

Response to the Department of Justice & Equality  
Consultation on the Personal Insolvency Act (Part 3)

30 June 2017

BPFI

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## 1. Introduction

The Personal Insolvency Act forms part of the comprehensive framework which is now in place to deal with debt in this jurisdiction. We believe that the focus of Personal Insolvency legislation should remain on personal debts, in particular on consumer and family home debt.

Since the publication of the Personal Insolvency Bill in 2012, following the intervention of the *EU/IMF Programme for Financial Support for Ireland*, there has been considerable improvement in the mortgage arrears and personal debt situation it was designed to address. The number of mortgages in arrears has reduced significantly and continues to be the focus of attention for lenders in 2017.

**Table 1**

	Private Dwelling Homes		Buy to Let properties	
	Jun-12	Mar 17	Jun-12	Mar 17
All mortgages	761,533	734,106	150,187	128,149
In arrears	128,416	76,422	34,719	24,553
	<b>16.9%</b>	<b>10.4%</b>	<b>23.1%</b>	<b>19.2%</b>

**Source:** *Central Bank of Ireland Residential Mortgage Arrears and Repossessions Statistics*

We are also aware of the recent proposals from the Commission of the European Union (EU) under the [Capital Markets Union Action Plan](#) to develop a consistent and harmonised approach to insolvency across the member states. During 2016 the BPF made a submission in relation to this Action Plan. We understand that our existing framework for personal insolvency is more far reaching than that proposed by the EU. We recommend that any proposals to amend the national framework should be aligned with the objectives of the EU.

Finally, we recommend that the principles of an effective personal insolvency framework as outlined by the World Bank are fully considered when undertaking a review of the legislation. In particular, we draw attention to the need for 'Compatible credit and enforcement systems'. We believe that a well-functioning economy includes a system of credit which relies on a robust, transparent and effective legal framework. Addressing the current issues and delays in the process e.g. repossession proceedings, will ensure that focus is maintained on those willing to engage rather than managing those who do not, for whatever reason, agree to participate in the wide range of options now available to deal with debt problems in this jurisdiction.

We welcome the opportunity to engage with the Department at an appropriate time to provide additional insights and feedback in relation to the workings of the current process.

The BPFJ has also been involved in the development of the response by the ISI Consultative Forum to the consultation and supports the recommendations included in that submission.

## 2. Observations on the implementation and effectiveness of the legislation

We believe that the Personal Insolvency Act has provided a strong framework for the resolution of issues in relation to personal debt. The framework is relatively new and has taken time to become a viable resolution for Debtors due to the steep learning curve for all stakeholders involved. We note the publication of the latest statistics from the ISI which highlight the growth in new insolvency applications and the welcome increase in engagement by Debtors. We welcome the impact of the Government's Abhaile Scheme which provides free support for Debtors with mortgage arrears including financial, legal and insolvency advice. We note and also welcome the revisions to the 'Mortgage to Rent' scheme criteria following completion of a review by the Department of Housing, Planning, Community and Local Government in February 2017.

We also believe the Act has made a positive contribution to the improvement in the overall mortgage arrears situation in this jurisdiction as evidenced by the figures set out in Table 1. Insolvency is part of the menu of options for Debtors in difficulty with arrangements. We support the consideration of a wider role for the ISI in administering the insolvency process and in particular the transfer of tasks from the Courts Service, subject to the introduction of the appropriate governance framework. This should result in less court time tied up in administration matters and improve the efficiency of the insolvency legislative process. This proposal has been discussed and agreed at the ISI Consultative forum by all stakeholders.

We are aware that the personal insolvency framework in Ireland is unique, due to the inclusion of secured debt within the regime. This is not the case in the UK as the IVA regime deals with unsecured debts only with the alternative for those with unsustainable secured debt being bankruptcy.

The amendments to the legislation have introduced a number of changes not all of which have been fully embedded. Of particular note however is the relatively low success rate of S115A appeals to date (25% as at 3 March 2017)<sup>1</sup>. In our view, the Appeals process is costly and long drawn out for all involved.

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<sup>1</sup> ISI S115A Review Statistics to 3 March 2017

### 3. Proposals for amendments to the Personal Insolvency legislation:

#### A. *General comments for consideration:*

##### **High Court Jurisdiction**

The legislation does not specify that there are any designated Judges dealing with personal insolvency matters in the High Court. It would be preferable if a panel of judges operated to minimise delays in getting appeals or applications listed for hearing. It would also facilitate the hearing of urgent applications before any judge on the panel.

##### **Co-Debtors**

The legislation should be clarified to take into further consideration a co-Debtor. The recent “JD” case was useful in this regard. The case dealt with a PPR loan where one party was in a PIA and the joint party was outside the PIA and not co-operating. The proposed arrangement required the bank to contract with the party in the PIA without including the co-debtor. The Judge confirmed that the bank may pursue a co-debtor, who has not co-operated with the bank. A legislative amendment, putting this clarification on a statutory footing would be beneficial to all stakeholders.

##### **Class of Creditors S115A**

In our view it would be fitting if the legislation would define ‘Class of Creditors’ more definitively before a debtor is entitled to invoke section 115A. It can often be the case, that a creditor or creditors, representing a very small amount of the overall indebtedness has voted for the Arrangement, while the Creditor facing the biggest prejudice is against. In order to invoke section 115A a properly constituted class of creditors representing a ‘de minimus’ amount of the debt, should have voted for the Arrangement. This would prevent any bundling of creditors together in an artificial manner to create a ‘class of creditors’.

***B. Observations on items that should be retained following review of the legislation***

**Retention of the definition of ‘family home’ (S2)**

We consider that the family home is where the debtor and/or their family are residing. We believe the existing provisions in the Personal Insolvency legislation should be retained.

**One Protective Certificate (PC) per 12 months, 57(f)(1) & 91(1)(1).**

We consider the existing legislation protection to be adequate - 70 days for a PC, a potential further 40 days if an extension was requested (plus potentially a further 40 days if another extension was required). Where the Creditors’ Meeting outcome is appealed, the court protection would be extended to allow the appeal to be heard in the relevant Court and possible appeal to the High Court thereafter. These time periods may be further extended if the ‘Time Period’ proposal (included in Section C) regarding the definition of “business days” is accepted.

In our view, this restriction is currently being overcome at present with Court approval to waive the waiting period. It is noteworthy that Creditor consent can help in making the Debtor’s application to the Court but is not a precondition.

**Retention of the €3m secured creditor consent required to be eligible for a PIA, S91(1)(a).**

We believe that the focus of PI legislation should remain on personal debts with particular emphasis on consumer and family home debt as the Act was designed to do so. In this regard, we reference the recent High Court decisions by Justice Baker (JD case and Callaghan case) on which she placed emphasis on the debtor’s family home.

Currently, the Act allows for secured creditors to accept cases over €3m into the personal insolvency process if all stakeholders are in agreement. As there have been

a small number of cases brought forward on this basis we believe there are insufficient grounds for the removal of the upper limit.

We also add the follow observations, based on Creditor experience of the insolvency process:

- Where a debtor is liable for secured commercial / business debts greater than €3m in their personal name and wants to enter personal insolvency then it is highly likely that such debts are unsustainable. Typically Debtors who have over €3m of secured debt either may have unsuitable family homes (larger than the norm) or are maintaining high value non-core assets. In these scenario's it would be usual that the secured creditor(s) would support a disposal strategy to sell secured assets, resulting in the customer becoming eligible for personal insolvency. In any case, there also remains the option for the PIP to request the relevant creditors consent to admission of such arrangements involving secured debt greater than €3m into personal insolvency
- We are also of the view that in the event that the threshold were to be increased or removed this would lead to the inclusion of commercial / business liabilities (albeit personal in name) whereby the voting rights of the creditor who holds the family home mortgage would be reduced and this may result in unfairly prejudicial arrangements being imposed. The only remedy for the creditor in this case would be through the court which is expensive and time consuming for all parties.

#### **Retention of the voting thresholds in terms of Class of creditors, S115A (9)(g)**

We consider that the existing thresholds are reasonable. We consider that majority creditor support is required under threshold 1 in a PIA and in a DSA. Were this threshold to be reduced, an arrangement could be biased by a large cohort of unsecured creditors determining the outcome for the PPR Lender.

**Retention of the definition of relevant debt being in arrears prior to January 2015, S115A (18) (b) (1)**

We recommend that the definition should be expanded to provide additional clarification in relation to the application of the legislation so that (b) (i) reads: ‘the debtor, on 1 January 2015, was in arrears with his or her payments.

Maintaining the 01 January 2015 date is key in our view as this is the year in which the Appeals mechanism was introduced and it deters new arrears cases from arising opportunistically. We note the comments in the judgement in the Hill case *“...Oireachtas chose this particular means to afford protection for debtors with distressed mortgages. Presumably to avoid “strategic defaulters” taking advantage of this scheme, the cut-off date of January 1st, 2015 was considered, “by economists at least”, when the worst of the financial and historic mortgage debt crisis would be over or would have stabilised”*.

## C. Specific proposals to amend the legislation

### Time Periods

Participants in the personal insolvency process work within various timeframes from the commencement of the application for a Protective Certificate (PC) to implementation of the insolvency arrangements, if approved by the Courts. There are various participants/ professionals involved in the process and differences in the understanding of what “day” means can vary from one participant/ professional to another. This can lead to inconsistency in approaches. In our view, improved clarity around the meaning of the term ‘day/days’ would be beneficial for all stakeholders involved in the insolvency process. Where the concept of ‘working days’ is adopted it would extend the time periods in the Act and could result in a decrease in the number of PC extensions currently issued. There may be a requirement to extend this approach to relevant Statutory Instruments also.

All Stakeholders have considered the consequence of this proposal and deem it warranted noting that currently 22% of cases avail of a PC extension<sup>2</sup> coupled with the complexity of some borrower circumstances. Stakeholders have also encountered time period challenges as a result of annual leave and public holiday periods such as Christmas and Easter.

Our suggestion is that there are definitions around “day” which would exclude public holidays, Saturdays and Sundays. This would make it clear what should/ should not be included in timeframes.

The following wording could be adopted:

- “day/ days” means any day other than a public holiday or a Saturday or Sunday.
- “public holiday” means a day which is a public holiday under the Organisation of Working Time Act 1997.

This proposal is also recommended by the ISI Consultative Forum.

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<sup>2</sup> Source: Insolvency Service of Ireland

### **Notification Periods**

We propose that the Act is amended to facilitate the provision of notification of the outcome of key steps in the insolvency process to Creditors. Notification is generally provided by electronic means so there should be limited additional impact on current procedures. In the event that the role of the ISI is extended to include notifications, the proposal can be reviewed to align with the new process. The amendments relate to specific steps in the insolvency process and the details are included in the appendix.

This proposal is also recommended by the ISI Consultative Forum.

### **DSA / PIA deemed to have failed after 6 month arrears default**

Amend Section 84(DSA) and 123(PIA) to permit that a Creditor, Debtor or PIP may also notify the ISI in terms of the arrangement having failed given 6 month arrears.

### **Grounds for Appeal PC (S97 (3)(a))**

The right of appeal by the Creditor to a PC is restricted to the establishment of 'irreparable loss'. The only avenue available for a creditor is to appeal by way of Court proceedings. This section of the Act should be amended so that it gives Creditors a statutory footing to appeal a PC where there are reasonable grounds to suspect the debtor was not entitled to same. As an example; in cases where information was inaccurate or omitted and where the inclusion of which would make the debtor ineligible for a PC.

### **Notification of successful completion**

Section 125 (1) be expanded so that notification of successful completion of a PIA is sent to Debtor, Creditor and ISI within a set period e.g. 1 month of expiration date. There are few examples of expired cases at this point but we had a recent example where the PIP advised the Creditor 19 months after completion. The Creditor must proceed on the assumption that the PC remains in place during these delays and so limiting them would be welcomed.

## **Notification Periods**

### **Details of proposal**

#### **1. Notification following Creditors meeting**

Section 75, insert the following:

*Where a Debt Settlement Arrangement is rejected or, as the case may be, deemed to have been rejected at a creditors' meeting in accordance with section 73, the personal insolvency practitioner shall as soon as practicable after the meeting has concluded notify the Insolvency Service and each creditor concerned of that rejection or, as the case may be, deemed rejection, which notification shall be accompanied by —*

*(a) (i) subject to subparagraph (ii) , a certificate with the result of the vote taken at the creditors ' meeting, identifying the number of votes, in value of the creditors present and voting, in favour of and against the proposed Debt Settlement Arrangement or*

*(ii) where section 73(7) applies to the proposal, a certificate to that effect,*

Section 112A, insert the following:

*Where a Personal Insolvency Arrangement is rejected at a creditors ' meeting in accordance with section 110 or, as the case may be, deemed under section 108 to have been rejected, or rejected under Section 111A, the personal insolvency practitioner shall as soon as practicable after the meeting has concluded or notice given by the creditor, notify the Insolvency Service and each creditor concerned of that rejection or, as the case may be, deemed rejection, which notification shall be accompanied by —*

*(a) (i) subject to subparagraph (ii) , a certificate with the result of the vote taken at the creditors ' meeting, identifying the proportions of the respective categories of votes cast by those voting at the creditors ' meeting, or*

*(ii) where the proposal is deemed under section 108(8)(a) (as amended by section 15 (b) of the Personal Insolvency (Amendment) Act 2015) to have been rejected, a certificate to that effect, or*

*(iii) where the proposal is rejected under Section 111A, a certificate to that effect.*

**2. Notification regarding a Variation**

*DSA Variation (Subsection 82 (9))*

*Where the variation of a Debt Settlement Arrangement is rejected under subsection (7), the personal insolvency practitioner shall as soon as practicable notify the Insolvency Service and each creditor concerned of the fact.*

*PIA Variation - Section 109 (6) applies the amendments covered under section 112A*

**3. Notification of outcome of Court**

**Extend subsection 78 (7) DSA**

*On receipt of a notification under subsection (6), the personal insolvency practitioner shall notify each creditor concerned whether the court—*

*(a) approves or refuses to approve the coming into effect of the Debt Settlement Arrangement under this section, or*

*(b) Decides to hold a hearing referred to in subsection (3).*

**Extend subsection 115 (6) PIA**

*On receipt of a notification under subsection (6), the personal insolvency practitioner shall notify each creditor concerned whether the court—*

*(a) approves or refuses to approve the coming into effect of the Personal Insolvency Arrangement under this section, or*

*(b) decides to hold a hearing referred to in subsection (3).*

**4. Notification of outcome of an appeal**

**Extend Section 115A (11)**

*On receipt of a notification under subsection (11), the personal insolvency practitioner shall notify each creditor concerned where the court makes or refuses to make an order under subsection (9)*

