

March 2018

Loan Sales in Ireland – Proposed Regulatory Changes

Background

On foot of increased pressure being placed on Irish banks by the European Central Bank (the "ECB") to deleverage their balance sheets, a number of Irish financial institutions - including Permanent TSB, Lloyds and AIB – have recently announced the planned sales of their non-performing loan books. This deleveraging programme has been the subject of significant domestic, political scrutiny. It is in this context that a number of legislative enactments have recently been proposed to offer significantly enhanced rights and protections to affected borrowers.

The Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018

The current impetus to legislate in this area revives a previous debate from 2015 which culminated in the decision to regulate the servicing (rather than ownership) of loans acquired by unregulated purchasers. This was implemented pursuant to the terms of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (as amended) (the "Credit Servicing Act").

The Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018 (the "Credit Servicing Amendment Bill") was published on 22nd February 2018. It is a private member's bill introduced by Fianna Fáil Deputy Michael McGrath. The primary feature of the Credit Servicing Amendment Bill is to propose that

For further information on any of the issues discussed in this article please contact:



Conor Houlihan

DD:+ 353 (0)1 673 1719

conor.houlihan@dilloneustace.ie



Kate Curneen

DD: + 353 (0)1 673 1738

Kate.curneen@dilloneustace.ie



Weisim Ho
DD: + 353 (0)1 673 1714
Weisim.ho@dilloneustace.ie

"credit agreement owners" be licensed and regulated by the Central Bank of Ireland. The credit agreements to which it is proposed the Credit Servicing Amendment Bill will apply are those entered into with: (i) individuals (with some very limited exceptions); and (ii) small and medium enterprises where the loan in question was originated by a regulated financial services provider.

Credit Agreement Owner

A "credit agreement owner" is defined to be a person (other than a NAMA entity) who:

- holds legal title to credit in respect of a credit agreement or a portfolio of credit agreements; and/or
- determines the overall strategy for the management and administration of a credit agreement or a portfolio of credit agreements; and/or
- determines the interest rate for a credit agreement or a portfolio of credit agreements; and/or
- maintains control over key decisions relating to a credit agreement or a portfolio of credit agreements; and/or
- takes such steps as may be necessary for the purposes of
 - enabling the undertaking of credit servicing by another person;
 - enforcing a credit agreement.

This definition as drafted is extremely broad and could arguably have the effect of including within its scope the fund(s) that ultimately (directly or indirectly) own and control the special purpose vehicles that are the legal owners of the loans. Whether, or to what extent, this definition will be amended as the Credit Servicing Amendment Bill makes its way through the legislative process is yet to be seen.

Concerns for SPVs

A further concern with the new proposals is that loan portfolio purchasers are frequently structured as special purpose vehicles; these entities generally have insufficient personnel to carry out the key governance and compliance requirements imposed by the Central Bank of Ireland.

In its current form, the Credit Servicing Amendment Bill does not contain any grandfathering provisions and has only a three month transition period. As such, existing owners of loans that fall within its scope would need to review the terms of their current servicing, structuring and financing arrangements and prospective purchasers of loan portfolios would need to ensure they structure their acquisitions in line with the terms of the legislation and to take into account the knock-on

TOKYO

acquisition and workout costs involved.

Additional Provisions

While the proposed regulation of credit agreement owners is the most notable provision of the Credit Servicing Amendment Bill, it contains a number of additional significant provisions, including the following:

- enlarging the Central Bank's powers (to direct a regulated financial service provider to make appropriate redress to customers) under Section 43 of the Central Bank (Supervision and Enforcement Act) 2013 in certain circumstances (including, for example, if enforcement action is taken where there is only an immaterial breach by the borrower of their loan agreement);
- outlining certain restrictions where the credit agreement owner holds title to loans in circumstances where the borrower also operates in the same competing commercial sector as the credit agreement owner;
- specifying that certain provisions of the Credit Servicing Amendment Bill will not apply where the purchase of the loan portfolio is made by way of securitisation. This provision would likely have an effect on the structuring of Irish loan acquisition transactions going forward. Securitisation is not however defined and further clarity as to interpretation is needed in this regard; and
- a credit agreement owner will be obliged to disclose to the borrower within 30 days of acquisition of the borrower's loan certain information, including the terms on which the loan was acquired, any material change in terms and whether the loan was sold at a discount.

Disclosure of Information to Borrower

The requirement to disclose commerical information in relation to the terms of a loan sale to borrowers could arguably include the actual price paid for loans, something that would undoubtedly have a negative impact on loan purchasers' ability to negotiate settlements with borrowers and could have a significant impact on the price that prospective purchasers are willing to pay for Irish loan assets.

On a related point, it has been reported that, in a recent decision of the Irish Data Protection Commissioner (this decision is not currently publicly available), NAMA was held to be in breach of its obligations under Irish data protection law by failing to provide two property developers with certain personal information held by it in relation to them. There has been some speculation that this decision could enable borrowers, whose mortgages have been sold, to request information from purchasers in relation to the price paid for, or valuation assigned to, their specific loan(s). The decision of the Data Protection Commissioner follows on from a decision of the European Court of

Justice in December 2017 where it was held that the definition of "personal data" should be broadly construed.

Next Steps

As the Credit Servicing Amendment Bill is a private member's bill, in order to proceed, it must be referred to a Dáil Select Committee for pre-legislative scrutiny. This referral was made on 6th March 2018. It is anticipated that the Dáil Select Committee will, in due course, make a series of amendments to the Credit Servicing Amendment Bill. The Minister for Finance has indicated that "the Bill will require some significant work from a drafting and amendment point of view". In addition, the Credit Servicing Amendment Bill may be referred to the ECB for an opinion on its provisions.

The Keeping People in Their Homes Bill 2017

A further proposed legislative measure in this area is the "Keeping People in Their Homes Bill 2017" (the "**Homes Bill**"). This is also a private member's bill and it is sponsored by Deputy Kevin 'Boxer' Moran, a member of the Independent Alliance.

The Homes Bill has been fast-tracked and it is now proposed that it will be transposed into the Courts and Land Conveyancing (Amendment) Bill (the "Courts and Land Conveyancing Bill") which will amend the Land and Conveyancing Law Reform Act 2009 (as amended). The heads of the Homes Bill are currently in the process of being drafted.

In broad terms, the Homes Bill provides that where an action for repossession of a mortgaged property, in which the mortgagor ordinarily resides, is before a court, the court must assess:

- whether the order is proportionate to the legitimate aim being pursued. Factors to be considered in this regard include: (i) the amount of principal/interest paid in relation to the total amount owed; (ii) the suitability or otherwise of a lifetime mortgage or a Personal Insolvency Arrangement; and (iii) adherence to the Central Bank's Code of Conduct on Mortgage Arrears (the "Code");
- the likely impact of such an order on the human rights of the mortgagor and other household members. Factors to consider here include: (i) the availability of suitable and affordable alternative accommodation; (ii) older persons or persons with disabilities in the household; (iii) circumstances surrounding the execution of the mortgage contract; (iv) information provided and vulnerability of the borrower; and (v) the extent and availability of State support to the enforcing entity and the cost of providing emergency accommodation; and
- where the enforcing entity is not the original lender to the mortgagor (e.g. a secondary purchaser), the Homes Bill provides that additional factors must also be taken into consideration, such as the amount that the enforcing entity paid for the loan, whether the loan

was also offered for sale to the mortgagor and the availability of tax relief in respect of the non-performing loan(s).

The Homes Bill as drafted is very far-reaching in its terms and - one would have to assume – would be open to constitutional challenge. It is anticipated that it will be subject to amendment as it advances through the Houses of the Oireachtas.

Other Developments of Note in this Area

Following the initial publication of the Credit Servicing Amendment Bill, the Minister for Finance, Paschal Donoghue requested the Central Bank of Ireland to review the Code to ensure that it provides sufficient support for borrowers in financial difficulties. We understand that this review is ongoing.

In addition, the Credit Servicing Amendment Bill and the Homes Bill (the "Bills") must be considered in light of Ireland's EU regulatory obligations. On 14th March 2018, the European Commission published a proposal for a draft directive on credit servicers, credit purchasers and the recovery of collateral (the "Draft Directive"). This forms part of the EU's Capital Markets Union, which has as one of its objectives the creation of an appropriate environment for banks to deal with non-performing loans. The provisions of the Draft Directive are subject to change, but it is anticipated that it will be finalised by 2019, with there being an obligation on Member States to implement its provisions by 2021.

The Draft Directive provides, *inter alia*, for the regulation of credit servicers rather than credit owners and also introduces a framework for accelerated extrajudicial collateral enforcement. Of particular note in this context is Article 15 of the Draft Directive which provides that Member States shall ensure that a credit purchaser is not subject to any additional requirements for the purchase of credit agreements other than as provided for by the national measures transposing the Draft Directive. The terms of the Bills will need to be carefully considered by the legislature here in light of the provisions of the Draft Directive.

Conclusion

Legislative change in this area is likely in the coming months. There appears to be cross-party consensus in Dáil Eireann broadly in favour of the changes proposed by the Bills. There are certain drafting issues that will need consideration in order to avoid unintended consequences that the Bills, in their current form, might lead to and the legislature will need to be careful to ensure that any changes to the current domestic regulatory regime are implemented in accordance with EU law. The Bills could have significant implications for lenders and loan purchasers going forward and will need to be closely monitored as they proceed through the legislative process.

We will issue further updates as to developments in this area as they occur.

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2018 Dillon Eustace. All rights reserved.