

Credit Review Scheme

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On 1st April 2010, the Credit Review Office was established to consider lending practices and procedures in the Banks participating in NAMA. The Credit Review Office will also re-evaluate decisions of the same Banks to refuse credits facilities.

The Minister for Finance intends the Credit Review Office to use the Guidelines issued under Section 210(1) of the NAMA Act ("the Guidelines") to increase the supply of credit for business purposes to borrowers with the capacity to repay their loans.

Who can apply?

Eligible borrowers are SME businesses including farm enterprises and sole traders. A SME business is one that meets one or more of the following criteria:-

- It has fewer than 250 employees;
- It has an annual turnover of less than €50 million; and
- It has a balance sheet value of less than €43 million.

Exclusions

Some decisions by Banks may not be reviewed including decisions where the application for credit facilities is for less than €1,000 and applications for credit in excess of €250,000.

Refusal to Grant Credit

A refusal to grant credit facilities includes a decision to reduce or withdraw an existing facility (e.g. loans, overdrafts and invoice discounting). Where a decision on an application for a credit facility is not granted within 15 working days, this is regarded as a constructive refusal and the borrower may apply for a review. Where a borrower considers that the terms or conditions attached to a credit facility or its price are so oppressive as to amount to a refusal, a borrower may also apply to have the decision reviewed. All applications for review must be made within 10 working days of the notification of the refusal. However, prior to making an application to the Credit Review Office, a borrower must exhaust any credit appeal mechanisms available within the Bank.

The Review

The review process is to be conducted with as little formality and as speedily as possible. When reviewing a decision the Credit Reviewer must take account of all submissions made to it by or on behalf of

both the borrower and the Bank. This must include the viability of the borrower and their capacity to repay the loan. Following the re-evaluation of the credit application, the Credit Reviewer may:-

- Support the refusal to grant credit;
- Recommend the credit facility be granted; or
- Make such other recommendations as he considers appropriate.

If the Credit Reviewer recommends that a credit facility should be granted, the Bank which refused the credit must comply with the recommendation or provide an explanation to the Credit Reviewer giving reasons why the Bank will not comply with the recommendation.

Withdrawal of Application

A borrower may withdraw an application for review at any time. A Bank may make an alternative offer of credit to the borrower before the Credit Reviewer issues a recommendation. If the alternative offer is accepted by the borrower, the review application is deemed to be withdrawn.

Terms and Conditions of the Credit

The standard terms which apply to the type of credit granted by the Bank shall apply to any credit granted following a review by the Credit Reviewer. The Bank cannot apply any unduly onerous terms to such credit facilities.

Lending Policies

The Credit Review Office is also carrying out a review of lending policies in each participating Bank in NAMA. The review is required to take account of the economic outlook in particular sectors in the economy. Following examination by the Credit Reviewer, he shall report to the Minister for Finance on whether there is sufficient credit to meet business needs.

In addition, the Credit Reviewer is required to prepare a regular analysis of applications for review and their outcomes including an evaluation of whether or not each Bank has complied with the recommendations made following each review. The Credit Reviewer must provide the results of his investigation or any other investigations requested by the Minister for Finance, which results may be published.



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Unnecessary 'Red Tape'

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A recent study reports that the highest administrative cost for compliance under Company Law legislation was the requirement that businesses must detail all directors on their letterhead. So what do you need for your letterhead?

- The name of the Company e.g. XY Limited;
- Christian name, surname, initials used, former name and nationality (if not Irish) of every Director or shadow Director;
- The place of registration of the Company, its registration number and address of its registered office i.e. Registered in Ireland No. 999999; Pepper Canister House, Dublin 4; and
- In the case of a Company exempt from the obligation to use the word "limited" as part of its name, the fact that it is a limited company.

This information is also required to be shown on websites, emails and all other forms of electronic communication from limited companies. In the case of order forms for goods and services, the same information is obligatory with the exception of the names and nationality (if not Irish) of all directors. In addition the name of the Company must be stated on all other hard copy documents including cheques, invoices and receipts.

Consequences of breach

Any person or Company who is convicted of an offence is liable, on summary conviction, to a fine not exceeding €2,000. If convicted of such an offence, a person who continues contravening the regulations shall be liable, on summary conviction, to a fine not exceeding €100 for each day on which the offence so continues.

Please tear along perforated line & keep

National Pensions Framework

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The aim of the National Pensions Framework is to address the challenges facing our pension system including sustainability over the long term in light of demographic changes and the adequacy of contribution levels and benefits.

State Pension

The reform framework recognises the state pension as the core of the pension system. The Government has also indicated an intention to seek to maintain the rate of payment of pensions at 35% of average weekly earnings and that it intends to adopt a 'total contributions approach'. The pension payment a person receives will be based on the number of social insurance contributions made by that person over their working life. In order for a person to receive the maximum pension, a total contributions requirement of 30 years contributions will be introduced.

State Pension Age

The state pension age will be increased gradually to 68 years. This will begin in 2014 with the state pension age increasing from 65 to 66. The age will then be increased to 67 in 2021 and 68 in 2028.

For those people who wish to postpone drawing down their state pension, arrangements will be put in place to allow them to receive an increased benefit when they decide to retire. For people with contribution shortfalls at pension age, they will be allowed to continue to make paid contributions for pension entitlements while they remain in work.

Effect on Current Pension Schemes

Most existing pension schemes specify a normal pension date at which benefits become payable. In addition, employment contracts frequently specify a normal pension date at which benefits become payable. There is potentially a gap between when a person is required to retire from employment under their contract, receive a pension under the scheme of which they are a member and receipt of the state pension. We will have to await the legislation to see whether this potential gap is addressed.

Auto-enrolment

Once a person enters employment or changes employment and is over 22 years of age, they will be automatically enrolled into the proposed auto-enrolment system unless the employee is already a member of their employer's pension scheme. Employees will be permitted to opt out of the auto-enrolment scheme after a period of three months. Employees can opt in again whenever they wish but they will be

automatically re-enrolled every two years. A once-off bonus payment will be paid to people who stay in the scheme for five years without a break in contributions. Details of how the auto-enrolment scheme will operate will be developed during the implementation phase. It is intended to introduce the auto-enrolment scheme in 2014 but only if the prevailing economic conditions favour its establishment.

The auto-enrolment, opt-out and opt-in provisions of the scheme make it potentially very onerous administratively for employers particularly in the SME sector. Designing the scheme to take account of this inherent complexity, the ability of businesses small and large to comply with reasonable time-frames and varying contribution rates will take time. Although it is intended to collect contributions through the PRSI system, we await details and will have to see whether the Government, assuming economic conditions improve, can meet the deadline of 2014. A recent report into the cost of red tape to business estimates these costs amount to over €600 million, the proposed scheme is unlikely to reduce this burden.

Current Pension Provision

In addition to the new auto-enrolment scheme, the Government also intends to reform existing occupational pension schemes including defined benefit (DB) and defined contribution (DC) schemes.

The Government is proposing a re-structured DB scheme that would consist of core benefits which would have to be guaranteed and non-core benefits which would be flexible depending on economic conditions. Contribution rates would be calculated on a basis intended to revalue benefits in line with inflation, before and after retirement. However, the promised level of benefits would be lower than under a typical current DB scheme but they would be provided with a greater degree of certainty.

It is proposed that from next year, access to Approved Retirement Funds (ARFs) will be extended to DC pension members. ARFs are not currently available to DC scheme members. In addition, it is proposed to increase the specified income limit of €12,700 to €18,000.

Conclusion

The Framework is intended to be implemented over a period of five years although the timing of some proposals are dependent on prevailing economic conditions.

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Play or fold – what to do when a S.214 demand is in the deck?

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It's no fun being owed money by a company and a S.214 demand (threat of liquidation if a debt is not paid within 21 days) is often seen by the creditor as the ace up the sleeve in getting payment. A recent judgment of Ms Justice Laffoy in the High Court has helped to clarify when this card comes up trumps. *In the matter of Silverhold Limited and the Companies Acts* [2010] IEHC 111, Judge Laffoy had to decide whether the Company had good grounds for resisting a winding up petition.

Leftbrook Ltd engaged accountancy firm Gilroy Gannon (Gilroys) to provide tax advice on a corporate restructuring to facilitate the sale of a pub to Nicholas. Gilroys envisaged that the restructuring would be put in place in two stages (Step 1 and Step 2). Their initial terms of engagement in October 2007 stipulated a down payment with the balance of fees payable on completion. In April 2008 they accepted a reduced down payment and proposed to invoice for the remaining balance based on time accrued to the completion of Step 1.

Gilroys issued two invoices: one in June 2008 for €66,550 and the other in November 2008 for €30,250. In October 2008, Leftbrook transferred its assets and liabilities to an associated company Silverhold Ltd as part of the restructuring and in a letter to Gilroys confirmed it would discharge the fees on completion of both stages. When Silverhold defaulted on a loan to pay the first invoice Gilroys had to repay IIB Bank. A S.214 demand was served on Silverhold in November 2009 for €96,800 and the petition was presented in January 2010. In September 2009 Leftbrook sued Nicholas for specific performance of the sale of the pub.

Judge Laffoy restated the applicable legal principles. If a company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed. The *bona fide* dispute may not concern the debt itself but may be a cross-claim by the Company against the petitioner. The cross-claim must be genuine, serious and have substance. It must be one which the Company has been unable to litigate and the amount must exceed that of the petitioner's debt. The issue to be decided on the petition is whether the dispute is genuine and not whether the Company's claim will succeed.

If genuine, the Company should be permitted to litigate the dispute without its existence being put at risk. A petition is not a legitimate means of enforcing payment of a debt which is genuinely disputed.

In finding that the first invoice was not genuinely in dispute, the Judge noted Silverhold had not disputed the invoice despite considerable correspondence from Gilroys and their solicitors nor had it given a reason for defaulting on the IIB Bank loan. In a previous case (*Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12), Keane J held that a petitioner should not be restrained from presenting a petition where a company admits part of the debt but disputes the balance. Laffoy J held that the same principle must apply where the Company has an undischarged liability on a S.214 demand.

Laffoy J had to consider, therefore, whether there was a genuine and serious cross-claim. Silverhold intimated an intention to sue Gilroys in light of matters pleaded in the specific performance proceedings. Although details were sketchy, the Judge was prepared to hold that the cross-claim was serious, genuine and likely to exceed Gilroys' debt but there was no evidence that Silverhold was unable to litigate the cross-claim.

There was a conflict on the affidavit evidence as to what Gilroys knew about the sale of the pub and the €1m deposit paid. As this was central to the specific performance proceedings and the proposed cross-claim, the Judge decided to dismiss the petition. In the absence of evidence of inability to pay its debts, she exercised her discretion under S. 216 CA 1963, to avoid a decision which would unfairly impact on the prosecution of the specific performance proceedings.

S.214 demands and the petitions which are grounded on them often evoke bluff by petitioner and respondent company. Both parties and their legal advisers need to carefully consider if there is a genuine dispute and adapt their legal strategy accordingly. If they do not, this case demonstrates that the Court will scrutinise the cards to see if the Company should play or fold.

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International Data Transfer

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Organisations looking to transfer personal data ('Data Exporters') to data controllers or data processors outside the European Economic Area ('Data Importers') can normally do so only if the non-EEA destination has been approved by the European Commission as having adequate standards of data protection, or where one of the alternative measures of section 11(4)(a) (i) – (ix) of the Data Protection Acts 1988 to 2003 ('the Acts') can be relied on.

The European Commission 'Model Contracts' satisfy the derogation provided under section 11(4)(a)(ix) of the Acts. By using one of these Model Contracts, the Data Exporter can contractually oblige the Data Importer to comply with data protection rules and any technical and organisational security measures.

It is considered best practice to safeguard the data flow to unapproved third countries through approved contractual provisions rather than relying on the other derogations provided under section 11(4)(a).

The European Commission has adopted a new 'Model Contract' updating the existing standard contractual clauses for the transfer of personal information to data processors outside the EEA. The new 'Processors' Model Contract permits the non-EEA data processor to outsource its data processing functions to non-EEA sub-processors provided the Data Exporter consents to this and provided the data continues to be fully protected.

The updated model contract should be followed for all new 'Processor' data transfer agreements entered into from 15th May 2010.

For further information please see 'Transfers of Personal Data Abroad' on the 'News and Publications' section of our website or contact our Corporate Law Department.

Since taking up his position at the start of the year, Matthew Elderfield, the Financial Regulator, has had an extensive brief including oversight of the banks' recapitalisation, appointing administrators to Quinn Insurance and generally rebuilding the reputation of his office and the Irish financial services sector.

As part of a strategy to update the regulatory framework for banks and insurance undertakings, the Central Bank and the Financial Regulator commenced two public consultations; first new **standards of corporate governance** for licensed and authorised credit institutions and insurance companies, second **codes of practice** for credit institutions that lend to their directors and senior management.

New Corporate Governance Requirements

The Regulator's foreword to these proposals highlights that one cause of the international financial crisis was inadequate oversight of credit institutions and insurance companies. Increased corporate governance (internal systems by which an organisation is directed and controlled), tougher regulation and intrusive supervision are identified as key to restoring confidence in Irish financial services.

Who will it affect?

The requirements set out minimum standards of corporate governance for all credit institutions and insurers licensed or authorised by the Financial Regulator. This includes Irish licensed and authorised subsidiaries of international financial services groups. However, the requirements will not apply to foreign incorporated subsidiaries of Irish banks and insurers.

What is required?

Covered institutions must have robust governance arrangements to effectively oversee, monitor and document its activities. Requirements for the composition and function of institutions' Boards of Directors are set out in detail, together with rules governing the appointment and role of the Chairman, CEO and various committees.

Board of Directors

Board members must understand and engage with the business and have the necessary competencies to drive good corporate governance. The Board should consist of no less than five directors, the majority being independent non-executive directors. To ensure maximum attention to their role on the institution's Board, directors are restricted in the number of directorships they can hold at any one time.

The Board must review annually and document the institution's risk exposure and ensure this is complemented by the risk management framework and internal systems.

Chairman and CEO

The Chairman must be an independent non-executive director with a financial background, or undertake suitable training. The roles of Chairman and CEO must be separate. Requirements concerning the appointment, expertise and role of the CEO are provided.

Committees

All covered institutions must establish an Audit Committee and a Risk Committee. In addition, Remuneration and Nomination Committees are required for 'major' institutions.

Enforcement

The Regulator will closely monitor adherence with institutions required to submit annual compliance statements. Non-compliance will be liable to administrative sanction.

New Code on Related Party Lending

The value of loans made to senior bank executives and directors, their creative accounting and remoteness of repayment are tackled by the Financial Regulator under these new proposals.

The 'Code on Related Party Lending' introduces a statutory code of practice for credit institutions that lend money to directors, senior management, significant shareholders, entities in which the credit institution holds a significant shareholding and persons connected to all those mentioned.

The Code aims to address conflicts of interest and prevent abuses in lending practices by requiring related party lending to be at arms length, capped to a percentage of the institution's own funds and subject to appropriate supervision and reporting.

Who will it affect?

It will apply to all credit institutions licensed to operate in Ireland, other than those incorporated in other EEA Member States operating here on a branch or cross border basis. All related party loans made by Irish credit institutions, whether the lending occurred inside or outside the State, will be covered.

What is required?

The proposed rules include:-

- Loans to related parties cannot be granted on better terms than given to a non-related party for a corresponding loan. (Staff rates are permitted if Board approved);
- Related party loans (or variation of existing terms) require prior Board approval;
- Board approval is necessary before any management action (such as grace periods, interest roll-up, loan write-off, enforcement decisions) is taken regarding the loan;
- Lending limits based on the credit institution's own funds; and
- Periodic reporting of compliance to the Financial Regulator.

The Code is intended to supplement existing legislation and requirements applicable to credit institutions. Breach of the Code will be liable to administrative sanction by the Financial Regulator, which may result in financial or other penalties.

Feedback

Feedback on the Corporate Governance Requirements should be submitted by 30th June 2010. The Related Party Lending consultation runs until 16 July 2010. Both consultation papers are available to download from:-
<http://www.financialregulator.ie/consultation-papers/Pages/default.aspx>

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