MABS National Development Limited

Review of the Code of Conduct on Mortgage Arrears

Response to Consultation Paper CP63

Contents

Introduction

The Money Advice and Budgeting Service (MABS) was established in 1992 to help people on a low income to cope with debts and take control of their own finances. It is a free, confidential and independent service. It currently comprises 53 MABS Services, located in over 60 offices nationwide. MABS is funded and supported by the Citizens Information Board.

MABS National Development Limited (MABSndl) was established in 2004 to further develop the MABS Service in Ireland. It provides training and technical support to MABS staff nationally. MABSndl also assists the MABS service in providing educational and informational supports as well as assisting in highlighting policy issues that arise in the course of the money advice work on behalf of clients. MABSndl has responsibility for the on-going development of the MABS website www.mabs.ie and for providing the MABS national helpline service.

We welcome the opportunity to contribute to the Central Bank's consultation CP 63 on the Review on the Code of Conduct of Mortgage Arrears. We hope our submission, which reflects the MABS experience, will assist you in your deliberations. We ask that consideration also be given to our report entitled '*MABS Clients and Mortgage Arrears*[1]' (the MABS Mortgage Report) and the recommendations contained therein.

[1] MABS Clients and Mortgage Arrears, January 2013 – Attached as an Appendix to this submission

Executive Summary of Recommendations

This submission on the Code of Conduct on Mortgage Arrears contains the following key recommendations:

- The introduction of an objective process of classifying a borrower as "not co-operating", as well as independent review of level and quality of engagement with such borrowers.
- The introduction of guidelines as to what constitutes 'fair and reasonable' timelines and 'proportionate and not excessive' contact.
- No change should be made to the existing Code in relation to level of permissible unsolicited contact between lender and borrower.
- The introduction of clear guidelines as to the agenda and circumstances for the unsolicited meetings between lender and borrower.
- Instructions for the application of the definition of "sustainable solution" contained in the Central Bank's Mortgage Arrears Resolution Targets and associated processes.
- The requirement for 'full disclosure' in completing the SFS to be part of any medium or long term arrangements.
- The provision of full information, in a format that is readily understood by the borrower, on the entire suite of options made available by the lender to allow that borrower to make a fully informed decision.
- The introduction of specific timelines for each stage of the MARP both for lenders and borrowers.
- Independent scrutiny of the lender's offer to move the borrower from a tracker mortgage to evaluate its long term advantage for the borrower.

Submission

Cooperation and Engagement

Non Co-Operation

The classification of a borrower as "not co-operating" is a very serious decision, made by the lender and having monetary and legal consequences. How the decision is arrived at should be consistent across all lenders and should follow a robust and fair process for all borrowers given their particular circumstance.

a. Failing to make full and honest disclosure: While we agree with the Central Bank's view that deliberately delaying real engagement is unacceptable and is not in the interest of either party we are concerned that borrowers, who would be considered vulnerable, whether by virtue of disability, literacy, numeracy or other difficulties[2], are at a considerable disadvantage if appropriate support is not made available by the lender for borrowers seeking to gather the necessary documentation to allow for assessment of their case (3.27, 3.28).

b. In our experience there are clients, who have literacy/numeracy difficulties or have serious health problems and who may have considerable difficulty in providing the information sought by the lender in the timescale required. Again, it is imperative that these borrowers are given the time and support necessary to research and assemble the information required by the lender.

c. As above in a. and b. Furthermore, the contingent condition that the borrower must engage "with a view to reaching an alternative repayment arrangement" is subjective and requires the lender to impute knowledge of the borrower's intention that they could not possibly have. This is of particular concern in the case of vulnerable borrowers (defined with reference to the above) who may be unable to accurately demonstrate their intention.

[2] In this regard, we would welcome the introduction of a definition of "vulnerable consumer" similar to that in use in the Consumer Protection Code, 2012 or with reference to guidance issued by the Energy Retail Association: "A customer is vulnerable if for reasons of age, health, disability or severe financial insecurity, they are unable to safeguard their personal welfare or the personal welfare of other members of the household".

The level and quality of the interaction between lender and borrower is fundamental to the MARP. In our experience lenders sometimes do not sufficiently assist the borrower in this regard. Therefore, before a borrower is classified as 'not co-operating' there must be an independent review (perhaps by a suitable member of the Appeal Board) of the level and quality of the process both from the borrower and lender perspective so that such a serious classification is just and fair.

Where a lender imposes a timeline it is left to the lender to decide what is fair and reasonable. We would suggest that objective guidance should be given as to what is fair and reasonable in this regard, with parameters prescribed within the Code itself. (3.33)

Contact between the lender and borrower

Our experience both from casework and contacts made with the MABS Helpline is that effective communication encourages debtors to engage with their difficulties. However they are often fearful and confused about the next steps and we would encourage borrowers to prepare in advance of contacting their creditor. We would therefore be reluctant to support any change to the existing interpretation, including any increase to the limit of three unsolicited communications per calendar month, without evidence that such a change is in fact required.

We would query the evidence supporting this proposed change (i.e. has the size / scale of the 'non engagement' problem experienced by creditors been established by lenders and the Central Bank over the lifetime of the current Code?) and submit that this data be published so that 1) the problem can be more fully understood and 2) the necessity or otherwise of amending the important provisions relating to unsolicited contacts as set out in the CPC and CCMA can be assessed.

In the current CCMA appropriate guidance is given as to what was considered as proportionate and not excessive. It is now being proposed that this guidance be left to the discretion of the lender. We have the following concerns about this change in the absence of any information on the size of the non-engagement problem.

1. Has relevant data been provided to the Central Bank to inform the proposal on the need to remove the present regulation on engagement?
2. If the proposal is adopted will the contact policy, drawn up by the lender with the approval of its board, be subject to approval by the Central Bank?
3. Will the borrowers be advised appropriately as to what is proportionate and not excessive, not aggressive or intimidating as per the contact policy of their respective lenders?

The proposed change in wording reflects what was proposed in the Consultation Paper issued by the Central Bank in 2010. Accordingly, we draw attention to the point made in our submission at that time, i.e. that proportionality be based on the borrower's personal circumstances.

It is also proposed that a lender must allow the borrower sufficient"breathing space" before attempting any further contact with the borrower. Here again it is left entirely to the lender to make the value judgment on what is sufficient breathing space without any guidance or reference point from the CCMA.(3.20.c). In this regard, we refer to the Lending Code 2011 implemented in the UK[3] which provides guidance as to the operation of this "breathing space" (in relation to unsecured debts) which may be a useful basis for the proposed amendment to the Code.

The present Code allows for a lender to make an unsolicited visit with a borrower in arrears where all attempts at contact have failed and immediately prior to classifying the borrower as not co-operating. In order to ensure transparency of process, the number and effect of these meetings (positive or negative outcome for the borrower) and the presence of third party borrower representatives (indicating potential vulnerability of the borrower) should be reported to the Central Bank and made available on request. It is essential that such a visit represents a positive experience for the borrower. However if the outcome is not positive, it may only have served to exacerbate the problem, rather than assist the resolution process. Clear guidelines need to be in place as to the agenda/circumstance for such a meeting – this is a particular concern for MABS given the high incidence of mental health related issues amongst our client group (MABS Mortgage Report 2013). We

[3] http://www.lendingstandardsboard.org.uk/docs/lendingcode.pdf - page 32

welcome the inclusion in the communication advising of the personal visit, the suggestion that borrowers may have a third party present at such a meeting, if they felt it would be of assistance and that the borrower is offered another venue for the meeting other than the family home, for that visit (3.25.c- v & vi) as positive steps to protecting the over-indebted consumer.

It is our view, based on experience, that while an offer to assist may be welcome, completing the SFS during such a visit, without the opportunity for borrower preparation may not provide appropriate values particularly where cost of living is concerned.(3.26.d).[4]

We would appreciate greater clarity on the extent, quality and limitations of the assistance envisaged and whether such assistance can include the giving of advice (3.25.d and 3.30. b).

Link between the CCMA and the Personal Insolvency Act, 2012

We welcome the proposal to ensure as smooth a process as possible for borrowers wishing to progress from the MARP to the Personal Insolvency Arrangements by providing information and appropriate links to the Insolvency Service's website and information line. However in these circumstances borrowers will require robust guidance and advice in addition to the relevant publications issued. It will be imperative on the Central Bank and the Insolvency Service of Ireland to ensure that those engaged in processing applications for Personal Insolvency Arrangements have been sufficiently trained to enable them to assess the adequacy, or otherwise, of the creditor's, and debtor's, application of the MARP.

The reference to linking the Code to the Personal Insolvency Act, 2012 (the Act) may be confusing for some borrowers as it suggests that the borrower may receive a more suitable outcome were s/ he to engage in a formal Personal Insolvency Arrangement process. If this is the intention of the amendments to the Code, we would query the rationale of creating a two-tiered process whereby a borrower's situation is deemed unsustainable on application of the Code, but that same borrower could be provided with a suitable alternative on application of the legislation.

It is also our understanding, based on significant engagement with the Act itself, that the arrangements contained in the Act are intended to be options of "last resort" for debtors,

[4] MABS request all clients to maintain a spending diary for a number of weeks, and to gather supporting documentation in relation to their debts, so that data used to populate an SFS is accurate.

given the restrictions on both creditor and debtor and the consequences of failure of the arrangements. They are not, and should not be considered as, supplementary to the Code.

The Personal Insolvency Act 2012 provides an opportunity for insolvent debtors to enter into a formal arrangement for the repayment and discharge of some or all of their debts and is a much welcomed development for 'can't pay' debtors. MABS anticipates, that while the various arrangements will be beneficial for many debtors, there will remain a cohort of debtors who cannot meet their repayments in full and who are either precluded from availing of the schemes on the basis of the eligibility criteria or who will not wish to enter into the schemes because of the consequences, (in terms of publicity, access to credit, the strictures imposed) or because they have a belief that their situation may improve. For those debtors the capacity to enter into voluntary arrangements with their creditors will remain important.

Many debtors seeking voluntary arrangements will continue to come to MABS for advice and support in arriving at voluntary arrangements while others will broker such arrangements through bilateral engagement with their creditors. We welcome the indications[5] that parts of the credit industry and the Central Bank are examining the means through which such voluntary arrangements are arrived at and governed.

As MABS has been at the forefront of negotiating good practice protocols for debt management over the last number of years it has a wealth of experience on how such arrangements could be developed and managed. The key principles are that the approach should be holistic and that the resulting arrangements should be 'realistic, mutually acceptable, affordable and sustainable'[6].

There needs to be clear and objective guidance in the CCMA as to what constitutes an 'unsustainable mortgage'. This is a matter of fundamental importance in the mortgage

[5] At a senior level Irish Banking Federation (IBF) member institutions have been developing a protocol on unsecured debt over the last several months. The Protocol was launched by the IBF on the 30 January 2013. It was reported last week that the Central Bank has invited banking and credit union representatives to a meeting to discuss the creation of a workable burden-sharing agreement between secured and unsecured lenders. (The Irish Times - Wednesday, February 27, 2013).

[6] IBF / MABS Operational Protocol, Working Together to Manage Debt, September 2009

arrears crisis. We are concerned that in arriving at the conclusion that a mortgage is unsustainable the lender may be influenced more by prudential requirements than by the long term sustainability of the borrower's mortgage (3.44). Accordingly, we welcome the proposal to include in the CCMA responsibility on the lender to provide, in writing, the reasons why an alternative repayment arrangement has not been offered as well as an outline of the other options available (3.44).

The issue of alternative repayment arrangements and how they are arrived at is of special interest to MABS. We are of the view that such arrangements must be arrived at holistically so that they are affordable and sustainable over time. (3.42) The Report of the Interdepartmental Mortgage Arrears Working Group (the Keane Group) recommended a decision tree approach to the processing of arrears cases under MARP (p.32). We would welcome the imposition of a publicly available, commonly agreed decision tree approach for lenders.

Use of the Standard Financial Statement (SFS)

The MABS Mortgage Report found that the profile of MABS clients in mortgage difficulty indicates clearly that there is a cohort of borrowers who find the comprehensive completion of the SFS challenging and need considerable support, which differs somewhat from the findings of the Central Bank's survey of 1,000 mortgage holders.

Furthermore, as there is no timeframe specified in the Code for the completion of the Assessment stage, timelines varied considerably from lender to lender and almost 50% of those mortgage cases at Assessment stage were waiting in excess of two months for their case to be assessed. We therefore propose that consideration be given to the introduction of specific timelines for each stage of the MARP.[7]

While we welcome the proposed new requirement of the lender to offer appropriate assistance to borrowers in completing the SFS the assistance should be in making the different sections clearly understood and the research required for its completion particularly section C which evaluates the actual expenditure amount needed for a reasonable standard of living. (Step 2.30b) It is possible, over time, that the Guidelines published by the Insolvency Service of Ireland on Reasonable Living Expenditures (RLEs) will

[7] MABS Clients and Mortgage Arrears 1013 – Chapter 5, Recommendation 2

form part of the underwriting criteria for lenders making decisions on credit / restructuring options and we have concerns that the use of RLEs in this way will result in borrowers who can afford to make some, albeit modified, repayment arrangement having their mortgage considered "unsustainable" by their lender.

While there may be instances where the full information on a borrower's income, outgoings, liabilities and assets are not immediately required by the lender this full disclosure, as required by the SFS, must be part of any medium or long term arrangements and, therefore, we would argue against the view contained in the Consultation Paper that there be discretion on the part of the lender as to which circumstances warrant such a full consideration.

Review of alternative repayment arrangements

We welcome the proposal to categorise alternative arrangements into short, medium and long term and the timelines attached to each review. It is also a positive proposal to require lenders to explain the potential impact of a particular review but again the parameters of that explanation will be very important. We would, however, be concerned in regard to the lack of monitoring of the medium and long-term arrangements to ensure that they continue to the suitable in the borrower's circumstances and suggest that there be an initial review after 12 months, including the completion of a revised Standard Financial Statement, in all cases.

Treatment of appeals and complaints

While an internal Appeals Board is an appropriate part of the consumer protection process there is need for recourse to an independent appeals mechanism in order to demonstrate transparency along with the right to appeal to the Financial Services Ombudsman.

The MABS Mortgage Report evidenced inordinate delays in processing appeals in the majority of cases with over 50% taking in excess of two months. Accordingly, we welcome the proposal that the appeal has to be adjudicated within 40 business days. It is important that the borrower is made aware of this timeline so as to avoid further stress and anxiety (3.52.e).

We would, however, be concerned at the suggestion (on p.12) that the current grounds for appeal set out in provisions 42(b) and 42(c) of the CCMA would be removed from this

section and instead be included as part of a general complaints provision under the Consumer Protection Code, 2012 (CPC) and would welcome further clarity that where such appeals are to be dealt with by the lender's Complaints Department, that the full protections of the Code continue to apply. Furthermore, the 'Complaints Resolution' provisions of the CPC specifically exclude mortgages to which the Code applies and, accordingly, were this amendment included in the revised Code a lacuna would be created whereby borrowers would have no recourse to address these issues at the present time without a contemporaneous amendment to the CPC (which would require a separate consultation).

Furthermore, in light of our concerns in relation to delays on the part of lenders expressed in the MABS Mortgage Report, we would be anxious on behalf of our clients and the wider consumer cohort, that the 12 month moratorium on legal action not continue to run while such "complaints" were being dealt with as to do otherwise could be detrimental to the borrower's case.

We are of the view that where a borrower makes an appeal and the appeal is not upheld by the lender's Appeal Board recourse should be had by the borrower to appeal to the FSO within a specified period and, subsequent to that appeal not being upheld, that then the twelve month moratorium would no longer apply (4.45f).

Information on other Options

While we agree with the proposal that a lender must document its considerations of each option examined, we are of the view that a full understanding by the borrower of the entire suite of options available from their lender, along with the associated terms and conditions, is a fundamental requirement before an informed decision can be made (4.39).

There will be different suites of options for the resolution of the mortgage difficulties from various lenders and those lenders with similar options may have different terms and conditions. Borrowers, therefore, with the same financial profile could be deemed sustainable by one lender and unsustainable by another. Again the existence of a common and objective definition of 'un/sustainability', to be used across all lenders, is crucially important. This lack of clarity with regard to what is sustainable / unsustainable will lead to a sense of unfairness when the inevitable comparisons will be made in the media and

elsewhere. While we acknowledge the definition of "sustainable solution" contained in the Mortgage Arrears Resolution Targets document[8] , how this definition will be applied, and the process used to determine it, will be of critical importance. It would assist also if there was commonality across lenders of the solutions on offer and the terms and conditions attached (3.38). We would therefore submit that these options, together with their terms, conditions and consequences, be made available as part of the lender's MARP information requirements on their website and in the MARP booklet.

While there may be commercial considerations which prohibit the release of the detail in relation to such schemes it is very important for advice giving organisations such as MABS to have knowledge of the full suite of options across all lenders and to have an understanding of how they will work in practice.

Tracker Mortgages

Allowing lenders to move a borrower in arrears off a tracker rate mortgage is a serious matter even where a loan modification is offered. The lender's offer must be independently scrutinised to evaluate its long term advantage to the borrower as the current proposal that the interest be changed where the loan modification is "advantageous to the borrower in the *long term*" is subjectively assessed by the lender, who has a vested interest in reducing the number of mortgages on tracker rates, and does not adequately provide for borrowers who require more support in the *short term*. While the lender must provide the borrower with a clear explanation, in writing, we would propose that the borrower should be required to secure a written independent evaluation of the offer's advantages alongside the advantages of retaining the present arrangement.

Appendix

Chapter 1

Application of the Code

It is the MABS experience that the treatment of separated people presents particular challenges, especially when one party has absconded, cannot be located or has chosen not to co-operate either with the lender or with the other party (the co-operating borrower).

[8] http://www.centralbank.ie/press-area/press-releases/Documents/Approach%20to%20Mortage%20Arrears%20Resolution%20-.pdf – page 25

While we understand the legal / contractual restrictions on lenders engaging with one party to a contract, there must be some cognisance contained in the Code of the position of the co-operating borrower vis a vis their family home. Where the co-operating borrower can continue to make payments to the mortgage, we submit that they continue to be afforded the protections of the Code.

There may also be cases where the primary residence is jointly owned other than by cohabiting / married couples (i.e. by siblings / friends) who would have similar "separating" issues and would welcome confirmation that any protection offered to the co-operating borrower outlined above would also extend to these circumstances.

Chapter 3

STEP 1

It is important for the smooth communication and interaction with the borrower that information already communicated by the borrower is captured and easily available to frontline staff so negating the need, and the frustration caused, for the repetition by the borrower of the same information. It would enhance the communication process if the borrower's interaction was with the same frontline staff member as much as possible.

Section 25(a)

A semantic point, but the definition of "primary residence", which includes a property in which the borrower no longer resides, would preclude lenders from visiting borrowers who, for financial or other reasons, have moved out of the primary residence.

Section 26(c)

This section does not provide for cases where the lender has agreed a write-down of some or all of the negative equity and would appear to preclude lenders from doing so. We submit that the language be amended to provide for cases where such a write-down is suitable in the borrower's circumstances.

STEP 3

The MABS Mortgage Report found that almost half (49%) of cases at Assessment Stage of the MARP were waiting in excess of 2 months for a Resolution proposal from their lender. In this regard, it would be beneficial to borrowers and lenders for the Code to impose a

timeframe for lenders to assess a borrower's case, such time not to be included in the 12 month moratorium on legal action.