

Consultation on Personal Insolvency Acts, Part 3,
Civil Law Reform Division,
Department of Justice & Equality,
Bishop's Square,
Redmond's Hill,
Dublin 2,
D02TD99.

27th June 2017

RE. APIP PROPOSED AMENDMENTS TO PERSONAL INSOLVENCY LEGISLATION

Dear Sirs,

APIP have worked extensively with stakeholders including the ISI, to enhance the performance of the legislation since its enactment, however there are a number of key amendments highlighted below that APIP believe will improve efficiencies and support government commitment to assist those in mortgage arrears, through the Abhaile Scheme.

Hereunder please find proposed amendments that the Association of Personal Insolvency Practitioners are of the opinion, if enacted, would greatly improve the operational effectiveness of the legislation and the ISI facilitated debt relief schemes provided for in the Personal Insolvency Acts 2012 – 2015.

1. Where a debtor has arrears on their family home mortgage loan, the PIP (as the licensed and regulated independent professional provided for in statute) having considered submissions and indications from secured creditors will construct a PIA proposal choosing the appropriate treatment(s) of the mortgage debt from the existing list of treatments in S.102(6), and once the comparison with bankruptcy is beaten, and the “means of the debtor reasonably permits”

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have been maximised in the PIA proposal, the PIA proposal needs to be approved by the relevant Court, without legal argument and/or a lengthy legal process.

2. In relation to the government funded Abhaile scheme and those that are in long term mortgage arrears, APIP specifically support, the “debt for equity” treatment of secured debt provided for in section 102(6)(f) and recommends that this is called out by Government as a preferred treatment for long term mortgage arrears cases. This provision could provide a cost-effective alternative to mortgage to rent, and be delivered in a timelier manner, i.e. within the 70-day protective certificate period. This solution is summarised in the appendix 1 to this submission.
3. The three gateway clauses in the legislation need to be removed:
 - a. **Relevant debt – S.115(18)** - where a debtor needs to have had arrears on their family home mortgage on 01/01/2015, or having had arrears prior to this date, entered into an alternative repayment arrangement with their mortgage lender [ref. Judgement of Baker J in Hill v Personal Insolvency Acts]
 - b. **Class of creditors – S.115A(9)(g)** - where a debtor’s PIA is Vetoed and it needs to be appealed (Court Review), currently it is required to have had 50% of a class of creditors supporting the PIA proposal. APIP believe that the 50% class of creditors should be the approval threshold for PIA instead of the current 65% of total debt, 50% of secured debt, and 50% of unsecured debt. In the alternative, if we are to maintain the 65%, 50%, and 50% PIA creditor voting thresholds, it is an unhelpful and unnecessary requirement to have the 50% of a class of creditor hurdle when in a single creditor PIA, there is no class of creditor gateway clause.
 - c. **€3M cap for secured debt – S.91(1)(a)** – where a debtor is insolvent and unable to meet their financial commitments as and when they fall due, and their secured debts are greater than €3M, a debtor needs to have written consent from all secured creditors before they can initiate the PIA process. These debtors cannot be returned to solvency short of a formal

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Personal Insolvency intervention, and should not be excluded from the process because their debts are too high.

APIP are of the view that Personal Insolvency Courts will not approve non-deserving PIA cases in the S.115A process, and gateway clauses to protect against this perceived threat are both unfounded and counterproductive.

4. The definition of a family home in the Personal Insolvency legislation needs to be aligned with the definition in the CCMA 2013.
5. Where a debtor needs to apply for a PIA a second time (failed to be approved in the first attempt), as it stands a second application shall not be made for 12-months following the expiry of the first Protective Certificate. APIP seeks to have this 12-month period to run from the issuance of the first Protective Certificate as opposed to 12-months from the expiry of the first Protective Certificate, [ref. S.91(1)(i)(i)].
6. There are some steps in the Personal Insolvency process that APIP would argue are superfluous to requirements. Two such processes are:
 - a. the requirements for an application for a Protective Certificate to go before the relevant Court, and
 - b. the application for the approval of a creditor approved insolvency arrangement to go before the relevant Court.

Both these applications go before the relevant Court as ex-parte applications. The legislation as it stands provides for a mechanism for an objecting creditor to bring an application before the same Court to object to either of these applications.

As APIP sees it, there is no prejudice experienced by any stakeholder in these applications being dealt with by the Insolvency Service of Ireland, with the Courts being troubled only if a creditor objection arises. In dealing with one household insolvency (a pair of interlocking applications for PIAs), this one change to the process would eliminate four applications going

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before the relevant Court. This would free up the resources of the insolvency practitioner/PIP and the Court service.

7. Revenue Debt – In most jurisdictions all state departments support the Insolvency process and its mechanisms, therefore APIP would support the removal of the opt out clauses in section 92 and 58 of the Act.
8. Personal Insolvency Practitioner (“PIP”) to be permitted to nominate a Chairman of the Creditors meeting.

As it stands, the conduct of a creditors’ meeting to approve or vary an insolvency arrangement is governed by Statutory Instrument 335 (“S.I. 335”).

S.I. 335 defines the “chairperson” in relation to a creditors’ meeting as follows:

“‘chairperson’ means the personal insolvency practitioner for the time being standing appointed pursuant to the Act in respect of the debtor (party, or who wishes to become party), to the Debt Settlement Arrangement or Personal Insolvency Arrangement the subject of the relevant creditors’ meeting;”

As the number of insolvency arrangement increase so do the number of creditors’ meetings. APIP respectfully submits that it is impractical to require the PIP to be the chairman of each creditors’ meeting. It is understood that a PIP can attend a creditors’ meeting by phone or electronically via Skype. However, clause 9 of S.I. 335 requires a PIP to be within the state at the time of the creditors’ meeting:

“Chairperson to be physically present in State.

Nothing in these Regulations shall permit the chairperson to be outside the State during the holding of a creditors’ meeting.”

APIP proposes the following change to the definition of “chairperson” in S.I. 335:

“‘chairperson’ means the personal insolvency practitioner for the time being standing appointed pursuant to the Act in respect of the debtor (party, or who wishes to become party), to the Debt Settlement Arrangement or Personal Insolvency Arrangement the subject of the relevant creditors’ meeting; or a person over the age of 18 (who may be an employee an employee, agent, representative, or servant of the personal solvency practitioner) that has been nominated by the personal insolvency practitioner to act as chairperson for the creditors’ meeting.”

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9. Substitution of the proposed summary prescribed financial statement (“PFS”) for use following the court approval of an Insolvency arrangement.

As it stands a new PFS is required to be prepared by the debtor (with the assistance of the PIP) at the time of an annual review of an insolvency arrangement, or where there is a material change in the circumstances of the debtor requiring a proposal for a variation of the insolvency arrangement.

It is understood that the PFS, as with other financial statements, deal with four separate headings:

1. Assets
2. Liabilities (debts)
3. Income
4. Expenditure (Reasonable Living Expenses)

It is further understood that the assets of the debtor are as per the PFS prior to the approval of the insolvency arrangement, and any change to the assets of the debtor during the course of the insolvency arrangement will have been dealt with in the debtor’s PIA or DSA.

Similarly, the liabilities of the debtor will be those on the debtor’s original PFS and amended by the proof of debt (“POD”) process.

If the PFS at annual review, or at the time a variation to the arrangement is proposed, is to be sworn by the debtor to be complete and accurate, then it would follow that the assets of the debtor (if any) would need to be regularly revalued; and the debts of the debtor would each need to be reduced by each debtor contribution to the arrangement. It is submitted this was never the intention of the PFS at the time of an annual review, or at the time a variation to the arrangement is proposed.

In the alternative APIP proposes the use of a “summary PFS” dealing with the continuing “income and expenditure” of the debtor for annual reviews and at the time a variation to an arrangement is proposed. This proposal would include the following amended wording to the Statutory Declaration to be completed by the debtor:

“I [debtor name 1], aged 18 and upwards, do solemnly and sincerely declare that the information contained in the Summary Prescribed Financial Statement completed by me on [date] for the purposes of the Personal Insolvency Acts 2012-2015 is a complete and accurate statement of my income and expenditure as of the date of that Summary Prescribed Financial Statement and that my assets and liabilities have not changed materially since the coming into effect of my Personal Insolvency Arrangement; and I make this solemn declaration conscientiously believing the same to be true by virtue of the Statutory Declarations Act 1938.

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I make this statutory declaration for the purposed of the Personal Insolvency Acts 2012-2015 including section 99(2)(j) and section 136(3) thereof."

APIP also propose that in the case of Interlocking PIAs that are being administered in common for debtors living in the one household, that a combined "Summary PFS" be used"

10. A PROPOSAL FOR A VARIATION TO AN INSOLVENCY ARRANGEMENT TO BE MADE BY ISSUING THE VARIATION EXECUTIVE SUMMARY DETAILING HOW THE COURT APPROVED ARRANGEMENT IS TO BE VARIED

For a variation to an insolvency arrangement to arise, a PIA or DSA needs to have been approved by the relevant Court in the first instance. In the vast majority of cases the PIA or DSA protocol document has been used by the PIP in constructing the proposal that became an arrangement.

A variation to the approved insolvency arrangement will solely be dealing with varying one or a number of the terms of that arrangement.

APIP are of the view that the arrangement should remain as approved by the Court, and if a variation is approved by creditors and the relevant Court, then it is only the terms of the variation that need to be considered by creditors and the Court.

As an example, APIP would suggest the process how a variation to a car insurance policy works. In the first in instance a person insures their car and receives an insurance policy with all the terms and conditions of insurance contract (policy). If the insured person changes their vehicle during the course of the insured term (usually one year), a one page variation to the policy will be produced by the insurance company detailing the change to the policy, and confirming that all the other terms and conditions (other than the vehicle insured) remain as before.

Similarly, APIP submits that in process of varying a PIA or DSA, the original Court approved PIA or DSA would equate to the original insurance policy document, and the proposed variation to the PIA or DSA would equate to the one page variation to the policy produced by the insurance company detailing the change to the policy. In this regard, the Variation Executive Summary document produced by the DSPSG (Protocol Committee) is designed to detail the proposed variation to an insolvency arrangement, and combined with the original Court approved PIA or DSA would constitute the newly varied PIA or DSA if approved by the requisite majorities of creditors and/or the relevant Court.

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APPENDIX 1

DEBT FOR EQUITY SOLUTION FOR FAMILY HOME MORTGAGES IN ARREARS

S.102(6)

Without prejudice to the generality of section 100 or subsections (1) to (3) and subject to sections 103 to 105, a Personal Insolvency Arrangement may include one or more of the following terms in relation to the secured debt:

- (f) that the principal sum due on the secured debt be reduced provided that the secured creditor be granted a share in the debtor's equity in the property the subject of the security.

CASE STUDY FOR DEMONSTRATION PURPOSES

A	Mortgage Balance Owed	€200,000
B	Value of Family Home ("PPR")	€150,000
C	Mortgage Balance debtor/borrower can service	€50,000
D	% of Mortgage Balance debtor can service sustainably	€50,000 / €200,000 or 25%
E	% of Mortgage Balance to be written down	€150,000 / €200,000 or 75%
F	Equity in PPR to be retained by the debtor	25% of €150,000 = €37,500
G	Equity in PPR to be given to Creditor (mortgage lender)	75% or €150,000 = €112,500
H	Return for Creditor in repossession	85% of €150,000 = €127,500
I	Return for Creditor in PIA incorporating "debt for equity"	€50,000 + €112,500 = €162,500
J	Positive Difference for Creditor	€35,000 or 27.5% uplift
K	Age of debtor	56
L	Average Life Expectancy in Ireland	82

Where a debtor has a mortgage loan of €200,000 relating to a family home worth €150,000, but only have income enough to service a mortgage of €50,000 in context of his reasonable living expenses ("RLES"), the equity in the family home would be split pro-rata with the level of mortgage debt the debtor can sustainably service until old age pension age. In this example, the debtor can service a mortgage of €50,000, and this amount represents 25% of the outstanding mortgage balance. Therefore, the debtor would retain 25% ownership of his home.

In exchange for the creditor writing down the mortgage debt to €50,000, the creditor would be given a 75% equity share in the debtor's family home. This transfer of ownership in the family home would happen by way of an irrevocable option granted to the creditor by the debtor exercisable in two events:

- i.) The sale by the debtor of his home, or

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- ii.) From the estate of the debtor (or the longer surviving co-borrower in the case of a couple).

The equity participation for the creditor to be by way of an irrevocable option to protect the creditor from the contingent liabilities associated with property ownership, i.e. the creditor would not become liable to pay a share of the insurance costs for the property, or the local property tax, maintenance of the property, etc.

Creditors who already have systems in place to record warehousing of mortgage debt will be able to use their existing systems to record a debt for equity treatment of mortgage arrears cases with little modification required.

Currently warehousing solutions as provided for in CCMA 2013 operated by mortgage lenders shows the warehoused amount being charged 0% interest for the duration of the warehousing. During the warehousing period, it is a commonly accepted financial fact that the value of the warehoused amount falls in real terms in line with the rate of inflation.

However, the debt of equity solution provided for in S.102(6)(f) of the Act would see the equity granted to the creditor in exchange for the mortgage debt being written down to a sustainable level, increasing in line with inflation each year until the creditor realises its security. Assuming 26 years to life expectancy for the debtor in this example, and further assuming a conservative level of capital appreciation for property of 2% per annum during this 26-year period, the equity stakes of the debtor and the creditor would have increased as shown below:

Debt for Equity Split	2017	2043 (2017 + 26-years)
Debtor's 25% equity	€37,500	€63,049
Creditor's 75% equity	€112,500	€189,146
Total value of family home	€150,000	€252,195

It shown above that the creditor's equity stake will have appreciated from a value of €112,500 in 2017 to €189,146 assuming the most conservative level of 2% property capital appreciation in the 26-year period. If property inflation were to run at 3% per annum the €112,500 equity stake would have appreciated to €245,177 in the same period.

If a Debt for Equity proposal is assessed against a performing loan in normal circumstances it can be considered as unfairly prejudicial. However, in context of the repossession crisis we are facing into, and in light of the warehousing solutions already being used by Irish banks, then the outcomes are clearly better.

Further, if one considers a debtor who loses his home on the basis he cannot afford to pay a mortgage on at least the current market value of his home, then the likely hood of this debtor having to rely on

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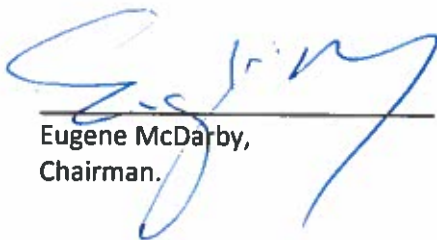
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the safety net of social housing (local authority or housing association housing) is very high. The cost of this to the state is significant in when the numbers of long term mortgage arrears cases work their way through the legal repossession process. The political and societal threats of not embracing the Debt for Equity solution already provided for in primary legislation are sobering.

This solution works as an alternative to the costly and cumbersome Mortgage to Rent ("MTR") scheme funded by Government. Simply put, the social tenancy rent a debtor would have to pay in a MTR scenario can be the minimum a debtor would pay as his mortgage payment on a monthly basis. This amount, combined with the mortgage lender's standard variable interest rate, and the number of months the debtor has until reaching old age pension age, generates the mortgage amount a debtor can pay sustainably into the future. This mortgage amount as a percentage of the total mortgage debt owed by the debtor will determine the percentage ownership of the home the debtor will retain.

This mechanism allows a debtor to retain some element of the ownership in their family home to form part of their estate to be left to children in a will. It also ensures that a debtor living on a state old age pension (having paid the mortgage on the element of the home that he will have retained) will not have a housing cost in as a pensioner. This is a significant feature of the proposed scheme as the Irish state old age pension does not currently envisage a debtor paying for housing from €230 income per week.

Yours sincerely,



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Chairman.

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