

Viewpoint: the Variable Mortgage Rates Bill - Peter OAKES

[Back](#)

Financial services has featured as first major test of the new minority Government. This month the Central Bank (Variable Rate Mortgages) Bill 2016 ('Bill') was passed in the Dail without a vote. Fianna Fail's 'private member's' Bill, proposed by its finance spokesperson Michael McGrath TD, was supported by Sinn Fein, Labour, People Before Profit-AAA, the Social Democrats and some Independents. The Bill was despatched to Committee Stage where McGrath says "it will receive line by line scrutiny". That's one thing which Fine Gael and Fianna Fail agree upon here.

Peter OAKES, a former Central Bank of Ireland director of enforcement comments:

Countless soundbites, without much substance, flew and will continue to fly around this Bill. It makes you wonder how many have in fact read the short 4 pages in the body. Comments by one very senior Government Minister (not Minister Noonan) makes me wonder if he read the Bill before commenting in the media - it is politics after all! Even a few economists seem more interested in stating what they think the Bill says rather than discussing its actual content. This simply leads to international investors hearing ill-informed views and making incorrect judgements.

In a press statement released the day before the Bill passed, Minister Noonan said that there are three major flaws in the Bill. Let's take a look at these:

1. Some of the provisions appear unconstitutional.

Nowhere can I find, including after speaking with the Minister's press office, a statement by the Minister or an official spokesperson for him identifying the specific article or articles of the Constitution which the Bill, if it becomes law, offends. It reminds me of the movie 'The Castle' when the lawyer argues that the country's constitution prohibits compulsory acquisition of a working man's home. The fictional lawyer could not identify the relevant article under that country's bill of rights, but he turns and looks to the judge saying 'It's the vibe of the thing your honour'.

I could have a stab at assuming which article(s) the Minister is concerned about, but I am not making a claim about constitutionality; one way or the other. Further, every Bill passed by both Houses of the Oireachtas must be signed by the President before it can become law. The President is entitled under the Constitution to refer any bill to the Supreme Court where, after he has first consulted with the Council of State, he has doubt about its constitutionality (otherwise the law as passed has presumptive constitutionality).

2. With provisions like these the European Central Bank will need to be consulted before legislation could be enacted.

Yes, no doubt and no debate here - Ireland has vast experience of consulting with the ECB as part of the EuroSystem and with many others from our former Troika days. As the Minister notes the obligation is to 'consult' but it doesn't extend to being 'directed' by the ECB to do or refrain from doing an act. There would be a constitutional issue under this heading if something more than consultation took place.

3. The Central Bank Governor (and his predecessor) has stated that they do not wish to regulate interest rates.

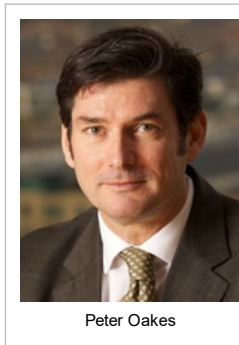
As an independent body even if the Central Bank were given the power to regulate interest rates they could not be required to exercise this power. In addition competition is not a function of the Central Bank, it falls within the remit of the Competition and Consumer Protection Commission (CCPC).

This is not a unique situation. I recall many occasions in the past where the Central Bank did not want a power but still received it. Notwithstanding it is an independent arm of the State, it is obliged to administer the laws of the State which have been properly conferred upon it. This Bill, in current form, does not look and feel like interference with its independence which some are arguing. The question of interference should only arise if for some reason the Central Bank having properly exercised its powers was pressured to do something which it did not see to be fit and proper within the laws it administers. Question: Where is the requirement which would force the Central Bank, after having completed an assessment (section 2), to issue a direction (section 5) and pursue an enforcement order before the High Court (section 6) on the basis that a market failure (section 4) was found to exist? Thus just because a market failure is identified, the Bill does not compel the Central Bank to issue a direction to a specific lender(s) to effectively cap the lender's standard variable rate. Nor is there a general provision in the Bill which would seek to hold the Central Bank accountable for failing to exercise any discretionary powers.

Clearly there is a lot of thinking and activity required on the present state of the Bill and not just the typo in the definition section. Law is static, economic conditions are not. Judging by the factors set out in section 3 which the Central Bank must take into account when performing an assessment, it might not be feasible for it to arrive at a conclusion of market failure until many quarters after the quarter to which the assessment relates. So an outcome may be reached, but to no effect.

Perhaps the debate and progress of this Bill may lead to identifying better mechanisms to ensure that a fairer outcome on SVRs can be achieved for lenders and borrowers. After all, necessity is the mother of both invention and innovation, and the Government certainly should resolve the issue.

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