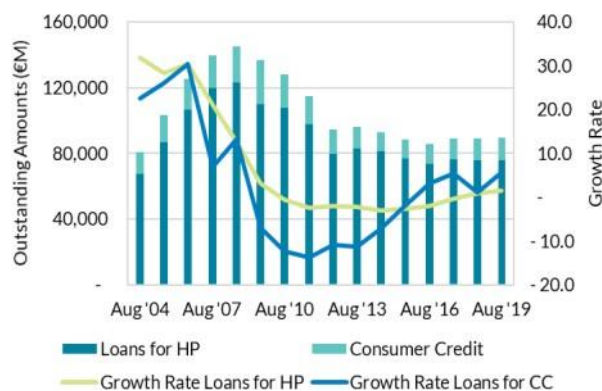


Spend Now Pay Later: The Regulation of Consumer Credit in Ireland

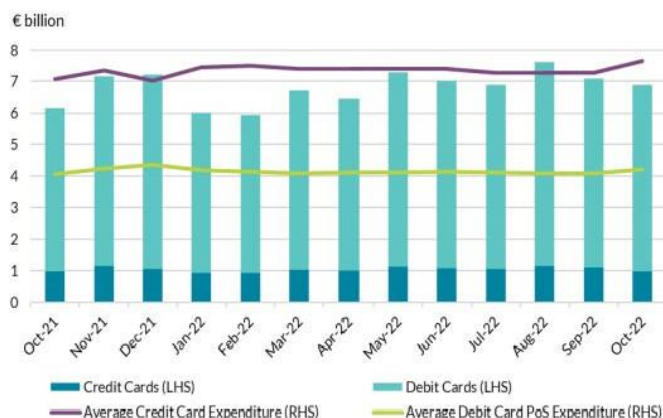
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Introduction:

It was reported in 2019 that Ireland has the fifth highest level of household debt-to-disposable-income (known as DTI) in the European Union. According to the Central Bank Household Credit Market Report in 2019¹, household debt stood at €136.9bn, or €28,186 per person in the first quarter of 2019. However, the bulk of household debt represents mortgage credit and not consumer credit. The following graphs illustrates the share of mortgage debt and consumer debt from August 2004 to August 2019²:



Despite this fact, the growth rate on consumer credit reached 5.6 per cent in August 2019, its highest level since September 2017³. Car financing represents 44% of all consumer credit as at August 2019. Some 12.7% of all households have credit card debt, but this increases to 21% for households with two adults and one to three children under the age of 18. Irish consumers are spending approximately €1bn a month on credit cards, as shown in the graph below⁴:



¹ https://www.centralbank.ie/docs/default-source/publications/household-credit-market-report/household-credit-market-report-2019.pdf?sfvrsn=2784821d_6

² Source: Central Bank, Credit and Banking Statistics, Table A.5.1.

³ However, the Covid-pandemic directly impacted consumer credit, which fell 12% (year-on-year) by August 2020.

⁴ https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/credit-and-debit-card-statistics/2022_oct_ie_credit_debit_cards.pdf?sfvrsn=c9e19b1d_3

Almost 64% of consumer credit is for a term of between 1-5 years, but the interest rate payable on this credit in Ireland was the fourth highest relative to other European countries, where data was available for comparison⁵. Because of these rates the Consumer Credit Act 1995 (Section 98a) (Maximum Interest Rates) Regulations 2022 were enacted prescribing that the maximum interest that can be charged on consumer credit agreements is capped at 1% per week, and the maximum interest payable will be set at 48% per annum. According to the Minister of State Sean Fleming at the time of commencement of this legislation⁶:

“This important legislation will restrict the rates that high cost credit providers can charge. It will reduce the cost of credit for the customers of high cost credit providers. It will provide better protection for consumers which is a key priority.”

Arising from the reliance on consumer credit in Ireland, the area is subject to extensive regulation under the terms of the Consumer Credit Act 1995, as amended. This Article will focus on this area of regulation.

What is Consumer Credit?

Consumer credit may be defined as personal debt for the purpose of purchasing goods or services. This includes purchasing goods and services using a credit card or where a consumer purchases goods or services now and pays for them in full at a later date or by instalments over a short period of time.

What is a Consumer Credit Agreement?

A consumer credit agreement may be defined as any agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, cash loan or other similar financial accommodation. Such agreements may arise in the form of cash, goods or services. For example, where a consumer obtains a credit card from a financial institution with a prescribed limit, or where a consumer buys a computer or furniture from a store through a credit financing agreement, or where a consumer obtains utility services on credit (even on a short-term basis). According to the Central Bank:

“Buying things using credit is the same as taking out a loan, even when no interest is charged. You will still have to repay the credit you have borrowed. You will also have to complete a credit assessment and agree a repayment plan with the credit provider.”⁷

Any provider of consumer credit in Ireland must be licenced⁸ as a retail credit firm.

⁵⁵ The typical annual percentage rate of interest (APR) on credit cards in Ireland is 22%-23%. There is a maximum interest rate of 23% APR applies to hire purchase agreements since 16 May 2022.

⁶ <https://www.gov.ie/ga/preasraitis/12004-consumer-credit-amendment-act-2022-will-restrict-rates-charged-by-high-cost-credit-providers-fleming/>

⁷ <https://www.centralbank.ie/regulation/industry-market-sectors/credit-servicing-firms/buying-goods-and-services-short-term-credit>

⁸ Irish businesses providing these services are licensed by the Central Bank of Ireland.

Types of Consumer Credit Agreements

These can take a variety of forms including:

- A. Hire purchase agreement
- B. Consumer-hire agreements (finance leases)
- C. Credit agreements for cash loans
- D. Credit sale agreements

Hire Purchase Agreements

This is a credit agreement whereby a consumer hires a good and agrees to pay the hire cost of the good in instalments. During the tenure of the agreement the consumer (the hirer) has the right to use the good, but is not its legal owner. The terms of the agreement may provide that the consumer becomes the legal owner of the goods when the final instalment is paid, or where they make a payment effectively purchasing the good at the end of the hire purchase period (known as a balloon payment). Up to the final payment being made the credit provider remains the legal owner of the goods, and restrictions will be imposed by them in relation to this good, including a prohibition on the resale of the good arising from a lack of title.

To be valid all hire purchase agreements must be in writing⁹, signed by the hirer and the finance provider¹⁰. A copy of this agreement must be provided to the hirer either at the time the agreement is made or within ten days thereafter¹¹. According to A. V. Gill¹²:

“The rationale of this provision, this essentially consumerist provision, is to ensure that the prospective hirer is fully informed, or is at least given every opportunity to become fully informed, of both the material provisions of the agreement itself and the obligatory statutory provisions which are designed to prevent what were once prevalent abuses in hire-purchase transactions.”¹³

In *Henry Forde & Son Finance Ltd v John Forde & General Accident Fire and Life Assurance Co. Ltd (1986)*¹⁴ Justice Carroll noted that the failure to comply with these obligations can be fatal to the enforceability of these agreements.

A hire purchase agreement must prominently state that it is a hire purchase agreement and contain the following prescribed terms¹⁵:

- (1) The hire-purchase price
- (2) The cash price of the goods to which the agreement relates
- (3) The Annual Percentage Rate (APR) charged (for all agreements made since 16 May 2022)¹⁶
- (4) The amount of each of the instalments by which the hire-purchase price is to be paid
- (5) The date, or the method of determining the date, upon which each instalment is payable
- (6) The total number of instalments
- (7) The names and addresses of all parties to the agreement at the time of its making
- (8) Any costs or penalties to which the hirer will become liable for any failure by the hirer to comply with the terms of the agreement¹⁷

⁹ Either on paper, or another durable medium – as per Regulation 13(1) of the European Communities (Consumer Credit Agreements) Regulations 2010.

¹⁰ Section 58(1) Consumer Credit Act 1995.

¹¹ Ibid at Section 58(2).

¹² *Pre-conditions to the Enforceability of Hire- Purchase Agreements*, Irish Law Times 1986, 4, 194-195.

¹³ Ibid at p. 194.

¹⁴ Unreported, 13 June 1986.

¹⁵ Section 58(3)-(7) Consumer Credit Act 1995.

¹⁶ As per Section 15, Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022.

- (9) Details of the goods to which the agreement relates, sufficient to identify them
- (10) A statement that the hirer is obliged to give the owner information as to the whereabouts of the goods to which the agreement relates

In addition, all such agreements must contain a minimum ten-day cooling off period. The purpose of this term is to allow the hirer to change their mind and walk away from the agreement, without penalty, upon the provision of notice of cancellation. In practice, the goods are generally not provided to the hirer until the ten-day cooling off period has expired, although the hirer has the right to waive the cooling-off period (by signing a written waiver) and then possession of the goods will pass to them. In most circumstances, hire purchase agreements are not enforceable where these requirements are not adhered to. In *Hurley v Pepper Finance Corporation (Ireland) DAC (2022)*¹⁸ the claimant alleged that a credit agreement was void and unenforceable as it had failed to provide a cooling off period, as prescribed by the legislation. However, the Court determined that as the credit agreement related to a housing loan the provisions of the legislation did not apply.

During the tenure of the agreement the hirer is obliged to take reasonable care of the good. In return, the creditor is required to ensure that any goods provided under these agreements are in compliance with the provisions of the Sale of Goods Act 1893 in relation to sales by description, sample, merchantable quality and fitness for purpose¹⁹. Any term in the agreement excluding the creditors obligations in this regard are void, unless they are determined to be fair and reasonable by the Courts²⁰. Where the good is faulty or becomes faulty the hirer has the right to a remedy from the seller/creditor.

Termination by the Hirer²¹: These agreements can be terminated during their tenure, where the hirer provides notice in writing to the creditor. In this situation the hirer may become the legal owner of the good where they pay the difference between the amount already paid and the total hire purchase price, less a reduction for the early repayment. Alternatively, the agreement may also be terminated by notice where the hirer has already paid one-half of the hire purchase price (or agrees to pay any deficiencies in sums already paid up to one-half of the hire purchase price) or the amount stated in the agreement, and returns the goods to the creditor. In this situation, the creditor cannot stipulate a pre-condition to the termination of the agreement and the return of the good, that one-half of the total hire purchase has already been paid. According to Justice Hanna in *Michelle Gabriel and Noreen Gabriel v GE Capital Woodchester Finance Ltd (2011)*²²:

*“To insert the precondition of discharge of liabilities, would, in my view, amount to an effective amendment to the legislation, something which neither the respondent nor this Court is entitled to do. If it was the intention of the Oireachtas to render termination of a Hire Purchase agreement contingent upon discharge of liabilities it would have said so.”*²³

Upon termination and return of the good, the cost of any damage to the good arising from the hirer’s failure to exercise reasonable care of the good must be borne by them, and the creditor will issue a notice of costs.

¹⁷ These may include late payment fees, penalties and surcharges on late or missed payments, repossession or rescheduling charges.

¹⁸ [2022] IEHC 299.

¹⁹ Section 75-77, Consumer Credit Act 1995.

²⁰ Ibid at Section 79(3).

²¹ Ibid at Section 63.

²² Unreported High Court, 27th July 2011.

²³ Ibid at p.15.

Repossession by the Creditor²⁴: The creditor is entitled to repossess the goods that are the subject of the hire purchase agreement where the hirer is in arrears on the instalment payments. Where a hirer in arrears has not already paid one-third of the total hire purchase cost, the creditor can repossess the goods without the need to take formal legal action. In this situation, the creditor has to issue a default notice to the hirer and allow them 21 days to comply with their payment obligations. Where the hirer has paid more than one-third of the total hire purchase cost, the creditor must take legal action to recover the goods. Default in this obligation by the creditor releases the hirer from liability under the agreement.

Personal Contract Plans (PCPs): This is a specific type of hire purchase agreement, which is often used in the motor trade in the context of the purchase of a motor vehicle. Under this agreement, the consumer pays a deposit, pays for the vehicle in instalments, and there is usually a balloon payment payable at the end of the contract term. On the expiry of the agreement, the consumer has the option of either making the balloon payment and becoming the legal owner of the vehicle, or returning the vehicle to the seller. During the tenure of the agreement, there are likely to be restrictive covenants contained in the contract relating to matters such as permissible use of the vehicle, mileage limitations and maintenance and servicing obligations.

Consumer Hire Agreements

This is a credit agreement (of more than three months duration) for the bailment²⁵ of goods to a hirer, and under which the ownership in the goods remains with the owner. For example, where a person purchases a car under a finance lease agreement. In this situation, the finance company (creditor) is the owner of the car, the car is in the possession of the consumer (the hirer), who is effectively hiring the car and paying that hire cost in instalments.

The same obligations regarding written agreements, signatures and provision of a copy of the agreement to the hirer, as apply to hire purchase agreements identically apply to consumer hire agreements²⁶.

Such an agreement must prominently state that it is a consumer hire agreement, and contain the following mandatory terms²⁷:

- (1) A statement that the goods remain the property of the owner
- (2) The cash price of the goods to which the agreement relates
- (3) Details of the good(s) to which the agreement relates
- (4) The amount of each instalment to be paid by the hirer under the agreement
- (5) The date, or the method of determining the date, upon which each instalment is payable
- (6) Where the agreement is for a specified period, details of (a) the number of instalments, and (b) the total amount payable under the agreement (including taxes)
- (7) The name and address of the supplier of the goods to which the agreement relates
- (8) Details of any additional costs to be paid
- (9) Details of the cost of any early termination by the hirer of the agreement
- (10) The names and addresses of all parties to the agreement at the time of its making
- (11) Details of any costs or penalties to which the hirer will become liable for any failure by the hirer to comply with the terms of the agreement

²⁴ Section 64, Consumer Credit Act 1995.

²⁵ This arises where the owner transfers physical possession of personal property for a time to another party, but still retains ownership.

²⁶ Section 84(1) Consumer Credit Act 1995.

²⁷ Ibid at sub-sections (2)-(7).

- (12) Details of the ten-day cooling-off period, and the right to waive this
- (13) A statement that the hirer is obliged to give the owner information as to the whereabouts of the goods to which the agreement relates

The main obligation imposed upon the hirer is to take reasonable care of the goods during the term of the agreement, and he will be liable to the owner where he fails to exercise such care²⁸. The main obligations of the owner is to allow the hirer quiet possession of the goods, and to ensure that the goods are in compliance with the implied obligations of the Sale of Goods Act 1893 (as explained in the context of hire purchase agreements)²⁹.

The hirer may terminate the consumer hire agreement at any time by giving notice of termination to the owner (or any person entitled to receive the sums payable under the agreement). Thereafter the agreement will be deemed to expire after a period of three months (or any lesser period as specified in the agreement) from the date of receipt of the notice³⁰.

Credit Agreements for Cash Loans

This is a credit agreement where a consumer borrows money from a licensed moneylender (although it does not apply to advances on a current account (such as an overdraft facility), or on credit card accounts (such as using your credit card to withdraw cash from an ATM)). To be valid such agreements must comply with the same obligations as hire purchase and consumer hire agreements in relation to written contracts, signatures, and the delivery of a copy of the agreement³¹. In *Allied Irish Banks Plc v Peter McGrath and Mark McGrath (2018)*³² the defendants alleged the unenforceability of a loan agreement on the basis that they had not received a copy of the agreement with ten days of signing, as required by the legislation. Justice Noonan rejected this argument on the basis that there was *prima facie* evidence that the bank had sent the document to the defendants within the relevant compliance period.

The agreement must prominently state that it is a cash loan agreement and contain the following mandatory terms:

- (1) Details of the parties to the agreement
- (2) Details of any costs or penalties to which the consumer may become liable for any failure by the consumer to comply with the terms of the agreement³³
- (3) Notification of the ten-day cooling off period, and the right to waive this³⁴
- (4) The amount of the credit lent under the agreement
- (5) Details of the date the credit is to be advanced (where known)
- (6) The amount of each repayment instalment
- (7) The rate of interest charged and the APR
- (8) The conditions under which the APR may be changed
- (9) Any charges not included in the calculation of the APR but which have to be paid by the borrower in certain given circumstances
- (10) The number of repayment instalments

²⁸ Ibid at Section 90.

²⁹ Ibid at Section 88.

³⁰ Ibid at Section 89.

³¹ Ibid at Section 30(1).

³² Unreported High Court, 30 July 2018, [2018] IEHC 545.

³³ Section 30(3), Consumer Credit Act 1995.

³⁴ Ibid at Section 30(2).

- (11)The date, or the method of determining the date, upon which each repayment instalment is payable
- (12)The total amount payable in respect of the loan
- (13)The date of expiry of the loan
- (14)The means and the cost of any termination by the borrower of the agreement before the final repayment instalment³⁵

Where the credit agreement is operated by means of a credit card or a running account it must contain a statement of (a) the amount of the credit limit, if any, (b) the rate of interest charged and the APR, (c) the terms of use and repayment, and (d) the means and the cost of termination of the agreement³⁶.

Credit Sale Agreements

This is a credit agreement relating to the sale of goods under which the purchase price or part of the purchase price is payable in instalments, but unlike in hire purchase agreements, the title in the goods passes to the buyer immediately upon the making of the agreement. In effect, the consumer is the legal owner of the goods upon the signing of this agreement, whereas in a hire purchase agreement the creditor is the owner of the goods for the term of the agreement and ownership passes to the hirer when the final instalment or a balloon payment is made.

Identical formality obligations apply to these agreements (as already outlined in hire purchase, consumer credit and cash loan agreements). The agreement must prominently state that it is a credit sale agreement and must contain the following prescribed mandatory terms:

- (1) Details of the parties to the agreement
- (2) Details of any costs or penalties to which the consumer may become liable for any failure by the consumer to comply with the terms of the agreement³⁷
- (3) Notification of the ten-day cooling off period, and the right to waive this
- (4) A description of the goods to which the agreement relates sufficient to identify them
- (5) The cash price of the goods
- (6) The total cost of credit
- (7) The amount of each of the instalments by which the total cost of credit is to be paid
- (8) The date, or the method of determining the date, upon which each instalment is payable
- (9) The number of instalments
- (10)The cost of any termination of the agreement by the buyer before final payment
- (11)Where applicable: (a) the rate of interest charged and the APR, and (b) the conditions under which the APR may be changed³⁸

Non-compliance with these obligations may result in such agreements being declared void and unenforceable.

In both cash loan and credit sale agreements the consumer is entitled to terminate the agreement early, by providing notice of termination in writing to the creditor or the owner of the goods. In this situation the consumer will be entitled to a reduction in the amount outstanding (based on the cancellation of the credit as a consequence of the early repayment).

³⁵ Ibid at Section 31(1).

³⁶ Ibid at Section 31(2).

³⁷ Ibid at Section 30(3).

³⁸ Ibid at Section 32(3)-(5).

Conclusion:

According to the Central Bank of Ireland, consumer credit increased to 11852 EUR Million in October 2022, from 11775 EUR Million in September of 2022³⁹. Given the high level of use of consumer credit in Ireland, it is imperative that consumers are aware of their rights, and the obligations imposed upon the providers of these credit services. In addition, to the obligations already outlined, creditors also have restrictions imposed upon them in relation to the advertising of financial products, as well as obligations in the context of pre-contract negotiations. They must also comply with the terms of the Consumer Protection Code 2012. Where an issue arises, the consumer has the right to raise a complaint to the Financial Services and Pensions Ombudsman, or the Competition and Consumer Protection Commission, depending on the nature of the complaint. They also have the right to issue legal proceedings in the Court. This area is ever evolving, with the ultimate aim of ensuring that consumers are properly protected when they contract for credit services.

³⁹ <https://tradingeconomics.com/ireland/consumer-credit>