

Revised Code of Conduct on Mortgage Arrears



The Central Bank of Ireland's (the "Central Bank") Code of Conduct on Mortgage Arrears (the "Code") for all regulated mortgage lenders operating in Ireland came into effect on 1 January 2011.

The Code was published on 6 December 2010 arising from recommendations of the Government's Expert Group on Mortgage Arrears and Personal Debt and in light of other issues which have arisen since the original Code's introduction in February 2009. The Code replaces the previous code issued by the Central Bank on 19 February 2010 and sets out the framework that lenders must use when dealing with borrowers who are in mortgage arrears or in pre-arrears.

The Code applies to the mortgage lending activities of all regulated entities, except credit unions, operating in Ireland. Lenders must comply with the Code as a matter of law and must be able to demonstrate compliance with the Code to the Central Bank.

Scope

The Code applies to the mortgage loan of a borrower which is secured by their primary residence.

"Primary Residence" is defined in the Code as being a property which is:

- (a) the residential property which the borrower occupies as his/her primary residence in this State, or
- (b) a residential property in this State which is the only residential property owned by the borrower.

Lenders must apply the protections of the Code to borrowers in both arrears and pre-arrears cases. The Code also applies to arrears cases which were in existence prior to 1 January 2011.

The revised Code sets out more detailed requirements for lenders when dealing with borrowers experiencing arrears and financial difficulties. The most significant provisions in the revised Code are set out below.

Mortgage Arrears Resolution Process ("MARP")

Lenders must establish a MARP and use this framework when dealing with arrears and pre-arrears customers. The MARP must:

- (a) allow for a flexible approach in the handling of arrears and pre-arrears cases;
- (b) be aimed at assisting the borrower as far as possible in his/her particular circumstances; and
- (c) set out how the lender will implement the five steps of the MARP (see below).

Lenders are required to establish an Arrears Support Unit ("ASU") and each branch or office of a lender must have at least one person with specific responsibility for dealing with arrears and pre-arrears cases and for liaising with the lender's ASU in respect of these cases. In this regard, the MARP must set out how the ASU will assess cases referred to it, including the types of alternative repayment measures or any other relief method that may be offered to borrowers by the lender.

The Five Steps of the MARP

The MARP must incorporate the following steps as set out in the Code:

Step 1: Communication with Borrowers

Lenders must ensure that communications with borrowers are presented in a clear and consumer-friendly manner and must make available to borrowers an information booklet which provides details on the MARP. Any meetings with borrowers must be conducted in utmost privacy.

Lenders must not initiate more than three unsolicited communications with a borrower, by whatever means, in a calendar month other than correspondence required by the Code or other regulatory requirement.

When arrears arise on a borrower's mortgage loan account and remain outstanding 31 days from the date the arrears arose, a lender must:

- (a) inform each borrower and any guarantor on the mortgage, unless the mortgage loan contract explicitly prohibits such information to be given to the guarantor, of the status of the account in writing, within 3 working days. The letter must include the following information:
 - (i) the date the mortgage fell into arrears;
 - (ii) the number and total amount of full or partial payments missed;
 - (iii) the monetary amount of the arrears to date;
 - (iv) confirmation that the lender is treating the borrower's situation as a MARP case;
 - (v) the importance of the borrower co-operating with the lender during the MARP process and notification that, if co-operation ceases, the protections of the MARP no longer apply and that the lender may start legal proceedings for repossession;
 - (vi) a statement that fees, charges and surcharge interest in relation to the arrears will apply, where the borrower does not co-operate with the lender;
 - (vii) details of any fees and charges in relation to the arrears that may be applied if the borrower does not co-operate with the lender;
 - (viii) a general statement about the impact of missed mortgage repayments and repossession on the borrower's credit rating; and
- (b) provide the borrower with the information booklet on the MARP.

When a third full or partial mortgage payment is missed and remains outstanding and an alternative repayment arrangement has not been put in place, the lender must notify the borrower, in writing, of the following:

- (a) the potential for legal proceedings for repossession of the property, together with an estimate of the costs to the borrower of such proceedings;

- (b) the importance of taking independent advice from his/her local Money Advice and Budgeting Service (“MABS”) or an appropriate alternative; and
- (c) that irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case.

Lenders must also have a dedicated section on their website for borrowers in, or concerned about, financial difficulties to include:

- (a) the information booklet detailing the MARP;
- (b) information on the level of charges that may be imposed on borrowers that do not co-operate with the lender; and
- (c) a link to any website operated by the MABS that contains information about mortgage arrears.

At the borrower’s request, the lender must confirm the time period remaining during which the lender may not commence legal action for repossession of the borrower’s primary residence.

Step 2: Financial Information

A lender must use a standard financial statement to obtain financial information from a borrower who is in arrears or in pre-arrears. The lender must pass the completed standard financial statement to its ASU.

The Code does not set out what must be included in this financial statement.

Step 3: Assessment

The lender’s ASU must assess the completed standard financial statement and must assess each case on its individual merits taking into account the individual circumstances of each borrower.

Step 4: Resolution

When considering a MARP case, a lender must explore all options for alternative repayment arrangements in order to determine which options are viable for each particular case. The lender must document its considerations.

A lender must not require a borrower to change from an existing tracker mortgage to another mortgage type, as part of an alternative arrangement offered to the borrower in arrears or pre-arrears.

The lender must monitor the arrangement that is put in place for a MARP case, on an ongoing basis and formally review the appropriateness of that arrangement for the borrower, at least every six months. As part of the review, the lender must check with the borrower whether there has been any change in his/her circumstances in the period since the arrangement was put in place, or since the last review was conducted.

Step 5: Appeals

Borrowers can make an appeal in relation to the decision of the ASU and the lender's treatment of the borrower's case under the MARP process, to an internal Appeals Board which lenders are required to establish.

The Appeals Board must be comprised of three of the lender's senior personnel, who have not been involved in the borrower's case previously. At least one member of the Appeals Board must be independent of the lender's management team and must not be involved in lending matters, for example, an independent member of the lender's Audit Committee. A lender must have in place a written procedure for the proper handling of appeals which must comply with minimum standards set out in the Code.

Arrears Charges

The Central Bank has also added a new provision in the Code on arrears charges. Lenders must not impose arrears charges or surcharge interest on borrowers who are in arrears and who are co-operating with the lender's MARP with effect from 1 January 2011.

Repossession

The lender must not apply to the courts to commence legal action for repossession of the borrower's primary residence, until every reasonable effort has been made to agree an alternative arrangement with the borrower or his/her nominated representative.

Where a borrower co-operates with the lender, the lender must wait at least twelve months from the date the borrower is classified as a MARP case (i.e. day 31), before applying to the courts to commence legal action for repossession of a borrower's primary residence.

The twelve-month period commences on day 31 but does not include:

- (a) any time period during which the borrower is complying with the terms of any alternative repayment arrangement agreed with the lender;
- (b) any time period during which an appeal by the borrower is being processed by the lender's Appeals Board;
- (c) any time period during which the borrower can consider whether or not they wish to make an appeal on the decision of the ASU;
- (d) any time period during which a complaint against the lender regarding any aspect of this Code, is being processed by the Financial Services Ombudsman's office; and
- (e) for pre-arrears cases, the time period between the first contact by the borrower in relation to a pre-arrears situation and an alternative repayment arrangement being put in place.

Where a borrower is in mortgage arrears, a lender may commence legal action for repossession of the property without the 12 month period applying, only in the following circumstances:

- (a) where the borrower does not co-operate with the lender;
- (b) in the case of a fraud perpetrated on the lender by the borrower; or

(c) in the case of breach of contract by the borrower other than the existence of arrears.

A lender, or its legal advisors on its behalf, must notify the borrower in writing immediately before it applies to the Courts to commence legal action for the repossession of the primary residence.

Compliance with the Code

The Code applies to mortgage lenders with effect from 1 January 2011. Lenders will be allowed a six month period (ending 30 June 2011), where the Central Bank of Ireland will be cognisant of issues relating to systems development or other technical difficulties and required staff training.

Failure to comply with the Code may result in sanctions under the Central Bank's Administrative Sanctions Framework.

Attribute to Rowena Fitzgerald, Barrister, financial services department Mason Hayes+Curran.

For more information, please contact Rowena at rfitzgerald@mhc.ie or + 353 1 614 5000. The content of this article is provided for information purposes only and does not constitute legal or other advice. Mason Hayes+Curran (www.mhc.ie) is a leading business law firm with offices in Dublin, London and New York.

© Copyright Mason Hayes+Curran 2010. All rights reserved.