

Consultation on sample PIA – ISI explanatory document

Background and introduction

On 23 August 2013 the ISI published a sample Personal Insolvency Arrangement (“PIA”) on its website and invited interested parties to respond by email with observations by 06 September 2013. The ISI published this sample PIA in accordance with its function under section 9(1)(e) of the Personal Insolvency Act 2012 as amended (the “Act”) to provide information to the public on the working of the Act. The ISI received 14 responses to the consultation, primarily from personal insolvency practitioners (“PIPs”) and from groups representing creditors.

The sample PIA sets out a possible layout and content for a PIA. It should be stressed that a PIP may use a different layout and text as he or she considers appropriate to an individual insolvency case to which he or she may be appointed subject to, and in accordance with, the requirements of the Act.

It should also be noted that the particular terms and conditions set out in this sample PIA are specific to the connected case study (‘Noel and Christina’) available on the website of the ISI ([link](#) to scenario three on page 15).

General points

One respondent in particular considered that the sample PIA would benefit from being written in plain English. The ISI accepts the premise that the information documents it produces should be readily accessible to debtors and believes in writing them in ordinary language where possible. The ISI has already done that with some of the information literature on its website which has been reviewed and approved for plain English by the National Adult Literacy Agency. We considered the various standpoints on this matter and the conflicting submissions. The sample PIA retains its formal style and legal structure.

We based this conclusion on the fact that the terms and conditions to a PIA form a binding legal arrangement between the debtors and their creditors which is approved by a court and has effect under statute. In making this decision we were cognisant that a debtor in considering these terms and conditions will not be doing so in isolation but will be in a position to have his or her queries answered by the PIP appointed to the case.

Wording of disclaimer

Several of the responses to the consultation expressed concern that the proposal would be seen as prescriptive. The strengthening of the disclaimer is an attempt to address this concern. The intention is to make it clear that the sample PIA is not a model form of personal insolvency arrangement with general applicability. Personal Insolvency Arrangements will naturally vary according to the individual circumstances of debtors. The sample PIA shows only one possible form such an arrangement can take. This sample PIA is based on one case-study scenario and is therefore tailored to the particular circumstances of that scenario.

Executive Summary Table

The ISI has removed the executive summary. The ISI intends to re-examine the format of this executive summary with a view to possibly developing a document summarising the main features of a PIA, which may in time be issued under section 137 of the Act (Guidelines and Codes of Practice). Section 137 permits the ISI to publish guidelines for PIPs, which may include a model form of PIA. Under section 137(2) of the Act, PIPs would be obliged to have regard to the model form of PIA. By contrast, the sample PIA forming the basis of the current consultation is produced for information only under section 9(1)(e) of the Act.

1. Background

No changes were suggested to this brief factual background. Further detail on the particulars behind this sample PIA is contained in the connected case study available on the website of the ISI at this [link](#) (scenario three on page 15).

2. Debtor confirmations

One respondent felt that the debtor confirmations in the sample PIA added an additional requirement over and above the requirements of the legislation. The ISI is of the view that these confirmations are useful in bringing to the fore some important information relevant to a creditor's assessment of the PIA.

We did amend the text on life assurance policies so as to avoid the suggestion contained in the original wording that life cover would not ordinarily be permitted where debtors enter into a PIA. The new wording attempts to make it clear that debtors may hold life insurance policies. If they hold policies at the point where they enter into a PIA and these policies have a value then it is possible that they may be brought into the arrangement as an asset.

3. Terms of the arrangement

3.1 Key provisions of PIA and payment terms

Several of the parties responding to the consultation felt it would be important to show why a PIP chose particular options such as, in this case, the choice of a term extension as opposed to a split mortgage in respect of the secured debt. The ISI accepts the importance of a PIP explaining his or her approach to creditors but considers that such explanations can be given outside the PIA itself, for example in the PIP's report under section 107(1)(d) and asks that it be borne in mind that this is a sample PIA showing only one possible approach. A PIP is required under the legislation to ask the secured lender how it wants to see the secured debt and its security dealt with and is required to have regard to that preference in formulating a proposal for a PIA to the extent that the PIP considers it reasonable to do so. In this sample PIA where the secured lender has expressed a preference for a term extension the PIP may well consider this to be the optimal outcome for all parties. Extending the term of the mortgage by 10 years reduces the monthly amount payable to the secured lender and so frees up money which can go to the unsecured creditors.

Having a fixed rate in respect of the secured debt for the six-year term of PIA was suggested in the sample PIA put out for consultation. One submission felt that the proposed removal of the tracker rate to be replaced by a fixed-rate of the same amount would be an undesirable outcome for the debtors, notwithstanding that the rate would remain at 3.5%. Another submission felt that the rate of 3.5% was inappropriately high and suggested that a rate of 2.5% would be more appropriate over the term of the PIA.

On the basis of the submissions received, the ISI re-considered the use of a fixed-rate mortgage in this case and has retained a tracker rate subject to the conditions contained in the sample PIA.

The original purpose of converting to a fixed-rate was to ensure that the debtors' payments would not increase during the arrangement. The same result can be achieved but with fewer potential operational challenges for the secured creditor if, as here, the secured creditor agrees that the new reduced monthly payment will not increase throughout the term of the PIA, unless the PIA is varied in accordance with section 119 of the Act.

This approach will give certainty to the PIP in calculating dividends to be paid to unsecured creditors. The amount of interest accruing in respect of the secured debt will remain subject to changes in interest rate. Any additional interest will be applied at the end of the PIA where the interest rate has increased above 3.5%.

Making mortgage repayments to the secured creditor on a monthly basis but paying dividends to the unsecured creditors on a quarterly basis was queried in a submission. The ISI considers this a reasonable term to include in a PIA given the administrative costs associated with dividend payments. Such costs do not arise in this situation for payments to the secured creditor as the debtors continue to pay their restructured mortgage repayments directly to the bank. This, together with the arrangement for quarterly payments to other creditors, has the effect of reducing the involvement (and so the fees) of the PIP and thus leaves a higher dividend available for distribution to the unsecured creditors.

The ISI considered a suggestion recommending the inclusion of a standard clause as to what constitutes arrears to be worthwhile and changed the original text accordingly. The insertion of sub-clause 3.1.13 which sets out that payments are to be applied in satisfaction of the oldest debt first was considered important in clarifying for all parties both when arrears arise and how they are to be calculated. This is particularly so given the provisions in sections 122 and 123 of the Act on termination of a PIA for reasons of arrears.

3.5 Duration of PIA

In this section, one response felt that the maximum extension to the ordinary term of 6 years for a PIA should be six months instead of 12 and should only operate in the case of short-term unforeseen contingencies. The Act, however, provides for an extension to the term of up to maximum 12 months.

This section has been reworded in an attempt to give greater clarity to how and in what circumstances a PIA will be extended beyond the usual term of 72 months. There has been no substantive change to the clause.

3.6 Payment break

Under this section responses tended to focus on the term of the break. Some alternatives were proposed such as that payment breaks should be confined to a maximum of two months on three separate occasions. One response called for clarity in respect of section 99(2)(c) of the Act. This response sought to understand whether the arrangement could be extended only once or on more than one occasion (up to a maximum extension of 12 months). The ISI considers the latter to be a reasonable view to take and, having considered submissions, believes the initial proposal that payment breaks last up to a maximum of four months on each of three occasions during the term of the PIA is reasonable.

Secured and unsecured creditors had different opinions on the question of payment breaks. Some creditors with a preponderance of secured debt considered that the break should only be for unsecured debt; and that the need for new facility letters and associated administrative complications make payment breaks unfeasible in the case of secured debt. On the other hand, some unsecured creditors expressed the view that it would be unfair if only they would be impacted in the event of a payment break.

The ISI takes the view that having payment breaks solely for unsecured debt would be of limited use in this scenario where the monthly payments of €1,653 on secured debt make up the preponderance of the debtors' obligations. Our view, confirmed by the legal advice we received on this matter, is that payment breaks for both secured and unsecured debt are consistent with the legislation. Payment breaks do not cut across the section 99 mandatory requirements and are consistent with the requirement that a debtor should not have to make payments to creditors such that he or she would not have enough left to support a reasonable standard of living.

A payment break may only be granted by a PIP where the debtors (or either of them) face an emergency or unusual item of expenditure or there is an unforeseen reduction in the debtors' income of a temporary nature which is material in the context of the debtors' payment obligations under the arrangement. This offers a level of protection to creditors in that a payment break can only be granted in specific and limited circumstances. The purpose of having the facility of payment breaks is to save the time and expense involved in a formal variation of the PIA pursuant to section 119 of the Act on any occasion where an emergency or an unforeseen temporary drop in income comes up which, unless quickly addressed, would derail the PIA. Having arrangements fail in such circumstances is in the interests of neither debtors nor creditors.

3.7 Assets necessary for employment, business, etc.

The ISI amended the wording of this clause to clarify its meaning as requested in several responses to the consultation.

3.8 Reasonable Standard of Living

One response document contained the opinion that the figures in relation to a reasonable standard of living were too high and considered that this may have the unintended consequence of incentivising people to choose insolvency or bankruptcy. This matter, the ISI believes, is outside the scope of the consultation. The guidelines on reasonable living expenses, produced under section 23 of the Personal Insolvency Act 2012, provide a mechanism for comment specifically in relation to reasonable living expenses by email to rle@isi.gov.ie.

3.9 PIP fees

Fees to be charged by PIPs attracted the most comment in the responses to the consultation. Much of the commentary related to whether or not advance fees should be charged and, if they are to be charged, how much of the fee should be taken upfront. PIPs who responded to the consultation document were concerned that they may not be paid where they formulate proposals to which creditors do not agree. One response document called for the fees payable to the ISI to be explicitly shown. Two responses requested that the basis of fees be expanded to provide full transparency and considered that the outlays of the PIP should be shown separately. There was also a suggestion that the fees and outlays should be shown inclusive of VAT and exclusive of VAT. Another suggestion was that the fees should be separated in the sample PIA into fees charged for pre-appointment work and those charged for post appointment work (preparing the proposal).

The ISI is satisfied that the level of fees and outlay shown in this sample PIA is broadly representative of the level of fees and outlay which one could expect of a PIA of this duration and level of complexity. However, the ISI acknowledges that in practice, it may be the case that the level of fees will be somewhat higher or lower than that shown in this particular sample PIA. The ISI has added some additional text at sub-clause 3.9.4 to cover situations where additional work for the PIP may arise over the term of the PIA as a consequence of payment breaks, or variations or the like.

3.10 Tax liabilities incurred during administration of PIA - section 99(2)(f)(ia)

One of the responses to the consultation felt that the paragraph in relation to the Collector-General withdrawing his or her agreement was unclear in that it did not make explicit whether this was only applicable where Revenue has already permitted a debt to be included in the PIA. The ISI has reworded the second paragraph of this section to now make it clear that withdrawal of agreement only applies where Revenue has permitted a debt.

3.11 Death of Debtor/Mental Incapacity of Debtor - section 99(2)(g)

The ISI received several responses to the effect that the provisions contained in this paragraph in relation to death of a debtor i.e. termination of the agreement could be unduly burdensome or could cause greater hardship to a survivor of the debtor. While there was general agreement that these issues should be addressed, and indeed the legislation requires death of the debtor to be addressed in the proposal, the ISI was asked to review these provisions. One response to the consultation noted that death or mental incapacity will impact secured debt in different

ways on account of mortgage protection policies or life policy payouts. Another response considered that a definition of mental incapacity would be necessary.

In light of these comments the ISI considered these issues in detail and sought legal advice on the matter. While recognising the legitimacy of many of the points made in relation to possible hardship to the survivor by the termination of a proposal, the ISI is of the opinion that seeking to continue a joint PIA following the death of one of the debtors party to a joint PIA may lead to difficulties under the legislation. For example, the legislation requires consent of the debtors to a variation of the PIA; such consent is not possible where either has died. Also, unlike some other situations involving estates, the terms of the Act and the terms of the PIA impose positive obligations on the debtors and imposing such positive obligations on an estate may present legal difficulties.

Nevertheless, the ISI recognises the concerns raised in the submissions which addressed this issue. The ISI fully understands that terminating a PIA on grounds of death or mental incapacity could lead to unfortunate and undesired results as, for example, when the PIA is near to completion. It is for that reason that the clause in the PIA provides where more than 50% of the amounts payable to unsecured creditors under the PIA have been paid, the debtors will stand discharged from the unsecured debts. The particular circumstances of this case (the debtors being parties to a joint PIA) pose a difficulty to continuing a PIA after a death. We have left the original text unchanged for these reasons but envisage that in a different scenario, such as where an individual is the sole debtor party to a PIA, the corresponding clause on death and mental incapacity could provide for other possibilities.

3.12 Principal Private Residence (“PPR”) - section 99(2)(h) and section 104

One response to the consultation requested that in this paragraph the PIP should confirm that the options of sale of the property or trade down to a smaller property had been considered. The ISI does not consider that this suggestion accords with the relevant provisions of the Act and has not amended the wording.

3.14 Surrender of additional income and assets

Several responses considered this clause. Some responses thought that the full amount of any windfall in excess of €500 should be given to the PIP for distribution to creditors. One response recommended the inclusion of an additional “all assets” clause, as would typically be found in an Individual Voluntary Arrangement in England and Wales. Such an “all assets” clause seeks to include as part of the arrangement after-acquired assets acquired from any source over the term of the arrangement.

In light of the responses, the ISI has altered the wording in sub-clause 3.14.1 with the effect that the surrender of additional income is no longer based on an absolute amount (€500 a month) but rather on a percentage increase above previous income (10%).

Sub-clause 3.14.2 has also been amended so as to provide for situations where a debtor benefits from what is often termed a ‘windfall’ gain, other than a gift or an inheritance. It seems only fair that a person who is benefitting from an insolvency arrangement on the basis that he or she is

insolvent should contribute more to it if he or she unexpectedly comes into money over the course of the arrangement.

3.15 PIP reduction of contributions

This received some attention in the submissions. One response proposed that contributions would only be reduced following consent from the creditors. A second response suggested that a 5% reduction was too low and put forward 15% as a more realistic figure. The ISI has decided to make no material changes to the original text. The ISI considers that a reduction of up to 5% is appropriate without the formalities of a variation and that the variation mechanism provided for under section 119 should be used for anything greater. The ISI also considers that changing these provisions to require creditor consent in all instances would defeat the intention of achieving simple and small changes on an informal basis.

3.16 Treatment of security held by the secured creditor - section 99(2)(k)

The ISI has made some changes to the section purely to achieve consistency with the new text introduced in section 3.1 e.g. an extension of the mortgage term and a reduction in the monthly payments.

3.20 Credit Facilities – section 118(4)

It was observed during the consultation process that the inclusion of this clause is unnecessary as it is already provided for in the legislation. The ISI considers the provision worthy of inclusion in the terms of the PIA because of the importance of this obligation.

3.21 Disposal of Property – section 118(5)

The ISI, in light of the consultation, has amended the wording of the section to change the approach so that no restrictions are imposed by the PIA in respect of disposals of interests in property by the debtors.

3.22 Early Termination – section 124

One response received by the ISI proposed alternative wording to the section. In the opinion of the ISI this did not materially change the existing text and so it was decided to leave the original text unaltered.

3.23 Breach by debtor

Sub-clause 3.23.2 has been altered to require that the debtor provide the PIP with an explanation as to the cause of the breach. Previously, this was only required if the PIP considered it necessary.

3.24 Discharge of Debt - section 99(2)(c) and section 125

The ISI expanded on the heading of the section to reflect the fact that it covers discharge from both secured and unsecured debts.

3.25 Invalidity or illegality

The ISI considered a suggestion to add this standard contractual clause to the sample PIA to be worthwhile.

4. Interpretation

The ISI, in consequence of some responses to the consultation, added some definitions to this section.

5. Relationship between Act and PIA

The ISI has added this new section which provides that the PIA does not seek to modify the application of the Act save where permitted by the Act.

Appendix 2 Summary Statement of Affairs

One response considered this section questionable in view of there being only a small quantity of assets but significant amounts of credit card and credit union debt. This response raised other issues about potential future house price value increases not being factored into the calculations.

However, the focus of the consultation was intended to be on the particular terms and conditions of this PIA rather than on the factual circumstances. The ISI expects that a spectrum of circumstances will be seen in personal insolvency arrangements as time goes on and holds that the financial circumstances in this sample PIA are not beyond possibility. The ISI also observes that a PIP must evaluate the debtors' affairs as pertaining at the point in time when the proposal is made and cannot be expected to base values on the speculated rise or fall in the value of assets.

Appendix 3 Summarised Monthly Income and Expenditure Statement

Two of the responses received commented on Appendix 3. One response considered there was a role for the PIP in terms of ensuring the debtor maximises his or her income as, for example, would be done in a money advice context. The other response queried whether it was necessary to show the "before PIA" position and the "during PIA" position. The ISI, having considered these matters, has elected to leave Appendix 3 in its original form.

Appendix 4 Dividend to Creditors

Appendix 4 was raised in a response which observed that it could be difficult for a PIP to prepare and the query was raised as to whether this level of detail is necessary. The ISI considers the information contained in Appendix 4 to be crucial in informing creditors as to the returns they can expect over the term of the PIA. Another response to the consultation thought that it would be useful for Appendix 4 to make explicit the payment dates for the unsecured dividends and this has been added.

Appendix 5 Comparison of Estimated Outcome

The ISI, in light of the recently commenced bankruptcy reforms introduced by the Personal Insolvency Act 2012 and the Courts and Civil Law (Miscellaneous Provisions) Act 2013, has re-worked Appendix 5. The basis for the bankruptcy figures is now set out in footnotes to the appendix.

One response to the consultation made the point that the sale of the property as envisaged under bankruptcy should make more income available subsequently to unsecured creditors. This was asserted on the basis that, as there is no mortgage payable once the house is sold, the debtors have additional disposable income available to them. It may be the case that some additional income becomes available but this is unlikely to be close to the full amount of the mortgage repayments given that debtors clearly still have a housing need and will presumably now have to rent somewhere to live.

Another response speculated as to possible knock-on effects of a person going bankrupt, such as the possibility that they may give up their employment. The ISI considered this to be too general and too speculative to include in this particular sample PIA.

Appendix 7 Amendment of Repayment Terms of Secured Debt

A new appendix has been introduced to make clearer the position with regard to the secured debt before, during and after the PIA.