SUBMISSION ON IFSRA CODES OF CONDUCT IN RELATION TO PROVIDERS OF FINANCIAL SERVICES

FREE LEGAL ADVICE CENTRES, MAY 2004

Introduction

The Free Legal Advice Centres brief in this area is to seek to improve the protection of the consumer who is availing of credit facilities. Thus, our focus in relation to the powers and duties of the Authority is on the consumer credit rather than the investment product side. This is not to say that the consumer as investor is not entitled to the highest standards of protection and may not be equally as vulnerable as the borrower. However, we believe in general terms that such consumers may be in a better position to seek advice and guidance to protect their own interests. This submission, therefore, concentrates on how the Codes, under the variety of headings set out in the Consultation Paper, might strengthen the position of the consumer as potential or actual borrower.

1. Unsolicited contact (cold calling)

The definition of cold calling in the Consultation Paper is confined to *'an uninvited personal visit or oral communication to an existing or potential private client who is an individual'*

However, many providers of financial services operate an inertia selling type policy in relation to the provision of **written information** on existing products and services to their current customers. In other words you must take a positive step such as ticking a specific box in order to elect not to be sent information. Should any code in relation to unsolicited contact include written communications? Should the consumer not have to positively elect to receive information before it can be sent by mail?

The Consultation Paper also refers to lenders '*offering unsolicited or pre-approved credit facilities'*. Again, an issue that arises here is whether any code should also include such offers made by post. For example, in the area of credit cards it is now common to receive an unsolicited offer of a card, subject to filling out an application form which also doubles as the agreement, often offering an initial credit limit of some thousands of euros. Are checks carried out to determine whether the target is already the holder of a card or a number of cards? The rapid growth in credit card debt as evidenced by recent Central Bank figures may be somewhat attributable to such 'hard sell cold post tactics'. For some people in financial difficulties, it is tempting to avail of these unsolicited facilities but it is likely in many cases that this will create more problems than it will solve.

Finally, a linked issue is the policy of some credit card companies to unilaterally raise a card holder's credit limit. There is some anecdotal evidence that this is done more readily with consumers who do not have a great payment record rather than those who are squeaky clean. Does this not amount to an unsolicited offer to provide an increased credit facility that is likely in many cases to increase the financial burden and over-indebtedness of many consumers? Should some control not be exercised over these practices as it is highly arguable that they can amount to reckless lending?

2. Categories of intermediaries

Insurance Intermediaries

Payment protection insurance has proven to be a problem for some Money Advice and Budgeting Service (MABS) clients in recent years, especially in the area of car finance. Some consumers become involved in hire purchase agreements and avail of insurance options that are ostensibly optional but are sometimes implied as conditions for obtaining the credit or are subject to a hard sell approach. In many cases, it is unclear who the insurer is? Is it a division of the creditor finance company or are they acting as an intermediary for a separate insurer? In at least one case, the money to pay for the payment protection is sometimes advanced in addition to the loan amount and substantial interest is charged upon it for the duration of the agreement.

Consumers often sign to the effect that they have read and understood the terms and conditions of the insurance product outlined in a particular booklet but the reality is that many have little idea what exactly the insurance covers and whether it is a suitable product for their needs. No written policy is issued in many instances and no details of exclusions/limitations are explained. Often, it is only when the consumer goes to make a claim on the insurance that they find that an exclusion or partial exclusion applies in their case.

A code or a section in a code should specifically deal with the question of payment protection insurance in credit or hire purchase agreements, obliging intermediaries and sellers of such products to assess their suitability for a client's needs and to issue a written policy outlining the terms and conditions, and exclusions.

Credit Intermediaries

There does not appear to be a code in operation at present for credit intermediaries. Section 148 of the Consumer Credit Act 1995, obliging a C.I to disclose in writing to a consumer in advance of any loan agreement for the acquisition of goods the nature of the financial accommodation, is often not complied with and the consumer is often unaware of the nature of the relationship between the intermediary and the creditor.

There is ample evidence of consumers walking out of garages with Consumer Hire (or leasing) agreements when they should have received or thought they were receiving Hire Purchase. There is still more evidence that many consumers do not understand that a Hire Purchase agreement does not give rights of ownership until the final payment has been made and are not being informed that this is the case. If any given consumer knew this, s/he might pursue the option of a personal loan agreement instead.

In relation to car finance and garages who act as credit intermediaries, there should surely be an onus on such intermediaries to train their staff to a sufficient level that differences between the types of agreement offered are understood. There should be a corresponding duty to explain the different products to the consumer so that an informed choice can be made. There is anecdotal evidence also, again through MABS, of sales staff requesting guarantors for H.P agreements only for the so called guarantor to find that s/he is in fact on the agreement as a joint hirer.

Finally, the onerous nature of the so called ‘balloon payment’, the practice whereby a Hire Purchase agreement is back loaded to include a substantial final cash instalment running to thousands of euros before ownership passes, should be clearly explained. The consumer should be given an option to elect to pay a higher monthly instalment instead of a balloon. A Code of Practice or a set of guidelines for credit intermediaries could and should include these obligations.

3. Complaints procedures

In our experience the existence of and information on complaints procedures can be hard for consumers to access. This could be improved by providing the essential details of the particular service provider’s procedure in the actual agreement itself with a designated phone number included for further detail to be accessed. In relation to a timeframe, the old adage ‘that justice delayed is justice denied’ should apply. In many instances the consumer is sent from pillar post with key parties ‘not being available’ at key moments. It might even be suggested that this is sometimes a conscious effort to frustrate the complainant into abandoning their complaint. Thus, not only should time limits be clear but they should also be reasonable and set out in writing in the complaints procedure.

It should also be mandatory under any code in this area to inform the complainant **in writing** of the potential right of reference of the complaint to a third party and at what point that right applies. Access should apply not just at the point at which the service provider signs off that the complaint cannot be resolved, but at any point where the time limits or other elements of the procedure are not being adhered to by the institution.

This area will become particularly important in light of the imminent creation of the Financial Services Ombudsman. It is speculated that some providers may wish to avoid Ombudsman complaints by resolving difficulties through their own procedures. It is, therefore, all the more critical that such procedures are accessible and speedy and they conform to the principles of natural justice.

4. Advertising rules

In relation to the question posed in the Consultation paper as to which impression is conveyed by the standard phrase, ‘such and such is regulated by IFSRA’, it is unlikely that many consumers take this as an endorsement of the product being offered and more likely that it conveys an impression that the provider is monitored and subject to some control by the Authority. Whether it simultaneously sends out a message that one should only deal with regulated entities is another matter altogether.

Any advertisement that offers a financial service product should have to clearly explain the nature of that product rather than simply giving it a name and assuming that the consumer knows what it means. Again, the thorny area of car finance is a case in point. Not only should an advertisement state that an agreement is a Hire Purchase Agreement or a Consumer Hire agreement as the case may be, but should also provide a salient explanation of the essential characteristics of the agreement. It is conceded that this could be more difficult in relation to media such as T.V and radio where airtime is expensive but it is feasible in relation to the print media.

If there are specific qualifying conditions in order to avail of a loan facility or product these should be explained. The relatively meaningless phrase ‘terms and conditions apply’ is not sufficient to alert the consumer. Section 21 (3) of the CCA 1995 does provide that charges other than payment of capital and interest should be specified. Subsection (4) adds that if any form of security is required it should be stated, but in practice, how often are these provisions adhered to? How many prosecutions have been brought under this section?

5. Certifying loans

In one sense it might be argued that the Consultation Paper answers its own question in this area by speculating that were a borrower to be forced to sign that s/he agreed with the lender’s assessment of his/her ability to repay, this might ‘*serve only to increase the red tape and provide further protection for the lender rather than help the consumer’***.**

It is our view that such a measure could be used as a stick to beat the borrower with in the event of default and to close off any potential argument that the loan was in some way reckless. It is also likely in many cases that the borrower will sign what is put in front of them whether they understand or agree with the assessment made by the institution.

It is now accepted by many that there is reckless lending as well as reckless borrowing. We do not condone consumers accessing credit when their financial situation is precarious but would argue that the marketing of credit means that there is considerable temptation to do so. We would argue that the consequences are more serious from the over-extended borrower’s point of view and, in particular, his/her dependants. The institution is in a better position to absorb the consequences of default with substantial financial resources and bad debt provision, whereas the borrower faces a potential crisis in their life with the spectre of legal proceedings and enforcement looming. It must also be remembered that the provider of credit is not doing the borrower a favour here. This is business for profit. Thus, there should be a greater duty and onus on the credit provider to establish ability to repay.

Finally, there are proposals in the revised consumer credit directive issued by the European Commission to establish a credit database for the purposes of mandatory checking before offering credit, although the European Parliament has proposed that they be deleted in its deliberations on the directive. Any developments in this area should possibly await the outcome of these discussions.

6. Financial Access

Access to credit/ Irresponsible lending

There is a delicate balance to be struck in a credit dominated society between the legitimate aspiration of the consumer to access credit in order to have now what it would take long periods of time to save for, and the danger that unrestricted access to credit will lead to over-indebtedness. There is also the fundamental fact that credit fuels economic growth in a market economy and that, therefore, it suits the State to promote or facilitate access to credit. In light of this, we have commented in our report on over-indebtedness and the legal system, 'An End Based on Means' that more enlightened treatment of the spiralling problem of over-indebtedness is required in our legal system.

We have also articulated elsewhere in this submission our belief that the credit provider should bear the brunt of responsibility for reckless lending. However, this does not simultaneously coincide with a belief that the credit provider should be allowed to unilaterally decide whether to provide a loan or not, without some objective justification for refusal.

IFSRA No 2 Bill

It is noteworthy that section 57BX of the IFSRA NO 2 Bill allows an eligible consumer to complain to the Financial Services Ombudsman about the conduct of a regulated service provider involving, inter alia, '*a failure by the financial service provider to provide a particular financial service that has been requested'*. It is assumed that this remit will extend to adjudicating on whether a decision to refuse to extend credit to an applicant for a loan was reasonable or not. Indeed, this could be the beginning of establishing a right to credit unless there are objective justifications for refusal.

However, the No 2 Bill has yet to be passed and the Ombudsman's office put in place. In the interim, a Code that recommended that providers of financial services should provide such objective reasons for the refusal of an application for credit might be a useful preparatory step for a part of the Ombudsman's proposed remit.

Equity release products

Slick and in some cases simplistic advertising has certainly been part of the marketing strategy behind the plethora of equity release products on the market. It would be interesting to track what proportion of the recent dramatic increases in residential mortgage credit is attributable to equity release. House price inflation and the consequent pressure on parents to provide for a child's/children's house deposit are one reason for availing of such products. Equally, people are being encouraged to release the hidden equity in their property in order to spend. This is fine if you can manage your finances successfully.

However, it would appear that the most vulnerable are those with substantial commitments who are being encouraged to consolidate all existing loans into one more affordable payment as in 'why pay for four cans when you can have a two litre bottle for substantially less'. Are the consequences of this being pointed out to the borrower? In many cases the loans being consolidated are unsecured whereas the new all into one commitment is secured on the title deeds of the borrower's property. Frequently, these unsecured loans are for much shorter periods of time than the consolidated one will be. Finally, the fact of consolidation into one lower payment may psychologically induce the borrowers to avail of more credit. This can become especially dangerous where the person's income is prone to decrease either through retirement or reduced earning capacity.

A code should oblige the credit provider to point out these matters to any potential borrower and to check that a consolidated loan is a suitable product for the consumer's needs, having regard to their income and earning capacity. The Authority should also have a role here in educating the consumer here. For example, is there an information leaflet on the consequences of equity release issued by the Authority currently in circulation? If not, perhaps there should be.

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