‘Debt Relief’ National Credit Amendment Bill: deliberations 13 March 2018

Meeting Summary:

The sub-committee on Trade and Industry invited the National Treasury and Eighty20 to deliberate on the ‘Debt Relief’ National Credit Amendment (NCA) Bill.

Treasury indicated that in total, borrowers who could qualify for debt review held over 16 million loans, of which 4.7 million (29%) were three months or more in arrears. There were 1.5 million borrowers with R9.8 billion in outstanding debt who were currently eligible for debt relief, having at least one account that was nine months or more in arrears but who were not in arrears on all other loans held. Borrowers with a monthly income of R1 500 or less had around 2.75 million open credit accounts. 956 000 of these loans (35%) were three months or more in arrears. Currently, the Bill provided once-off and immediate relief for NINAs (No Income, No Assets), as well as future relief.

However, it did not do the following:
· Systematically address the situation where a low(er)-income South African was insolvent and had insufficient assets and income to cover debt obligations i.e. sequestration;
· Make improvements to debt review – although this was where the problem started;
· Differentiate between someone who could not rehabilitate because they could not access debt review versus insolvency.

Treasury specifically supported:
· Proposals relating to ongoing NINA sequestration processes; they replaced the need for *ad hoc* Ministerial powers (s88F) and compulsory insurance (which remained problematic), as this approach had a wider reach, gave certainty and would be of immediate effect;
· The introduction of certainty that those who could pay, should pay, reduced the moral hazard and kept those in good standing in the credit market with access to credit.
· Leveraging debt review infrastructure did not “split” the credit market.

Eighty20 looked into the number of borrowers that could qualify. The more the criteria got spread out, the number of debtors that could qualify increased. The main issue was to ensure that the targeted group was the right one. Currently, there were over a million people who were most likely to qualify, and there was going to be a substantial impact on the credit market as a result.
Members asked about the debt review process, particularly where the costs could be reduced; how much people were indebted through property transactions, such as mortgage bonds; the debt intervention process; the number of borrowers who were not able to service their debt; and why the process for debt extinguishment was subjected to the private sector, but not the debt from the public sector.

The Department of Trade and Industry (Dti) indicated that it supported the strengthening of the interventions, and building the capacity of the National Credit Regulator (NCR) and the National Credit Tribunal (NCT). The Dti anticipated having more reputable debt counsellors through the NCR on a contractual basis, to assist in addressing the target market that was not currently catered for.
The NCT said the process would mirror that of the consent order application it already dealt with. If the parties agreed to all the information furnished to the NCR, the Tribunal member would then adjudicate the matter and make an order if all the information provided checked out. However, if there was a dispute, the member would grant a temporary order, and the disputing party would have to furnish reasons and evidence why the order should not be a permanent one. A complaint would first have to be lodged with the NCR before it could act on reckless lending.
Members asked what the procedure would be if the credit provider objected to 80% of the applications; whether these applications would remain inside the temporary order area, and how long it would take to resolve the situation; the turn-around times for the NCR and NCT to address each application; whether the NCR had the capacity to deal with reckless lending applications; and what the negotiation process entailed, as well as the framework to be applied on that process.

Meeting report

National Credit Amendment Bill: Treasury briefing

Ms Katherine Gibson, Senior Advisor: Financial Sector Policy, National Treasury took the Members through the presentation, and commenced with the proposed guiding questions. The questions were:

- How can we reach and help the poorest of the poor?
- How can we have the biggest, most sustainable impact?
- How can we cause the least disruption to the credit market?
- How can we ensure that those borrowers who are in good standing, can continue to access credit (if they want it), and are not financially excluded?
- How can we ensure effective implementation?

She took the Members a step back on the problems that the Bill sought to address. She indicated that gaps in protection for those struggling under too much debt were:

- Weaknesses in the debt review system: it only worked for South Africans with incomes over R7 500.
- Weaknesses in the insolvency framework: sequestration does not work for NINAs (No Income, No Assets).

Therefore, what needed to be fixed for those with some income was to improve the debt review system in order to address the issue of “who pays, and what fee”. However, this could be done relatively quickly. Secondly, for those with no income, a mechanism was needed to get this cleared with reasonable consequences for lenders and borrowers.
In total, borrowers who could qualify for debt review, hold over 16 million loans. 29% of these loans (4.7 million) were three months or more in arrears. There were 1.5 million borrowers, with R9.8 billion in outstanding debt, who were currently eligible for debt relief that had at least one account that was, nine months or more in arrears but were not in arrears on all other loans held. In total, borrowers with an income of R1 500 or less had around 2.75 million open credit accounts. 35% of these loans (956,000) were three months or more in arrears.

Currently the bill provided once-off and immediate relief for NINAs, as well as future relief. However, it did not do the following:

- Systematically address the situation where a low(er)-income South African was insolvent and had insufficient assets and income to cover debt obligations i.e. sequestration;
- Make improvements to debt review – although this was where the problem starts;
- Differentiate between someone who could not rehabilitate because they could not access debt review versus insolvency.

Treasury supported the revised proposals because they addressed the root causes of the problem rather than just the symptoms, and brought on-going relief in a more certain and sustainable way. Furthermore, the changes significantly strengthened constitutionality, because they dealt especially with procedural arbitrariness and an element of substantive arbitrariness relating to “least restrictive means plus makes use of existing measures, and they take steps to mitigate retrospectivity risks. In addition, it begins to align the Bill with international practice, which was a narrower version of the New Zealand and United Kingdom approach.

Treasury specifically supported:

- Proposals relating to ongoing NINA sequestration processes; they replaced the need for *ad hoc* Ministerial powers (s88F) and compulsory insurance (which remained problematic), as this approach had a wider reach, gave certainty and would be of immediate effect;
- The introduction of certainty that those who could pay, should pay, reduced the moral hazard and kept those in good standing in the credit market with access to credit.
- Leveraging debt review infrastructure did not “split” the credit market.

Most of the consumers in the segment that could qualify for debt interventions -- the R7 500 income earning segment -- were in fact in good standing and were fulfilling their debt obligations. It was

important to focus on this because it would be useful to discern those borrowers who were over-indebted. The danger of treating them all the same was potentially risking the borrowers being impacted in terms of their ability to access debt going forward.

Eighty20, a leading analytics consultancy, had looked into the number of borrowers that could qualify, and found the more the criteria were spread out, the number of debtors that could qualify increased. The main issue was to ensure that the targeted group was the right one. There were over a million people who were most likely to qualify, and there was going to be a substantial impact on the credit market as a result.

Another important factor was a consideration on how much it was going to cost, as debt counselling costs would be R100 million. The costs needed to be brought down, but they were widely variable across the market.

In conclusion, Treasury was looking for guidance from the Committee on policy finalisation and supporting the Department of Trade and Industry (Dti) with its implementation.

Eighty20: Impact of implemented and proposed policy interventions

Ms Claire Hayworth, Director at Eighty20, said that 1.6 million borrowers earned an income of R1 500 or less. The majority were female and just under a quarter appeared to be grant recipients. Gauteng had the majority of the targeted group, with 22% of over-indebted consumers. Retail apparel accounts were leading in the credit market, followed by unsecured credit, where most consumers were heavily indebted.

Discussion

Ms P Mantashe (ANC) needed clarity on the debt review process, particularly where the costs could be reduced. There was no clarity as to how much people were indebted on property transactions, such as mortgage bonds, because this was one of the key areas to financial freedom, as it was substantive debt.

Mr S Mbuyane (ANC) asked about the debt intervention service or process, who paid for it and how long it took to process. He asked for confirmation of the numbers for borrowers who were not able to service their debt. It was apparent that if one lent someone money earning about R1 500 or less in a form of debt servicing, in his opinion it amounted to reckless lending.

Mr D Macpherson (DA) was concerned about the moral hazard -- targeting consumers that did not want to be targeted -- because every consumer active in the credit market would jump at the opportunity to not pay their debt. Thus it was important to clearly define the criteria in the system and this needed to be a key priority. It was interesting that people earning R1 500 were still granted credit to service their loans. The ineffectiveness of debt recovery outlined the presentation was an issue, and he suggested that perhaps the main focus should be on improving access for debt recovery to consumers earning less than R7 500. Furthermore, there was a need to reform debt counselling and make it effective, because it did not benefit the consumers to take them out of the credit market. The focus should be educating consumers and rehabilitating them.

Advocate A Alberts (FF+) said that on slide 9 of the National Treasury presentation, the Bill did not make improvements on debt review. It was therefore important to note what the problems in the debt review system were in order to address them going forward. When consumers applied for credit, the credit provider would normally look at the current and historical picture of the consumer's credit activity, so he wanted know why the process for debt extinguishment was subjected to the private sector, but not the debt from the public sector.

Ms Gibson responded first to the question on the cost reduction for the process. People needed to

understand how the process would unfold in order to understand the costs attached to the process. The second stage of the process might be subjective, based on the information provided to the intervention officers by a consumer. The intervention officer at this stage would play a very strong advisory role, thus making it time consuming. The relevant consideration in reducing costs would be to minimise the cost drivers. However, an interface (person) was needed during the process. Furthermore, there was a need for verification, as well as to ensure whether the information furnished by the applicant or consumer was complete and true, and this was administrative. With that said, the administrative part could be relied upon through a verification entry point -- a system -- which would make it cheaper, but a programme would need to be designed to account for various factors.

With regard to mortgage bonds, the starting point of the Bill was to target and assist the poorest of the poor. In the discussions, it had come up that it was a problematic area to tap into, and one needed to be careful on the remedy and the extinguishing of debt relating to mortgage bonds because it was a more dynamic insolvency process. The process could be streamlined by saying that the people earning less than R7 500 did not own any assets, and that immediately made the process easier. The moment there were assets involved, the process became more complicated and more expensive to implement.

In respect of who pays for debt intervention, currently it was the borrower who paid for the counselling process, and the banks fund the system, but that would be switched over to the Credit Regulator. The Regulator wanted to take ownership over the machine that had been put up by the credit providers, which was probably the right thing to do. To the extent that there were concessions granted, those concessions implied costs for the credit providers. The process would take two months time frame for the initial stage, and an additional nine months for certification in the Tribunal. The two months was the implementation stage.

On Mr Macpherson's comment regarding the 'moral hazard,' the issue was that the extinguishing of debt was being offered, but that did not mean it would not come with consequences. People were not going to have their debts extinguished, only to go and apply for more credit the following day. Provided it was properly understood, the implication of that was that the process would assist consumers that were over-indebted, but the behavioural component to that was that people did not want to be hamstrung.

Appropriate and stringent measures would be applied to ensure that consumers who were paying off their debts, even though they would qualify for debt intervention on the basis of the criteria, would not exploit the process. Debt review was viewed as being costly, and the behavioural component was that people did not want to be denied the opportunity to access the credit market, so ideally keeping people in the system and rehabilitating them would also be preferred. However, Members needed to bear in mind that there was already a low recovery rehabilitation rate.

With regard to the low rehabilitation rate of debt recovery, that was not the rate of people in debt review but of loans that had been sold to debt collectors who were now in the recovery process.

To improve debt review, one needed to be cautious of the fact that there were more substantive reforms that could happen, and should happen. There was already a commitment to make that happen. Eighty20 could engage the Committee on this at a later stage, because it had been doing some extensive research and collecting data on this. The process was a good one when it works, but a deeper look had to be applied to ensure that processes that should be implemented were done so effectively. Section 88(f) aimed to correct and help people in future who could not rehabilitate in the future. A person would be able to access the NINA process described, but it could be removed when it was not needed anymore.

There is still a question mark around incidental debt.

Ms Hayworth said it had been found that there very few borrowers who were in arrears with their mortgages and long terms loans – only about 4% consumers were in arrears in their mortgage bonds – so the issue here was very minimal compared to the unsecured credit component. The targeted segment was very diverse, and it was difficult to assess just using data from the bureau. For example people in this segment could be dependents, or could be people who had recently lost their jobs and had ended up in that space, or people with very low incomes. However, one might be missing informal income, because the bureau data did not take that into account.

The Chairperson indicated that during the proceedings and the in-depth engagements with the relevant stakeholders, that public debt such as student loans, municipal debts, etc, should be excluded.

Department of Trade and Industry

Ms Evelyn Masotja, Deputy Director-General: Department of Trade and Industry (Dti) said that with regard to funding, the Department supported the strengthening of the interventions and building the capacity to the National Credit Regulator (NCR) and the National Credit Tribunal (NCT). The capacity of the institutions needed to be improved, and the Dti anticipated having more reputable debt counsellors through the NCR on a contractual basis to assist in addressing a target market that was not currently catered for. The Dti preferred strengthening the entities and streamlining the processes to ensure that the target market was properly catered for.

National Credit Regulator

Ms Nomsa Motshegare, Chief Executive Officer: NCR took the Members through the debt review process flow chart (*see attached document*).

When the NCT received an application from the NCR, it would refer the application to the Tribunal member to adjudicate.

National Credit Tribunal

Professor Joseph Maseko, Executive Chairperson: NCT said that at the NCT, the process would mirror that of the consent order application it dealt with. If the parties had agreed to all the information furnished to the NCR, the Tribunal member would then adjudicate the matter, and then make an order if all the information checked out. However, if there was a dispute, the member would grant a temporary order, and the disputing party would have to furnish why the order must not be granted to be a permanent one. Pending a return date, which was when the both sides came back to present to the NCT, all of this would be evidential. The evidence was gathered from the presentation of the disputing parties. Everything presented to the NCT would be deemed *prima facie* evidence unless stated otherwise.

Ms Motshegare said that when credit providers received an application from the consumer, they had to verify the income and the living expenses of the consumer. This was the basic assessment that needed to be conducted. When the NCR received complaints from the consumers on alleged recklessness in granted credit, the NCR would be able to verify that and make a recommendation to the Tribunal. There must first be a complaint lodged with the NCR before it could act. With banks, there were sometimes back end processes that the NCR was not aware of. Banks sometimes made use of scorecards, where the Regulator may be unable to ascertain whether due income verification had been conducted before credit was granted. She indicated that there must be reasonable suspicion of reckless lending for the NCR to act.

Professor Maseko said that on the reasonable suspicion point, the NCR needed to be assisted in order for it to use its own monitoring mandate, because it regulated credit providers, so the mandate in the Act should enable them to use their monitoring function and not wait for complaints.

The Act could be tweaked in manner that upon reasonable suspicion, the NCR may institute an investigation. Reckless lending was already provided for in the Act, and the debt counsellors were able to assess and determine for themselves whether there was reckless lending and take that information to an open court. If the court agreed with them, the credit provider could go and defend. If the court decided that the debt had indeed been granted recklessly, that debt would then be struck off.

The Tribunal also dealt with reckless lending, but on a different scale. As the law stood now, it could attend to the reckless lending allegations only when they were brought forward by the Regulator. If the NCR said that the credit provider had acted recklessly, and it was a prohibited conduct, it would be the prohibited conducted which would be attended to by the Tribunal. However, if the credit provider was found guilty of such a conduct, the debt would not be struck off but the credit provider would be fined. The only thing that had not been catered for fully by the Tribunal was the insolvency component of the Bill, but reckless lending was catered for.

Ms Motshegare said that instead of taking matters to the court, debt counsellors could refer those matters to the NCR, because taking the court route had cost implications. The NCR would then refer the matter to the Tribunal, with no costs attached to the process.

Discussion

The Chairperson referred to the flow chart, and asked what the procedure would be if the credit provider objected to 80% of the applications. Would these applications remain inside the temporary order area? What would happen, and how long it would take to resolve it?

Mr Mbuyane asked about the turnaround times for the NCR and NCT to address each application, and how long the entire process would take as depicted on the flow chart from the initial stage of the Dti to the NCT to provide assistance for credit intervention.

Adv Alberts asked whether the NCR had the capacity to deal with reckless lending applications, because there had been some disturbing stories coming from the Tribunal and the magistrates' courts alleging that the Tribunal rubber stamped applications without applying due process and accepting what the debt counsellors say without consideration the consumers' version. If those powers were to be taken to the NCR, what would the scope of the NCT function be in ensuring that there was truly reckless lending taking place? It needed to be labelled as such, with the consequences that went with it.

Mr Macpherson asked for clarity on the NCR's credit provider negotiation process, and what it meant. He also wanted to know what the negotiation process entailed, as well as the framework to be applied for that process. When the NCR agreed with the credit provider, did it refer the application back to the consumer or was it sent to the Tribunal, even if the NCR felt the application was without merit after receiving information from the credit provider?

Ms Motshegare responded that the process would mostly be on paper, even in instances where the credit provider opposed the application. The NCR would still go ahead and refer the application to the NCT, because the credit provider would still have the opportunity to present its case at the Tribunal. The NCR would make its own recommendations for the Tribunal to make an order, particularly in cases where the NCR had instructed the credit provider reduce the monthly payments of the consumer, but had refused to do so.

On the NCR's capacity to deal with reckless lending matters, the Regulator proposed that this was tweaked in the Bill to ensure that it was capacitated. With regards to the turn-around time to assess applications, the NCR was looking at about an hour to assess one application, but this was a rough estimation.

Professor Maseko said that a temporary order would be issued after receiving the application from the NCR, and it had been considered and was complete. The Tribunal would immediately stamp it to go out to the parties (credit providers), for them to come back and defend on a set date (e.g. 30 days), and consider whether the credit provider would like to contest the order in the Tribunal. The temporary order was basically a waiting period to object to why the order should not be permanent. When the set date approached and nothing had been furnished by the credit provider, the order would proceed to the permanent stage. However, the credit provider could apply for an extension or postponement.

The Tribunal was still trying to interact with the Bill as it was being crafted, and at the moment there was nothing being defended by the Tribunal. It would just adjust to whatever was suggested in the Bill. With regard to the Tribunal rubber stamping applications, this was not true, but it may be the case with consent orders that had already been negotiated by the debt counsellors and credit providers. The parties could even implement a consent order without the Tribunal's stamp, but the Tribunal was only requested to make it an official order to prevent an event where one of the parties fell short on honouring their obligations. Even with consent orders, the Tribunal still followed the due processes to check whether the parties involved were legitimate.

It could be true that magistrates may not understand the process, but that might have improved by now. The Tribunal interacts with the South African Judiciary Education Institute to help it to train judges and magistrates in the relevant legislation regarding the credit market.

Ms Masotja appealed for the Committee to look at the powers of the NCR to ensure that it was capacitated. In addition, on the time lines of applications, these could still be strengthened to improve processes.

The meeting was adjourned.