

## CONTENTS

<b>Application</b>	<b>1</b>
<b>Mortgage Arrears</b>	<b>2</b>
<b>Arrears Management</b>	<b>2</b>
<b>Formal Demand and Enforcement</b>	<b>2</b>
<b>Addressing Arrears Problems</b>	<b>2</b>
<b>Repossession</b>	<b>2</b>
<b>Contacts</b>	<b>2</b>

## Financial Regulator issues new Code of Conduct on Mortgage Arrears

This update covers details of the Code of Conduct on Mortgage Arrears (the “Mortgage Code”) announced by the Financial Regulator on 13 February 2009.

The Mortgage Code is issued under Section 117 of the Central Bank Act 1989. Regulated entities subject to the Mortgage Code are therefore required to comply with it as a matter of law.

The Mortgage Code takes effect from 27 February 2009. The Mortgage Code closely resembles the Irish Banking Federation’s voluntary Code of Practice on Mortgage Arrears, but places additional time constraints on repossessions.

### Application

The Mortgage Code covers mortgage lending activities to consumers in respect of their principal private residence in Ireland. Mortgage lending to any individual who is not a consumer, or to properties that are not principal private residences, is therefore outside the scope of the Mortgage Code.

This Mortgage Code applies to the mortgage lending of all lenders operating in Ireland including:

- the lending activities of all regulated entities operating in Ireland for which they need to be authorised by, or registered with, the Financial Regulator;
- the lending activities of persons with an equivalent authorisation or registration in another EU or EEA Member State when providing services in Ireland on a branch or cross-border basis; and
- the lending activities that are subject to the regulation of the Financial Regulator under the Central Bank Act 1997 or the Consumer Credit Act 1995, for which a separate authorisation is not required.

The Mortgage Code is to be read in conjunction with the Financial Regulator’s Consumer Protection Code. All terms in the Mortgage Code have the same meaning as those in the Consumer Protection Code. Therefore, the term ‘consumer’ refers to the wider definition of consumer contained in the Consumer Protection Code (which includes all natural persons) and not the more limited definition of consumer contained in the Consumer Credit Act 1995 that covers only natural persons acting outside the course of their business.

## Mortgage Arrears

The Mortgage Code states that an arrears problem arises as soon as a borrower fails to make a mortgage payment by the due date. The Mortgage Code emphasises the need to address a 'missed payment situation' as speedily and effectively as circumstances allow. Efforts must be made by lenders to contact borrowers to rectify the situation as soon as an arrears situation develops.

## Arrears Management

Where the arrears situation continues, and the initial contact has been unsuccessful in rectifying the problem, the lender must continue to make efforts to contact the borrower and, assuming co-operation from the borrower, a plan can be developed for clearing the mortgage arrears that is consistent with the interests of the borrower and the lender.

All viable options open to the borrower must be examined during which consideration must be given to the borrower's repayment capacity, previous repayment history and any equity remaining in the property.

## Formal Demand and Enforcement

Once a third repayment is missed, the lender may issue a formal demand, either for the full amount due on foot of the mortgage or for possession of the property. With the issue of a formal demand, the borrower must be advised in writing of:

- the total amount of arrears;
- where applicable, any excess interest (expressed as a rate or an amount) that may continue to be charged and the basis on which this will be charged; and/or any charges that may be payable (the basis for which will have been detailed in the original contract documentation); and
- advice regarding the consequences of failing to respond - namely, the potential for legal proceedings and loss of his/her property, together with an estimate of the costs to the borrower of such proceedings.

Where the arrears situation continues, the lender may reserve the right to enforce the mortgage agreement. The lender must wait at least six months from the time the arrears first arise before

applying to court for an order for possession of a borrower's primary residence. In addition, the Government's announcement of the recapitalisation of Allied Irish Banks plc and Bank of Ireland stated that the two regulated banks would not commence court proceedings for repossession of a principal private residence until after 12 months of arrears appearing, where the customer continues to cooperate reasonably and honestly with the bank.

## Addressing Arrears Problems

The Mortgage Code allows lenders to distinguish between borrowers who are genuinely unable to pay and those who could pay some/all of the arrears but will not. Each case must be examined on its individual merits. Lenders should take the following points into consideration in addressing a mortgage arrears problem:

- the borrowers overall indebtedness;
- the possibility of alternative repayment arrangements (the Mortgage Code suggests several such alternatives);
- at the borrower's request and with the borrower's written consent, liaising with a third party nominated by the borrower; and
- where appropriate, the borrower must be made aware of other options such as trading down, voluntary sale or alternative refinancing through another lender.

## Repossession

The lender must make every reasonable effort to agree an alternative repayment schedule before seeking repossession. However, where it is clear the borrower is deliberately not engaging with the lender, or where other circumstances reasonably justify, the lender may seek repossession without the borrowers engagement. The Mortgage Code does not prevent repossession by voluntary agreement or where the property has been abandoned by the Borrower without notifying the lender.

During repossession proceedings, the lender must maintain contact with the borrower. The proceedings should be put on hold in the event that an agreement can be reached. The lender must keep the borrower informed of any liability for costs, accrued interest, or outstanding debt.

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