Submission to the Central Bank of Ireland (CBI) on the Consumer Protection Code Review Discussion Paper, October 2022

May 2023

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights. FLAC operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice.

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations in relation to social welfare law, equality and anti-discrimination law, human rights and access to justice. This includes policy reports and submission to national and international bodies, including human rights bodies. Through our *Casebook* Blog, FLAC provides updates and analysis of developments in social welfare law and our casework in this area.

FLAC is a member of the Department of Social Protection's Migrant Consultative Forum. We are also a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

Introduction and overarching concerns.

FLAC welcomes the opportunity to make a submission to the consultation of the Central Bank on the Consumer Protection Code review. This submission is informed by FLAC's work in the area of debt and consumer protection.

As a human rights organisation with a core objective of access to justice, FLAC has engaged in advocacy, research, campaigning, policy analysis and the provision of second-tier legal advice and training to money advice staff in Ireland on consumer credit, debt and financial services for over twenty-five years. A *rights-based approach* to supporting people experiencing financial difficulties has been and continues to be the hallmark of our work in this area. By this we mean that in a marketised economy that is heavily dependent on the provision and the use of financial services, consumers availing of financial products – particularly credit – must be properly informed and protected and must be supported when circumstances outside their control cause a change in financial capacity[1].

Access to information, advice, advocacy, legal representation, effective remedies and fair and just laws should also be key features of a rights based system. It is noted, however, that such elements are largely absent from the "Key features of a Consumer Protection Framework" described on page 20 of the Discussion document and throughout the document. Thus, we note with concern the central theme that is emphasised in the Governors' foreword and through the discussion document that "*consumers' interests are best protected through having effectively functioning financial services markets made up of sustainable, resilient and well-run consumer - focused firms who act in their customers' best interests and provide availability and choice*". In our view, consumer protection must involve much more than effectively functioning markets, important as they are, particularly where those markets may operate to exclude some consumers.

The conflation of effectively functioning financial services markets with the welfare and interests of consumers may also be at odds with the Bank's guiding principle, also noted in the foreword, which requires the Bank's "*constant and predominant aim*" to be *"the welfare of the people as a whole"*. It also appears to be inconsistent with the statutory remit of the Bank set out in section 5A of the Central Bank Act 1942[2]. Section 5A provides that "*the Bank shall perform its functions and exercise its powers in a way that is consistent with (a) the orderly and proper functioning of financial markets; (b) the prudential supervision of providers of financial services* ***and*** *(c) the public interest and the interests of consumers*.

In a similar vein, Section 6A of the 1942 Act states that *"the Bank has as an objective the proper and effective regulation of financial service providers and markets while ensuring the best interests of consumers of financial services are*

[1] See Foreword to Paper One of FLAC's series of papers, Pillar to Post, on issues arising in new and existing consumer debt cases in light of the Covid 19 pandemic, June 2021.
[2] See footnote 21, page 15 of the discussion document.

protected." Thus, the governing legislation does not conflate in the manner that the discussion document does. The public interest and the interests of consumers is a separate consideration not solely determined or measured by reference to the functioning of financial markets.

The foreword also asserts that *"consumer protection is embedded in everything we do."* However it is notable that there is no reference to human rights and equality standards being embedded in the Bank's work. Neither in the foreword nor anywhere in the text of the discussion document is there mention of the public sector equality and human rights duty contained in section 42 of the 2014 Irish Human Rights and Equality Act. This duty requires public bodies like the Central Bank to have due regard to the need to promote eliminate discrimination, promote equality and protect human rights of consumers of financial services, in carrying out its functions. The Bank similarly fails to reference to the Equal Status legislation 2000 (as amended), which is similarly relevant.[3]

A critical question that follows here is who defines what is in the best interests of consumers and what standards and processes are deployed in these assessments. The critical role the Bank itself plays is obvious, as is the role of financial service providers themselves. However, the role played by consumers and/or their advocates is less emphasised. On this question, is anyone involved in financial regulation and consumer protection in the Bank speaking directly to consumers about their experience of utilising financial services? Is there a facility for members of the public to respond to the review of the Code, for example?

A recent example is noted in the course of FLAC's Pillar to Post Paper series and concerns payment break data published by the Bank. This data enabled an analysis to be carried out by FLAC that became the subject of Paper Three of the series[4]. Notably, this payment break research, while quite extensive, was viewed from an institution perspective and did not feature any attempt to talk to consumers about their experience[5]. On the other hand, useful research into the borrower's experience of payment breaks emerged quite quickly in the UK and provided some interesting consumers insights[6].

In the UK, there is also an independent statutory Financial Services Consumer Panel *'set up to represent the interests of consumers in the development of policy for the regulation of financial services'* that works in co-operation with the Financial Conduct Authority (FCA). There is no equivalent in Ireland and it is time there was.

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[3] As are the provisions of the EU Race Directive and the Gender Equal Treatment Goods and Services Directive.
[4] https://www.flac.ie/publications/flac-pillar-to-post-paper-3/.
[5] See analysis in Paper Four, pages 30-33.
[6] 'How well did deferrals work'? Evidence from Step Change clients.

The CBI Consumer Protection Code (CPC) review submission

Please note: FLAC's principal area of interest and concern in relation to the provision of financial services lies in the area of consumer credit. Accordingly, this perspective is reflected strongly in the points made and examples provided in this submission.This submission also refers in detail to some recent amendments to consumer credit legislation. Though strictly speaking outside the remit of the Bank's Discussion Paper, these changes were introduced with little apparent consultation and have implications for standards of consumer protection.

1. The prototype consumer lifecycle

In Section 1 of the review paper, under the heading of 'The Role and Regulation of Financial Services', the Bank sets out a graphic of a 'Financial Consumer Lifecycle'. This idealised cycle begins with a First Savings Account and moves on through stages of App-based payments to Insurance Protection to Student/Car Loans to Home Mortgage to Home Improvement to Retirement Planning to Pension, peppered at all times with undefined levels of 'Financial Education'.

We are concerned at this portrayal of consumers in the discussion document. A typical consumer is presented as someone who has easy access to third level education, has savings, a mortgage and a pension. This is at odds with the type of consumer routinely contacting MABS for assistance for example. What of the 12,000 adults and children accessing emergency accommodation, households with long-term mortgage or rent arrears and Ukrainian and other refugees who do not feature in this lifecycle. Are they not consumers too?

Broadly speaking this graphic seems to frame consumer protection in terms of financial services very much in a middle class context. Even within that context, it is arguable that it no longer reflects the reality of living in Ireland in 2023, where a mortgage, for example, is a distant prospect for many, particularly younger people under 35. Indeed, it is somewhat ironic that this paper promotes this lifecycle at a time when the consequences of the 'financialisation' and the repeated 'commodification' of housing are apparent for all to see.

Thus, at the time of writing, the 'no fault' eviction ban has been lifted and increased levels of eviction and associated homelessness are predicted to follow. It is notable too that this ban did not, in any case, apply to cases of rent arrears cases at a time when the escalation of the cost of rent in private tenancies has already deepened the accommodation and evictions crisis and threatens the financial solvency of a number of consumers, many of whom are working full-time in the Irish economy.

This is a very different kind of 'Financial Consumer Lifecycle' and one that potentially threatens the health of the Irish economy into the future, quite apart from that of its citizens, where a significant number of younger people are voting with their feet and

emigrating to locations where they may earn a lower salary but where their money goes further and where affordable accommodation is more readily accessible.
The apparent failure of the CBI to take the wider housing context into account when describing a consumer lifecycle is reminiscent of the approach it took when framing its mortgage lending guidelines. The Bank did not, to our recollection, examine difficulties in the wider property rental market before arriving at those limits. Notwithstanding that the lending limits it subsequently set were and remain suitably prudent, reflecting a backlash to the era of irresponsible lending prior to the Global Financial Crash (GFC), the wider potential effect of such limits does not seem to have been gauged before their introduction. Arguably these limits have enabled investors and buy-to-let borrowers rather than owner occupiers, and have contributed to the spiralling cost of private rental tenancies that sees many tenants pay more for their accommodation in rent than the applicable mortgage on the relevant property, had it been available, would have cost them. In this manner, levels of mortgage arrears may be kept largely under control[7], but unaffordable tenancies and resulting rent arrears accelerate. This is not, of course, the CBI's direct area of responsibility, but a wider assessment of the implications of its actions in terms of permitted levels of mortgage lending would have been welcome.

In the conclusion to this introductory section, the review paper states that '*while consumers should be free to contract in open and free markets, those markets must be regulated to common standards in the form of legislative and regulatory frameworks designed to protect consumers'.* Shut out of participation in the 'open and free' mortgage market by lending limits (and the absence of the kind of parental financial support that may be available to some) and forced into a private rental market with no such controls, those on limited incomes pay dearly for another person's right of ownership until the time that person decides to cash in on their asset.

2. Acting in the consumer's best interests

This section concludes by stating that *'in complying with those (legislative and regulatory) frameworks, firms must act in the best interests of their customers, to ensure an appropriate level of consumer protection. This is essential to promoting trust and confidence in financial services generally.'*

When it is apparent that government and the machinery of State has not, insofar as it concerns the provision of public and private housing accommodation for example, appeared to have been acting in the best interests of many of its citizens, it is perhaps naïve to suggest that providers of financial services are likely to prioritise the consumer or customer's best interests when the requirement to be profitable is likely to be uppermost in the provider's thinking.

[7] Note, however, that the most recent CBI PDH mortgage arrears figures for Q.4 2022, show that the numbers in the 'Under 90 days' in arrears category increased by over 2,300 (15%), compared with the Q.3. This is likely to reflect ECB interest rises and the cost of living crisis, rather than imprudent lending.

How is this notional duty reflected in the consumer protection infrastructure in Ireland in practice? To what degree does the CBI and other relevant agencies, such as the Financial Services and Pensions Ombudsman (FSPO), act to enforce such a standard. If it is the provider's duty to act in the customer's best interests, surely it follows that it is also the State's duty to ensure that it does so. If it does not, this principle is in grave danger of becoming an aspiration set by regulators (or indeed the OECD from which this principle stems) to which lip service is largely played.

An example here that may call into question the reality of this proposition is the CBI's history of enforcing lender compliance with the MARP/CCMA process. Despite the Bank explicitly acknowledging that breaches of rules and processes have been committed by lenders, no sanctions to our knowledge have been imposed on lenders in respect of such breaches. Indeed, the current Minister for Finance, Michael McGrath, TD, when opposition spokesperson on Finance, expressed *'extreme disappointment'* in 2015 at this failure and suggested that it was *'simply inexplicable that no monetary sanctions have been imposed for breaches of the CCMA'*[8]. To our knowledge, the closest the CBI has come to a reprimand has been to issue 'Dear CEO letters' in March 2019, outlining what it expects of regulated mortgage lenders and emphasising the necessity for greater compliance with the rules on communicating assessments.[9]

At a recent meeting bilateral meeting we attended with officials of the Bank on the review of the Code, which took place on March 9th, 2023, we requested that details of sanctions imposed on regulated entities in response to breaches of the standards set out in the CPC be provided. We await feedback in this regard. In the interim, we would suggest that a more realistically attainable objective here might be to require firms providing financial services *'not to act contrary to the best interests of the consumer'.*

3. Complaints Handling and Redress (incorporating OECD Principle 9).

[8] See https://www.fiannafail.ie/news/banks-being-let-offthe-hook-over-breaches-of-mortgage-arrears-codemcgrath, 30th November 2015 (accessed 5th September 2022). In this media release, then Fianna Fáil Finance spokesperson Michael McGrath TD said that he was extremely disappointed with confirmation to him that no fines or other financial penalties have been imposed on banks found in breach of the Code of Conduct on Mortgage Arrears. Deputy McGrath commented that "The Code of Conduct on Mortgage Arrears (CCMA) is far from perfect following the dilution of it in recent times. However it does afford a level of protection to borrowers who fall into difficulty with their mortgage and should be followed in full by all banks and financial institutions which fall within its remit" and "In my view it is simply inexplicable that no monetary sanctions have been imposed for breaches of the CCMA. This weak approach will only encourage the banks to engage in further underhand tactics against their customers. With nearly 100,000 family home mortgages currently in arrears, it is vital that mortgage holders have confidence that the Central Bank will act to vindicate their rights under the CCMA".

[9] Letter issued to regulated entities by the CBI Director of Consumer Protection re Obligations under the Code of Conduct on Mortgage Arrears. Dublin: Central Bank of Ireland, 22nd March 2019. https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/letter-issued-to-regulated-entities-re-code-of-conduct-on-mortgage-arrears-22-march-2019.pdf?sfvrsn=5414bb1d_8.

OECD Principle 9 states that:

'Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays (our emphasis) *or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public'.*

Does our complaints infrastructure in Ireland comply with these minimum requirements?

First, how does the current complaints handling mechanism set out in Chapter 10.7 of the Consumer Protection Code match up in practice with these aspirations?

Second, how does the independent redress process that should be available to address complaints thereafter, i.e. access to the Financial Services and Pensions Ombudsman, work for consumers?

Chapter 10.9 of the CPC currently prescribes the following rules in relation to complaints handling:

A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the complainant's satisfaction within five business days, provided however that a record of this fact is maintained. At a minimum this procedure must provide that:

a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;

b) the regulated entity must provide the complainant with the name of one or more individuals appointed by the regulated entity to be the complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;

c) the regulated entity must provide the complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days (i.e. four weeks)*, starting from the date on which the complaint was made;*

d) ***the regulated entity must attempt to investigate and resolve a complaint within 40 business days*** (i.e. eight weeks) ***of having received the complaint;***

where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint *and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman;*

and

e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of: i) the outcome of the investigation; ii) where applicable, the terms of any offer or settlement being made; iii) that the consumer can refer the matter to the relevant Ombudsman, and iv) the contact details of such Ombudsman.

The wording of 10.9. d) in particular, in terms of the sequence of events, is weak.

- *The regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint;*

Note that the regulated entity is only required to attempt to investigate and resolve a complaint within 40 business days, i.e. eight weeks. It is difficult to maintain that a person failed to comply with the rule as long as it can be shown that an attempt was made. Indeed a person can attempt to do something more than once and fail on each occasion to succeed and still legitimately argue that an attempt was made. Most notably then, the wording here does not provide for any process of accountability in terms of the attempt/s made. Neither does it seem to consider that a provider might delay addressing a complaint in the hope that the complainant might give up pursuing it. Thus, no effort is made here to define what a legitimate attempt is or how many attempts an entity might have.

In its 2021 information leaflet, '**How to make a complaint to the Financial Services and Pensions Ombudsman (FSPO)',** the FSPO suggests that *'the provider should deal with your complaint through its complaint handling process'* and that *'the provider may take up to 40 working days to deal with your complaint'.* The possibility that the provider may in fact take more than 40 days, and even considerably more, is not alluded to. This is not the only apparent 'disconnect' between the terms of the CPC and the FSPO's written guidance thereon.

- *Where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint…..*

The wording here would appear to provide further cover for an entity that might be trying to delay or obfuscate. We are not by any means saying that every provider spins out the process, but it does happen. This clause seems to implicitly accept that 40 days may elapse and the complaint may not be resolved by the provider, without

in any way discouraging this. So, for example, there is no wording here to warn that this should be an exceptional event and/or that the provider must provide any cogent reason or reasons for the delay. There are no constraints placed on the provider whatsoever here.

There are instances where 'putting the complaint on the long finger' has been applied by regulated entities. For instance, we can provide you with anonymised documentation of a particular case where a bank repeatedly wrote to a complainant on several occasions over a period of many months, where the initial 40 days had elapsed and the further timeframes provided had elapsed and so on and so forth. On each occasion, the relevant provider failed to account in any substantive way for the successive delays and, again, it is important to point out that the wording of the rule does not require any explanation to be provided.

- *…..and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman;*

The complainant can at this point of course dispense with the internal complaint to the provider and go directly to the FSPO, as outlined above, but there will still be further delays before that complaint will be dealt with. Moreover, even when that complaint is processed, the FSPO will immediately encourage the complainant to engage in a **mediation/early resolution** process, sometimes with a provider who has already failed or refused to deal with his/her complaint in a timely manner.

A key question that the Bank might address is the extent, if at all, to which it monitors the adherence of regulated entities to the notional limits in this complaints process. **Is anyone in the Bank inspecting the files of providers to monitor their track record and compliance with what are already quite liberal timeframes?**

In '**How to make a complaint to the Financial Services and Pensions Ombudsman (FSPO)',** the FSPO suggests that at the conclusion of the complaints process *'the provider issues a final response letter and you are satisfied with the resolution of your complaint'* or *'the provider issues a final response letter and you are not satisfied with the resolution of your complaint'.* It is notable that there is no explicit reference to such a 'final response letter' in Chapter 10.7 of the CPC.

More notable perhaps is a statement by the current Ombudsman, Liam Sloyan, in the FSPO's document 'Overview of Complaints for 2022', wherein he suggests the following:

'It is clear that many of the consumers making complaints to this Office could have had their complaints addressed by their provider, at an earlier point in time'…... 'I encourage all providers of financial services and pension products, to adopt an approach of seeking, where possible, to resolve complaints quickly with their customers. In many cases, complaints are resolved promptly when the provider

receives an initial contact from the FSPO, requesting a final response letter or simply advising of the receipt of the complaint. There are several such case studies in this publication which describe how the complaint was resolved once the complaint was made to the FSPO. Providers seeking to resolve complaints at the earliest stage would not only contribute in a positive way to the vision of this Office for a progressive financial services and pension environment built on trust, fairness and transparency, where complaints are the exception; it would also make a significant difference to the customers of those providers, by removing the requirement for complainants to use the services of the FSPO'.[10]

Broadly then, our view is that the current wording of Chapter 10.7 of the CPC is drafted in a weak and arguably naïve manner and, ultimately, maintaining a weak complaints process is not acting in the best interests of consumers. This section of the Code could do with a more exacting redraft and more pro-active and vigilant monitoring of providers and their internal complaints handling mechanisms.

The question of how effective the FSPO is as a third party complaints resolution mechanism is a question for another submission. However, it is perhaps worth pointing out that there is no access to any designated avenue of assistance for complainants to help formulate and pursue their complaints and the initial response of providers to complaints can often be to drown the complainant in a sea of paper. In practice, the FSPO seeks to persuade the complainant to engage in mediation as part of a dispute resolution process, even where the provider has declined or failed to investigate the initial complaint in a timely manner. A full investigation of the complaint only takes place *'if you and your provider don't reach a resolution through the dispute resolution service',* largely for resource reasons. A limited appeal lies to the High Court where appellants often remain unrepresented.

4. Issues relating to pricing

The provision of credit and the cost of that credit to consumers is not a 'Specific Discussion Theme' included in the 'Discussion Paper' published in October 2022.[11] However, the broad heading of 'pricing matters' is cited as such a discussion theme. Notably, the review paper states here that:

> *'In general, prices are set by the market, determined by supply and demand, without state or regulatory interventions. A well-functioning competitive market should facilitate the formation of fair and reasonable prices without intervention. The Central Bank does not have a role in setting prices'*.

This extract suggests that prices 'are set by the market'. Is this an idealised market where providers and consumers and supply and demand meet on some sort of equal footing before arriving at a price that is mutually advantageous? Does such a market in reality exist? What of the recent evidence of the energy market that has seen

[10] See page 4, https://www.fspo.ie/documents/Overview-of-Complaints-2022.pdf.
[11] See Page 49 CPC review paper.

inflated bills imposed on consumers by suppliers, some of whom are exploiting international events to boost already massive profits?

The paper suggests that '*A well-functioning competitive market **should** facilitate the formation of fair and reasonable prices without intervention'.* Perhaps it should, but does it? In the case of consumer credit, for example, it is clear that in practice there are prime markets and sub-prime markets. In the latter, the consumer may be exploited based on perceptions of payment capacity and associated risks and the absence of alternative sources of credit.

- **Recent consumer credit amendments**

In this context, a recent piece of legislation - the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 amending, amongst other statutes, the Consumer Credit Act 1995 – could be set to have a significant impact on the consumer credit market in Ireland, particularly from the perspective of borrowers on limited incomes. It provides that previously unregulated providers of Hire Purchase car finance agreements must now become regulated as retail credit firms. These firms are currently authorised by the CBI on a transitional interim basis since August 2022, allowing them to continue their operations whilst their status is being confirmed. On the same basis, other currently unregulated direct or indirect providers of credit agreements (as opposed to hire purchase agreements) are also required to become retail credit firms. Of particular importance here are providers of online or in store credit, including entities who facilitate the provision of goods or services, sometimes referred to as buy now, pay later credit (BNPL).

The crux of this legislation from a cost of credit perspective is that each of these previously unregulated entities, in addition to existing retail credit firms who were already authorised, will now be expressly permitted to **charge an APR of up to a statutory maximum of 23% on the hire purchase or credit agreements they offer, regardless of the length of the term of those loans**[12], both pending their regulatory status being confirmed and after they officially obtain their authorisations. In the case of hire purchase (or personal contract plan (PCP) agreements) in particular, which are normally agreements of three and potentially up to five years duration, this is a very high cost of credit limit.

In tandem, a further amending Act – the Consumer Credit (Amendment) Act 2022 – while replacing the terms moneylender and moneylending agreement with the terms **'high cost credit provider'** and **'high cost credit agreement'**, continues to provide that **any credit agreement where the total cost of credit to the consumer is in excess of 23% APR is a high cost credit agreement.**

[12] See Section 14 of the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 inserting new Sections 28A and 28B in the Consumer Credit Act 1995.

The rationale for these simultaneous developments, if indeed there is one, appears to be a desire to divide the provision of consumer credit into agreements which are ‘high cost’ and agreements which are not high cost, notwithstanding that they may turn out to be very expensive for the borrower nonetheless. In our view, this is a crude and inappropriate mechanism, especially since the length (or term) of credit agreements offered by these retail credit firms has not been taken into account in fixing the maximum rate.

As we understand it, APR is a more complete measurement and accurate reflection of the cost of a loan than the interest rate alone (the reason why the European Union chose it as the Europe wide method) as it calculates the cost to borrow money as a yearly percentage of the amount borrowed. Thus, loans of short duration, such as a six month high cost credit loan, will invariably carry a high APR since the borrower has the use of the money borrowed for a much shorter period. For example, a number of currently licensed high cost credit providers offer high cost credit loans of 25-30 weeks duration which carry APR’s in the region of 150%[13]. At this rate of interest, borrowing €100 over a period of six months will involve total repayments of around €125, i.e. €25 is paid in interest.

On the other hand, a personal loan of €20,000 for example, currently being offered (subject to relevant credit checks) by one already authorised retail credit firm over a three year (36 month) period, will involve total repayments of €22,198.61, i.e. €2,198.61 is paid in interest. The APR quoted on this loan is 7.1%, reflecting the three year repayment period.

However, the interest of €2,200 approx. paid on this three year personal loan of €20,000 will exceed by many multiples the amount of interest paid on the six month high cost credit agreement of €100, despite the former’s much lower APR.

Thus, by allowing newly regulated retail credit firms to lawfully charge up to 23% APR – over three times the rate charged in the €20,000 three year personal loan quoted above – the State is risking the exploitation of vulnerable borrowers whose credit profile may be poor or whose income may be considered too low by a prime lender.

- **Sub-prime Hire Purchase**

It is important to reiterate here that a number of providers have been lending in the area of car finance for some time in what might be termed a sub-prime market without any regulatory supervision. For example, one such HP agreement in 2018 that came to our attention through MABS, involving a vehicle almost ten years old at the point the agreement was issued, contained the following basic terms:

- ***Vehicle Purchase Price*** ***€6,250***

[13] See Register of High Cost Credit providers at https://registers.centralbank.ie/DownloadsPage.aspx.

- ***Trade-in €500***
- ***Balance €5,750***
- ***Charges €3,492.24***
- ***160 weekly instalments x €56.83 €9,092.24***
- ***Purchase fee €150.00***
- ***Total repayable €9,242.80***
- ***Total HP price €9,742.24***

No APR rate of interest was quoted with this agreement, as it was not then required by law as outlined above, an issue that has at least being addressed by the 2022 amendments.

However, we think it is likely (the CBI should be able to confirm this with its APR calculator) that the APR on this agreement comes nowhere near to exceeding the now permitted maximum of 23% APR, despite what is clearly a very high cost of credit. If this assumption is correct, were this agreement to be offered today, it would be perfectly lawful. What does the Hirer have at the end of an agreement like this having paid almost €10,000. A car that is now 13 years old and practically worthless.

- **Conclusion**

The review paper as outlined above states that '*A well-functioning competitive market should facilitate the formation of fair and reasonable prices without intervention'* and '*the Central Bank does not have a role in setting prices'.* **The setting of this high maximum cost of credit in legislation for these previously unregulated providers, however, somewhat contradicts these assertions.**

The Bank may of course argue that it did not set this maximum but rather that it was decided in government legislation passed by the Houses of the Oireachtas, though it would surely have been consulted in the framing of this limit. It might also conceivably argue that the setting of a maximum is a consumer protection measure, designed to prevent excessive costs of credit. Equally, it may be validly suggested that competition between the newly regulated retail credit firms will ensure that this maximum cost of credit is never remotely approached.

However, the dangers of legitimising such a high cost of credit benchmark for these entities without regard to the term of the relevant loans are obvious. Not only can this be classified as an intervention; it is also neither a fair nor reasonable one. A number of questions follow concerning what decision making process was deployed here, what research was conducted on the sub-prime car finance sector and what data and criteria were examined prior to setting this limit? **Further, what level of consultation, if any, took place with organisations working to avoid and resolve over-indebtedness and to protect the interests of households on limited incomes?**

What, in turn, was the nature of debate in the Houses of the Oireachtas on this particular proposal before this legislation was passed? At second stage, Martin Kenny TD (Sinn Fein) noted that *'in its submission in 2019, FLAC recommended that the Central Bank carry out a review of the merit of differential rates of APR-based on loan duration. I ask the Minister of State to respond to this view'.* No response appears to have been provided to this request and later at the Select Committee stage, this section 13 (section 14 in the final Act when commenced) did not merit a mention in the discussion.

We are not suggesting that the CBI or anyone else should routinely interfere in matters of pricing, in particular if it has an effect of access to credit. However, we do believe that consumers should be protected from excessive costs of credit. If the State is to set a single maximum rate as it has done here based on historical and arguably outdated distinctions between licensed banks and licensed moneylenders, it should at least be based on a detailed appraisal of the market as it currently exists and with high levels of consumer protection in mind. Repeatedly, this review document emphasises the duty of the financial services firms to act in the best interests of the consumer. **What about the State's duty in this regard?**

A final point occurs in conclusion on this question. It is notable that Section 9 of the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 provides that the Minister may request the Bank, in writing, to collect and publish information under Central Bank legislation relating to credit agreements, consumer-hire agreements, and hire-purchase agreements. It seems likely that this provision is intended to monitor the cost of credit and other terms and conditions in consumer credit agreements, with a possible view to introducing reforms into the future. **Given the high maximum cost of credit that retail credit firms are entitled to impose at present, the sooner this provision is activated the better.**

5. S.149 of the Consumer Credit Act 1995

On the specific question of charges that credit institutions are entitled to levy in the event of consumer default, footnote 57 on page 49 of the review paper goes on state that an exception to the CBI's absence of a role in pricing matters '*is the Consumer Credit Act (*where*) credit institutions must notify us if they wish to introduce new charges or increase the level of previously notified charges'.*

This is a reference to s.149 (as amended) of the CCA 1995, which requires a credit institution to notify the CBI of every proposal—

(a) to increase any charge that has been previously notified to the Bank, or
(b) to impose any charge in relation to the provision of a service to a customer or to a group of customers, that has not been previously notified to the Bank.

The section goes on to provide *'that a statement of the commercial justification for the proposal, including a detailed statement of cost, and details of the estimated*

amount of additional income accruing from the proposal' must accompany the provider's proposal.
The term 'charge' in turn *'includes a penalty or surcharge interest by whichever name called, being an interest charge imposed in respect of arrears on a credit agreement or a loan, but does not include any rate of interest or any charge, cost or expense levied by a party other than a credit institution in connection with the provision of a service to the credit institution or the customer and that is to be discharged by the customer'.*

We have suggested in previous discussions with officials of the Bank that these charges, whenever they are approved, should be published by the Bank on its website in a form accessible to consumers of financial services. Borrowers should be entitled to check (in advance) what an institution has been sanctioned to charge in a given situation, ideally before the consumer decides to avail of a financial product from it. In our view, this is no different than comparing APR rates of charge from a range of credit providers before deciding from whom to draw down a loan.

The stock response we have previously received from the CBI in response is that such publication is not possible for reasons of confidentiality pertaining to Section 33AK of the Central Bank Act 1942, which provides that:

> *'A person to whom subsection (1) applies (i.e. staff of the Bank) shall not disclose confidential information concerning- (a) the business of any person or body whether corporate or incorporate that has come to the person's knowledge through the person's office or employment with the Bank, or (b) any matter arising in connection with the performance of the functions of the Bank or the exercise of its powers, if such disclosure is prohibited by the Rome Treaty, the ESCB Statute or the supervisory EU legal acts.*

On what basis is such information considered to be confidential? The decision making process may involve considering confidential information concerning the operations of the provider, but the outcome of that decision making process – to ultimately approve or not to approve a proposed default related charge under s.149 – surely is not. **Failing to provide transparent access for consumers to such important information can hardly be considered acting in their best interests, arguably the dominant motif in this review paper.**

At the date of writing, of 42 entities listed as retail credit firms on the relevant CBI register, 27 are described as transitional and this 'transitional' status dates from 16th August 2022. The remaining 15 firms are described as 'authorised'. It is therefore now approaching nine months since the 27 firms were effectively allowed to continue their business and a decision has yet to be on their authorisation status.

Some important questions occur here.

First, what is the nature of this authorisation process in terms of the due diligence that the CBI carries out before finally making a decision on the status of these entities? Are the views of consumers or those representing consumer interests sought? How long will it take for a final decision to be made here?

Second, is it or will it be part of this process to examine the existing default charges imposed by these entities under s.149 of the CCA 1995 and decide whether or not to approve those charges?

In our view, it would appear that this is now required as a result of further provisions in the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 outlined above. Section 10 of that Act amends Section 2 of the CCA 1995 to include retail credit firms within the definition of credit institution. Since, the S.149 process applies to credit institutions; it must now also apply to retail credit firms. This would suggest that not only default charges levied by the 'newly authorised on a transitional basis' retail credit firms but also those imposed by already existing authorised retail credit firms alike must be processed or have been processed under s.149.

This is no inconsequential matter. One of the newly authorised 'transitional' firms widely involved in online and in-store retail instalment plan (or credit sale) agreements for the provision of goods or services, reserves the right to charge a €9 'dishonour fee' for each time a instalment payment, to be taken from a borrower's debit or credit card, is missed on a loan. This level of charge should be carefully examined by the Bank as regulator and, in our view, should not be sanctioned where it is excessive and disproportionate in relation to the amount of the instalment payment to which it relates.

This provider's loan documentation also contains other terms and conditions of a sweeping and unilateral nature that arguably impose disproportionate potential consequences and liability on the borrower. Examples include providing that *'a default occurs if you are in default under any other financial obligation to any person'* and that you '*will pay on demand all costs and expenses incurred by us in enforcing or preserving or seeking to enforce or preserve our rights under the agreement. We may debit these expenses to your account. We will give you notice before we do so. They will become immediately due for payment once debited.'*

In the arena of car finance, a previously unregulated provider now similarly authorised on a transitional basis to act as a retail credit firm, previously set out the following penalty charges in the terms and conditions of its Hire Purchase agreements as follows:

- Condition No.5 allowed the Owner to '*charge €30 should the Hirer wish to reschedule the agreement'; 'If the Hirer has insufficient funds to cause a bounced Direct Debit, the Owner will charge €12.70'* and *'if the Hirer wishes to*

cancel/terminate the agreement at any stage, two additional payments may be taken'.

- Condition No.7 stated that '*The Owner will install a GPS Tracker and Disabler to the goods and has the right to disable the motor vehicle remotely if the Hirer is in breach of this agreement. For the avoidance of doubt, in breach of this agreement means the Hirer is not keeping up the payments as per the schedule'.*
- Condition No.12 states that *'The Hirer shall pay interest at a rate of 0.25% per month on all overdue instalments from the due date until payment thereof'.*

The final clause of Condition No.5 - *if the Hirer wishes to cancel/terminate the agreement at any stage, two additional payments may be taken'* - is particularly pernicious. It also amounts to a flagrant breach of s.63 of the Consumer Credit Act 1995, by imposing an additional liability on the Hirer who is exercising his/her statutory right to terminate a HP agreement, in addition to that imposed by the section itself. The provision for a tracker and disabler, in addition to being dangerous, is arguably a breach of the fundamental implied term of mutual trust in any contract.

It may well be suggested that such terms are unlikely to be enforced and are included largely for dissuasive value. Nonetheless, default in payment occurs in most instances due inability, as opposed to lack of willingness, to pay. The examples of terms and conditions in the agreements above and the manner in which they are phrased may inhibit rather than encourage engagement from borrowers who have got into financial difficulty.

It is to our mind worrying that of the 42 Retail Credit Firms on the Bank's current register, 27 have their status listed as 'transitional', dated 16th August 2022, now nine months ago. It is our understanding that this transitional status allows such firms to continue to operate as if they were, in fact, authorised, though we stand to be corrected on this point. In a changing market, is this wise and what is the timeframe for making a final decision on their authorisation?

Meanwhile, if we understand it correctly, not only can they continue to trade but they also appear to be allowed to continue imposing default charges of their own creation that have not yet been approved by the Bank. Is this fair to consumers?

6. Application of the CPC to retail credit firms

A further consequence of the passing of the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022, following from the regulation of previously unregulated providers of credit as outlined in detail above, is that the

terms of the CPC will now apply to them. In this regard, the CBI's 'Addendum to the Consumer Protection Code (2012)'[14] states as follows:

"Where regulated entities are providing hire-purchase agreements, consumer-hire agreements and/or BNPL agreements, only the following sections of the Code apply (our emphasis)*:*
Chapter 2, General Principles;

Except where regulated entities are providing BNPL agreements which fall within the scope of the European Communities (Consumer Credit Agreements) Addendum to the Consumer Protection Code | Central Bank of Ireland 3 Regulations 2010 (S.I. No. 281 of 2010), in which case only General Principles 2.1 to 2.4 and 2.7 to 2.12 apply.

Chapter 5, Knowing the Consumer and Suitability;

Except where regulated entities are providing BNPL agreements which fall within the scope of the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I. No. 281 of 2010), in which case the Provisions in this Chapter do not apply.

Chapter 9, Advertising;

Except where regulated entities are providing BNPL agreements which fall within the scope of the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I. No. 281 of 2010), in which case the Provisions in this Chapter do not apply.

It would appear from this that very limited provisions of the CPC apply to hire-purchase agreements, consumer-hire agreements and/or BNPL agreements offered by the newly regulated retail credit firms. The Addendum does not specify or explain why this is the case and we are somewhat mystified by the partial nature of the application.

The potential consequences of this limited application means that borrowers who have drawn down loans from these entities will not be covered by some of the mandatory processes which the Code imposes on other lenders and other types of financial service providers. Two particularly significant examples here include the rules in **Chapter 8 on 'Arrears handling'** and in **Chapter 10 on 'Errors and Complaints Resolution'**.

Does the failure to apply these chapters to retail credit firms mean that, in practice, these entities will not actually be required to have a complaints mechanism nor to

[14] https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/addendum-consumer-protection-code-2012-may-2022.pdf?sfvrsn=5.

have an identifiable arrears process that complies with the minimum standards set out in the CPC, unless they choose themselves to do so?

The implications of the latter – complaints resolution - creates obvious problems in terms of making onward complaints to the Financial Services and Pensions Ombudsman (FSPO). How is a consumer to show, as the FSPO legislation requires, that s/he has utilised the provider's internal dispute resolution procedures[15], if there is no such procedure in place that complies with the terms of Chapter 10?
In terms of the former – arrears handling - if a retail credit firm is not obliged to comply with the relatively uncontroversial arrears processes the chapter provides for, such as a written procedure, rules on communication with the borrower, liaising with a third party such as MABS, it may skew the overall assessment and collective approach required to assess capacity to pay, particularly in multiple debt and personal insolvency situations.

It may that we are missing something here but would be obliged for an explanation to be provided one way or another. In the interim, it is hard not to conclude that there is a potential failure here to join up the necessary dots.

7. Innovation and Digitalisation

The paper suggests that *'we are at a moment of unprecedented technological-led transformation in financial services'*[16]. It is also suggested that, as well as challenges, *'innovation also presents clear benefits for consumers, who are experiencing greater choice and ease of access to financial products'*[17].

It is further suggested that '*One important aspect of financial services where digitalisation is having a significant impact is in the provision of consumer credit. Many borrowers now access credit online, without any physical contact with the credit provider. The move to digital delivery of this fundamental financial service highlights key benefits and risks associated with a move away from a personal interface. The availability of and ease of access to credit can increase the risks posed by irresponsible lending for instance through aggressive and unsolicited marketing driven by on-line tracking and profiling, which can entice consumers into easily and quickly accessible loans'*[18].

[15] See Section 54 of the FSPO At 2017 which provides that (1) The Ombudsman may decide not to investigate or make a decision on a complaint where—
(a) the complainant has not engaged with the financial service provider or the pension provider concerned, and
(b) that financial service provider or pension provider has not been given a reasonable opportunity to deal with the complaint, as the case may be, through the internal dispute resolution procedures of the provider concerned.
[16] Page 36.
[17] Ibid.
[18] Page 42.

This section of the review document concludes with questions for those making submissions as follows:

Do you agree with our analysis of the benefits, challenges and risks around digitalisation in the area of financial services? What are the key issues for you?

Consumers understanding how financial products work, and what the pitfalls and advantages are, is essential to offering some level of protection in terms of subsequent choices, where choice is available. Nonetheless, many have suggested that the benefits of financial education are exaggerated. For example, Timothy Ogden, Managing Director of the Financial Access Initiative, a research centre focused on financial services for low-income households at New York University's Robert F. Wagner Graduate School of Public Service argues that:

> *`Financial education simply doesn't work. It doesn't change behaviour — as numerous studies have shown. Indeed, the fact that giving people information does not, by itself, change how they act is one of the most firmly established in social science, whether the subject is the dangers of drug use, the value of getting vaccinated or the calories in a restaurant's bacon cheeseburger. The same is true of finance.*[19]

With this in mind, accessing credit online to purchase goods and services is a pertinent example of benefits and challenges simultaneously. Ease of access provides convenience, less form filling, time saved, ease of payment facility.[20] It may also lead to less vigilance, less tracking and ongoing assessment of capacity to pay on the part of either lender or borrower. When it comes to borrowing money online, if the borrower begins to lose track or control of his/her commitments and the provider is not monitoring the flow of credit responsibly, there is a tangible risk that the challenges may be in danger of outweighing the benefits.

The current evolving trend of Buy Now Pay Later (BNPL) credit and the entry of providers offering retail instalment plans into the market is one example that may, in time, become a problem. The provisions of the Credit Reporting Act 2013 (as amended) are a relevant consideration here. Under the terms of that Act, lenders are only required to provide personal and credit information to the Central Credit Register in respect of credit applications and credit agreements, of €500 and above. This appears to mean that a series of loan facilities from the same provider, each under the €500 limit, is not reported and therefore does not appear in the credit information subject's (CIS) credit report. Some BNPL and retail instalment plan loans may come under this limit.

[19] See https://www.washingtonpost.com/outlook/2019/04/23/more-states-are-forcing-students-study-personal-finance-its-waste-time/.

[20] One prominent BNPL entity states, for example, that *'We accept all major pre-paid, debit and credit cards'* and that *'your payments are automatically withdrawn from your connected card according to the agreed payment schedule'.*

Furthermore, a credit information provider is only obliged to check a CIS credit report when the amount of the proposed loan is €2,000 or more. In terms of proposed loans of €500 or over but less than €2,000, our understanding is that the provider may, if it wishes, access the borrower's credit report to carry out a credit check but is not obliged to. Again, it is conceivable that a number of online loans may fall between these limits.

In addition, as we understand it, although it is a potential offence for a credit provider to fail to seek a report where one is required by the legislation, there is no sanction provided for under the legislation where a report is obtained but its contents are ignored, and this is arguably a significant weakness in the credit reporting regime.[21]

The key issue for us here is the need to promote and enforce the responsible provision of credit. There is also a need to promote responsible use of credit, although in our view this is a more complex issue, particularly where low income prevails and choices for borrowers are limited. We appreciate that there are careful balances to be struck here. Access to credit cannot and should not be confined to borrowers who have demonstrated irrefutable evidence of capacity to pay. However, exacerbating an existing problem with more credit is a recipe for personal insolvency, with all its negative effects for the borrower, his/her dependants and society generally. Looking at the online information and offerings promoted by one provider, it would appear that the level of credit provided may start slowly but may conceivably grow significantly. The processes may be completed from the comfort of a digital device. This is a space where vigilance is required.

8. Knowing the consumer and assessing suitability

Continuing on the subject of assessing capacity to repay, the existing Code already contains rules on 'Knowing the consumer' and 'Assessing suitability' (Chapter Five) that have evolved and have been amended since the first iteration of the Code in 2006. These provide in general terms that *'A regulated entity must gather and record sufficient information from the consumer prior to offering, recommending, arranging or providing a product or service appropriate to that consumer'* (Knowing the consumer 5.1)

in addition, that:

'Prior to offering, recommending, arranging or providing a credit product to a personal consumer, a lender must carry out an assessment of affordability to ascertain the personal consumer's likely ability to repay the debt, over the duration of the agreement' (Assessing suitability 5.9).

[21] Section 16 of the Act sets out the purposes for which the information obtained under the Act may be used by a credit information provider, including evaluating any risk arising from the affording or extending of credit to the credit information subject. This is not expressed in a mandatory way.

However, the introductory section to this Chapter Five states that *'Where regulated entities are providing credit under credit agreements which fall within the scope of the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I. No. 281 of 2010), the Provisions in this Chapter do not apply'* (our emphasis).

The 2010 regulations referred to above are those that transpose the **2008 Directive on 'credit agreements for consumers'** (2008/48/EC repealing Council Directive 87/102/EEC). This Directive and the regulations transposing it apply to credit agreements (excluding mortgages, hire purchase agreements credit agreements for less than €200 and more than €75,000 and some other categories).

The effect of this exemption therefore is that the potentially more exacting requirements to 'know the consumer' and 'assess suitability' do not apply to credit agreements (personal loans, credit sales and credit card agreements, for example) **where the amount borrowed is between €200 and €75,000.**

The rationale for this exemption is that since the 2008 Directive is a 'maximum harmonisation' measure, i.e. Member States are not permitted to introduce more stringent rules in their regulatory systems than the Directive provides, there is no scope to apply these rules to such loans. The net result was that the only obligation placed on a lender prior to offering loans of this order was the weak Article 8 of the Directive which provided (and continues to provide[22]) that:

> *'Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement'.*

The 2010 regulations followed the path of least resistance on this and other areas of the Directive by replicating the wording of Article 8 in Regulation 11 as follows:

> *'Before concluding a credit agreement with a consumer, a creditor shall assess the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database'.*

A creditor (or credit intermediary arranging credit) that contravenes this regulation commits an offence and summary proceedings may be prosecuted by the CBI in relation to such offences. We are not aware of any prosecution brought or sanction imposed under this heading and would be obliged to hear more concerning the Bank's activities in this regard.

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[22] A further updated Directive on consumer credit is currently in active progress through the EU legislative process.

Following the rollout of the Troika's 'Economic Adjustment Programme for Ireland' (or the 'bailout') announced in late 2010, the position in relation to assessing the creditworthiness of potential borrowers in Ireland shifted once again, with the passing of the Credit Reporting Act 2013. As part of the bailout, the Government agreement to establish the Register as part of the EU/IMF Program of financial support. This reflected a requirement that more diligent standards should apply to the provision of consumer credit than applied prior to the Global Financial Crisis (GFC).

Thus it would appear, when it is deemed necessary by the institutions of the EU (and the IMF) in what might be considered to be exceptional circumstances, the prohibition on 'gold plating' a maximum harmonisation Directive can be dispensed with, since the Credit Reporting Act goes further on the credit reporting and assessment front than the 2008 consumer credit Directive does.

The result of this relative confusion is an uneven and somewhat contradictory rulebook that might be summarised as follows, insofar as it concerns unsecured loans.

- Chapter 5 of the CPC, in terms of the requirements to 'know the consumer' and to 'assess his/her suitability' for credit does not apply to unsecured loans from €200 to €75,000.
- The Credit Reporting Act 2013 (as amended) obliges a 'credit information provider' to provide data to the Credit Register concerning a 'credit information subject' on a 'credit application' or a 'credit agreement' of €500 or more.
- It obliges a credit information provider to access the information contained on the Credit Register where an application is made by a credit information subject for a credit agreement of €2,000 or more.
- It also allows, but does not oblige, a credit information provider to access the information contained on the Credit Register where an application is made by a credit information subject for a credit agreement of €500 but less than €2,000.
- Loans and applications for loans under €500 are not included in the 2013 Act.
- The 2013 Act does not provide for any sanction where the relevant credit checks are carried out and the credit information provider ignores the results[23].
- It is unclear what sanctions, if any, apply where the current terms of Chapter Five of the CPC are not adhered to. In any event, the application of Chapter Five to unsecured lending is very limited as already outlined.

9. Vulnerable consumers

[23] See footnote 15 above.

The definition of vulnerable consumer in the current 'unofficially consolidated' version of the Code (2015) reads as follows:

"vulnerable consumer" means a natural person who:

a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons);

and/or

b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties).

This is a limited definition, seeming to equate vulnerability largely to a given consumer having a physical, intellectual or mental health disability. In the context of the provision of financial services, involving products that may be complex and may require an understanding that is not immediately accessible to many, this seems wholly inadequate at this point.

It is not immediately clear to us from the review document that the Bank intends to replace and expand this definition. However, there is a discussion on 'Vulnerability' in Theme 6 in the review document that would certainly indicate that it will, if the discussion is any guide. The review document notes that:

> *Vulnerable consumers are more likely to suffer detriment or harm. They can make poor or uninformed decisions, especially when firms are not acting with the appropriate level of care. Vulnerable consumers are more likely to be over-indebted, subject to scams and exposed to mis-selling. They are also more likely to purchase inappropriate products, or are unlikely to be able to manage a product or service, including seeking to resolve issues or complain when problems arise.*

and

> *Vulnerability indicators can relate to a multitude of issues, ranging from language barriers, cognitive or age-related impairment; elder abuse; family or domestic violence; financial exploitation or abuse; mental illness; serious illness; or any other personal or financial circumstance which can result in vulnerability. Circumstances may include bereavement, the breakdown of a relationship or job loss. Poor financial literacy or learning difficulties are also characteristics that can make consumers potentially vulnerable. All of these issues and characteristics can impact on a person's capacity to negotiate a process and make decisions in their own interests.*

This is a wider consideration of the concept of vulnerability and the Bank's understanding of vulnerability has clearly evolved over time. However, the vulnerable consumer is still largely defined only by his/her personal circumstances and situation. It would be helpful if external societal factors such as the housing crisis, inflation, climate change and international geopolitics might also be identified as elements that can and clearly do affect the vulnerability of consumers.

It is also notable that proposed strategies still seem to largely focus on the market place and the firms themselves taking responsibility for resolving the disadvantages suffered by vulnerable consumers. Of course, firms have a critical role to play here but without vigilant supervision by the Bank, a properly functioning complaints mechanism and meaningful enforcement action, these aspirations are in danger of amounting to lip service. Thus, it is worrying, for example, that the Bank does not see itself "having a role at the level of individual consumer transactions with firms"[24].

Who will have such a role? Who is to help the vulnerable consumer to identify and articulate any detriment and/or harm suffered, to make a complaint and to empower him/her to access an effective enforceable remedy? We have already referred above to the inherent weaknesses of the rules on complaints in Chapter 10 of the Code. In our view, these are exacerbated by a lack of access to assistance for consumers making onward complaints to the Financial Service and Pensions Ombudsman (FSPO), when faced with the superior resources of financial service providers. This is a pattern repeated in other alternative dispute resolution (ADR) mechanisms in Ireland. How are the rights of the vulnerable consumer vindicated without access to financial and legal information and advice, advocacy, legal representation where required, effective enforceable remedies and fair and just laws?

Theme 6 on vulnerability concludes with two questions as follows:

"Given that vulnerability should be considered more as a spectrum of risk than a binary distinction, how should firms' duty to act in their customers' best interests reflect this?

What other specific measures might be adopted to protect consumers in vulnerable circumstances while respecting their privacy and autonomy?"[25]

On the first question, the spectrum of risk identified by the Bank needs to be expanded. It is notable here that the paper refers in a footnote to the intention of the OECD to revise Principle 6 of its 'High Level Principles' to read *"Equitable and Fair treatment of Consumers including those who may be vulnerable"* with the text to include *"Special attention should be paid to the treatment of consumers who may be experiencing vulnerability or financial hardship".* This may be read in our view as suggesting that financial hardship or the risk of financial hardship is a vulnerability in itself. Thus, it properly belongs in the spectrum of risk referred to by the Bank. This

[24] Page 16.
[25] Page 55.

especially pertains in the area of consumer borrowing but it is also relevant to insurance and investment services. The duty of firms to act in the best interests of their customers should be reflected by pro-active, fair resolution mechanisms that acknowledge financial hardship as an inherent risk, engage consumers effectively and that tackle problems early.

In our view, there is a connection between Theme 5 – 'Informing Effectively' and Theme 6 – 'Vulnerability'. For the many consumers whose understanding of financial services and products is limited, information overload – for example, terms and conditions drafted in technical and complex language - may act as a deterrent to further understanding and expanding knowledge. On this question, Theme 5 observes that:

> *"We have seen ways in which regulators seek to alleviate the information burden on consumers. In EU law, there is the concept of a Key Information Document for certain products, designed to act as a sort of 'executive summary', a single reference point which concisely sets out all of the key information relevant to a transaction. We are interested in learning from stakeholders' experiences of proposed solutions such as this"[26].*

An accompanying footnote suggests that *'this direction is supported by international research'* and refers to relevant sources, including an OECD Policy Note which refers to 'need to know' information being presented up front and 'nice to have' information pared down or provided separately. Information that is accessible and makes sense may encourage consumers to want to know more and understand better. Access to further sources of information and advice for consumers may be the missing link.

In conclusion, as already outlined in the introduction to this submission above, in considering the treatment of "vulnerable customers" the Bank should have regard to its statutory obligation in carrying out its functions to have due regard to the need to eliminate discrimination and to promote equality, which is particularly relevant to the individuals that come within the discriminatory grounds in the equality legislation such as age and disability. It should also emphasise the obligations placed on financial service providers under the Equal Status Act 2000 (as amended) which, subject to some exemptions, prohibits discrimination in the course of the provision of services and requires that "reasonable accommodation" is provided to a person with a disability or disabilities to enable that person to avail of such services.

[26] Page 53.