Interpretation Act 2005 as a day which is not a Sunday - and 9.00 am on the following day or at any time on a Sunday or a public holiday; [126]

(b) *Consumer Protection Code 2012* which:

(i) completely prohibits *unsolicited personal visits* to individual consumers' *place of employment, business or home.*[127] (However, under guidance issued relating to the Consumer Protection Code 2012, a 'last-resort' home visit is permitted where a 'personal consumer' - which definition aligns with that of 'consumer' under the Consumer Credit Act 1995 - is in arrears - see (c) below). *Informed consent* must be obtained in respect of any personal visit to a consumer who is an individual, which must be specific to each visit including the purpose(s) of, and the time and date for, the personal visit – ie, a blanket consent will not suffice;[128]

(ii) permits an *unsolicited telephone call* to be made to a consumer who is an existing customer of a regulated entity on satisfaction of one of specified conditions, the most relevant of which in a lending context is likely to be where the consumer holds a product which requires the regulated entity to maintain contact with the consumer and the contact is in relation to the product (although not stated, this is subject to the Consumer Credit Act 1995 requirements set out at (a)).[129] *Unsolicited telephone calls* - which would extend to a call to a consumer's mobile telephone - must be made within the stricter timeframe (than that set out in the 1995 Act) of between 9.00 am

[125] *Review of Consumer Protection Code: Consultation Paper CP47* (Central Bank of Ireland, 2010) and *Consultation Paper CP 54: Second Consultation on Review of Consumer Protection Code* (Central Bank of Ireland, 2011).
[126] CCA 1995, s 46. This leaves open the opportunity for a consumer to be contacted between the hours of midnight on a Sunday and 9 am on a Monday.
[127] CPC 2012, s 3.37
[128] CPC 2012, s 3.38 and s 3.39.
[129] CPC 2012, s 3.40.

and 9.00 pm Monday to Saturday (excluding bank and public holidays).[130] In separate guidance, the Central Bank has indicated that text messages can be sent outside of these hours;[131]

(iii) where a personal consumer is in arrears, in addition to the 'last-resort' visit permitted under guidance issued relating to the Consumer Protection Code 2012 (see (c) below), permits the lender to initiate a maximum of *three other unsolicited communications per calendar month*, by whatever means, to the personal consumer.[132] (These arrears-related provisions do not apply where the arrears are secured by a mortgage over an individual's primary residence in the State, in which case the personal contact rules under the Code of Conduct on Mortgage Arrears 2013 apply – see (d) below).[133] The three unsolicited communications include any communication where contact is attempted but not made with the personal consumer but do not include any communication that has been requested by, or agreed in advance with, the personal consumer or any communication to the personal consumer the sole purpose of which is to comply with the requirements of the Consumer Protection Code 2012 or other regulatory requirements.[134] A lender must ensure that the level of contact and communications from it or any third party acting on its behalf with a personal consumer in arrears is proportionate and not excessive;[135] and

(iv) requires a *protocol* to be followed by representatives of a regulated entity where a *personal visit or telephone contact* is made to or with a consumer (which includes 'consumer' as defined in the Consumer Credit Act 1995) under the Code. This involves the making of various disclosures and includes establishing whether the consumer wishes the personal visit or telephone contact to proceed and, if not, ending the contact immediately.[136] As there is no reference in the Consumer Protection Code 2012 to a consent overriding these protections, it would appear they apply irrespective of whether a consent is held by the regulated entity; it would also appear to apply to the 'last resort' unsolicited personal home visit to a personal consumer in arrears (see (c) below);

(c) *CPC Guidance* which appears to override the complete prohibition on unsolicited personal visits set out in the Code and permits *unsolicited personal visits* to an individual consumer's *hom*e in respect of arrears to which the Code of Conduct on Mortgage Arrears 2013 do not apply where attempts at contact have failed and before a lender decides to begin legal action. Where an unsolicited visit is made to an individual consumer in arrears in these circumstances, the consumer must be given at least five working days' notice in writing of the lender's intention to make the unsolicited visit within a specified time frame (eg, in the next ten working days). This visit (together with notice thereof) does not count towards the limit of three unsolicited contacts per calendar month permitted by the Consumer Protection Code 2012 where the consumer is in arrears;[137]

(d) *Code of Conduct on Mortgage Arrears 2013*, which applies where an individual is in or facing *arrears secured over his or her primary residence* in the State. The limit of three unsolicited

[130] CPC 2012, s 3.43.
[131] *Consumer Protection Code 2012 Guidance* (Central Bank of Ireland, December 2012) 6, s 2.4.
[132] CPC 2012, s 8.14.
[133] See 'Clarification of Scope' at the start of Chapter 8 of the CPC 2012 dealing with arrears.
[134] CPC 2012, s 8.14.
[135] CPC 2012, s 8.13.
[136] CPC 2012, s 3.44(d).
[137] *CPC 2012 Guidance* (Central Bank of Ireland, December 2012), s 2.2, 5 (clarification included with effect from 21/12/2012).

contacts per month which had applied under the previous version of the Mortgage Arrears Code – and still applies in respect of arrears under the Consumer Protection Code 2012 which are not secured over a person's home (subject to the exception for a last-resort personal visit) - has now been replaced under the 2013 Code with more nuanced requirements, which apply to both solicited and unsolicited contact, in order to place 'a greater emphasis on a more qualitative approach to contacts'. [138]Thus the Code of Conduct on Mortgage Arrears 2013 requires the level of communications from the lender to be proportionate and not excessive, taking into account the borrower's circumstances, including that unnecessarily frequent communications are not made, that communications with borrowers are not aggressive, intimidating or harassing, that borrowers are given sufficient time to complete an action to which they have committed before a follow-up communication is attempted and that steps are taken to agree future communication with borrowers;[139]

(e) *EU Distance Marketing of Financial Services Regulations 2004,* which, in a lending context, prohibits a lender from communicating with a consumer, with a view to supplying to him or her a distance financial service such as a loan, by means of an automated calling system or a fax machine, without the consumer's consent to the use of that means of communication. Any other means of distance communication in communicating with a consumer with a view to supplying a financial service to him or her is prohibited, unless either the consumer has consented or has not manifested an express objection to the use of that means of communication;[140] and

(f) other requirements which are not financial services-specific but apply as relevant, including data protection legislation under the *GDPR* and the *Data Protection Act 2018* (relevant to direct marketing), the *Consumer Protection Act 2007*,[141] the *European Communities (Electronic Communications Network and Services) (Privacy and Electronic Communication) Regulations 2011*[142] and the *Non-Fatal Offences Against the Person Act 1997*.[143]

C1.3 The imperative for, to the extent possible, streamlining and consolidating these requirements is evident.

C1.4 It might be noted that when formulating the requirements set out in the Consumer Protection Code 2012, the primary regulatory concern related to the pressurised selling of financial products by financial service providers, using selling tactics that could be perceived as pushy, aggressive or overly intrusive.[144] Reflecting the Central Bank's particular concerns in relation to door-step selling, these requirements focused on strengthening protection for individual consumers against *unsolicited personal visits* from representatives of regulated entities. As matters have evolved, the

[138] *Review of the Code of Conduct on Mortgage Arrears CP 63* (Central Bank, March 2013) 8.
[139] Code of Conduct on Mortgage Arrears 2013, s 3.22
[140] EU Distance Marketing Regulations 2004, regs 20(1) and (3).
[141] A persistent failure to comply with a request from a consumer to cease communicating or initiating unwanted or unsolicited contact with him or her by telephone, fax, email or any other electronic means or remote media is a prohibited commercial practice under the Consumer Protection Act 2007, except to the extent justified or permitted by or under law in order to enforce a contractual obligation. See CPA 2007, s 55(3)(c) and s 56.
[142] (SI 336/2011), in particular reg 13 (requiring automatic calling machines, fax machines or email to be used for the purposes of direct marketing to individual users who have given their prior consent) and reg 14 (National Directory Database).
[143] An offence is constituted under s 10(1) of the Non-Fatal Offences Against the Person Act 1997 where a person: 'without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with or about him or her'.
[144] See *Consultation Paper CP 54: Second Consultation on Review of Consumer Protection Code* (Central Bank of Ireland, 2011) 12 and *CPC 2012 Guidance* (Central Bank of Ireland, December 2012), s 2.1, 4.

protection of personal consumers in arrears - particularly mortgage arrears - from what they may perceive as harassing or intimidatory *telephone calls* from regulated entities may merit increased regulatory focus. For example, lenders and borrowers may have differing views as to what concepts such as 'not excessive', 'proportionate', 'unnecessarily frequent' and 'harassing' (as prohibited under the Code of Conduct on Mortgage Arrears 2013) mean in real terms.

C1.5 It should be borne in mind also that typically a lender will hold a wide-ranging consent from the consumer permitting contact by various means which has been signed by the consumer along with the other loan documentation at the outset of the loan facility. At the time of the provision of the consent, circumstances may have been quite different, involving, potentially, a different lender. Ensuring that sufficient safeguards are in place so that appropriate contact (in particular, by telephone) is made with consumers where it is not technically unsolicited because the contact is the subject of such a consent is an area that may merit further regulatory or legislative focus.

Appendix D

What constitutes 'consumer' buy-to let lending - establishment of statutory criteria?

D1.1 Another issue that arises in relation to the retail banking regulatory landscape is the desired policy position of the State as to the extent to which buy-to-let lending constitutes 'consumer' lending, to which the protections of the EU Mortgage Credit Regulations 2016 (and other consumer-specific legislation such as the EU Unfair Contract Terms Regulations 1995 and the Consumer Credit Act 1995) applies.

D1.2 For reasons of operational efficiency, as well as caution, lenders may decide to elect to treat buy-to-let lending to an individual as within the scope of the EU Mortgage Credit Regulations 2016 - and entitled to these and other statutory consumer protections - unless it is very clear that the borrower is acting for business purposes - eg, where the borrower is clearly a professional landlord with a number of buy-to-let properties. (Consistent with this approach, lenders may similarly elect to apply the credit and mortgage loan-specific requirements of the Consumer Protection Code 2012 - which apply to 'personal consumers', the definition of which is aligned with that of 'consumer' under the EU Mortgage Credit Regulations 2016 - to this type of lending). In general, such an approach obviates the necessity for loan officials to make case-by-case assessments as to the level of protections to be afforded to individual borrowers. It also avoids the risk of borrowers who should have been afforded such protections being miscategorised, thereby potentially exposing the lender to the consequences of statutory breach.

D1.3 Nevertheless, the necessity for lenders to make these types of decisions highlights the imperative for a view to be reached (within the constraints of EU law) as to the desired policy position concerning the nature of consumer-buy-to-let lending and the protections which should attach to this activity.

<u>National discretion exercised: application of full protections of EU Mortgage Credit Regulations 2016 to consumer buy-to-let lending</u>

D1.4 By way of background, at the time of implementation of the EU Mortgage Credit Directive 2014, Member States were permitted to exclude from the application of the Directive a mortgage credit agreement prohibiting the occupation of the property as a residence by a consumer or his or her family members and providing for the property to be rented on the basis of a rental agreement. This was on the basis that such credit agreements: 'have risks and features that are different from standard credit agreements and therefore may require a more adapted framework.'[145] Where this opt-out was adopted, Member States were required to put in place an appropriate framework for consumer buy-to-let lending.[146]

D1.5 The position adopted by the State was to apply the full requirements of the EU Mortgage Credit Regulations 2016 to buy-to-let lending. The stated rationale for this was the potential for buy-to-let mortgage loans - in particular, given their recourse nature - to cause significant difficulties for consumer borrowers and, on this basis, it was appropriate that the full consumer provisions of the Mortgage Credit Directive 2014 apply to such mortgage loans. (In contrast, the arrears-related protections set out in the Code of Conduct on Mortgage Arrears 2013 apply to a buy-to-let property only where it is the sole residential property owned by an individual borrower in the State). It was noted that this approach would mean that the EU Mortgage Credit Regulations 2016

[145] See MCD 2014, art 3(3)(b) and Recital 17.
[146] MCD 2014, art 3(4).

applied only to: 'consumer "buy-to-let" mortgages' as opposed to buy-to-let transactions entered into for business purposes. [147]

Interpretation of 'consumer' concept by the Irish courts

D1.6 Thus, credit agreements relating to buy-to-let property come within the ambit of the EU Mortgage Credit Regulations 2016, provided that the loans made under such agreements are to consumers. The concept of 'consumer' has been strictly interpreted by the Irish courts in the context of legislation including the Consumer Credit Act 1995 and the EU Unfair Contract Terms Regulations 1995 – each of which, similar to the EU Mortgage Credit Regulations 2016, derive from EU legislation. Adopting the position of the CJEU, the Irish courts have held that in interpreting the concept of 'consumer', the purpose for which the borrower is entering into the particular loan agreement and whether in so acting, the individual is acting outside of his or her trade, business or profession, must be determined. The test for so determining laid down by the courts is whether in entering into the loan agreement, the borrower is satisfying his or her own *private consumption* needs.

D1.7 The weight of Irish authority is that loan agreements entered into for the purposes of the purchase of a residential investment property has been entered into for business purposes and so should not qualify as consumer lending.[148] Thus, based on the current approach of the Irish courts, it appears that credit advanced for the purposes of purchasing a buy-to-let residential investment property where the intention of the borrower is to rent out the property for the purposes of making a profit will generally be excluded from the scope of the EU Mortgage Credit Regulations 2016, on the basis that it does not comprise consumer lending. Conversely, other lending that is merely *secured* over buy-to-let property should come within the scope of the EU Mortgage Credit Regulations 2016 as a consumer loan where the loan is clearly entered into for reasons of satisfying private consumption needs - eg, where the purpose of the loan is to fund the education of a family member of the borrower.

D1.8 Nevertheless, uncertainty remains. In some contexts, the concept of consumer has been more widely interpreted – eg, for the purposes of special jurisdictional rules, the CJEU has, at the very least not challenged the ability of contracts relating to sophisticated transactions on the financial markets entered into for the purposes of making a gain, to qualify as 'consumer' contracts.[149] In December 2021 in the case of *AIB plc v O'Callaghan*, the Irish Supreme Court agreed to rule as a matter of general public importance on a case involving an analysis under the Consumer Credit Act 1995 as to whether a borrower was acting as consumer. The circumstances of this case are quite different from a buy-to-let scenario, involving significant indicia of commercial activity. Nevertheless, some of the observations of the Court when the decision ultimately issues may have relevance to the case involving an individual engaging in limited investment activity such as funding a buy-to-let property.

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[147] See *Regulatory Impact Analysis (RIA) in relation to the transposition of the Mortgage Credit Directive* (Department of Finance, March 2016) 20-21.

[148] *Hogan v Deloitte & Ors* [2017] IEHC 673 at paras 36 and 37 (relating to the definition of 'consumer' for the purposes of the EU Unfair Contract Terms Regulations 1995), *Allied Irish Banks plc v Doyle* [2017] IEHC 364, para 12 (relating to the definition of 'consumer' for the purposes of the CCA 1995 and the EU Unfair Contract Terms Regulations 1995), *Allied Irish Banks plc & Anor v McGouran & Ors* [2016] IEHC 629 para 23 (relating to the definition of 'consumer' for the purposes of the CCA 1995) and *Allied Irish Banks plc Mortgage Bank v Gunning* [2018] IEHC 555, para 24 (relating to the definition of 'consumer' for the purposes of the CCA 1995).

[149] *Petruchová v FIBO Group Holdings Ltd* Case C-208/18 ECLI:EU:C:2019:825, *AU v Reliantco Investments LTD Limassol Sucursala București* Case C-500/18 ECLI:EU:C:2020:26 and *AB, BB v Personal Exchange International Ltd* Case 774/19 ECLI:EU:C:2020:1015.

D1.9 The question of the desired policy position of the State thus arises, at least in a mortgage context. Specifically, what is 'consumer "buy-to-let" mortgage' lending - as opposed to buy-to-let transactions entered into for business purposes – to which the statutory protections of the EU Mortgage Credit Regulations 2016 - and other 'consumer' statutory credit protections - apply and should this be statutorily clarified?

Potential statutory approach for differentiating consumer and business buy-to-let lending

D1.10 Unlike every other Member State,[150] the UK approach was to exercise the permitted national discretion and opt out consumer buy-to-let lending from the Mortgage Credit Directive 2014; as required in order to exercise this discretion, the UK put in place a separate regime for lending of this nature.

D1.11 Some of the following principles applied in the UK - albeit in the context of its decision to apply a more limited regime to consumer buy-to-let lending - may be helpful in statutorily differentiating in this jurisdiction consumer and business buy-to-let lending and may be worth considering for this purpose.

D1.12 The effect of UK legislation is that each of the following scenarios constitutes business buy-to-let lending:

(a) *active borrower decision to become a landlord*: where a loan that is secured by a mortgage over a buy-to-let property finances the purchase of that property and the borrower intends that the property will be rented out and not occupied as a dwelling by him or her or family members[151] - which is the case in the majority of buy-to-let transactions. In those circumstances, the borrower has made an active decision to become a landlord. The consequences arising therefrom, such as the taxation as a business of the resulting income and compliance with fire and electrical safety standards are characteristics of a business rather than a consumer activity and, accordingly, should not have the benefit of consumer regulatory protections;[152]

(b) *buy-to-let business*: a loan secured by a mortgage over a buy-to-let property is treated as a business loan where the borrower owns another buy-to-let property,[153] presumably on the basis that multiple buy-to-let property ownership is indicative of the undertaking of a business;

(c) *borrower declaration*: where the borrower provides the lender with a declaration to the effect that he or she is acting for business purposes.[154] The borrower's declaration must include a statement that:

(i) the loan agreement is entered into by him or her wholly or predominantly for the purposes of a business;

(ii) he or she understands that he or she will not have the benefit of the protection and remedies that would otherwise be available to the borrower if the loan agreement were treated as a consumer contract; and

[150] See *Evaluation of the Mortgage Credit Directive (Directive 2014/17/EU) Final Report* (European Commission Directorate-General for Financial Stability, Financial Services and Capital Markets Union November 2020) 37.
[151] [Check] Mortgage Credit Directive Order 2015 (SI 2015/910) (England), art 4(4)(a).
[152] See *Consultation Outcome - Implementation of the EU Mortgage Credit Directive* (HM Treasury, Updated 26 January 2015), s 3.
[153] Mortgage Credit Directive Order 2015 (SI 2015/910) (England), art 4(4)(b).
[154] Mortgage Credit Directive Order 2015 (SI 2015/910) (England), art 4(2).

(iii) if he or she is in any doubt as to the consequences of this, then he or she should seek independent legal advice.[155]

D1.13 While a lender could not rely on this declaration where it knew or suspected that it was incorrect, the UK policy approach is that such knowledge or suspicion could only be on the basis of information available to the lender and that the lender was not under a duty to demonstrate that it had conducted checks in respect of the declaration. A declaration of this nature was described as: 'established practice in the context of consumer credit and the government believes it is an important part of a pragmatic implementation of the requirements set out in the MCD.'[156]

D1.14 Conversely, the English regime provides for a borrower to be treated as a consumer and subject to the more limited protections applied to consumer buy-to-let lending where he or she has become an '*accidental landlord'* through circumstances rather than as a result of his or her active business decisions, such as on an inheritance or a gift or where the borrower has previously lived in a property, but is unable to sell it so resorts to a buy-to-let arrangement.[157] These circumstances are more likely be relevant where the property has already been acquired and is subsequently being mortgaged to the lender. They are also likely to represent a small proportion of buy-to-let lending.

D1.15 It is submitted that, in this State, there is merit in adopting sensible statutory criteria differentiating business and consumer buy-to-let lending.

D1.16 In such a case a policy decision would be required as to the degree of protections that would attach to business buy-to-let borrowers – eg, would the disclosures and cooling-off period - required by the Consumer Protection Code 2012 where a personal consumer requests to change, or a regulated entity offers a personal consumer the option to move, from a tracker interest rate to an alternative rate on their existing loan[158] – apply to business borrowers borrowing for the purposes of acquiring a buy-to-let?

[155] Mortgage Credit Directive Order 2015 (SI 2015/910) (England), art 4(2).

[156] *Implementation of the EU Mortgage Credit Directive: summary of responses* (HM Treasury UK, January 2015), s 4.28.

[157] *Consultation Outcome - Implementation of the EU Mortgage Credit Directive* (HM Treasury, Updated 26 January 2015), s 3.

[158] CPC 2012, s 6.9 and s 6.10.

Appendix E

Consumer Rights Bill 2022 - application to consumer financial services sector

E1.1 The Consumer Rights Bill 2022 seeks to overhaul the general regulatory framework for consumer contract law as between traders and consumers.[159] When enacted, the provisions of the Bill particularly relevant to financial services[160] – including the provision of credit - are those contained in Parts 4 (contracts for the supply of a service) and 7 (unfair terms in consumer contracts).

Part 4 of the Consumer Rights Bill 2022

Outcomes-focused subjective standard

E1.2 Included in Part 4 of the Bill is an obligation for the supplier to provide service contracts in compliance with mandatory standards which are to be incorporated as implied contractual terms,[161] including those described as 'subjective requirements'. Where the services provided on more than one occasion or on a continuous basis - eg, a loan - the supplier must ensure that the service complies with these mandatory standards on each such occasion or during that period.[162] Including any contractual term seeking to exclude or restrict the supplier's liability - which, the Bill makes clear, includes a disclaimer[163] - under the mandatory standards (including subjective standards) provided for under the Bill is an offence for a trader, with any such term not binding on the consumer.[164] Any additional or stricter statutory or common law obligations imposed on a trader in relation to the supply of a service are generally unaffected.[165]

E1.3 One of the mandatory subjective terms to be contractually implied is that the service is of a nature and quality that can reasonably be expected to achieve any result that the consumer has made known to the supplier at or before the conclusion of the contract and which was accepted by the supplier.[166] The onus is on the supplier to show that it did not accept any such result.[167] A similar standard is included regarding fitness for purpose.[168] The 'subjective standard' concerning fitness for purpose thus applies to service contracts broadly similar standards applying to the sale of goods, which themselves arise from the 2019 EU Directive concerning the sale of goods.[169] An additional subjective standard is to be implied in relation to the expected result as to nature and

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[159] For example, it is intended that Part 4 will replace Part IV of the Sale of Goods and Supply of Services Act 1980 for services contracts between a consumer and a trader - see Consumer Rights Bill (1 June 2022), s 173(1) and Sch 6, Part 1, item 2.

[160] 'Financial service' is defined in s 2(1) of the Consumer Rights Bill 2022 (1 June 2022) as: 'any service of a kind normally provided in the ordinary course of carrying on a banking business, an insurance business or a business of providing credit, personal pensions, an investment service or a payment service'.

[161] Consumer Rights Bill (1 June 2022), s 82.

[162] Consumer Rights Bill (1 June 2022), s 81(5) and s 81(6).

[163] Under the Consumer Rights Bill (1 June 2022), s 94(3), excluding or restricting the supplier's liability is very widely defined to include: (a) excluding or limiting a right or remedy in respect of a supplier's liability; (b) making such a right or remedy, or its enforcement, subject to a restrictive or onerous condition; (c) allowing a trader to put a consumer at a disadvantage as a result of pursuing such a right or remedy; d) excluding or restricting rules of evidence or procedure, or (e) preventing an obligation arising or limiting its extent. Thus, a disclaimer of liability would be caught by this restriction and statutorily prohibited (unless otherwise permitted by the Act, when enacted).

[164] Consumer Rights Bill 2022 (1 June 2022), s 94(2) and s 94(5).

[165] Consumer Rights Bill (1 June 2022), s 77(1). See also s 77(2),

[166] Consumer Rights Bill (1 June 2022), s 80(1)(d). The Scheme of Consumer Rights Bill 2021 indicates (at fn 318, p 150) that this provision is similar to protections applying under New Zealand and Australian law and: '*It is important to note that the provision does not require the service to achieve a particular result, but rather that it should be such that it can reasonably be expected to* ***achieve the required result****. If the supplier of a service considers that he is not in a position to provide a service reasonably fit for the purpose required or one that can reasonably be expected to* ***achieve the result made known by the consumer****, he or she can decline to accept the result proposed by the consumer*.' Emphasis added.

[167] Consumer Rights Bill (1 June 2022), s 80(5).

[168] Consumer Rights Bill (1 June 2022), s 80(1)(c).

[169] See EU Directive 2019/771 on certain aspects concerning contracts for the sale of goods, art 6(b).

quality. A recent amendment made at Select Committee stage confirms that the reference to a reasonable expectation is to be interpreted objectively, having regard to the nature and purpose of the contract, the circumstances of the case and the usages and practices of the parties to the contract.[170]

E1.4 **Nevertheless, should the Consumer Rights Bill as enacted contain such provisions dealing with the consumer's reasonable expectations, lenders may seek to include in their standard consumer contracts disclaimers of these standards relating to fitness for purpose or the achieving of a particular result.[171] To do so may be viewed as a necessary risk management technique, particularly in the context of services such as the provision of variable rate loans, foreign currency loans or leveraged investments where the performance of elements, including the price, of the contract, may be out of the lender's control.**

E1.5 Some of the provisions of Part 4 of the Consumer Rights Bill 2021 are clearly warranted – eg. the incorporation as implied contractual terms of objective standards to the effect that the trader has the necessary skill to supply the service and shall supply the service with reasonable care and skill.[172] However, in light of the extent of the extensive existing sector-specific conduct of business requirements concerning consumer contracts in the financial services sphere and the availability to a consumer of common law and other remedies - including the statutory cause of action under s 44 of the Central Bank (Supervision and Enforcement) Act 2013 – suppliers of financial services may be of the view that the subjective standards concerning the consumer's reasonable expectation are a blunt instrument which will serve only to increase the already dense level of detail included in credit documentation required to be provided to consumers. [173]

E1.6 While it can certainly be advocated from a consumer protection perspective that the more consumer rights the better, the trade-off for these additional rights may not be warranted where

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[170] Consumer Rights Bill (1 June 2022), s 2(6). A somewhat similar provision had been included in Head 3(10) of the Scheme of Consumer Rights Bill but was not included in the Bill as initiated (April 2022).

[171] Disclaimers would be permissible in this scenario as they are implicitly envisaged by the Consumer Protection Bill which refers to a result accepted by the supplier - see Consumer Rights Bill (1 June 2022), s 80(1)(c)(ii) and s 80(1)(d)(ii).

[172] Consumer Rights Bill (June 2022) s 81(a) and (b).

[173] See the rejection of a proposed similar test for services in what became the Consumer Rights Act 2015 (England) in *Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny* (Secretary of State for Business, Innovation and Skills, January 2014) item 165, p 23-26, including the following: '*The Government is not convinced that the challenges of an outcome-based approach can be overcome by resorting to a 'reasonable person test'. Because of the subjective element of many services it may not be clear what a reasonable person might expect in different circumstances. With goods it is usually obvious whether the item is 'fit for purpose' or of 'satisfactory quality'. For many services that can be less clear cut, as to what might be expected and is likely to vary from consumer to consumer … We acknowledge that courts could, and have in some circumstances, been willing to imply outcomes-based terms into service contracts. However, the Government does not believe that that will prevent businesses from reacting with lengthier contracts or with more disclaimers to help anticipate situations where they may not be able to deliver what a reasonable person might expect. Rather than helping consumers and businesses reach an understanding of what is expected, this could also lead to bureaucratic lists of disclaimers. Over time, case law and experience could help build up an understanding in different service sectors which will reduce uncertainty over time. But the Government is of the view that case law can be difficult to access and apply for businesses and consumers and this would add to costs initially and uncertainty, the opposite of the Government's and the Select Committee's shared goals for the reforms, without the promise of significant consumer benefits later. The Government examined carefully the evidence and examples submitted by those that thought an outcome-based quality standard would benefit consumers, but concluded that such a standard would not in fact increase protection further than the current standard of 'reasonable care and skill'. There were also those in the consultation responses who disagreed that alignment with the goods regime would boost confidence and clarity. For example: The Association of British Insurers commented that a quality standard would "reduce clarity and risk further inconsistency of application". Mobile Broadband Group said they "support the Government's proposal not to align the law on services with the law on sale of goods, as there are material differences between the two that could make the costs of compliance and the risks of unintended consequences outweigh any consumer benefit." While we agree that alignment and simplification are important, the Government also recognises that differences in regimes are still sometimes necessary to ensure there are not unintended consequences. … It is therefore not a sufficient argument in itself*.' The UK Governmental approach thus disagreed with the proposal as to an outcomes-based approach contained in *Consolidation and Simplification of UK Consumer Law* (Consumer and Competition Policy Directorate, November 2010) 46-68.

they give rise to additional complexity for consumers in an already highly regulated area such as financial services.

Remedies under Part 4 of the Consumer Rights Bill on breach of the mandatory standards

E1.7 Contravention of the mandatory requirements gives rise to specified remedies, such as a requirement for the supplier to comply with these standards within a reasonable time or, where this is impossible, proportionate price reduction or, where the contravention is not minor, termination at the election of the consumer.[174]

E1.8 The Bill provides that on termination, the trader must reimburse the consumer for all payments made under the service contract; in the case of a service provided over a period, the amount reimbursed is to be pro-rated, including for the period during which the service was not in conformity with the service contract.[175] It is unclear how this would operate in a financial services context - eg, should a consumer assert that the service provided by a lender under a loan agreement was not of the nature and quality that the consumer reasonably expected to achieve the result that the consumer had made known to the lender and which was accepted by it, it then appears to follow that the consumer can seek to claim a reimbursement of interest and fees for the period in which the contract did not meet this standard. An entitlement for the consumer to withhold payment arises under the Bill on a similar basis which again raises the issue, eg, in a credit context, as to a claimed statutory entitlement of a consumer to withhold payment of interest and fees on the basis of a claimed failure by a lender to comply with the standards set out in Part 4 of the Act.[176] Some of the other statutory remedies - eg, proportionate price reduction - may not be particularly relevant for a consumer of financial services. Moreover, the specified obligations of the consumer on termination relate to the return of any goods and are not easily applicable to a contract such as a loan, where on termination it is likely that the consumer will owe funds to the lender.[177] Again, these remedies do not appear to translate easily to a financial services context.

E1.9 While the consumer's other remedies under the contract or at common law are unaffected,[178] the application of these entitlements in a consumer financial services context raises the vista of consumers seeking to assert rights under the Act (when enacted) that in fact do not add anything other than complexity.

Further consideration of application of Part 4 to financial services?

E1.10 In light of these issues, it is submitted that prior to enactment of the Bill and its application to financial services, the provisions of Part 4 of the Bill should be interrogated as against the main categories of retail financial services including credit, payments and investment and pensions business. This would include a consideration of the interplay between the requirements of the Bill and the primary conduct of business regulatory requirements already applying and the usual contractual remedies on breach of contract, including under common law. Such an examination should identify the net benefit, if any, arising from the application of at least some of the subjective standards provided for under the Bill to consumer financial services and the attendant remedies for breach.

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[174] See Consumer Rights Bill (1 June 2022), s 85 - s 88 for all of the specified remedies.
[175] Consumer Rights Bill 2022 (1 June 2022), s 89. Any reimbursement amount or price reduction due must be paid by the trader within 14 days, failing which the trader is liable in damages for any loss or damage suffered by the consumer as a result of the failure to make payment - see Consumer Rights Bill 2022 (1 June 2022), s 90.
[176] Consumer Rights Bill (1 June 2022), s 91.
[177] Consumer Rights Bill (1 June 2022), s 88(3)-(6).
[178] Consumer Rights Bill (1 June 2022), s 95.

Part 6 of Consumer Rights Bill 2022 – Unfair Contract Terms

E1.11 The effect of the Consumer Rights Bill 2022, if enacted in its current form, is that the EU Unfair Contract Terms Regulations 1995 will be repealed and replaced by Part 6. The following implications of Part 6 on the financial services sector should be highlighted.

Financial services context - certain 'blacklisted' provisions under Part 6 too widely cast?

E1.12 The Consumer Rights Bill 2021 designates some contractual provisions as unfair in all circumstances.[179] It may be contended that the terms of some of these 'blacklisted' provisions are too widely cast to the extent they apply in a financial services context. Serious consequences are proposed to arise for a trader such as a lender on concluding a consumer contract containing a term that is 'blacklisted' including the commission of a criminal offence and, potentially, the imposition of very significant fines amounting to up to 4 per cent of annual turnover.[180]

E1.13 A particular concern in a financial services context may be the designation as a 'blacklisted' term one that excludes or hinders the consumer's right to take legal action or exercise a legal remedy.[181] An example of a term falling within this category is an 'entire agreement' provision ruling out earlier commitments made by the seller or its agent.[182] Although a term along those lines is currently included in the 'grey list' scheduled to the EU Unfair Contract Terms Regulations 1995, these previsions are indicatively unfair - not necessarily unfair[183] - and their inclusion in a contract does not give rise to the very serious consequences proposed under the Consumer Rights Bill 2021. While a term of this nature would include one restricting or hindering a consumer from bringing legal proceedings, the term may be interpreted more widely as applying in the case of a purported restraint on a right of action which a consumer would otherwise have, were it not for the provision. The question may be asked as to where the boundaries of such a term may end.

E1.14 There may be sound policy reasons for seeking to control provision of this nature. Nevertheless, there may be standard retail lending contractual provisions which are captured by this category such as restrictions on the exercise of set-off on the part of a consumer, waiver of subrogation rights, standard exclusions of guarantor defences and other exclusions of, or provisions providing for the contracting out from, statutory rights and entitlements (which may be the subject of other statutory controls). Other proposed 'blacklisted' terms may also have unintended effects in relation to standard retail lending document such as standard default clauses.[184]

E1.15 While terms of this nature may not be the intended target of the 'blacklist' but may inadvertently fall within it, these issues should be addressed before commencement of any 'blacklisted' provisions affecting consumer contracts in the financial services sector.

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[179] Consumer Rights Bill 2022 (1 June 2022), s 132(1).

[180] Consumer Rights Bill 2022 (1 June 2022), s 173(2) and Schedule 6, Part 2, amending European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2020.

[181] Consumer Rights Bill 2022 (1 June 2022), s 132(1)(d). This replaces the potentially unfair contractual provision currently included in the 'grey list' to the 1995 Unfair Contract Terms Regulations (Schedule 3, s 1(q)) as follows: 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.'

[182] *Identifying and Avoiding the Use of Unfair Terms in Consumer Contracts* (Competition and Consumer Protection Commission, June 2020) 12.

[183] *Identifying and Avoiding the Use of Unfair Terms in Consumer Contracts* (Competition and Consumer Protection Commission, June 2020) 11.

[184] Consumer Rights Bill 2022 (1 June 2022), s 132(1)(h) designates as unfair in all circumstances a provision granting the trader a shorter notice period to terminate the contract than the notice period required of the consumer.

Appendix F

Miscellaneous recommendations in relation to other regulatory matters

Unnecessary disapplication of domestic consumer credit protections to EU Consumer Credit Regulations 2010 credit?

F1.1 The Consumer Credit Directive 2008 which is implemented by the EU Consumer Credit Regulations 2010 is a maximum harmonisation measure. This means that Member States are not authorised to maintain or introduce national provisions other than those provided for by the Consumer Credit Directive 2008 in relation to the matters specifically covered by the Directive. Member States may not adopt stricter rules than those provided for in maximum harmonisation measures, even in order to achieve a higher level of consumer protection.[185] However, the Consumer Credit Directive 2008 harmonises only certain aspects of Member States' rules concerning consumer credit agreements. Thus, in relation to matters that are not harmonised by the Consumer Credit Directive 2008, Member States remain free to maintain or introduce national rules.[186]

F1.2 It has been recognised, in the context of the Consumer Credit Directive 2008, that the degree to which Member States retained a discretion to maintain or introduce national consumer credit rules was 'a contentious issue' with, at the time of the implementation of the Directive, a difficulty in identifying 'with precision the point where the harmonised rules eliminate such discretion'.[187] This may have given rise to a degree of disapplication of the national regulatory framework to credit within the scope of the EU Consumer Credit Regulations 2010 at the time of the implementation of the Directive that may have been viewed as necessary but which has transpired since then, with the assistance of CJEU case law, not to have been called for.

F1.3 Thus in 2019, the CJEU held that a national rule prohibiting lending in the event of a negative creditworthiness assessment – which is currently not dealt with at all in the Directive[188] - did not infringe the maximum harmonisation nature of the Consumer Credit Directive 2008 on the basis that it was consistent with the objectives (and, as applicable, other provisions) of the Directive. In the same case,[189] the CJEU decided that a national rule requiring the lender to establish the type and amount of credit most suitable for the consumer – being an extension of a requirement of the Consumer Credit Directive 2008 for lenders to provide 'adequate explanations' to the consumer, in order to enable the consumer to address whether the credit agreement was adapted to his or her needs and financial situation - did not infringe the maximum harmonisation nature of the Directive. It appears where a matter is an extension of a requirement of the Consumer Credit Directive 2008, in addition to being consistent with the objectives of the Directive and other

[185] *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* Joined Cases C-261/07 and C-299/07, para 51.
[186] See Opinion of AG Sharpston in *Home Credit Slovakia, a.s. v Bíróová* Case C-42/15 ECLI:EU:C:2016:431, para 39 and Opinion of AG Hogan in *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka z siedzibą w Gdyni* Case C-383/18 ECLI:EU:C:2019:451, para 34, which points out that Art 22(1) of the CCD 2008 provides that it is only 'insofar as this Directive contains harmonised provisions [that] Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive'.
[187] See Opinion of AG Sharpston in *Home Credit Slovakia, a.s. v Bíróová* Case C42/15 ECLI:EU:C:2016:431, para 38.
[188] Article 18(4) of the proposed revised Consumer Credit Directive imposes a direct linkage between the undertaking of the creditworthiness assessment and the advance of funds, precluding the making of the loan in the event of a negative creditworthiness assessment absent 'specific and well justified circumstances'. See Proposal for a Directive of the European Parliament and of the Council on Consumer Credits COM/2021/347.
[189] *Schyns v Belfius Banque SA* Case C-58/18 ECLI:EU:C:2019:467.

provisions thereof, any national rule must be in line with the flexibility permitted by the Directive.[190]

F1.4 In light of the above, a strong argument may be made that the disapplication of certain of the existing statutory consumer credit protections to credit agreements that are subject to the EU Consumer Credit Regulations 2010 was unnecessary and does not serve consumer interests. Examples of what may be argued to be an unnecessary disapplication of existing requirements include:

(a) limitation on enforcement rights, including the requirement under the Consumer Credit Act 1995[191] for the lender to provide 21 days' notice before making a demand under the credit agreement on the consumer's default within which the consumer may remedy the breach. The Consumer Credit Directive 2008 itself states that it does not affect national law in the area of contract law regulating the rights of the contracting parties to terminate the credit agreement on the basis of a breach of contract;[192]

(b) lenders' duty under the Consumer Credit Act 1995 to supply a copy of the credit agreement within 10 days of written request from the consumer, an important consumer entitlement;[193]

(c) lenders' duty under the Consumer Protection Code 2012 to notify increases in charges (other than overdraft facilities[194]) and the manner by which penalty charges which have been imposed on a consumer, including surcharge interest, may be mitigated; the requirement to display fees and charges has also been disapplied; [195]

(d) lenders 'duty under the Consumer Protection Code 2012 for the lender to gather 'knowing the consumer' information and to assess the suitability of the loan under various criteria where there is an advisory relationship or other qualitative engagement between the parties.[196] A creditworthiness assessment, albeit very general, is provided for under the EU Consumer Credit Regulations 2010[197] (and it is currently proposed that the revised Consumer Credit Directive will impose suitability obligations where lenders are providing advisory services to consumers.[198]) Nevertheless, other elements of the suitability assessment mandated under the Consumer Protection Code 2012 are not covered by the creditworthiness assessment currently required under the EU Consumer Credit

[190] See Opinion of AG Kokott in *Schyns v Belfius Banque SA* Case C-58/18 ECLI:EU:C:2019:120, para 54.
[191] CCA , s 54(2). *See also Redressing the Imbalance. A study of legal protections available for consumers of credit and other financial services in Ireland* (FLAC, 2014) 17-18, the principal author of which is P Joyce, Senior Policy Researcher, where the benefits of s 54 of the CCA 1995 as a consumer protection measure are outlined and the necessity for its disapplication to credit within the scope of the CCR 2010 questioned. For the disapplication of certain requirements of the CCA 1995 to credit agreements within the scope of the CCR 2010, see reg 4(2) of the CCR 2010.
[192] CCD 2008, Recital 33.
[193] CCA 1995, s 43(1). CCA 1995, s 43(1). See *Redressing the Imbalance. A study of legal protections available for consumers of credit and other financial services in Ireland* (FLAC, 2014) 17, the principal author of which is P Joyce, Senior Policy Researcher, where the benefit of this entitlement from a consumer perspective is outlined and the necessity for its disapplication to credit within the scope of the CCR 2010 questioned. The requirement under the CCD 2008 (arts 5(4) and 6(6)) to provide a draft of the credit agreement on the consumer's request applies at pre-contractual stage so the entitlement of a consumer to seek a copy of the agreement after it has been concluded should not be impacted by the provisions of the CCD 2008.
[194] CCR 2010, reg 15(2) requires the consumer to be informed on paper or another durable medium of any increase in any charge payable in respect of overdraft facilities before the change comes into effect.
[195] CPC 2012, s 6.18 and s 6.19. For disapplication, see CPC 2012, Chapter 6, under the heading 'Clarification of Scope'. See also CPC 2012, Chapter 1, 'Application'.
[196] The entirety of Chapter 5 of the CPC 2012 dealing with knowing the consumer and suitability has been disapplied to credit within the scope of the CCR 2010. For disapplication, see CPC 2012, Chapter 5, under the heading 'Clarification of Scope'. See also CPC 2012, Chapter 1, 'Application'.
[197] CCR 2010, reg 11.
[198] Proposal for a Directive of the European Parliament and of the Council on Consumer Credits COM/2021/347, art 16(3).

Regulations 2010. In light of the CJEU decision referred to above that a national 'most suitable' rule did not infringe the maximum harmonisation nature of the Consumer Credit Directive 2008, there are grounds for the application of suitability-related obligations to credit within the scope of the EU Consumer Credit Regulations 2010, where an advisory relationship exists between the parties;

(e) the obligation imposed on a lender under the Consumer Protection Code 2012 where a consumer refuses to provide information sought for the purposes of the suitability assessment, to inform the consumer that, as it does not have the relevant information, it cannot offer the product or service in question. No explicit linkage is currently set out in the EU Consumer Credit Regulations 2010 between the undertaking of a creditworthiness assessment and the ability of the lender to make the loan (although it is currently proposed that such a direct linkage be included in the revised Consumer Credit Directive[199]). In light of the decision of the CJEU that a prohibition on a lender making a loan in the event of a negative creditworthiness assessment did not contravene the maximum harmonisation nature of the Consumer Credit Directive 2008, there would appear to be no reason why a similar prohibition could not be imposed in the case of a loan to which the EU Consumer Credit Regulations 2010 applies; and

(f) all of the extensive advertising provisions set out in Chapter 9 of the Consumer Protection Code 2012.[200] The rationale for this wholesale disapplication is unclear. The EU Consumer Credit Regulations 2010 themselves deal with advertising in a relatively limited way, requiring the inclusion in an advertisement indicating an interest rate or any figures relating to the cost of the credit, of a representative example showing specified information in a clear, concise and prominent way, to enable consumers to compare different offers of credit.[201]

F1.5 While it may be that some of these issues will be addressed when the final text of the revised Consumer Credit Directive is implemented in the State, there certainly appears to be a strong case for a review of those provisions of the existing regulatory conduct of business framework for personal lending that have been disapplied to credit within the scope of the EU Consumer Credit Regulations 2010 with a view to, at the very least, further assessment.

<u>Anomaly in the application of Consumer Credit Act 1995 housing loan protections to business lending secured over borrower principal residence</u>

F1.6 At present, specific protections set out in Part IX of the Consumer Credit Act 1995 apply to housing loans. The current definition of 'housing loan' is a revised definition, having been amended, with effect from 1 August 2004, by the Central Bank and Financial Services Authority of Ireland Act 2004.[202] The stated rationale for the amendment was to ensure that the protections under Part IX of the Consumer Credit Act 1995 for housing loans extended 'to any natural person who borrows funds on the security of the family home even where the funds are borrowed for business purposes'.[203] The focus here was to afford appropriate statutory protections in light of the utilisation of the family home as security for business lending.

F1.7 The amendment of the definition has resulted in an anomalous position under the Consumer Credit Act 1995 whereby ostensibly the protections of Part IX of the Act dealing with housing

[199] See Proposal for a Directive of the European Parliament and of the Council on Consumer Credits COM/2021/347, art 18(4).
[200] CPC 2012, Chapter 9, under the heading 'Clarification of Scope'. See also CPC 2012, Chapter 1, 'Application'.
[201] CCR 2010, reg 7.
[202] Central Bank and Financial Services Authority of Ireland Act 2004, s 33 and Sch 3, Pt 12, item 1, amendment (b)(a).
[203] See comments of Minister C McCreevy at Committee Stage (Select Committee on Finance and the Public Service) of the Central Bank and Financial Services Authority of Ireland Bill 2003 when introducing amendment 114 on 19 February 2004.

loans apply to all natural persons - not just consumers - who have borrowed funds secured on their principal residence or that of their dependants. This would extend to borrowing for business purposes. However, 'borrower' is defined in the Consumer Credit Act 1995 as a consumer - being a natural person acting outside the person's business, trade or profession - acting as a borrower. Where a person borrows for business purposes, he or she is not acting as a 'consumer' under the Consumer Credit Act 1995; thus, he or she is not acting as a 'borrower' (as defined). While there is scope for an additional class of persons to be prescribed as a consumer,[204] no such order has been made. The effect of this is that many protections under Part IX of the Consumer Credit Act 1995 which are stated to apply to 'borrowers', 'consumers' or 'credit agreements' (which are defined by reference to the provision of credit to a 'consumer') do not extend to persons borrowing for business purposes where the debt is secured on their principal residence, notwithstanding the inclusion of such loan arrangements in the definition of 'housing loan'. These protections include the following:

(a) the advertising requirements of the Consumer Credit Act 1995;[205]

(b) the ability of a borrower to redeem a housing loan;[206]

(c) the calculation of the APR (being the total cost of credit to the borrower);[207]

(d) the borrower's freedom of choice in relation to the insurance of the mortgaged property;[208]

(e) prohibition on recovery by the lender from the borrower of the lender's legal costs relating to investigation of title;[209]

(f) the lender's duty to arrange mortgage protection insurance in the event of the borrower's death;[210]

(g) the lender's obligation to provide to the borrower a copy of the mortgage deed and statements;[211]

(h) the making of regulations requiring the disclosure to the borrower of charges, agency introduction fees, commissions and expenses;[212]

(i) certain disclosures to the borrower relating to endowment loans;[213]

(j) disclosure to the borrower of interest rate and penalties to be applied to housing loan arrears;[214] and

(k) protection of the borrower in the event of the lender's winding up.[215]

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[204] CCA 1995, s 2(9).
[205] Part II of the CCA 1995, which is stated in s 20(1) of the Act to apply to advertising indicating a willingness to provide or to arrange the provision of credit to a consumer.
[206] CCA 1995, s 121.
[207] CCA 1995, s 122.
[208] CCA 1995, s 124. Section 124(3) of the CCA 1995 (prohibiting a mortgage lender from imposing more onerous insurance requirements for insurance effected through a third party) does apply to all housing loans, however.
[209] CCA 1995, s 125.
[210] CCA 1995, s 126.
[211] CCA 1995, s 130.
[212] CCA 1995, s 131.
[213] CCA 1995, s 133. Certain of these disclosures (under s 133(1), (2) and (3)) apply to all housing loans, however.
[214] CCA 1995, s 134.
[215] CCA 1995, s 136.

F1.8 Those provisions of Part IX of the Consumer Credit Act 1995 referable to housing loans which (as drafted) do extend to persons whose business loans are secured on their principal residences or those of their dependants are:

(a) the provision by the lender of the valuation report to the loan applicant;[216]

(b) the prohibition on linking of services by the lender;[217]

(c) the provision of risk warning notices by the lender concerning loss of home and variable rate mortgages;[218]

(d) the inclusion by the lender of a notice of important information in the credit agreement;[219]

(e) the disclosure of fees;[220] and

(f) the issuance of directions by the Central Bank concerning the advertising of housing loans.[221]

F1.9 Moreover, the general requirements of the Consumer Credit Act 1995 which apply to housing loans do not apply to a borrower who has entered into the loan for business purposes, to the extent that the relevant requirement is specified to apply to a 'consumer', 'borrower', 'credit agreement' or any other matter limited to these terms.

F1.10 These anomalies arise from a drafting issue which could be dealt with by way of legislative amendment. They could also be addressed as part of the holistic review of the consumer credit conduct of business regulatory framework advocated for in this Submission.

[216] CCA 1995, s 123.
[217] CCA 1995, s 127.
[218] CCA 1995, s 128.
[219] CCA 1995, s 129. The notice of important information required by the 1995 Act to be included in credit agreements for housing loans under the CCA 1995 has been disapplied for credit agreements that are subject to the MCR 2016. See reg 44(2) of the MCR 2016.
[220] CCA 1995, s 132.
[221] CCA 1995, s 135.