

Access to Justice and the ECB

A Study of ECB Supervised and other Mortgage Possession Cases in Ireland



NUI Galway
OÉ Gaillimh



Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland

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Executive Summary

Access to justice in Ireland is underpinned by constitutional, national, European and international law. It is particularly important for those who face losing their homes. There are now in Ireland some 30,000 mortgages in arrears over two years. Central Bank of Ireland research shows a high representation of single parent (women) borrowers with three or more children, with most reliant on state supports. There has been a significant increase in possession cases before Irish courts. Many debtors cannot afford legal representation – some try to represent themselves – and County Registrars and Circuit Court Judges seek to achieve a resolution, where possible. This study examined 99 Court Lists of almost 2,400 mortgage possession cases in December 2017 and January 2018. In some 70% of cases, home loan debtors had no recorded legal representation. For ECB directly supervised lenders, the figure was 64% without any recorded legal representation. A small number (7%) represented themselves.

There is a significant EU dimension as ECB directly supervised entities in Ireland are seeking possession of these homes. EU institutions such as the ECB must operate and respect EU law, including the EU Charter of Fundamental Rights, and the State must ensure that EU law is systematically applied in Ireland. There is no evidence that the ECB is respecting the Charter or other EU law protections for debtors in this micro-prudential supervision role in Ireland. There are also important human rights issues, as well as issues of access to justice. These include non-compliance with Irish legislation on the human rights public sector duty by the Central Bank of Ireland, the Courts Service and other public bodies, including state-owned financial institutions. This raises questions as to whether there is widespread and systematic non-application of EU law in Ireland, particularly by the ECB.

Achoimre Feidhmiúcháin

Tá an dlí bunreachtúil, náisiúnta, Eorpach agus idirnáisiúnta mar bhonn faoi cheartas in Éirinn. Tá tábhacht ar leith ag baint leis dóibh siúd atá i mbaol a dtithe a chailliúint. Faoi láthair tá tuairim is 30,000 morgáiste i riaráiste níos mó ná dhá bhliain. Léiríonn taighde Bhanc Ceannais na hÉireann gur tuismitheoirí aonair (mná) le triúr gasúr nó níos mó is mó a bhfuil iasachtaí acu, agus a bhformhór acu ag brath ar thacaíochtaí stáit. Tá ardú ar líon na gcásanna athshealbhaithe a thagann os comhair chúirteanna na hÉireann. Níl mórán féichiúnaithe in acmhainn íoc as ionadaíocht dlí – déanann cuid acu iarracht ionadaíocht a dhéanamh orthu féin – agus déanann Cláraitheoirí Contae agus Breithiúna de chuid na Cúirte Cuarda iarracht réiteach a aimsiú, nuair is féidir. Sa staidéar seo rinneadh scrúdú ar 99 Liosta Cúirte as beagnach 2,400 cás athshealbhaithe morgáiste i mí na Nollag 2017 agus i mí Eanáir 2018. I 70% de na cásanna, ní raibh ionadaíocht dlí ag féichiúnaithe iasachta baile. I gcás iasachtóirí atá faoi stiúir BCE go díreach, ní raibh ionadaíocht dlí ag 64%. Rinne líon beag acu (7%) ionadaíocht orthu féin.

Tá baint ar leith ag AE leis seo de bhrí go bhfuil aonáin in Éirinn atá faoi stiúir dhíreach BCE ag lorg seilbhe ar na tithe seo. Caithfidh institiúidí AE leithéidí BCE meas a léiriú do dhlí AE agus don Chairt um Chearta Bunúsacha AE agus iad a chur i ngníomh, agus caithfidh an Stát a chinntiú go gcuirtear dlí AE i bhfeidhm go córasach in Éirinn. Níl aon fhianaise ann go bhfuil BCE ag tabhairt aird ar an gCairt ná ar chosaintí dlí eile de chuid AE d'fhéichiúnaithe sa ról maoirseachta micreastuamachta seo in Éirinn. Baineann ceisteanna tábhachtacha i leith chearta an duine le hábhar, mar aon le ceisteanna i dtaobh rochtain ar cheartas. Áirítear ina measc seo neamhchomhlíonadh le reachtaíocht na hÉireann maidir le dualgas na hearnála poiblí i leith chearta an duine ag Banc Ceannais na hÉireann, an tSeirbhís Chúirteanna agus comhlachtaí poiblí eile, institiúidí airgeadais faoi úinéireacht an Stáit san áireamh. Ardaíonn sé seo ceisteanna an bhfuil neamhaird déanta de dhlí AE in Éirinn go forleathan agus go córasach, go háirithe ag BCE.

1 Introduction

Access to justice is one of the most basic rights enjoyed in civilised societies. It is underpinned in Ireland by international, European, constitutional and national law. Access to justice is particularly important in situations where people are at risk of losing their homes.

The banking crash generated an unprecedented increase in the caseload of Irish courts, as property values dropped and mortgages became unsustainable. Some commentators have described this as a ‘tsunami’ of home possession cases.¹ This placed unprecedented pressure on Irish courts, described by one High Court judge as already overburdened. Home loan debtors are pitched against the legal resources of major corporate lenders, often in what appears like a David versus Goliath encounter. As Irish courts address these increased caseloads, access to justice for home loan debtors has never been more important.

Loss of home can amount to a violation of human rights. Indeed, victims of home loss experience a range of reactions, such as feelings of painful loss, a continued longing, a depressive tone, frequent symptoms of psychological, social or somatic distress, a sense of helplessness, and expressions of direct and indirect anger, as well as having to engage in the active work required in adapting to the altered situation of losing home.² One study showed that those evicted were approximately four times more likely to commit suicide than those who had not been exposed to this experience.³

There are particularly negative consequences for children in the loss of home and any experience of homelessness.⁴ Research shows that even two years after their eviction from home mothers still experienced significantly higher rates of material hardship and depression than peers.⁵ Foundation Abbé Pierre and FEANTSA have described eviction from home as:

¹ In its report (2016) on the stocktake of national practices and legal frameworks related to non-performing loans (NPLs) the European Central Bank (ECB) commented on the judicial system in Ireland and acknowledged ‘The high volume of cases and the timelines associated with repossession proceedings for residential property security represents an important challenge for private debt resolution; this primarily relates to PDHs as BTL mortgage contracts generally allow for the appointment of receivers’ (p. 82). In the second stocktake report (2017) the ECB states: ‘The survey continues to show that the vast majority of jurisdictions with high NPL levels consider the inefficiencies of the judicial system to be a notable challenge for NPL resolution, mainly owing to the excessive length of proceedings due to the clogging-up of the courts. The inexistence of specialised judges dealing exclusively with insolvency proceedings is also a reason for judicial inefficiencies’ (p 27). The ECB (2016) report cited shows that blanket bans or moratoria on sales/auctions/foreclosures of distressed home loans were legally in place in Greece, Italy, Portugal and Spain. See Appendix 2 below.

² See Fox-O’ Mahony, L (2007) *Conceptualising Home; Theories, Laws and Policies* (Oxford, Hart Publishing), 110.

³ Rojas, Y and Stenberg, S, ‘Evictions and suicide: a follow-up study of almost 22,000 Swedish households in the wake of the global financial crisis’, *J Epidemiol Community Health* 2016, 70: 409–413, <http://jech.bmj.com/content/70/4/409>

⁴ Fox-O’ Mahony (2007), 440–441.

⁵ Desmond, M and Kimbro, RT (2015) ‘Eviction’s Fallout: Housing, Hardship, and Health’, *Social Forces*, 94(1): 295–324. Compared to matched mothers who were not evicted, mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress.

... one of the worst forms of violence that can afflict someone. It is not one of life's ups and downs; it is a mark of infamy inflicted by society through institutions such as the police force and the legal system. Eviction is not only a punishment, it is a collective abandonment of other people; prioritising one individual's right to own property over another individual's most basic needs ... but also psychologically in that the outside world invades the private sphere. Eviction is a humiliating and traumatising experience, which risks pushing the victim down a slippery slope towards destitution and poor self-esteem. It constitutes a violent rupture of one's home life that directly feeds into the problem of homelessness.⁶

The Irish tracker mortgage scandal reveals that many people experienced wrongful, court-approved loss of home. This report demonstrates that in the absence of legal representation among 70% of mortgage arrears cases, it is likely that similar wrongful evictions of people from their homes will take place, with all the consequences for the households involved.

In his introductory statement to the Joint Committee on Finance, Public Expenditure and Reform and An Taoiseach on 18 January 2018, the Governor of the Central Bank of Ireland, Professor Philip Lane, stated:

A mortgage is the most significant financial commitment for most people. They have a right to expect their lenders to treat them fairly and honour contractual commitments. The Central Bank's role is to ensure that the best interests of consumers are protected in their dealings with financial firms. That is why, after pursuing tracker issues with a number of individual lenders through extensive supervisory and enforcement work prior to 2015, the Central Bank launched the industry-wide Tracker Mortgage Examination ... I acknowledge that this work has taken time to complete and I am conscious of the devastating impact that lenders' failures have had on customers, up to and including the loss of their homes and investment properties. I acknowledge also that no amount of money will ever fully compensate a person or family for the trauma involved in losing their home.⁷

One insightful and informed journalist has recently pointed to emerging problems in the ECB supervision of lenders in Ireland:

That the major three mortgage banks ... could contemplate selling off mortgage loan books to vulture funds, in response to growing impatience by the ECB with Irish and Italian banks, is nothing less than a scandal ... The Central Bank needs to learn the lessons from another scandal – that of the tracker mortgage scandal. Failing to get out ahead meant that banks were less than forthcoming about the numbers of customers that had been overcharged for their home loans over several years. In the

⁶ The Foundation Abbe Pierre – FEANTSA (2017) *Second Overview of Housing Exclusion in Europe*, chapter 3, 'Evictions in Europe: Useless, Expensive and Preventable', 82.

⁷ <https://www.centralbank.ie/news/article/introductory-statement-by-philip-r.-lane-at-the-joint-committee-on-finance-public-expenditure-and-reform-and-taoiseach>

scandal, people lost their homes ... The mortgage arrears scandal is deeper still ...⁸

There are some 30,000 mortgage accounts in arrears over two years, and Central Bank research shows that those in long-term mortgage arrears are more likely to be single parent (women) borrowers with three or more children; have lower net incomes (most rely on state supports); have higher mortgage debt service ratios (monthly repayment over monthly income); and have experienced shocks to the debt service ratio since taking out the mortgage.

Department of Finance/Central Bank of Ireland research shows that in 2015, some 40% of mortgage-related court proceedings for mortgage arrears resulted in an order for possession.⁹ In cases where the loans were held by non-bank entities some 64% resulted in an order for possession, and where loans were held by unregulated entities some 70% resulted in an order for possession. However, borrowers are actually more likely to voluntarily surrender or abandon their homes before the conclusion of court proceedings than be forcibly repossessed. Of the dwellings repossessed by lenders between 2009 and 2016, some 66% were repossessed after voluntary surrender or abandonment.¹⁰

In relation to loss of home arising from home loan mortgage arrears in Ireland, the critical decision makers are the courts – mainly Circuit Court Judges and County Registrars. The State and the public have entrusted to these the specialised and complex role of examining and balancing the interests of indebted households with those of corporate lenders – at that crucial time – and the granting or execution of possession orders on homes.

Since 2014, the main euro-area banks have been supervised directly from the ECB in Frankfurt in relation to macro- and micro-prudential rules and capital requirements under the Single Supervisory Mechanism (SSM).¹¹ The ECB has undertaken to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way. ECB directly supervised entities are engaged in the majority of home possession cases in Irish courts.

In this complex legal arena, the rights of debtors as citizens, and consumers, cannot be properly protected without legal assistance or representation. Human rights protection requires that those at risk of losing their home have access to justice, and this means equality of arms in a court, and an opportunity for their consumer and human rights to be considered.

It is important therefore to know whether there is equality of arms in these cases, and whether distressed home loan mortgagors are, in fact, legally represented, so that the systemic application of EU consumer and human rights protections in Irish courts can be gauged. The application of a proportionality assessment in relation to any orders made or

⁸ See Quinn, E, *Irish Examiner*, 2 January 2018.

⁹ Department of Finance/Central Bank 2016, 40.

¹⁰ Department of Finance/Central Bank 2016, 33.

¹¹ Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions – The SSM Regulation, OJ L287, 29 October 2013, 63–89. The SSM means the system of financial supervision composed of the ECB and national competent authorities (Central Bank of Ireland) of participating Member States as described in Article 6 of the Regulation.

executed involving home loss are particularly important in this context.¹² The protection of the right to respect for home and family life, and particularly the rights of children, cannot be ignored in the judicial process.

This study examined a sample of 99 Circuit Court, County Registrar and Callover Lists published by the Courts Service of Ireland in December 2017 and January 2018. The data on some 2,396 cases examined shows the home loan debtor had no recorded legal representation in 70% of cases. In 7% of these cases the home loan debtor represented themselves, having no recorded legal representation. In relation to ECB directly supervised entities, some 64% of home loan debtors at risk of repossession or home loss had no recorded legal representation in the proceedings.

This raises important systemic questions in relation to access to justice in Irish courts in mortgage repossession/home loss cases. It also raises important questions as to whether the ECB, as an EU institution directly supervising the lenders engaged in this process, is fully respecting EU consumer and human rights law, and especially the EU Charter of Fundamental Rights. It may be the case that a systemic non-application of relevant EU consumer and human rights law is taking place in Ireland.

It is also a bitter irony that home loan debtors usually end up paying the costs of the lenders' legal actions, both ECB directly supervised and other lenders, although the debtors themselves cannot afford such representation. Such unfair terms are common within Irish mortgages, yet these clauses are rarely examined for compliance with EU law in the Irish courts. Indeed, somewhat semi-feudal approaches to banking and the legal system can, in some cases, present a court environment more akin to a criminal trial than a civil law dispute in a mortgage consumer case. The experiences of unrepresented distressed debtors in the courts has been recounted by legal writers:

When cases hit court, this inequality of resources is so blatant that it unintentionally serves to infantilise the debtors and gives the proceedings a bizarre classroom quality.¹³

The Review Group on the Administration of Civil Justice was established in 2017 to make recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system and ensuring better outcomes for court users.¹⁴

¹² The Keeping People in their Homes Bill (2017) proposed a specific statutory obligation on Irish courts to carry out a comprehensive proportionality assessment in cases of mortgage-related possessions, particularly respecting the rights of children, older people and persons with disabilities, in line with European law.

¹³ See Francesca Comyn, *Sunday Business Post*, 9 July 2017.

¹⁴ See <http://www.civiljusticereview.ie/> The aim of the Review is to examine the current administration of civil justice in the State with a view to improving access to justice and other matters, including the identification of steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid, and wards of court.

2 Access to Justice in Ireland

Access to justice is a core fundamental human right and a central concept in the broader field of justice. Access to justice as a fundamental right is recognised in a range of international human rights instruments, including Article 6 of the European Convention on Human Rights,¹⁵ Article 47 of the EU Charter of Fundamental Rights of the European Union, and Article 14(1) of the International Covenant on Civil and Political Rights.¹⁶

In Ireland in 2017, the Chief Justice Mr Frank Clarke stated in relation to access to justice in Irish courts:

But there is little point in having a good court system, likely to produce fair results in accordance with law, if a great many people find it difficult or even impossible to access that system for practical reasons. A high priority must, therefore in my view, be accorded to questions relating to practical access to justice. I emphasise the practical because there are few formal legal barriers to access to justice in the Irish legal system. But it has increasingly become the case that many types of litigation are moving beyond the resources of all but a few.¹⁷

In the recession, the Free Legal Advice Centres (FLAC) highlighted the inadequacy of legal aid for those before the courts.¹⁸ FLAC has pointed out that home loan borrowers in mortgage arrears have found it very difficult to access legal supports. Yet Article 40.5 of *Bunrecht na hÉireann* states: 'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.' In *Irish Life and Permanent PLC v Duff*¹⁹ Hogan J stated:

[O]ne might, of course, say that any homeowner is free to come to an agreement that he or she will allow a third party to take possession in defined circumstances. But this would be to allow the triumph of ancient legal fictions over the requirements of justice in a modern society ...²⁰

It is, however, to say that those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be assured outside the judicial process or, at least, something akin to the judicial process.²¹

¹⁵ *Airey v Ireland* No 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981).

¹⁶ European Union Agency for Fundamental Rights (2016) *Handbook on European law relating to access to justice*, available at <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice> See also <http://fra.europa.eu/en/theme/access-justice>.

¹⁷ Statement of the Chief Justice for the New Legal Year 2017, 3 October 2017, <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/B137A31686073CA5802581A800536B5E?openDocument>

¹⁸ See FLAC (2016) *Accessing Justice in Hard Times*, available at

https://www.flac.ie/download/pdf/key_facts_accessing_justice_in_hard_times_final.pdf?issuual=ignore

¹⁹ [2013] IEHC 43, paras 42–50. See also *Fagan v ACC Loan Management* [2016] IEHC 233.

²⁰ [2013] IEHC 43, para 42.

²¹ [2013] IEHC 43, para 50.

However, legal aid is not normally available for ‘property-related’ disputes. Section 28 of the Civil Legal Aid Act 1995 precludes legal aid from being granted in proceedings which are ‘disputes concerning rights and interests in or over land’, save if any of the exceptions in s 28(9)(c) apply, whereby it ‘may’ be granted. These exceptions include family law-type disputes around the household’s main residence. However, legal advice may be provided, and occasionally a mortgage repossession may be regarded as involving contractual or debt enforcement issues (and limited legal aid may be granted). A merits test and a means test must be satisfied for eligibility, and no class or representative actions are supported in Irish courts in this area.

The *Abhaile* scheme, operated by the Money Advice and Budgeting Service (MABS), offers vouchers to borrowers at risk of home loss for free legal advice from a solicitor or a consultation with a Personal Insolvency Practitioner (PIP). The objective of this government-backed service is to ensure that a person in serious mortgage arrears can access free, independent, expert financial and legal advice and support. Priority is given to finding solutions which will allow the person to remain in their home, wherever that is a sustainable option.²² However, this does not cover legal representation before a court, but facilitates a short consultation with a solicitor for the purposes of legal advice.²³

Access to justice for all is central to the rule of law. Those who cannot effectively access the courts system to have their human and consumer rights properly considered are denied access to justice. The limited availability of civil legal aid and the cost of privately paid legal services are leading to situations where a significant number of debtors have no legal representation, or are forced to represent themselves in court. The result can be a denial of justice for some, and compromised access to justice for others. In many cases, EU and Irish citizens, as defendants to civil proceedings, have no option but to attempt to represent themselves, or allow judgment to be entered in default of a response to the claimant’s case. In some cases, those with genuine and good claims face no option but to abandon their rights, leaving problems unresolved and potentially worsening, unless they are prepared to attempt to represent themselves in court.

²² Department of Justice and Equality, Scheme of Aid and Advice on Home Mortgage Arrears, available at http://www.justice.ie/en/JELR/Pages/Scheme_of_Aid_and_Advice_on_Home_Mortgage_Arrears

²³ Civil Legal Aid Regulations 2016 (SI No 272/2016). FLAC points out that while the scheme allows for legal representation for a court review of a Personal Insolvency Arrangement, a similar level of assistance is not provided to borrowers facing Circuit Court possession proceedings against their home due to home loan mortgage arrears. See *FLAC Submission on Department of Justice Statement of Strategy 2016–2019* (p 8) https://www.flac.ie/download/pdf/final_flac_submission_dept_of_justice_strategy_statement_.pdf

3 Mortgage Arrears and Repossessions Overview

Although Ireland's domestic banks reduced their non-performing loans (NPL) from 27% in 2013 to 14% in 2017 (above the EU average of 5%), the resolution of this issue is problematic. There are estimated to be more than 20,000 possession cases before the courts.²⁴

The Central Bank of Ireland Statistical Release shows that as at September 2017, there were 731,119 mortgage accounts related to 580,000 principal dwellings (PDH) with a value of €98.6 bn.²⁵ Some 72,489 (10%) mortgage accounts were in arrears, of which 50,688 (7%) were in arrears over 90 days. However, accounts in arrears over 720 days constituted 44% of all accounts in arrears and 90% of outstanding balances. In the quarter to end September 2017, legal proceedings for possession were issued in 1,072 cases, and some 597 cases were concluded – 403 cases involved a grant of sale or possession order.²⁶

Central Bank of Ireland Residential Mortgage Arrears and Repossession Statistics show that in the period from June 2009 to end September 2017 some 8,195 principal dwelling homes were repossessed by mortgage lenders in Ireland.²⁷ Of these some 2,722 were repossessed on foot of a court order, while 5,473 were repossessed as a result of surrender or abandonment.

There is no reliable research on the personal circumstances of or the personal outcomes for those who have lost their homes in these circumstances in Ireland.

Clearly, the risk of mortgage repossession or loss of home is much greater for those in arrears for over one or two years. A 2015 study of 21,000 households, based on Central Bank of Ireland loan-level data and borrowers' Standard Financial Statements, showed that those with long-term mortgage arrears (LTMA) (over one year) were more likely to:

- have experienced an unemployment shock since taking out the mortgage;
- have experienced a divorce since taking out the mortgage;
- be single borrowers with three or more children;
- have lower net incomes;
- have higher mortgage debt service ratios (monthly repayment over monthly income);
- have experienced shocks to the debt service ratio since taking out the mortgage;
- and

²⁴ There is a significant discrepancy between Central Bank data and Courts Service of Ireland data in relation to numbers of actions commenced and numbers of possession orders granted.

²⁵ Central Bank of Ireland, Statistical Release December 2017: <https://www.centralbank.ie/news-media/press-releases/mortgage-arrears-and-repossessions-statistics-q4-2016>. According to the Central Bank of Ireland, 'mortgage account' means an account which records loans to individuals for house or apartment purchase, renovation, improvement or own construction of housing fully or completely secured by a mortgage on the residential property which is or will be occupied by the borrower as his/her principal private residence. 'Top up' of existing mortgages and re-mortgages should also be recorded in this category. Mortgages secured on properties located in the State only should be included. This means that there may be more than one account per property, for example, if a single property relates to a mortgage account and a separate top-up account.

²⁶ The Central Bank reports are based on information provided by the mortgage lenders themselves, and do not report arrears levels or repossession policies of each lender, which vary quite considerably between ECB-supervised entities in Ireland.

²⁷ See <https://www.centralbank.ie/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears>

- have higher ratio of non-mortgage debt to total debt.²⁸

This Central Bank research report shows that:

Those in long-term arrears who are most at risk of repossession are significantly more likely to have the following characteristics: lower income, higher mortgage burdens relative to income, larger mortgage affordability shocks, unemployment shocks and divorce since origination. They are also more likely to have accumulated large stocks of non-mortgage debts, such as Buy-to-Let mortgages, credit card, auto loans and other consumer debt. We also show that LTMA borrowers face higher interest rates, and that LTMA are more prevalent among more vulnerable family types, such as single borrowers with multiple children.²⁹

A study by South Mayo Money Advice and Budgeting Service of 50 households in mortgage arrears published in 2016³⁰ showed that the average age of distressed mortgage clients was 50 years. Family sizes were also larger than average, and household income was relatively low, with poverty rates and unemployment rates relatively high. Some form of assistance, scheme, pension or welfare payment was the main source of household income for most, with only very few having any 'realisable asset' at all to fall back on. Significantly, most encountered payment difficulties in the early years of the loan, 'often where brokers, sub-prime lenders and subsequently wound-up institutions were involved'. Most borrowers in the study had been offered loans based on 'precarious' income, related to construction or services industry work. The research also showed that although there is a willingness by lenders to restructure, this was only when lenders expected to recoup the full amount of capital and interest, and in no case had a write-down been proposed.

In a follow-up study 18 months later, some arrears had been settled and repayments commenced. However, in addition to the households that had lost their homes in the earlier study, loss of family home was identified as imminent or a likely outcome in some 20% of cases in the foreseeable future.³¹

This study provided valuable data on the outcomes of repossession hearings by the County Registrar in Castlebar Circuit Court between January and July 2017. As Figure 1 below shows, of some 504 cases, some 67% were adjourned, some 7% were struck out, and a

²⁸ Kelly, R and McCann, F (2015): 'Some defaults are deeper than others: Understanding long-term mortgage arrears,' Research Technical Papers 16/RT/04, Central Bank of Ireland, available at <http://www.centralbank.ie/publications/Documents/05RT15.pdf>

²⁹ Kelly, R and McCann, F (2015): 'Households in long-term mortgage arrears: lessons from economic research', Central Bank of Ireland, Economic Letter Series, Vol 2015, No 11, 2, available at <http://www.centralbank.ie/publications/Documents/Economic%20Letter%20-%20Vol%202015,%20No.%2011.pdf>

³⁰ Stamp, S and Joyce, P (2016) *Analysis of Mortgage Arrears Among South Mayo MABS' Clients*, South Mayo MABS, available at https://www.mabs.ie/downloads/news_press/South_Mayo_MABS_Mortgage_Research_August2016.pdf

³¹ Stamp, S and Joyce, P (2017) *Analysis of Mortgage Arrears Among South Mayo MABS' Clients, April 2016–September 2017*, South Mayo MABS, http://www.citizensinformationboard.ie/en/news/2017/news20171212_1.html

possession order was granted in 3.3% of cases.³² Assistance from the *Abhaile* scheme, Personal Insolvency Practitioner or MABS was only available in 9% of cases.³³

Figure 1. Outcomes of Repossession Hearings by the County Registrar in Castlebar – January to July 2017

Lender	Order granted	Struck out	Transfer to Judges list	Technical changes ²	Abhaile scheme/ PIP/PC/ MABS	Adjourn	Total
Ulster	2	7	0	15	8	87	119
PTSB	6	8	3	0	5	44	66
EBS	2	6	1	6	11	38	64
BOI	2	2	3	0	10	36	53
Start	0	3	0	7	2	32	44
AIB	0	4	3	0	1	35	43
Mars	0	3	0	8	1	24	36
Pepper	1	1	2	2	4	16	26
KBC	4	2	2	0	2	12	22
S-Board	0	0	2	5	1	10	18
Shoreline	0	1	4	2	0	5	12
Senior	0	0	1	0	0	0	1
TOTAL	17	37	21	45	45 ³	339	504

Source: South Mayo MABS

The MABS report also shows that mainstream or ECB directly supervised lenders were instigating the majority of possession cases and were involved in the majority of cases (94%) where a possession order was granted. The report suggests that state policy interventions are not working for large numbers of households and that this was directly related to socio-economic and institutional factors.

Recent Central Bank of Ireland data shows that of the 31,624 mortgages in arrears over two years, 9,000 were held by non-bank entities, with balance and arrears outstanding of some €2.5 bn arrears on €7 bn outstanding loans.³⁴ Many of the home loan mortgage possession cases are taken by investment funds often described as ‘vulture funds’. These funds, often registered as Special Purpose Vehicles (SPV), acquired loan portfolios from Irish lenders and NAMA at a significant discount.³⁵ The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 requires the servicer (or in the absence of a servicer, the owner) of such loans to become authorised as a ‘credit servicing firm’. Credit servicing firms are subject to

³² The figures were recorded by the dedicated Mortgage Arrears Adviser at South Mayo MABS, Vivienne Molloy, at each sitting over that time.

³³ These were mainly cases where a PIP was involved or where the outcome was *Abhaile*-related.

³⁴ According to Central Bank of Ireland, non-bank entities comprise regulated retail credit firms and unregulated loan owners. Unregulated loan owners include owners of mortgages not regulated by the Central Bank of Ireland that have purchased mortgage loans secured on Irish residential properties.

³⁵ One report states that Mars Capital’s 2015 accounts show they paid 42 cent in the euro for a portfolio of loans (formerly Irish Nationwide mortgages) acquired from IBRC. See Stephen Donnelly TD <http://stephendonnely.ie/how-did-the-government-shaft-mortgage-holders-and-taxpayers-in-one-fell-swoop/>

supervision and enforcement by the Central Bank of Ireland. The Act permits customers of credit servicing firms (ie the underlying borrowers) to complain to the Irish Financial Services Ombudsman about the conduct of the firm, and provides such customers with protection under the Central Bank's Code of Conduct on Mortgage Arrears, the Code of Conduct for Business Lending to Small and Medium Enterprises and the Consumer Protection Code. However, these funds must also comply with Irish and EU law in relation to possession proceedings, although Irish courts do not generally recognise that acquisition of these distressed mortgages by such funds creates any new consideration in the enforcement of security.³⁶ However, in *Re: Hayes, a debtor*,³⁷ in dealing with a possession application and associated insolvency arrangement, Baker J distinguished investment funds from commercial lenders, in respect of an unfair prejudice argument that was largely based on the fixing of an interest rate.

³⁶ *Launceston Property Finance Ltd v Burke* [2017] IESC 62.

³⁷ [2017] IEHC 657.

4 The Courts Process

In Ireland, the Circuit Court (and in some cases the High Court) is the appropriate court for housing loan mortgage cases where lenders seek repossession orders as a prelude to sale in cases of arrears.³⁸ Proceedings for possession or sale on foot of a mortgage require a non-exhaustive list of proofs, including sworn statements by lenders verifying factual matters, such as the details of the security and the arrears, and that the lender has complied with any code of conduct of the Central Bank.³⁹

The revised Circuit Court Rules of 2016⁴⁰ state that the failure of a defendant in a home loan mortgage arrears case to enter an Appearance following the Civil Bill issued by the lenders can result in a summary judgment involving loss of home without any court consideration of the circumstances of the debtor, or their household members' situation.⁴¹ It is questionable whether this procedure undermines the principle of effectiveness of the Unfair Contract Terms Directive, as the operation of the rules could mean that a debtor loses their rights to a defence, and the opportunity to have the mortgage contract examined by a court for unfair terms.⁴² A series of Practice Directions issued by the Circuit Court enable variations for adjournments, cross-examination and other procedural matters not immediately apparent from a perusal of the Civil Bill.

The Civil Bill is then usually published in a list with other cases by the Courts Service, publicly and online, and with a record number, the names of plaintiff(s) and defendant(s) and whether they are represented legally or representing themselves (when they, personally, file an Appearance). Where no Appearance has been filed, the list records either nothing, or may be marked 'unrepresented'. Invariably, the mortgage lender/plaintiff is represented by a solicitor, and mostly, at this level, by a barrister also. This initial list is dealt with by the County Registrar, the Courts Service official appointed to run the Circuit Court office. His/her role and function is determined by the Circuit Court Rules. This essentially involves the administration of a judicial function at a basic level, but, where there is a defence filed, or generally speaking where controversy arises (or other judicial intervention in the opinion of the Registrar is required in accordance with the Circuit Court Rules and directions), the matter is referred into the Judge's List.

³⁸ See Wylie, JCW (2013) *Irish Land Law* (5th edn, Dublin, Bloomsbury); Land and Conveyancing Law Reforms Acts 2009–2013; SI No 264 of 2009: Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009; SI No 358 of 2012: Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2012; SI No 346 of 2015: Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2015; SI No 171 of 2016: Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016.

³⁹ In *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy* [2015] IESC 64, the Supreme Court held that the Code of Conduct on Mortgage Arrears (CCMA) did not create any new legal rights for mortgagors. An affidavit by the lending institution to the effect that proceedings were commenced outside the moratorium period is sufficient to establish lender compliance with CCMA. This case was decided before the transposition of the EU Mortgage Credit Directive in 2016.

⁴⁰ SI No 171 of 2016: Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016.

⁴¹ SI No 171 of 2016: Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016, p 5: 'PLEASE NOTE that unless you file an Appearance with the County Registrar and file the replying affidavit as set out above, you will be held to have admitted the said claim, and the Plaintiff may proceed with the claim against you and judgment may be given against you in your absence without further notice.'

⁴² Article 7 of the Directive states that EU Member States have a duty to ensure that adequate and effective means exist to prevent the continued use of unfair terms. See Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*, para 50.

The Circuit Court Judge’s List is also published online by the Courts Service, and consists of a daily list of cases sent forward by the County Registrar. Possession cases are sometimes heard alongside other civil matters. A Circuit Court judge can proceed to hear a case or decide to adjourn matters. In the nature of possession proceedings, the trauma associated with possession orders is distressing, and the courts are anxious to be seen to facilitate debt resolution by other means, where possible.

Section 2 of the Land and Conveyancing Law Reform Act (LCLRA) 2013 provides that in repossession proceedings involving a principal private residence, irrespective of whether the mortgage was created before or after 1 December 2009, a court may, where it considers appropriate or on application by the borrower, adjourn the proceedings to enable the parties to consider whether a Personal Insolvency Arrangement (PIA) under the Personal Insolvency Act 2012 would be a more appropriate alternative to repossession. The intention behind this provision is to ensure that lenders do not resort to the repossession remedy without fully considering the alternative PIA option. The Insolvency Service of Ireland (ISI) has established *Guidelines on a reasonable standard of living and reasonable living expenses*, which safeguard a minimum standard of living so as to protect debtors while facilitating creditors in recovering all, or at least a portion, of the debts due to them under the insolvency and bankruptcy laws in Ireland.⁴³ The terms of the PIA will provide for the manner in which the secured debt is to be treated, and can include interest-only payments, reductions in the capital sum, capitalisation of arrears or reduction of the interest rate. Where the secured property is a family home, efforts must be made to find alternative arrangements to selling the home. The Personal Insolvency (Amendment) Act 2015 gives Irish courts the ability to overturn a secured creditor’s decision to reject a borrower’s proposal for a PIA under the Personal Insolvency Act 2012.

The case lists used in this research were published online by the Courts Service and are divided into three categories:

- The County Registrar’s List
- The Circuit Civil Court or Judge’s List
- The County Registrar’s Callover List.

This latter list is the County Registrar’s overview list of cases ready to be dealt with at a hearing, according to the paperwork on file. These cases overlap with the Registrars’ or Judges’ Lists since it is for the purpose of compiling those lists that the ‘Callover’ List is required. However, the cases examined in this study did not include duplicates appearing on more than one list.

‘Lay Litigants’ and McKenzie Friends⁴⁴

There are many accounts in the media of ‘lay litigants’ in Circuit Court possession cases, and some references to ‘lay litigants’ being exploited by persons offering misleading advice.⁴⁵ The Courts Service has issued Practice Directions on McKenzie friends for the Circuit

⁴³ See https://www.isi.gov.ie/en/ISI/Pages/RLE_calculated

⁴⁴ The McKenzie friend concept – acceptance by a court of the intervention of a non-legally qualified person who assists a lay litigant and who may take notes and quietly make suggestions and give advice in a court. See *McKenzie v McKenzie* [1970] 3 WLR 472. See also *Start v Kavanagh* [2017] IEHC 433, *KBC v Flynn* [2017] IEHC 79 and *Fox v McDonald* [2017] IECA 189.

⁴⁵ See Sammon, G (2015) ‘Organised Pseudo-legal Commercial Argument Litigation: Challenges for the Administration of Justice in Ireland’, *Dublin University Law Journal* 38(1): 85–102.

Court,⁴⁶ the High Court and the Court of Appeal,⁴⁷ which came into effect on 1 October 2017. In *Bank of Ireland Mortgages v Martin*⁴⁸ Noonan J stated:

The exponential increase in this category of litigant is now at a level where it presents a very serious challenge to the Irish courts system, already overburdened with an ever increasing case load of genuine cases.

However, in the context of the extraordinarily high levels of non-representation among mortgage debtors, and the relatively low number of 'lay litigants' evidenced in this study (7% of cases), it is perhaps appropriate to recognise differences between different types of lay litigant and genuine McKenzie friends.

Of course, the only other common law jurisdiction in the EU has already faced many of these issues arising from the increased court caseloads in civil proceedings and the costs of engaging legal assistance. In 2011, a Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice of England and Wales on *Access to Justice for Litigants in Person* (or self-represented litigants) suggested that the guiding framework of principle should be that:

- Self-represented litigants are users of the civil justice system, and the system exists for its users;
- Judges can be at the heart of addressing what needs to be done, and create solutions rather than dealing with imposed solutions;
- The most important thing for self-represented litigants is access to objective advice that can be trusted, above all, advice about merits, and risks (including costs), but also about process. As a result every effort should be made to increase the availability and accessibility of early advice of this type, including on a paying basis for those litigants who can afford a piece of advice but not to engage lawyers for the whole case;
- Everything must be done to simplify and demystify the law and the system, including its language. This includes court forms, procedures and hearings;
- As far as possible the fullest assistance (from legal aid, from the courts and court staff, from advice agencies and – within obvious limits – from the pro bono sector) should be reserved for those with the most complex personal needs but available from the earliest point possible so that problems do not escalate unnecessarily or begin to cluster;
- While technology and improved written materials are essential, they alone are not sufficient to achieve the support required. People are the most important resource for all self-represented litigants, but especially the most vulnerable.

FLAC is concerned by anecdotal evidence which suggests that there are growing numbers of 'lay litigants' in court proceedings. Often, unrepresented litigants are viewed as impeding

⁴⁶ See

<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/8b0cf6b80f56429c802581a90048dad6?OpenDocument>

⁴⁷ See

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/49D88B362F44CF2780258170005BCEF2?open> document. The Practice Directions state 'Litigants may obtain reasonable assistance from a lay person, sometimes called a McKenzie friend (MF). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation. They have no entitlement to payment for their services.'

⁴⁸ See [2017] IEHC 707.

the timely administration of justice, as they are frequently unaware of procedural rules and require considerable assistance from courts, which can cause delays.⁴⁹ In its submission to the Department of Justice *Statement of Strategy 2016–2019*, FLAC points out that the public sector duty under section 42 of the Irish Human Rights and Equality Commission (IHREC) Act 2014 has particular significance in relation to access to justice.⁵⁰ Section 42 states that a public body (such as the Courts Service of Ireland) shall, in the performance of its functions, have regard to the need to protect the human rights of its members, staff and the persons to whom it provides services. The IHREC *Guide on the Public Sector Duty*, issued under the legislation of 2014, sets out the types of measures which can be taken.⁵¹ A similar obligation is required of the Central Bank of Ireland as a public body, as well as the Insolvency Service of Ireland and other state bodies involved in the home loss/lender repossession process.

⁴⁹ The EU Agency for Fundamental Rights (2016) *Handbook on European law relating to access to justice*, <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice> points out at p 89 that: ‘The right to self-representation in non-criminal proceedings is not absolute. Determining whether the interests of justice require the compulsory appointment of a lawyer falls within the margin of appreciation of domestic authorities. Limitations can be imposed, for example, to prevent abuses to the dignity of the courtroom, to protect vulnerable witnesses from trauma and to prevent suspects or accused persons from persistently obstructing proceedings. Any discretion should be exercised with proportionality and restrictions should be imposed with care.’

⁵⁰ https://www.flac.ie/download/pdf/final_flac_submission_dept_of_justice_strategy_statement_.pdf

⁵¹ <https://www.ihrec.ie/our-work/public-sector-duty/>

5 The Role of the European Central Bank (ECB)

All of the possession/home loss cases examined in this study took place in Irish courts. However, there is an overarching EU dimension. The great majority of home possession cases examined in this study involved ECB directly supervised lenders enforcing the security on the home loan mortgages. Major questions arise as to how the EU consumer rights and human rights of those at risk of losing their homes are being protected in these proceedings. These rights flow from the role and obligations of the ECB as an EU institution in the prudential direct supervision of credit institutions and mortgage lenders in Ireland.⁵²

The Single Supervisory Mechanism (SSM⁵³) conferred specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions in Ireland and other EU Member States.⁵⁴ The SSM Regulation states:

The ECB should carry out its tasks subject to and in compliance with relevant Union law including the whole of primary and secondary Union law, Commission decisions in the area of state aid, competition rules and merger control and the single rulebook applying to all Member States.⁵⁵

European Union credit institutions must comply with a system of guidelines, ECB-specific regulations and manuals of supervisory practices approved at the Supervisory Board.

The link between prudential regulation of Irish ECB directly supervised lenders in relation to non-performing loans and repossession proceedings has been widely made in ECB publications and in Central Bank of Ireland reports.⁵⁶ ECB Banking Supervision specifically

⁵² Article 19 of the SSM Regulation requires that the ECB and the National Competent Authorities act 'independently' while carrying out their supervisory tasks under the SSM Regulation. Recital 75 of the SSM Regulation states: 'In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence.' See keynote address by Yves Mersch, Member of the Executive Board of the ECB, at the *Symposium on Building the Financial System of the 21st Century: An Agenda for Europe and the United States*, Frankfurt am Main, 30 March 2017 at <https://www.ecb.europa.eu/press/key/date/2017/html/sp170330.en.html>. See also Zilioli, C, 'The Independence of the European Central Bank and Its New Banking Supervisory Competences' in D Ritleng (ed) (2016) *The Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press), 125-179.

⁵³ See also Directive 2014/59/EU, establishing a recovery and resolution framework in the European Union.

⁵⁴ Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions – The SSM Regulation, OJ L287, 29 October 2013, 63–89. The SSM means the system of financial supervision composed of the ECB and national competent authorities (Central Bank of Ireland) of participating Member States as described in Article 6 of the Regulation. Article 6(1) SSM Regulation states: 'The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM.' See European Central Bank, *Guide to Banking Supervision* (2014) available at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf?404fd6cb61dbde0095c8722d5aff29cd>

⁵⁵ At Recital 32. The term 'all relevant Union law' is not defined in the SSM Regulation. Article 28 of the SSM Regulation requires the ECB to provide the necessary financial resources for its supervisory tasks and Article 30 empowers the ECB to levy fees on credit institutions to cover its expenditure on supervision.

⁵⁶ Remarkably, the EUCFR is specifically cited on ECB regulatory actions relating to supervised entities, but of course, this should be applicable to all EU legal and natural persons. For instance, data has been collected for financial stability and regulatory purposes since December 2010 by the Central Bank of Ireland – a

addresses the problem of NPLs with individual banks in its supervisory work.⁵⁷ The key issue here is that ECB prudential regulation relates to the disposal of assets, and realisation of the security of mortgages through possession proceedings, and this process must respect the EU Charter of Fundamental Rights.⁵⁸

This is separate to the regulation of consumer protection issues, which is entirely within the ambit of the Central Bank of Ireland, although there is some linkage between consumer issues and prudential regulation.⁵⁹ However, this report focuses primarily on the role of ECB micro-prudential supervision as set out in EU law.⁶⁰

For SSM purposes, credit institutions have been separated into ‘significant’ or ‘less significant’. Significant credit institutions (SCIs) are directly supervised by ECB staff, together with national supervisors (such as the Central Bank of Ireland). The ECB directly supervised significant credit institutions involved in mortgage possession proceedings at the time of this research in Ireland were: Allied Irish Bank (AIB) (and its subsidiaries including EBS dac and Haven); Permanent TSB (which after November 2017 was no longer regarded as a systematically important lender, but is included in this category as it was so regarded by the ECB when the proceedings were undertaken); Bank of Ireland; Ulster Bank (which now includes First Active loans); KBC Bank Ireland (which includes IIB Finance). The list also

constituent part of the ECB, described in detail in McCann, F (2017): ‘Resolving a Non-Performing Loan crisis: The ongoing case of the Irish mortgage market,’ Research Technical Papers 10/RT/17, Central Bank of Ireland. This refers to the five main mortgage lenders in Ireland, who are directly supervised by the ECB, covering roughly 90 per cent of the market (AIB, Bank of Ireland, PTSB, KBC, Ulster Bank).

⁵⁷ See ECB website – *What are non-performing loans (NPLs)?* 12 September 2016, <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/npl.en.html>: ‘Addressing non-performing loans within the European banking system is one of the key priorities of the ECB’s supervisory work. Supervisors monitor the overall level of NPLs across euro area banks. They also check whether individual banks adequately manage the riskiness of their loans and if they have appropriate strategies, governance structures and processes in place. This is part of the common supervisory review and evaluation process (SREP) that is carried out for each bank every year. Furthermore, the ECB regularly carries out coordinated exercises to review the asset quality of the banks it directly supervises.’

⁵⁸ Recital 63 of the SSM Regulation states: ‘When determining whether the right of access to the file by persons concerned should be limited, the ECB should respect the fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial.’ See also Recital 86.

⁵⁹ See ‘Non-Performing Loans: The Irish perspective on a European problem’ – Deputy Governor Ed Sibley of the Central Bank of Ireland and Board Member of SSM (September 2017): ‘At its simplest, depositors need to trust that when they put their money into a bank they have certainty of being able to withdraw that money in the future. Similarly, banks need to trust that when they gather these deposits, and lend at longer maturities, they will either be repaid, or *in extremis* be able to enforce collateral. This requires trust in the legal, judicial or extra-judicial processes ... Authorities, including supervisors, therefore have a critical role in ensuring trust within the system ... This trust is hard-earned and easily lost. By taking the necessary decisions, by doing the right things we will continue to earn the trust of the European public and market participants. And this includes taking firm action in relation to NPLs. But it is not easy. We must consider financial stability issues, and perhaps less obviously for some prudential supervisors – but crucially nonetheless – consumer protection matters. Prudential supervision and consumer protection are inherently interlinked and mutually self-reinforcing. Poor outcomes for consumers are poor outcomes for the banking system.’ <https://www.centralbank.ie/news/article/non-performing-loans-dg-ed-sibley21Sept2017>

⁶⁰ The SSM Regulation sets out the ECB’s duty to, as appropriate, cooperate fully with the national competent authorities, such as the Central Bank of Ireland, in relation to the supervision and regulation of consumer protection issues. However, ‘consumer protection is outside the scope of the ECB’s responsibilities and therefore stays with national supervisory authorities’; see <https://www.bankingsupervision.europa.eu/about/consumerprotection/html/index.en.html>

includes Danske Bank (recorded as being regulated from Finland) and Lloyds Bank (recorded as being directly supervised by the ECB through the Netherlands).⁶¹

Respecting EU Consumer and Human Rights Law

In the ECB-approved mortgage repossession procedure in Irish courts, the ECB and its Irish constituent member the Central Bank of Ireland must respect EU consumer and human rights law in at least four aspects.⁶²

Firstly, the SSM Regulation obliges the ECB to respect the rights and principles of the EU Charter of Fundamental Rights (EUCFR).⁶³

This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, and the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles.⁶⁴

Article 51(1) EUCFR provides that the Charter is binding on the institutions, bodies, agencies and offices of the EU, and these include the European Central Bank and the European Banking Authority.⁶⁵ Article 47 EUCFR relates to the right to effective remedy, fair trial and access to legal aid:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

According to the *Explanations* on the EUCFR:⁶⁶

⁶¹ ECB, List of supervised entities. Cut-off date for changes in group structures: 1 October 2017. Number of significant supervised entities: 119. Part A. List of significant supervised entities. Cut-off date for significance decisions: 5 December 2017.

<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.list.of.supervised.entities.201712.en.pdf>

⁶² Peers, S et al (2014) *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart).

⁶³ The Charter of Fundamental Rights was adopted by EU Member States in the Lisbon Treaty, according to which it has the same value as the Treaties (Article 6 of the Treaty on European Union).

⁶⁴ At Recital 86.

⁶⁵ See EU Regulation No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 [The SSM Regulation].

⁶⁶ *Explanations relating to the Charter of Fundamental Rights* (OJ 2007/C 303/02).

With regard to the third paragraph [of Art 47] it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11).

The CJEU held in *Sánchez Morcillo and Abril García* [2014] that Article 47 of the EUCFR provides a right to an effective judicial remedy, and noted that the loss of the family home 'places the family of the consumer concerned in a particularly vulnerable position'. Article 7 EUCFR states that 'Everyone has the right to respect for his or her private and family life, home and communications.' According to the *Explanations* on the EUCFR this corresponds with Article 8 of the European Convention on Human Rights (ECHR).⁶⁷ Indeed, the Court of Justice of the European Union (CJEU) has applied the rights in Article 7 EUCFR in mortgage consumer law cases. In Case C-34/13, *Monika Kušionová v SMART Capital as*, the CJEU held (at paras 63–65):

The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in *Aziz*, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in *Sánchez Morcillo and Abril García*, EU:C:2014:1388, paragraph 11). In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137). Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13 [Unfair Terms in Consumer Contracts Directive].

Article 24 on the rights of children, Article 25 on the rights of older people and Article 27 on the rights of persons with disabilities must also be respected in the ECB-approved home possession process.

However, there are major questions as to whether EU human rights are being systematically respected in the current mortgage repossession process instigated and advanced by ECB directly supervised lenders in Ireland.

The **second** aspect in which the ECB and the Central Bank of Ireland must respect EU consumer and human rights law in this ECB-approved process involving ECB directly

⁶⁷ Article 8 of the ECHR states: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

supervised lenders is the EU Mortgage Credit Directive (MCD) of 2014.⁶⁸ The Directive states:

In order to facilitate the emergence of a smoothly functioning internal market with a high level of consumer protection in the area of credit agreements relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner, an appropriately harmonised Union legal framework needs to be established in a number of areas, taking into account differences in credit agreements arising in particular from differences in national and regional immovable property markets.⁶⁹

Article 28 of the MCD states:

Arrears and foreclosure

1. Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.
2. Member States may require that, where the creditor is permitted to define and impose charges on the consumer arising from the default, those charges are no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default.
3. Member States may allow creditors to impose additional charges on the consumer in the event of default. In that case Member States shall place a cap on those charges.
4. Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or transfer to the creditor of the security or proceeds from the sale of the security is sufficient to repay the credit.
5. Where the price obtained for the immovable property affects the amount owed by the consumer Member States shall have procedures or measures to enable the best efforts price for the foreclosed immovable property to be obtained. Where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place.

The European Union (Consumer Mortgage Credit Agreements) Regulations 2016, SI No 142 of 2016 was commenced on 21 March 2016 for the purpose of giving effect to Directive 2014/17/EU. Article 29(1) of the Irish statutory instrument states:

A creditor shall exercise reasonable forbearance before possession proceedings are initiated and shall, at a minimum, comply with the

⁶⁸ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

⁶⁹ Directive 2014/17/EU *Preamble* 5.

provisions of any code or similar measure put in place by the Central Bank on the handling of arrears.⁷⁰

In 2015, the European Banking Authority (EBA) published *Guidelines on arrears and foreclosure*,⁷¹ which provide broad European minimum standards on how financial institutions should give effect to the provisions stated in Article 28 MCD, by encouraging creditors to make concessions towards a consumer facing, or about to face, difficulties in meeting his/her financial commitments.⁷² The EBA states that these guidelines are an appropriate tool for achieving supervisory convergence because they are legally binding on the addressees.⁷³

In 2017, the ECB provided guidance on dealing with non-performing loans for Irish and other ECB-supervised lenders.⁷⁴ This proposes a range of measures which banks should consider including: interest-only payments; reduced payments; grace period/payment moratorium; arrears/interest capitalisation; long-term interest rate reduction; extension of maturity/term; additional security; sale by agreement; rescheduled payments; other alterations of contract; new credit facilities; debt consolidation; partial or total debt forgiveness.

Thirdly, the effectiveness of EU consumer law may be systematically undermined by the current court process in Ireland in relation to mortgage proceedings. Directive 93/13 on unfair terms in consumer contracts (Unfair Contract Terms Directive (UCTD))⁷⁵ protects consumers against standard contract terms which were not individually negotiated and which cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Member States are obliged to apply the UCTD and national courts are under a duty to assess of their own motion whether a contractual term is unfair based on the information available to them.⁷⁶ Schedule 3 of the European Communities (UCTD) Regulations 1995 provides that the terms listed in the Annex to the UCTD are classified as unfair terms in consumer contracts in Ireland.⁷⁷ Under Section 1(j) of the Regulations 1995,

⁷⁰ The effect of the Mortgage Credit Directive was not considered in *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy* [2015] IESC as it had not been transposed at that time.

⁷¹ See EBA/GL/2015/12. EBA *Final Report, Guidelines on arrears and foreclosure* <https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-on-arrears-and-foreclosure>

⁷² Section 1.2 of the *Guidelines*: 'Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.'

⁷³ EBA, *Final Report, Guidelines on arrears and foreclosure* – Summary of responses to the consultation and the EBA's analysis, p.17.

⁷⁴ See European Central Bank (2017) *Guidance to banks on non-performing loans*, available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf, 40–45. The *Guidance* makes reference to the Central Bank of Ireland template for Standard Financial Statements.

⁷⁵ Council Directive [93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts.

⁷⁶ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Györfi*.

⁷⁷ European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27. These Regulations were amended on a number of occasions – see European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, SI 2000/307; European Communities (Unfair Terms in

a term will be deemed unfair if it enables ‘the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract’.⁷⁸ Regulation 5 provides that:

(1) In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

(2) Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.⁷⁹

The recent tracker mortgage scandal, where some 33,000 mortgage consumers were overcharged and which resulted in at least 100 households losing their homes, has highlighted the systematic failure of the ECB and the Central Bank of Ireland to effectively promote these consumer protections.⁸⁰ Indeed, the Irish UCTD Regulations provide that an authorised body, which includes the Central Bank of Ireland, can apply to the Circuit or High Court for a declaration that a contractual term in general use is unfair or for an injunction to prevent its use.⁸¹

The UCTD requires a national court of its own motion to examine contracts (including mortgage contracts) for compliance with Directive obligations. Only some Irish courts have accepted this obligation to carry out *ex officio* or ‘own motion’ assessments of mortgage contracts for unfair terms – along the lines of the *Oceano*,⁸² *Aziz* and other cases.⁸³ The case of *AIB v Counihan*⁸⁴ recognised this obligation.

Consumer Contracts) (Amendment) Regulations 2013, SI 2013/160; European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014, SI 2014/336.

⁷⁸ European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27.

⁷⁹ *Ibid.* See also Case C-186/16 *Andriuc and Others* [September 2017].

⁸⁰ *The Irish Times*, 29 September 2017.

⁸¹ See Donnelly, M and White, F (2014) *Consumer Law – Rights and Regulation*, (Dublin, Round Hall), Chapter 5.

⁸² Case C-240/98 to C-244/98 *Oceano Grupo Editorial*; Case C-168/05 *Mostaza Claro*; Case C-243/08 *Pannon GSM*. See also Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*. See also Case C-377/14 *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s.*, where the CJEU reiterated that a national court is obliged to examine of its own motion the compliance by sellers or suppliers with the rules of EU consumer protection law. This also applies in insolvency proceedings as well as in consumer credit agreements, including mortgages. See European Commission, DG Justice and Consumers/Max Planck Institute (2017) *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law*, Chapter 3.

⁸³ Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya*. The CJEU stated at para 53: ‘As regards the principle of effectiveness, it is the Court’s settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (see *Banco Español de Crédito*, paragraph 49).’ See also Case C-280/13 *Barclays Bank* [2014]; Case C-280/13 *Sánchez Morcillo and Abril García* [2014]; 014:2099); Cases C-482/13, C-484/13, C-485/13; Case C-539/14 *Sánchez Morcillo and Abril García* [2015]; Case C-8/14 *BBVA* [2015]; Case C-49/14 *Finanmadrid EFC* [2016]; Case C-421/14 *Banco Primus* [2017].

⁸⁴ [2016] IEHC 752.

Drawing on the CJEU jurisprudence in Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Barrett J outlined some key issues applying to the Irish courts. The CJEU appears to contemplate a court, even in an adversarial system of justice, acting in an inquisitorial manner (para 10):

a summary application for debt seems to the court to afford a classic example of proceedings in which the potentially ruinous consequences for a consumer of the court's judgment (the defendants indicated that the effect of judgment against them at this time would render them all but destitute) on the basis of relatively limited argument, requires that the above-mentioned task be undertaken if consumers are to be protected in the manner contemplated by Directive 93/13/EEC (as now implemented). (para 12)

In a summary application, where there are terms identified which may be unfair and if found to be so which would yield an arguable defence, the court, after inviting further submissions, and if there are one or more such potential arguable defences, ought to refer the matter to plenary hearing. It is then for the court at plenary hearing to decide, inter alia, (i) whether such terms as are identified by the court at summary hearing or other terms ('or other terms' because the court at plenary hearing likewise operates in the shadow of *Aziz*) are unfair, and (ii) what consequences, if any, such a finding has as regards the debt recovery application before it (para 13). Ultimately, even the demands of precedent must yield to the supremacy of European Union law, where applicable (para 14).

In *EBS v Kenehan*⁸⁵ Barrett J pointed out that since the lender had not placed all the relevant documentation before the court, '[since the court] was unable to perform a task incumbent upon it as a matter of European Union law before the order for possession may stand, the court cannot allow that order to stand'.⁸⁶ In *Cronin v Dublin City Sheriff*⁸⁷ a request for an 'own motion' assessment for unfair contract terms was refused on grounds of *res judicata*.⁸⁸

Fourthly, EU institutions (such as the ECB) and Member States, when implementing EU law or acting within the scope of EU law, must 'respect the rights, observe the principles and promote the application of the EUCFR, in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.⁸⁹

Essentially, the EUCFR traces existing EU law provisions, so that whenever an issue of EU

⁸⁵ [2017] IEHC 606.

⁸⁶ Ibid, para 26. 'In a situation where EBS [lender] knew that it would face a *Counihan*-based argument on appeal, it was in EBS' self-interest to place the court in a position where it could discharge its *Aziz-Counihan* obligations. This EBS did not do.' (Para 27).

⁸⁷ [2017] IEHC 685. See also *Bank of Ireland v McMahon* [2017] IEHC 600; *Bank of Ireland Mortgages v Martin* [2017] IEHC 707.

⁸⁸ However, the court stated 'I should perhaps note that this judgment does not, and I do not consider it necessary to, decide the question of the extent of any obligation placed upon the Irish courts in house repossession cases by virtue of the Directive (as interpreted by the ECJ) in cases which are still "live". The present case is one where the repossession proceedings had been concluded' (para 35).

⁸⁹ See EUCFR Article 51(1). The *Explanations* state: 'As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).' See also Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, 7 May 2013.

law is being adjudicated, then the Articles of the Charter must be also applied.⁹⁰ In all cases, EU Member States are under an obligation to interpret national law harmoniously, that is, in a way that will not conflict with EU law or with actions of EU institutions (called indirect effect and stemming from the principle of sincere cooperation).⁹¹ Under the doctrine of consistent interpretation, national courts and administrations have a duty to interpret national law in light of EU law.⁹² Individuals can obtain damages, in specific circumstances, where a breach of EU law has been established.⁹³

Thus, in all situations where Irish courts are dealing with mortgage possession cases which are covered by either the operation and rules of SSM, the Mortgage Credit Directive, or the UCTD, then the provisions and protections of the EUCFR are applicable, including respect for the Articles of the EUCFR which protect human rights.

There is an obligation on the Irish State as well as on EU institutions such as the ECB to ensure the effectiveness of EU law in this area in Ireland. It would appear that the EU Charter of Fundamental Rights is not being fully respected in this context.⁹⁴ Aside from a possible breach of Article 47 of the EUCFR, the absence of legal representation among home loan debtors in cases involving ECB directly supervised lenders possessing homes means that these four areas of EU consumer and human rights law are not being fully respected by ECB directly supervised lenders and others involved in home possession cases in Ireland. Indeed, most of these EU law issues are not considered in the courts.

⁹⁰ See Kingston, S and Thornton, L (2015) *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (Law Society of Ireland/Dublin Solicitors Bar Association).

⁹¹ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

⁹² Schütz, R (2015) *An Introduction to European Law* (2nd edn, Cambridge University Press), 137.

⁹³ Case C-479/93 *Francovich* [1995] ECR I-3843.

⁹⁴ See Martin, E 'Unfair Terms in Consumer Contract Loans' *Commercial Law Practitioner* 2017, 24(4), 71–76 for a limited Irish interpretation of the EU consumer law obligations, and Micklitz Hans-W, and Reich, N 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' *Common Market Law Review* 51: 771–808, 2015, for a wider EU law perspective.

6 Methodology for the Research

In Ireland, almost all home loan mortgage cases are heard in the Circuit Court, or by the County Registrar. This research examined the level of home loan debtor legal representation and self-representation in a sample of Circuit Court and Registrars' Lists, comprising 2,396 cases, in late 2017/early 2018. It also analysed the level of absence of legal representation among home loan debtors of ECB directly supervised entities enforcing home possession cases in Ireland.

There are eight Circuit Areas: Dublin, Cork, Midland,⁹⁵ South Eastern,⁹⁶ Eastern,⁹⁷ Northern,⁹⁸ South Western⁹⁹ and Western.¹⁰⁰ While the Registrar and Circuit Court information is available to the public, the files are not, and are regarded as the private information of the parties.

An initial period for sampling property/possession Civil Bills listed in Civil Circuit Court (Judges' Lists for County Circuit Courts) and/or County Registrars' Lists was considered from the lists published online in the Courts Service of Ireland website¹⁰¹ on 11/12 December 2017 and again on 11/12 January 2018. In some instances, the Callover Lists were used, especially where a significant number of possession cases were listed. However, different Registrar, Court or Callover samples were taken from each Circuit Court area, so that there was no duplication of cases in the study. For Dublin all the County Registrars' Lists and Circuit Court possessions cases lists were examined for the month of December 2017. Contact was made with the Courts Service of Ireland statistical section to clarify issues in relation to the publication of lists, and the reliability of these. To supplement the statistical data, one of the researchers attended a four-day sitting of the Circuit Civil Court presided over by a judge, and two sittings of a County Registrar, involving some 150 cases.

The Lists record the names of the parties and the legal representatives of each party, if any.¹⁰² Non-representation is evidenced by the absence of any legal representatives in the List. Self-represented/'lay litigants' are shown on the Court Lists as 'self', 'lay litigant', 'in person', 'defendant in person', or the person's name. The category 'no legal representation' or 'unrepresented' is indicated in the Circuit Court Lists or Registrars' Lists as the absence of a legal representative and relates to cases involving all categories of lenders. The final column of Table 1 below relates to ECB directly supervised entities, and treats both situations of no legal representation and self-representation as instances of absence of legal representation.

⁹⁵ Counties Laois, Roscommon, Longford, Sligo, Offaly and Westmeath.

⁹⁶ Counties Carlow, Tipperary, Kilkenny, Waterford, and Wexford.

⁹⁷ Counties Louth, Meath, Wicklow and Kildare.

⁹⁸ Counties Leitrim, Donegal, Cavan and Monaghan.

⁹⁹ Counties Limerick, Kerry and Clare.

¹⁰⁰ Counties Galway and Mayo.

¹⁰¹

<http://www.courts.ie/Courts.ie/Library3.nsf/PageCurrent/56F2259BE71F74E180257FB00055003D?open&l=en>

¹⁰² See Part 3 above.

The tables set out in the Appendix do not give the full extent of such cases, merely a representative sample for the purposes of identifying the level of recorded debtor representation or non-representation.

The various lenders and investment funds seeking possession in these cases comprise a mix of 'significant' supervised entities and their subsidiaries and 'less significant' entities.¹⁰³ One problematic ECB supervisory issue arises where 'significant' supervised entities have sold on mortgages to investment funds, which then use the name of the ECB directly supervised entity in possession proceedings.¹⁰⁴

The other lenders and investment funds which are not regarded as part of the category of ECB significant institutions include Stepstone Mortgages, Start Mortgages, Mars Capital (part of Oaktree investment fund), Tanager (which holds former Bank of Scotland loans), Pepper Asset Servicing, Pepper Finance Corporation, ACC (part of Rabobank), ICS (part of Dilosk), Leeds Building Society, Home Funding Corporation, Elstree Mortgages, Cabot Asset Purchases, Shoreline Residential dac, Seniors Money Mortgages, Promontoria dac, Bank of Scotland and Leeds Building Society.

The following ECB directly supervised entities have been represented by the legal firms listed below in the Lists examined:

Allied Irish Banks, which includes EBS and Haven: AC Forde; Holmes, O'Malley, Sexton; Barry Galvin; Joynt & Crawford; Gore & Grimes; Lyons Dermody; Ronan, Daly, Jermyn; OSM Partners; AB Wolfe; Ivor Fitzpatrick; O' Connor Solrs.

Bank of Ireland: Beauchamps; Hugh J Ward & Co; Ivor Fitzpatrick; Mason, Hayes & Curran; GJ Maloney; Belgard Solrs; Whitney Moore; Keating, Connolly, Sellers; McDowell Purcell:

Permanent TSB: Eversheds, Sutherland; Belgard; Whitney, Moore & Keller; O' Grady & O' Neill.

KBC: Beauchamps; Joynt & Crawford; Lavelle Solrs; McDowell Purcell; Ivor Fitzpatrick.

Ulster Bank: Beauchamps; MJ O' Connor; Hugh Ward & Co; Ivor Fitzpatrick; Mason, Hayes and Curran.

Danske Bank: MacCarthy Johnson.

¹⁰³ See Part 4 above.

¹⁰⁴ Transfers of mortgages can take various forms, with agreements of trust and subordination, whereby the name of the originator of the mortgage remains on official records.

7 Research Findings

This research was based on a sample of 99 Court Lists and 2,396 cases taken from the Courts Service of Ireland website in December 2017 and January 2018. It shows some 70% of home loan debtors had no recorded legal representation in mortgage possession cases. For ECB directly supervised lenders the figure was 64% without any recorded legal representation. Indebted borrowers represented themselves in 7% of cases. See full table in Appendix 1.

Table 1. Table of Cases of Civil Proceedings for Mortgage Possession December 2017/January 2018

Circuit	Total mortgage cases examined	No legal representation: All cases	Self/in person/'lay litigant': All cases	ECB directly supervised lender; debtor with no legal representation¹⁰⁵
Dublin Circuit Court	78	27	21	36
Dublin County Registrar's List	379	284	41	269
Eastern	372	318	18	274
Cork	93	55	6	48
Northern	446	360	3	304
Western	152	98	12	82
Midland	351	238	30	221
South West	161	109	7	94
South East	364	190	30	202
Total	2,396	1,679	168	1,530
Percentage	100%	70%	7%	64%

Circuit Court Judges and Registrars make valiant efforts to explain procedures, processes and even the meaning of legal terms to people who are at best anxious and nervous, and at worst suffering from serious illness, disorientated and emotionally vulnerable and fragile. The data shows that in all cases the lending institutions had a least a solicitor (and almost without exception, a barrister) on record, fully briefed with correspondence, diary entries, records of attendances – with detailed typed notes, telephone messages, etc. There is no equivalent level of representation, in most cases, for the home loan debtor.

The ECB and Irish institutional micro-prudential supervisory framework promotes home repossession in Ireland in cases of mortgage default. ECB supervision supports financial entities engaged in proceedings in Irish courts in evicting households from their homes. This study of more than 2,000 cases shows that there is little possibility for EU consumer or human rights to be examined in Irish courts due to the systematic imbalance in representation before the courts for those in mortgage arrears.

¹⁰⁵ This includes cases where the debtor represented themselves.

The ECB and ECB directly supervised entities are systematically failing to fully respect EU consumer protection and human rights law in their micro-prudential supervision of home loan creditors in Ireland.

As this research shows, the principles of access to a fair trial and access to legal aid are being denied to two-thirds of those who are facing loss of home through the actions of ECB directly supervised entities involved in repossession of homes. These actions of the ECB and ECB directly supervised institutions are undermining the effectiveness of EU consumer and human rights protection in a systematic way in Ireland.

8 Case Studies

These case studies are based on sittings attended by one researcher in December 2017 and are typical of the types of cases before the courts.

Case A

Counsel for the financial institution informed the Court that this case had been before the Court on nineteen occasions. A Standard Financial Statement (SFS) had been filed by the defendants, a husband and wife, who took out a loan of €305,000 in 2008. They were to pay €1,075 per month during a test period. This was underpaid, although €375 per month had been paid for the previous three months. Ample opportunity had been afforded by the bank, Counsel said, and the bank now wanted an order for possession.

The husband and wife both separately represented themselves. She told the court that the marriage had broken down in 2009. The husband would not move out, so she took the three children with her and moved to rented accommodation. He did not look after the mortgage, and moved out in 2014, when she moved back in. He left the house 'in bits'. The floors were torn up, there was no heating or ventilation. She said that the bank was not interested in engaging with her. Her mother helped with the payment of €1,048 per month. She asked the bank where they were getting their figures from, but 'they never came back to me'. They 'seemed to be pulling figures out of the sky'.

The Judge told her she should have paid her mortgage instead of 'doing up' her house. In response to the Judge, she said the Personal Insolvency Practitioner (PIP) had advised her that after the Personal Insolvency Arrangement had been in place for five years she would still not own her house, regardless of what arrangement was put in place.

The Judge pointed out that there had been nineteen adjournments. She replied that of these she had only looked for two. She also said she had one daughter who was a second-year college student, and that her son would sit his Leaving Certificate the following May. The Judge then went through the rest of the proofs with Counsel for the bank, granted the order for possession and put a stay on the implementation of the Order for seven months, until June of the following year, to allow the son stay there until after his Leaving Certificate examinations. The Judge advised the defendant 'to consult another PIP as the law may have changed'.

Case B

The male partner's solicitor had come off record and he was representing himself. He had put the property up for sale, but his partner wanted to buy it for herself and the children. She had not known about the sale initially. He was going through 'a lot of stuff' with two deaths in the family. She said she would have a job in February and her intended employer was in court to so testify. Her new salary would allow payments of a satisfactory nature to be made. She wanted to keep the house for herself and the three children.

The Judge remarked 'The Court is becoming a forum for negotiations on mortgages – you might not get a Judge in future who is prepared to do that.' The name of a PIP was given as having been involved, and the Judge was minded to give an adjournment remarking, 'another Judge on another day might not give the opportunity'. An order was made adjourning the matter to next sessions, conditional on the sum agreed being paid and an up-to-date Standard Financial Statement being filed.

9 Conclusions and Recommendations

- The problem of non-performing loans held by households is a European problem, and a legacy of the banking and financial crash.¹⁰⁶ The European Systemic Risk Board suggests that the current speed of least-cost NPL resolution is too slow, and that the ‘wait and see’ approach should be strongly discouraged. All solutions should comply with the EU legal framework.¹⁰⁷
- This report suggests that the ECB and other EU institutions do not fully respect EU consumer and human rights law, including the Charter of Fundamental Rights, in their direct supervision of mortgage lenders in Ireland as part of the SSM framework in relation to the repossession of mortgaged properties and the eviction of households in arrears. This is particularly egregious where children are being threatened with homelessness.
- There appears to be widespread and systematic non-application of EU consumer and human rights law in Ireland in mortgage possession cases. The European Commission, as the guardian of EU law, must take action on this systemic non-application of EU law by EU and other institutions in Ireland. The Irish Circuit Court Rules of 2016 may act to undermine the effectiveness of EU consumer law in Ireland.
- This research, based on a sample of 99 Court Lists and 2,396 cases published by the Courts Service of Ireland in December and January 2017/2018, shows that some 70% of home loan debtors had no recorded legal representation in mortgage possession cases. For ECB directly supervised lenders the figure was 64%.
- This raises the question whether there is a widespread and systemic violation of Articles 7 and 47 of the EU Charter of Fundamental Rights.
- The complicated nature of mortgage possession proceedings requires that appropriate legal representation be made available by the Irish State in order to comply with the standards set out in *Airey v Ireland* (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32). The Courts Service of Ireland and the Legal Aid Board must effectively fulfil their public sector duty under section 42 of the IHREC Act 2014¹⁰⁸ in respect of those who have no legal representation and who face losing their homes through the actions of ECB- and Central Bank of Ireland-supervised mortgage lenders. Irish courts should fully apply the protections under the ECHR and EU law in cases of mortgage arrears, especially where there is no legal representation and a risk of loss of home.
- The Central Bank and Financial Services Authority Ireland, Allied Irish Banks, Permanent TSB, EBS, Haven Mortgages, Springboard Mortgages and all public sector

¹⁰⁶ There were a total of €1tn NPLs in the European banking sector at end 2016, or 5.1% of loans. In Ireland the figure was €30bn. or 12% of advances. See https://www.esrb.europa.eu/pub/pdf/reports/20170711_resolving_npl_report.en.pdf

¹⁰⁷ European Systemic Risk Board (July 2017) *Resolving non-performing loan in Europe*, 4. See also *Bäck v Finland* App No 37598/97 (ECHR, 20 July 2004). Measures taken by Finland in the 1990s to deal with the social misery of debt-involved loan write-offs, and these were held to be compatible with ECHR property rights protections. Significantly, in a presentation on Non-Performing Loans: The Irish perspective on a European problem – Deputy Governor Ed Sibley of the Central Bank of Ireland and Board Member of SSM pointed out that in Ireland NPL ‘accounting write-offs have not yet featured to the extent warranted’. See <https://www.centralbank.ie/news/article/non-performing-loans-dg-ed-sibley21Sept2017>. The European Central Bank (September 2016) *Stocktake of national practices and legal frameworks related to NPLs* points out that there are no specific national guidelines or rules for NPL write-offs (p 74), although loan loss provisions are fully tax deductible for lenders (p 82). Debtors have no such benefits.

¹⁰⁸ Section 42 states that a public body shall, in the performance of its functions, have regard to the need to protect the human rights of its members, staff and the persons to whom it provides services.

bodies in Ireland involved in home possession cases must address their public sector duty to protect human rights under section 42 IHREC Act 2014.¹⁰⁹

- The SSM Regulation provides that the ECB is accountable to the European Parliament and the EU Council for its supervisory tasks.¹¹⁰ Article 21 of the SSM Regulation also provides for specific reporting obligations towards national parliaments. However, there appears to be undue influence on the governance of the ECB as a result of the lobbying power of financial institutions as compared to the limited consultation with democratic and civil society organisations.¹¹¹
- It is now critical for the citizens of Europe through civil society, human rights and consumer organisations to engage in constructive dialogue through the established procedures, at national and European Parliamentary level, to assist the ECB and Central Bank of Ireland in respecting and promoting the EU Charter of Fundamental Rights as an integral part of their activities under the SSM framework, while maintaining due respect for the independence of the ECB.¹¹²
- Susskind points out that the world's leading 100 law firms are sustained largely by the world's top 1,000 businesses.¹¹³ This study shows that ECB directly supervised lenders were able to avail of specialist legal representation while the situation for home loan debtors was dramatically different. It is a bitter irony that home loan debtors usually end up paying the costs of the lenders' legal actions, although they themselves cannot afford such representation. It is suggested that access to justice in ECB-supervised home possession cases does not reflect acceptable standards, whether Irish or European.

¹⁰⁹ See Central Statistics Office (CSO) 2016 Register of Public Sector Bodies (including General Government Bodies) in Ireland, October 2017:
http://www.cso.ie/en/media/csoie/methods/nationalaccountsoutputandvalueaddedbyactivity/Register_of_Public_Sector_Bodies_in_Ireland_2017_October.pdf

¹¹⁰ See Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013; Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), 11.12.2013.

¹¹¹ According to Corporate Europe Observatory, (2017) *Open door for forces of finance at the ECB*, (Brussels, Corporate Europe Observatory) there is a risk of regulatory capture or undue influence exerted by lobbyists from financial corporations via the privileged position that a seat on an advisory group of the ECB offers them. At the time the ECB was running 22 advisory groups with 517 representatives from 144 different entities: either corporations, companies or associations, mainly trade associations. According to the ECB, these 'maintain the necessary dialogue with representative associations in civil society'. See <https://corporateeurope.org/financial-lobby/2017/10/open-doors-forces-finance>

¹¹² Article 19 of the SSM Regulation.

¹¹³ Susskind, R (2013) *Tomorrow's Lawyers* (Oxford, OUP), 75. See Zilioli, C, 'The Independence of the European Central Bank and Its New Banking Supervisory Competences' in D Ritleng (ed) (2016) *The Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press), 125-179.

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Appendices

Appendix 1 Table of Cases of Civil Proceedings for Mortgage Possession December 2017/January 2018

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
Dublin Circuit Court				
20/11/2017	1		1	1
21/11/2017	4	4	1	1
22/11/2017	5	3	1	3
23/11/2017	6	5	0	5
24/11/2017	2	0	0	0
27/11/2017	2	0	2	2
28/11/2017	2	0	1	0
28/11/2017	1	0	0	0
29/11/2017	9	4	0	4
30/11/2017	8	0	3	3
04/12/2017	3	0	1	1
05/12/2017	4		2	2
06/12/2017	5	1	3	1
07/12/2017	5	2	3	3
08/12/2017	5	2	1	3
11/12/2017	4	2	0	2
13/12/2017	3	2	0	2
14/12/2017	1	0	0	0
15/12/2017	2	1	1	1
19/12/2017	2	1	0	1
20/12/2017	4	1	1	1
Subtotal	78	27	21	36
Dublin County Registrar				
01/12/2017	56	39	6	36
04/12/2017	10	9	1	9
05/12/2017	5	5	0	4

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
06/12/2017	3	0	0	3
07/12/2017	45	35	1	31
08/12/2017	43	32	7	34
11/12/2017	2	2	2	2
13/12/2017	6	4	1	5
14/12/2017	39	29	7	29
15/12/2017	47	35	6	36
20/12/2017	10	7	1	8
21/12/2017	52	37	4	30
11/01/2018	61	50	5	42
Subtotal	379	284	41	269
Eastern Circuit Court				
Dundalk 28/11/2017 Circuit Court	23	18	2	18
Bray 11/12/2017 Registrar's List	34	28	0	19
Naas 1/12/2017 Circuit Court	27	19	2	15
Naas 11/12/2017 Registrar's List	78	69	3	64
Trim 12/12/2017 Circuit Court	6	6	0	6
Trim 13/12/2017 Circuit Court	18	14	2	12
Naas 11/1/2018 Circuit Court	25	19	2	17
Bray 15/1/2018 Registrar's List	41	39	0	29
Dundalk 15/1/2018 Callover	41	34	5	28
Naas 16/1/2018 Circuit Court	2	2	1	1
Naas 17/1/2018 Circuit Court	1	1	1	0
Dundalk 17/1/2018 Registrar's List	76	69	0	65
Subtotal	372	318	18	274

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
Cork				
Cork 23/11/2017 Registrar's List	11	6	1	7
Cork 6/12/2017 Registrar's List	37	29	1	23
Cork 19/12/2017 Circuit Court	21	6	0	5
Cork 19/12/2017 Circuit Court	10	4	1	5
Cork 11/1/2018 Circuit Court	1	1	0	1
Cork 16/1/2018 Circuit Court	6	4	2	4
Cork 15/1/2018 Registrar's List	4	3	0	3
Cork 15/1/2018 Callover	3	2	1	0
Subtotal	93	55	6	48
Northern Circuit				
Cavan 5/12/2017 Circuit Court	16	11	0	7
Cavan 5/12/2017 Circuit Court	14	11	0	6
Monaghan 6/12/2017 Circuit Court	41	34	0	28
Monaghan 6/12/2017 Callover	8	5	0	5
Carrick 7/12/2017 Registrar's List	33	28	0	21
Cavan 11/12/2017 Registrar's List	50	44	2	38
Letterkenny 11/12/2017 Registrar's List	135	113	0	103
Letterkenny 15/12/2017 Circuit Court	25	22	0	19
Letterkenny 15/1/2018	119	90	1	75

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
Registrar's List				
Monaghan 11/1/2018 Circuit Court	5	2	0	2
Subtotal	446	360	3	304
Western Circuit				
Castlebar 11/12/2017 Registrar's List	68	40	5	35
Galway 12/12/2017 Registrar's List	84	58	7	47
Galway 11/1/2018 Circuit Court	7	3	0	7
Subtotals	152	98	12	82
Midland Circuit				
Tullamore 30/11/2017 Callover	115	87	8	74
Sligo 11/12/2017 Callover	9	4	1	4
Portlaoise 11/12/2017 Registrar's List	33	30	0	28
Sligo 13/12/2017 Registrar's List	21	17	1	13
Athlone 15/12/2017 Registrar's List	40	31	0	25
Roscommon 18/12/2017 Registrar's List	54	30	6	29
Longford 20/12/2017 Registrar's List	10	4	1	4
Tullamore 12/1/2018 Circuit Court	7	4	0	3
Roscommon 11/1/2018 Callover	21	2	6	9
Tullamore 11/1/2018 Circuit Court	7	0	7	5

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
Tullamore 15/1/2018 Circuit Court	34	29	0	27
Subtotal	351	238	30	221
South Western Circuit				
Limerick 4/12/2107 Registrar's List	5	5	0	5
Listowel 5/12/2017 Circuit Court	4	2	0	2
Limerick 18/12/2017 Registrar's List	1	1	0	1
Tralee 12/12/2017 Callover	9	3	2	3
Ennis 11/12/2017 Registrar's List	22	20	1	16
Killarney 13/12/2017 Callover	18	4	0	2
Limerick 11/1/2018 Circuit Court	8	4	1	4
Limerick 15/1/2018 Registrar's List	37	35	1	35
Killarney 18/1/2018 Circuit Court	5	1	0	0
Tralee 18/1/2018 Registrar's List	52	34	2	26
Subtotal	161	109	7	94
South Eastern Circuit				
Nenagh 27/11/2017 Registrar's List	31	23	3	18
Wexford 4/12/2017 Callover	120	70	21	68
Waterford 4/12/2017 Registrar's List	14	8	1	8
Carlow 14/12/2017 Callover	58	45	0	35
Kilkenny 3/1/2018	66	44	5	37

Circuits	Total mortgage possession cases	Not legally repres'd: All Cases	Self-rep/in Person/'lay litigant': All Cases	ECB directly supervised lender/no legal representation (incl 'lay litigant'/self-represented)
Callover				
Wexford 11/1/2018 Registrar's List	1	1	1	1
Clonmel 11/1/2018 Registrar's List	1	0	1	1
Nenagh 15/1/2018 Callover	10	3	0	2
Nenagh 15/1/2018 Callover	2	1	0	0
Waterford 15/1/2018 Callover	12	7	2	6
Waterford 15/1/2018 Callover	33	24	0	14
Nenagh 15/1/2018 Circuit Court	16	14	0	12
Carlow 18/1/2018 Circuit Court	18	15	0	12
Subtotal	364	190	30	202
Totals	2,396	1,679	168	1,530

Appendix 2 Extract from ECB (2016) *Stocktake on National Practices and Legal Frameworks Related to NPLs*¹¹⁴

Table 14

Main features of debt enforcement/foreclosure

	Cyprus	Germany	Greece	Ireland	Italy	Portugal	Slovenia	Spain
Is debt enforcement/foreclosure an obstacle to NPL resolution?	YES	NO	YES	NO	YES	YES	YES	NO
Legal techniques to enable out-of-court enforcement of collateral?	Yes*	Yes	No	Yes	No	No**	Yes	Yes
Bilateral sales of repossessed assets permitted?	Yes	n.a.	No	Yes	n.a.	Yes	Yes	Yes
Blanket bans (moratoria) on sales/auctions/foreclosures?	No	No	Yes*	No	Yes	Yes	No	Yes***

* changed recently, the effectiveness has yet to be tested

** just on financial collateral

*** just on foreclosures

¹¹⁴ European Central Bank (September 2016) *Stocktake of national practices and legal frameworks related to NPLs*, 18.

Appendix 3 Possession Orders Granted by Circuit Courts by County (2016)¹¹⁵

County	Primary home	Buy to let	Other/Unknown	Total
Carlow	19	0	2	21
Cavan	26	5	13	44
Clare	19	1	2	22
Cork	86	1	23	110
Donegal	6	2	7	15
Dublin	150	12	22	184
Galway	56	0	14	70
Kerry	15	2	4	21
Kildare	32	0	11	43
Kilkenny	11	0	1	12
Laois	27	0	8	35
Leitrim	9	0	2	11
Limerick	0	0	0	0
Longford	4	1	0	5
Louth	46	0	3	49
Mayo	42	5	7	54
Meath	67	3	24	94
Monaghan	15	0	2	17
Offaly	16	1	3	20
Roscommon	30	1	2	33
Sligo	11	7	0	18
Tipperary	53	12	2	67
Waterford	34	1	0	35
Westmeath	29	0	8	37
Wexford	12	0	4	16
Wicklow	33	6	0	39
Total	848	60	164	1,072

¹¹⁵ Court Service of Ireland available at <http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/a5814a6d13e784b380257fc60041c930?OpenDocument>

Appendix 4 Review of the Administration of Civil Justice

The Review Group on the Administration of Civil Justice, chaired by the President of the High Court Mr Peter Kelly, was established in 2017 to make recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system and ensuring better outcomes for court users.¹¹⁶

The aim of the Review Group is to examine the current administration of civil justice in the State with a view to:

- Improving access to justice;
- Reducing the cost of litigation including costs to the State;
- Improving procedures and practices so as to ensure timely hearings;
- Removing obsolete, unnecessary or over-complex rules of procedure;
- Reviewing the law of discovery;
- Encouraging alternative methods of dispute resolution;
- Reviewing the use of electronic methods of communications including e-litigation;
- Examining the extent to which pleadings and submissions and other court documents should be available or accessible on the internet;
- Identifying steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid, and wards of court.

The Group requests submissions from interested persons or parties in relation to its work. The broad topical areas to be pursued by the Group will, in an overall context of improving access to justice and reducing costs of litigation, be

- (a) Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;
- (b) Reviewing the law of discovery;
- (c) Encouraging alternative methods of dispute resolution;
- (d) Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet;
- (e) Achieving more effective outcomes for court users, particularly vulnerable court users.

Submissions should be sent solely in electronic form to submissions@civiljusticereview.ie by **12pm Friday 16 February 2018**.

¹¹⁶ <http://www.civiljusticereview.ie/>

