DIRECTIVE 2167/2021 EU Article 28 (“MORTGAGE ARREARS and FORECLOSURE FORBEARANCE”) OBLIGATION and PROPORTIONALITY

Central Bank Regulation of the parameters of Directive 2014/17/EU ARTICLE 28 (as substituted). Pre-litigation “Reasonable forbearance” engagement.

1. Will the servicer, and the purchaser, and the originator, all be obliged to complete an SFS-style recital of loan history including pre assignment facts ?
2. Where facts disclosed in a particular case warrant special concession to a consumer, will the Central Bank publish a (redacted) ruling “on the record” so that other consumers will be afforded equal treatment ?
3. Following the judgment in Re Hayes, a debtor, [2017] IEHC 657, will the purchaser be obliged to prove its investment and cost of funds ?
4. Will “proportionality” be assessed by reference to the face value of the credit, or the book value ?
5. How will profit participation loans be assessed ? Will ATAD be applied ?
6. If the originator retains risk or has derivative or “loop-back” proprietary trading settlement exposure, will the tax avoidance it has booked be factored in calculating the consumer’s net position ?
7. Given the new, Article 28A, burdening of a purchaser with liability in respect of consumer’s claims against the originator, will reckless lending be a factor to be weighed ?
8. Will servicers have to fully account for GRG-style default engineering ?
9. Should the charitable status of the ownership vehicle of SPV shares be subject to revocation if a servicer acts without regard to a consumer’s right to fair treatment ?
10. Will senior citizens’ equity release be presumed to be unconscionable ?
11. Will the Central Bank approve a forbearance compromise where further payments are to be held in escrow until the true ownership of the mortgage is identified ?
12. Recalling current GDPR practice as anecdotal, can the regulator’s selective, or data based, approach to enforcement in securing rights co-exist with a consumer’s individual justiciable right to a Directive compliant engagement by the servicer ?
13. Given the ruling in Cannon’s case, [2020] IESC 2, confirming justiciability of EU directed “Codes”, will a consumer be able to injunct further legal steps until a Directive conforming engagement process is complete ? Will the Central Bank join as amicus or itself initiate proceedings ?
14. For the purposes of Article 28, does the CB consider the appointment of a receiver to be the commencement of foreclosure proceedings, given that his appointment entitles him to possession of the security property ?
15. Will the Central Bank have zero tolerance for, and injunct, receivers who act unlawfully ?
16. Will the templates of factors for cramdown in the Insolvency Acts, the 2019 LCLRAA and the SCARP legislation for SMEs be regarded as persuasive in assessing proportionality ?
17. Will forbearance involving mortgage “imprisonment” be deemed disproportionate ?
18. If the originator retains ownership of the mortgage after a “true sale” securitization, will the collateral be available for sequestration in satisfaction of regulatory fines, the interests of the securitization counterparty notwithstanding ?
19. Will there be a Chinese wall between that part of the Central Bank which regulates mortgage arrears forbearance and the other part which concerns itself with general prudential and contagion risks ?
20. Does the Central Bank accept that its liability shield must be disapplied if EU law is effective and judicially protected ?