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An Roinn Airgeadais
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Credit Servicers Directive Public Consultation

Submission

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Introduction.

An estimated 113,000 mortgage borrowers in Ireland have loans that have been sold by the main lenders to non-bank entities, often to private, off-shore registered equity funds – and including sales between equity funds.¹ By international standards Ireland is now one of the main global hubs for hosting non-bank financial institutions.² These non-bank entities, regulated with the Central Bank of Ireland as Retail Credit Firms or Credit Servicing Firms, hold 15.5% of homeloan mortgages and over half of all private dwelling house mortgages in long-term arrears.³

The Credit Servicers Directive⁴ has the potential to transform the treatment of NPLs in the EU, but the coherence and effectiveness of the regulatory framework for this novel cross-EU approach has yet to be seen. It will impact consumer and housing rights and mortgage law. Some of the weaknesses in consumer protection in the original drafts have been addressed, but not all. BEUC - the European Consumer Organisation has pointed out that market actors who maximise their profits on the back of vulnerable consumers and businesses should not be supported but should, instead, face restrictions.⁵ The BEUC Report highlighted the potential risks of supervisory arbitrage by 'rogue' players in this secondary market to the detriment of consumers:

...given that the interests of credit servicers/credit purchasers and consumers are diametrically opposed, it is highly doubtful that those firms will respect all legal obligations and put consumer interests above their own. Especially since those firms typically do not enjoy a high reputation and do not run significant reputational risk. The consumer would be exposed to credit servicers and credit purchasers established abroad, which creates further risks.

It is the role of the national competent authorities to enforce legislation, but, in fact, the quality of supervision and enforcement varies widely across Member States. According to the Commission's proposal, credit servicers would be supervised by their home country authority, where the EU passport is obtained. This means that credit servicers will have a strong incentive to obtain the EU passport in Member States with weaker supervisory standards. In other words, there is a significant risk of supervisory arbitrage that will ultimately impact the protection of distressed borrowers.⁶

¹ The top sellers of non-performing loans in 2019-20 were AIB, Rabobank, Ulster Bank, Goldman Sachs, Permanent TSB and Lone Star, while the top buyers were Cerberus, Carval, Cabot, Goldman Sachs, Lone Star and Morgan Stanley. See KPMG (2021) Irish Debt Sale Report. Available at: <https://assets.kpmg.com/content/dam/kpmg/ie/pdf/2021/06/ie-eds-report-2020-ireland.pdf>

² Emter, L. Killeen, N. and McQuade, P.' Bank and non-bank financial institutions' cross-border linkages: New evidence from international banking data' Central Bank of Ireland, Vol.2021, No.3 (2021) Available at: https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-3-bank-and-non-bank-financial-institutions.pdf?sfvrsn=33878f1d_7

³ Central Bank Statistical Release December 2022: https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2022q3_ie_mortgage_arrears_statistics.pdf?sfvrsn=35bb9b1d_3

⁴ DIRECTIVE (EU) 2021/2167 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU. OJ L 438/1 8.12.2021. Recital 9.

⁵ See BEUC (2018) *Secondary Market for Non-Performing Loans: The European Commission's proposal is a bad deal for distressed borrowers*. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-068_secondary_market_for_non-performing_loans.pdf

⁶ Ibid.

It will make it possible for lenders with non-performing loans (NPLs) to sell these to a credit purchaser, who may or may not be based in the EU, who will sign a “credit services agreement” with a credit servicer, who may be authorised in any EU Member State, and who may outsource their debt collection activities. The potential for a ‘race to the bottom’ in relation to EU consumer protection is a major risk. Among the risks to consumers are the likelihood of credit servicers (or their outsourced entities) from other EU Member States with different legal traditions, consumer and human rights protection and different legal systems acting to realize the security of Irish non-performing loans (NPLs).

The Department of Finance in Ireland undertook a Public Consultation Process between 24 January and 8 March 2023 for submissions to be taken into account when taking decisions on the national discretions contained within the Credit Servicers’ Directive and when transposing its provisions into Irish law. This Submission is in response to that Public Consultation on the Credit Servicers Directive by the Banking Division of the Department of Finance in Ireland, ahead of the transposition of the Directive as a Statutory Instrument by the Irish State by 29 December 2023.

The Department of Finance proposes to transpose the necessary provisions as set out in the Directive by way of regulations made under section 3 of the European Communities Act 1972. Were such a major legislative measure, which impacts on banking, mortgages, housing policies and rights to be transposed as a statute there would have been more public debate and awareness.

This Public Consultation itself is confined to a small number of issues where Member States have been given some discretion to adopt higher or lower levels of consumer protection. Wider public consultation could have been undertaken on the impact of the Directive on homeloan borrowers in arrears in Ireland, and how the Central Bank of Ireland will ensure that maximum protection from eviction and from harassment by both credit servicers and their outsourced debt collectors. A wider public consultation on the Directive as a whole, would have contributed to the public awareness of EU consumer law protections and rights of borrowers. It could also have led to better and higher standards of consumer and rights protection – something which is provided for in Recital 52 of the Directive which states: “[T]his Directive should not prevent Member States from applying stricter provisions in order to protect borrowers”.

This new EU framework will not apply to the sale of performing loans originated by credit institutions, to the sale of performing or non-performing loans originated by non-credit institutions, to the sale of NPLs originated by credit institution before December 2023, or to the sale of NPLs by EU credit institutions to other EU credit institutions after 30 December 2023.

The Department of Finance proposes to retain the existing national credit servicing regulatory framework, as provided for in the Consumer Protection (Regulation of Retail Credit Firms) Acts 2015 and 2018 and the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022, in respect of the servicing of those activities and agreements that fall outside the scope of this Directive. However, for the servicing of these agreements that fall inside the scope of the Directive, the provisions of the Directive as transposed will have to apply.

The Directive seeks to harmonise the procedures, regulation and consumer protection for borrowers within a streamlined secondary market for non-performing loans (NPLs). While only credit servicers will be regulated, and not purchasers of NPLs (who may be based outside the EU) will be regulated, the Directive could improve consumer and housing protection in EU

Member States where it is not well developed. The Directive also allows for greater levels of protection to be provided in Member States that already have such protection. Thus, it could be seen overall as a valuable addition to EU mortgage, consumer and housing rights protection, especially as it integrates the EU Charter of Fundamental Rights (EUCFR) into EU homeloan mortgage laws.

a. Impact on poor households

This Directive will impact on poorer households in mortgage arrears in Ireland and across Europe. Indeed, those in mortgage arrears in other EU Member States may find their loans being administered by credit servicers regulated in Ireland (or their outsourced entities). Irish consumers may find that decisions are taken about their loans, including enforcement of the security and eviction, by credit servicers registered in other EU Member States.

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, the active work required in adapting to the altered situation of losing home, the sense of helplessness and expressions of direct and indirect anger.⁷ There are particularly negative consequences for children in the loss of home and any experience of homelessness.⁸ Research shows that even two years after their eviction from home, mothers still experienced significantly higher rates of material hardship and depression than peers.⁹

The sale of distressed mortgages in secondary markets will impact disproportionately on the most vulnerable households. For instance, a study of 21,000 households by the Central Bank of Ireland in 2015 showed that those with long-term mortgage arrears were often single parent households with children – a cohort with women as head of household. Those in long term arrears who are most at risk of repossession were 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.¹⁰

A Study by South Mayo Money Advice and Budgeting Service (MABS) of 50 households in mortgage arrears published in 2016, 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 payments 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

⁷ See Fox-O' Mahony, L. (2007) *Conceptualising Home; Theories, Laws and Policies*. Oxford: Hart Publishing, p. 110.

⁸ Fox (2007), pp. 440-441.

⁹ Desmond, M. & Kimbro, R. T. 'Eviction's Fallout: Housing, Hardship, and Health' *Social Forces*, Volume 94, Issue 1, September 2015, 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.

¹⁰ 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, p. 2. Available at <https://www.centralbank.ie/docs/default-source/publications/economicletters/economic-letter--vol-2015-no-11.pdf?sfvrsn=10>.

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.¹¹

A Central Bank Study in 2021, of 8,280 Standard Financial Statements from borrowers in mortgage arrears from the five main retail banks, showed that those in mortgage arrears over one year had lower net monthly incomes.¹² A third of the borrowers were unemployed. One-quarter of borrowers in long term arrears were over 60 years, with 12% over 65 years, and most were aged between 40 and 60 years. Using the Insolvency Service of Ireland (ISI) Reasonable Living Expenses¹³ to define a reasonable non-housing expenditure for each household, the study found that over half had expenditure below minimum reasonable levels, implying that there was no capacity for repayment of loans.

The study considered that in cases where there was some positive equity in the home, in fact, with current high prices and rents, the result of any enforced sale would only generate 34 months of private sector rent. Given that those in long term mortgage arrears would have difficulty accessing any new mortgage finance, “the figures depict clear challenges with housing access that would remain in cases where long term mortgage arrears were cleared through a voluntary sale”.¹⁴ In this context, the study suggests that policy responses targeting a smooth transition to supported housing arrangements would be necessary in many cases, and this highlights the “interlinkage between housing policy and financial policy”.¹⁵ The study found that there was a strong relationship between repayment capacity and repayment behaviour, although remarkably, one quarter of those with no capacity to do so were making payments.¹⁶ However, the study also found that there was no engagement between the lender and significant numbers (43%) of consumers in long term arrears. Yet, there has been little research on whether this is as a result of lack of trust, relationship breakdown in borrower households, or fear of eviction from their homes - the Central Bank study suggests “ensuring that a ‘credible threat’ (presumably of eviction) through the courts system is in existence.”¹⁷

Another Central Bank of Ireland study in 2021 of banks and non-banks, based on their assessments of the capacity of borrowers to clear all debts, showed that 13% of mortgages (95,000+) will have a shortfall in repayments by the end of the term, representing €14.5bn.¹⁸ Of these, **some 63,000 mortgage accounts were assessed as having either a low, moderate**

¹¹ Stamp, S., & 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

¹² Kelly, J., Lyons, P., McCann, F. & O’ Brien, E. (2021) ‘Long-term mortgage arrears: Analytical evidence for policy considerations’, Vol. 2021, No. 8. Central Bank of Ireland, Financial Stability Notes, p. 4. https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/long-term-mortgage-arrears-analytical-evidence-for-policy-considerations.pdf?sfvrsn=88148c1d_4

¹³ Insolvency Service of Ireland, ‘Reasonable Living Expenses Background Information’ https://www.isi.gov.ie/en/ISI/RLEs_Guidelines_August_2020.pdf/Files/RLEs_Guidelines_August_2020_0.pdf

¹⁴ Kelly, J., Lyons, P., McCann, F. & O’ Brien, E. (2021) ‘Long-term mortgage arrears: Analytical evidence for policy considerations’, Vol. 2021, No. 8. Central Bank of Ireland, Financial Stability Notes, p. 7.

¹⁵ Ibid., p. 7

¹⁶ Ibid., p. 12.

¹⁷ Ibid., p. 17.

¹⁸ Duignan, D., Furling, J., Kearns, A., & J. Scanlon (2021). ‘Mortgage borrowers facing repayment shortfalls: a summary of assessments by financial firms’. Central Bank of Ireland - Behind the Data. <https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/mortgage-borrowers-facing-end-of-term-repayment-shortfalls>.

or uncertain ability to clear the mortgage debt. Remarkably, **two-thirds of those assessed as having low or uncertain ability to repay the mortgage were not part of any restructuring process with the lenders**, despite the existence of the CCMA and various regulatory provisions promoted by the Central Bank of Ireland. These, 63,000 mortgages could potentially be impacted by the provisions of this Directive. With one quarter of borrowers over 60 years of age, the solutions offered by developing a secondary market in such mortgages appears quite bizarre.

b. Impact on human rights

While private debt is selectively coded by legal instruments – recognized by courts internationally, mortgage contracts exist in a broader legal and economic universe, in which human rights law interacts with (and limits) the rights of creditors.

Although generally perceived as not dealing with human rights matters per se, financial consumer protection laws and bankruptcy regulations have important roles to play in this regard. Such laws should allow for the protection of individual facing over-indebtedness or abusive lending and collecting practices, with have a potential impact on human rights. Consumer and bankruptcy frameworks should thus be envisaged as a means to prevent possible abuses, to safeguard the human rights of borrowers and to compensate for the inherent power imbalance between the parties to a lending contract. Such an endeavour should include –and even encourage–the possibility for financial consumers to organize and negotiate collectively to compensate the power imbalance between lenders and borrowers.¹⁹

In her Final Report to the UN Human Rights Council in 2020, Leilani Farha, UN Special Rapporteur on adequate housing highlighted the need to ensure the regulation of businesses in a manner consistent with State obligations, and to address the financialisation of housing.

67. A change in direction is urgently needed, and a new relationship between governments and the investors currently dominating the housing landscape must be forged. The Committee on Economic, Social and Cultural Rights has clarified that States violate their obligations with respect to the right to housing by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.²⁰

68. The obligations that States must impose on businesses directly involved in the development or ownership of housing are different in kind from those that apply to other businesses...²¹

Ireland has accepted that the right to housing is part of its international obligations and on which it regularly reports to international human rights monitoring bodies at the UN and Council of Europe. These accepted housing rights are included in Article 25 of the UN *Universal Declaration of Human Rights* (UDHR) (1948),²² Article 11 of the *International*

¹⁹ See UN Doc. A/HRC/43/45, para 87. Juan Pablo Bohoslavsky. *Private debt and human rights, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*. Available at <https://undocs.org/A/HRC/43/45>.

²⁰ General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 18.

²¹ UN Doc. A/HRC/43/43; Guidelines for the Implementation of the Right to Adequate Housing available at: <https://undocs.org/A/HRC/43/43>.

²² U.N. Doc. A/810, *Universal Declaration of Human Rights* (1948).

Covenant on Economic, Social and Cultural Rights (ICESCR)(1966,²³ the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979)²⁴, the UN *Convention on the Rights of the Child* (CRC)(1989)²⁵, the *International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990),²⁶ the UN *Convention Relating to the Status of Refugees* (1951)²⁷ and the UN *Convention on the Rights of Persons with Disabilities* (UNCRPD) (2006).²⁸ Article 19 UNCRPD ratified by Ireland in 2020²⁹ states that it requires that persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others. Many of those in long term mortgage arrears have a disability, and State bodies (such as the Central Bank of Ireland) must address this situation in reports and legislative proposals.

Ireland also accepts housing rights obligations set out in the Council of Europe *European Social Charter* (ESC)(1961),³⁰ the *Revised European Social Charter* (RESC)(1996)³¹ and *European Convention on Human Rights and Fundamental Freedoms* (1950).³² The UN Special on adequate housing as a component of the right to an adequate standard of living has pointed out that the full realization of the right to adequate housing, without discrimination, cannot be promoted solely by financial mechanisms and requires broader and more holistic housing policies and State interventions.³³

Since the Irish State is implementing EU law through the application of this Directive, and interpretation of the Directive will also engage the EU Charter of Fundamental Rights (EUCFR).³⁴ Article 51 on the field of application of the EUCFR states:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

For instance, Article 7 EUCFR states that “Everyone has the right to respect for his or her private and family life, home and communications”. This corresponds to Article 8 of the

²³ U.N. Doc. A/6316, *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A (XXI), (1966).

²⁴ UN Doc. CEDAW/C/TUN/3-4 [2000].

²⁵ UN Doc. CRC/C/GC/10 [1989].

²⁶ UN Doc. A/RES/45/158.

²⁷ UN Doc. A/RES/429, <UNHCR - The 1951 Refugee Convention.>

²⁸ UN Doc. A/RES/61/106, *The Convention on the Rights of Persons with Disabilities and its Optional Protocol*.

²⁹ See [UN Convention on the Rights of Persons with Disabilities – Thursday, 20 Sep 2018 – Parliamentary Questions \(32nd Dáil\) – Houses of the Oireachtas](#).> < [Article 19 - Living independently and being included in the community | United Nations Enable](#).

³⁰ Turin, 18.X.1961, Council of Europe, European Treaty Series - No. 35. See *Dunja Mijatović, (2020) Commissioner for Human Rights, Council of Europe: The right to affordable housing: Europe’s neglected duty*. Available at: <https://www.coe.int/en/web/commissioner/-/the-right-to-affordable-housing-europe-s-neglected-duty>. See also Issue Paper (2008): *Housing Rights: The Duty to Ensure Housing for All*. [https://rm.coe.int/ref/CommDH/IssuePaper\(2008\)1](https://rm.coe.int/ref/CommDH/IssuePaper(2008)1)

³¹ *European Social Charter. (Revised)* Council of Europe Strasbourg 3.5.1996. CETS 163 - [European Social Charter \(Revised\) \(coe.int\)](#)

³² ECHR/ROME/ 4.XI [1950].

³³ UN Doc. A /67/286. *The Right to adequate housing*. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/459/18/PDF/N1245918.pdf?OpenElement>

³⁴ Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02.

European Convention on Human Rights (ECHR),³⁵ and the Court of Justice of the European Union (CJEU) has held that under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 EUCFR which must be taken into consideration in the implementation of this or other EU Directives, such as Directive 93/13 on unfair contract terms in consumer contracts – as applied to mortgage possession cases.³⁶ Thus, the proportionality of the interference with the right to respect for home must be applied in any interpretation of EU primary or secondary law.³⁷

Indeed, Recital 22 of the Directive states:

Article 47 of the Charter of Fundamental Rights of the European Union ensures the right to a fair and public hearing by an independent and impartial tribunal and the possibility of being advised, defended and represented by a lawyer. That can be of particular relevance for the full and complete understanding of all the issues and legal arguments being addressed and to ensure comprehensive preparation of court representation for the case in dispute. Borrowers who lack sufficient resources should be able to resort to legal aid, where that is necessary to ensure effective access to justice and under the conditions laid down by the applicable national law.³⁸

This reflects the aim and general objectives of the Directive, and is significant in the context that Article 47 of the EUCFR requires that the operation of EU consumer law be in line with EUCFR obligations on fair procedures. Indeed, the *Sanchez Morillo*³⁹ case placed the principle of effective judicial protection in Article 47 of the EUCFR into the principle of effectiveness of EU law, particularly concerning the legal protection of over-indebted consumers. In 2022, the CJEU has held that national procedural principles cannot impede the rights that individuals derive from EU law.⁴⁰

Section 1 outlines the scope and key provisions of the Credit Servicers Directive, addressing the nature, roles and supervision of functions of credit servicers, the relationships with borrowers of the sold NPLs, credit purchasers, the outsourcing of debt collection, and the supervision by competent authorities of both credit servicers and credit purchasers cross-border activities. It also sets out how this Directive addresses consumer protection and how it will replace the more limited provisions on forbearance set out in the EU Mortgage Credit Directive with legally binding provisions.

³⁵ See *Explanations to the Charter of Fundamental Rights* (OJ 2007/C 303/02), 7. Article 52(7) of the Charter states: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

³⁶ Case C-34/13 *Kusionova v SMART Capital* [2014] para 65.

³⁷ Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993. Kenna, P. (2020) *Integrating EU Charter Housing Rights into EU Economic Governance and Supervision*.

<https://www.universityofgalway.ie/media/housinglawrightsandpolicy/files/Briefing-Paper-3-Integrating-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision-.pdf>

³⁸ See also Kenna, P. (2018) *Access to Justice and the ECB - A Study of ECB Supervised and other Mortgage Possession Cases in Ireland*. Centre for Housing Law, Rights and Policy NUI Galway. <https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf>

³⁹ Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* [2014] ECLI:EU:C:2014:2099.

⁴⁰ Case C-600/19 *Ibercaja banco*; Joined Cases C-693/19 *SPV Project 1503*, C-831/19 *Banco di Desio e della Brianza and Others*; Joined Cases C-725/19 *Impuls Leasing România* and C-869/19 *Unicaja Banco*. [2022]. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-05/cp220085en.pdf>

Section 2 sets out the Irish context for the transposition of this Directive, some 15 years after the financial crisis, and the development of a range of legislative, administrative, consumer and housing rights in Ireland in that period. Awareness of this legal and policy context in the sale of Irish NPLs is important for credit purchasers and their advisers as well as for credit servicers planning to register in Ireland. Section 3 sets out the responses to the 10 questions posed in the Department of Finance Public Consultation Document. Section 4 offers some concluding comments.

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Section 1. The Credit Servicers Directive

a. The Directive

Directive (EU) 2021/2167 of the European Parliament and of the European Council on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (hereinafter the Directive) was adopted by the European Parliament in December 2021 and EU Member States are required to transpose its provisions by 29 December 2023. The purpose of the Directive is set out in Recital 9:

This Directive should foster the development of secondary markets for NPLs in the Union by removing impediments to, and laying down safeguards for, the transfer of NPLs by credit institutions to credit purchasers, while at the same time safeguarding borrowers' rights. Any measures adopted should harmonise the authorisation requirements for credit servicers. This Directive should therefore establish a Union-wide framework for both purchasers and servicers of non-performing credit agreements issued by credit institutions, whereby credit servicers should obtain authorisation from, and be subject to the supervision of, Member States' competent authorities.⁴¹

Member States that previously had different rules for dealing with both the sales and servicing of NPLs must now conform to a harmonised procedure from 2024 – but this will only apply to loans transferred after the Directive comes into force in January 2024.

Ms Irene Tinagli, MEP, ECON Committee Chair and Co-Rapporteur who presided over the Committee Stage of the Directive pointed out that the sale of NPLs was only one method of dealing with these:

... managing NPLs doesn't necessarily mean selling them. First of all, it means that creditors must apply all necessary measures and concessions so that the debtor can return to pay. Even if their sale becomes necessary, it is essential that the secondary market for NPL is more solid and regulated than the current one. **A truly efficient secondary market for NPLs can only exist if it goes hand in hand with the preservation of financial stability and with the highest possible level of borrowers' protection, both households and businesses. This is what we aim to do...**⁴²

The Directive's common framework and requirements for credit servicers and credit purchasers,⁴³ and authorisation under uniform conditions across the EU,⁴⁴ applies only to non-

⁴¹ DIRECTIVE (EU) 2021/2167 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU. OJ L 438/1 8.12.2021. Recital 9.

⁴² European Parliament News: Non-performing loans: vote on EU rules for selling NPLs to third parties. <https://www.europarl.europa.eu/news/en/press-room/20210111IPR95312/non-performing-loans-vote-on-eu-rules-for-selling-npls-to-third-parties>. Significantly, the references to the Accelerated Extrajudicial Collateral Enforcement (AECE) whereby lenders could enforce the security on a loan (including on a home) without any judicial oversight, were dropped from earlier drafts of the Directive.

⁴³ DIRECTIVE (EU) 2021/2167. Article 3(4). (a) credit servicers of a creditor's rights under a non-performing credit agreement, or of the non-performing credit agreement itself, issued by a credit institution established in the Union, who act on behalf of a credit purchaser; (b) credit purchasers of a creditor's rights under a non-performing credit agreement, or of the non-performing credit agreement itself, issued by a credit institution established in the Union.

⁴⁴ Article 1 (a) and (b).

performing credit agreements.⁴⁵ These are defined as “an agreement as originally issued, modified or replaced, whereby a credit institution grants a credit in the form of a deferred payment, a loan or other similar financial accommodation”.⁴⁶

The Directive does not apply to credit institutions,⁴⁷ servicing of NPLs not issued by an EU established credit institution (non-bank lenders or non-EU established banks)⁴⁸, or purchase of NPLs by EU-established credit institutions to other EU credit institutions.⁴⁹ It does not apply to transfers of NPLs before the transposition deadline of the Directive [December 2023]. The Directive does not apply to servicing by public notaries, bailiffs, or lawyers when conducting credit servicing activities as part of their profession, unless included by a Member State.⁵⁰ The Directive excludes entities already subject to other Directives which authorise and monitor them.⁵¹

“Home State” is EU Member State where credit servicer is authorised.

“Host State” is a second (or other) EU Member State where the cross-border loan servicing activities are taking place.

b. Credit Purchasers

NPLs will be sold from Eurozone banks to “credit purchasers”. These are defined as “any natural or legal person that purchases a creditor’s rights under a non-performing credit agreement, or the non-performing credit agreement itself, in the course of its trade in accordance with applicable Union and national law”.⁵²

While no authorisation or registration of the credit purchaser is required, Member States shall require that credit institutions that sell NPLs to a credit purchaser inform the competent authorities of the (designated) Member State, on a biannual basis, of the credit purchasers legal entity identifier, or its representative (if not based in the EU), and of the identity, address, of the credit purchaser or member of its management organ.⁵³ Information must also be provided on the aggregate outstanding balances, number and size of creditors rights and:

...whether the transfer includes the creditor’s rights under the non-performing credit agreements, or the non-performing credit agreements themselves, concluded with consumers and the types of assets securing the non-performing credit agreements, when applicable.⁵⁴

⁴⁵ A Credit Agreement means an agreement as originally issued, modified or replaced, whereby a credit institution grants a credit in the form of a deferred payment, a loan or other similar financial accommodation. These rules will only be attached to NPLs which originate from credit institutions within the EU. Article 1 (a) and (b).

⁴⁶ Article 3(4).

⁴⁷ Credit Institution is defined in Article 4(1) of Regulation (EU) No 575/2013 which states: “credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account”.

⁴⁸ Article 2 (5).

⁴⁹ Article 2 (5).

⁵⁰ Article 2 (5).

⁵¹ Article 2 (5).

⁵² See TITLE II and Article 3(6).

⁵³ Article 15.

⁵⁴ Article 15(2)(d).

Member States must ensure that credit institutions provide information on creditors, non-performing credit agreements and their collateral to prospective credit purchasers.⁵⁵ This information will then inform prospective credit purchasers as the associated risks and how likely they are to recover the capital, and must ensure protection of that information.⁵⁶

Competent authorities (regulators) of host Member States may require this information on a quarterly basis as necessary, or during a period of crisis, where there will be a high volume of transactions.⁵⁷ Any information provided under these circumstances must be communicated without delay to the home Member State of the credit purchaser.⁵⁸

The European Banking Authority (EBA) has produced a set of technical standards templates for this purpose, which covers data fields on the enforcement status to help the prospective buyers estimate time to recovery and recovery value. The templates include data fields related to jurisdiction of court, currency of enforcement, court appraisal and other relevant information about the **“court auction for the specific collateral that may have taken place”**.⁵⁹ It also includes information on mortgage guarantees, including the mortgage amount, higher ranking loan and lien position. EBA Loan (Template 3) covers information on the contractual loan agreement, including any lease agreement or forbearance measure granted.

It includes among others, data fields on: the cut-off date, the asset class to which the loan belongs to, the type of instrument, the legal balance at the cut-off date, loan currency, loan amounts split in principal amount, accrued interest and other balances, days in past-due, date of the default status of the loan. The template also covers information on any legal proceeding at loan level as this information is considered key for loan pricing. They include, among others, the loan legal status, the stage reached in the legal proceeding and the date of initiation of the legal proceeding.⁶⁰

Some indication on how NPLs will be sold is discernable from the EBA Final Report on the Technical Standards:

The extended use of the NPL transaction data templates is also expected to widen the investor base and facilitate the work of the existing and emerging **NPL electronic auction or transaction platforms**....⁶¹

Given the level of application of the draft ITS, the transfer of NPL may happen as bilateral transaction between two parties, where the parties may agree on the channels that are most suitable to their needs. Whereas, **where credit institutions use electronic auction platforms** or electronic transaction platforms to organise the sale or transfer process of NPL, further requirements for the electronic and machine-readable format may be set out by such platforms.⁶²

Clearly, the Irish legal and policy context of the enforcement of the security of NPLs that involve housing loan mortgages will be of relevance for completing this template. Both sellers

⁵⁵ Article 15 (1).

⁵⁶ Article 15 (1).

⁵⁷ Article 15 (3).

⁵⁸ Article 15 (4).

⁵⁹ EBA (2022) Final Report - Draft Implementing Technical Standards EBA/ITS/2022/05. P.

[8.https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2022/EBA-ITS-2022-05%20ITS%20on%20NPL%20transaction%20data%20templates/1045969/Final%20report%20on%20draft%20ITS%20on%20NPL%20transaction%20data%20templates.pdf](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2022/EBA-ITS-2022-05%20ITS%20on%20NPL%20transaction%20data%20templates/1045969/Final%20report%20on%20draft%20ITS%20on%20NPL%20transaction%20data%20templates.pdf)

⁶⁰ Ibid., p. 8.

⁶¹ Ibid., p. 5.

⁶² Ibid, p. 11.

of NPLs (and their advisers) will be required to honestly and accurately set out the level of legal and consumer protection provisions that apply in relation to Irish NPLs. Only credit which is originated after 1 July 2018 that becomes non-performing after 28 December 2021 will be subject to these EBA technical reporting standards for data templates.⁶³

The Directive will enable credit purchasers (including funds based in non-EU locations with undisclosed beneficial owners) of distressed loans to enforce the security from outside the EU Member State where the loan originated, and in some cases outside the EU itself, without any onerous registration or authorisation criteria. The limited obligation for the non-EU credit purchasers to designate a representative in the EU – facilitating the promotion of virtual office, without any accountability over the registering of beneficial ownership as required under the EU Anti-Money Laundering (AML) Directives.⁶⁴ This ‘representative’ will be addressed by the competent authority in addition to or instead of the credit servicer, on all issues related to compliance with the Directive.⁶⁵

While the Directive states that all existing consumer rights are preserved, the whole process of EU-law backed sales of NPLs creates another layer of complexity for local courts to navigate in seeking to uphold consumer and housing rights, which may be set out in national constitutional or legislative instruments. It requires a knowledge of both national and EU provisions on property, consumer and housing rights, as well as the integration of EUCFR rights within any interpretation or implementation of the Directive.

c. Credit Servicers

The key players from the perspective of consumer and human rights protection in this new framework is the “credit servicer”. A credit servicer is defined as “a legal person that, during its business, manages and enforces the rights and obligations related to a creditor’s rights under a non-performing credit agreement (or to the non-performing credit agreement itself), on behalf of a credit purchaser”.⁶⁶ Credit servicing activities are defined as one or more of the following activities:

- (a) collecting or recovering from the borrower, in accordance with national law, any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself;
- (b) renegotiating with the borrower, in accordance with national law, any terms and conditions related to a creditor’s rights under a credit agreement, or of the credit agreement itself, in line with the instructions given by the credit purchaser, where the credit servicer is not a credit intermediary;
- (c) administering any complaints relating to a creditor’s rights under a credit agreement or to the credit agreement itself;
- (d) informing the borrower of any changes in interest rates or charges or of any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself⁶⁷

Credit servicers are required to be authorised by the competent authority⁶⁸ (usually the Central Bank) of the Member States in which they plan to carry out their activities.⁶⁹ A credit servicing agreement means “a written contract concluded between a credit purchaser and a credit

⁶³ Article 16 (7).

⁶⁴ Article 19 (1).

⁶⁵ Article 19 (2).

⁶⁶ Article 3(8).

⁶⁷ Article 3(9).

⁶⁸ Article 4 (2).

⁶⁹ Article 4 (1).

servicer concerning the services to be provided by the credit servicer on behalf of the credit purchaser".⁷⁰

Member States competent authorities must establish a register of all the credit servicers authorised within that territory.⁷¹ The EBA will develop standardised guidelines for competent authorities.⁷² This register will then be made publicly available.⁷³ Article 9 of the Directive states that the "list or register ... shall be made publicly accessible online on the website of the competent authority [Central Bank of Ireland] and shall be updated on a regular basis."

The credit servicer applicant must be a legal person with its registered office or head office in the Member State where they seek authorisation.⁷⁴ The management or administration of the legal person must be of sufficiently good repute, meaning they must demonstrate they have not been involved in criminal activities⁷⁵, they maintain a "transparent, open and cooperative" relationship with supervisory regimes⁷⁶, and there is no ongoing insolvency or bankruptcy.⁷⁷ Authorised legal persons must ensure that internal mechanisms are in place to respect borrower's rights.⁷⁸ The applicant must provide adequate and specific internal measures to record and handle complaints from borrowers.⁷⁹ Similar protections are created for the prevention of money-laundering and terrorist financing.⁸⁰

The Impact Assessment on the draft Directive in 2018 found that there were at least 47 loan/credit servicers with assets under management of €508bn in the EU. Loan servicers were well established in EU Member States, except Cyprus and Malta. Both United Kingdom (UK) and Italy had 24 each, with Germany, Spain and Ireland having 15 or 16 loan servicers operating in their countries. The Netherlands, France, Poland, Belgium and Luxembourg each had 5 to 8 third-party loan servicers. Other Member States had less than 3 loan servicers each.⁸¹

While the credit purchaser does not carry on the activities of credit servicing, that purchaser must appoint a credit servicer through a credit servicing agreement.⁸² This contractual relation between credit servicer and credit purchaser is central to the servicing of these NPLs once sold, and must include detailed borrower information.⁸³

Member States shall require that credit purchasers and credit servicers, in their relationships with borrowers: (a) act in good faith, fairly and professionally; (b) provide information to

⁷⁰ Article 3(5).

⁷¹ Article 9 (1).

⁷² Article 9 (1).

⁷³ Article 9 (2) and (3).

⁷⁴ Article 5 (1)(a).

⁷⁵ Article 5 (1)(b)(i).

⁷⁶ Article 5 (1)(b)(iii).

⁷⁷ Article 5 (1)(b)(iv).

⁷⁸ Article 5 (1)(e) and (f).

⁷⁹ Article 5 (1)(g).

⁸⁰ Article 5 (1)(h) and (i).

⁸¹ COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans (Part 1/2) And Accelerated Extrajudicial Collateral Enforcement (Part 2/2) Accompanying the document Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on credit servicers, credit purchasers and the recovery of collateral Brussels, 14.3.2018 SWD(2018) 75 final PART 1/2 {COM(2018) 135 final} - {SWD(2018) 76 final} https://www.parlament.gv.at/PAKT/EU/XXVI/EU/01/58/EU_15813/imfname_10796459.pdf. 125.

⁸² Article 11 (1).

⁸³ Article 11 (2).

borrowers that is not misleading, unclear or false; (c) respect and protect the personal information and privacy of borrowers; (d) communicate with borrowers in a way that does not constitute harassment, coercion or undue influence.⁸⁴

In advance of the first debt collection and whenever requested by the consumer, the credit servicer must provide the borrower in clear, understandable language information about the NPL transfer and date; the credit purchaser's identification and contact; the credit servicer's identification, contact and authorisation; and the details and breakdown of all amounts due.⁸⁵ Significantly, the credit servicer also has an obligation to include a statement to the effect that all relevant Union and national law concerning in particular the enforcement of contracts, consumer protection, borrower's rights and criminal law continues to apply, and the name, address and contact details of the competent authorities of the Member State in which the borrower is domiciled, or its registered office is situated, or, if under national law it has no registered office, the Member State in which its head office is situated and to which the borrower can submit a complaint.⁸⁶ However, this statement will have limited effect without a reference to the actual laws which apply, covering constitutional, human rights and EUCFR rights. This is especially significant in relation to evictions being arranged by credit servicers on behalf of offshore NPL purchasers.⁸⁷

d. Outsourcing

Article 18(1) of the Directive provides for the outsourcing of the debt collection and enforcement of the security (which may involve eviction proceedings) by a credit servicer. The credit servicer must inform its authorising body only of the identity and address of that outsourced operator.⁸⁸ The Directive provides that Member States must ensure that outsourcing of these activities are subject to the same agreement requirements and must be fulfilled by the credit servicer.⁸⁹ There must be a written outsourcing agreement between the credit servicer and the credit service provider.⁹⁰ Under this outsourcing agreement, the credit service provider must state they will comply with the applicable legal rules and provision for the credit servicer.⁹¹ The obligations of the credit servicer within the credit servicing agreement to the credit purchaser remain, despite the outsourcing of the activities – although the supervision of this is likely to present major challenges for bodies like the Central Bank of Ireland, where debt collection activities take place across a number of EU Member States, and the credit servicer home State is Ireland (see below section f.).⁹² Credit servicers remain

⁸⁴ Article 10(1).

⁸⁵ Article 10(2).

⁸⁶ Article 10(2).

⁸⁷ Kenna, P. (2020) *Integrating EU Charter Housing Rights into EU Economic Governance and Supervision*. <https://www.universityofgalway.ie/media/housinglawrightsandpolicy/files/Briefing-Paper-3-Integrating-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision-.pdf> Kenna, P., Benjaminsen, L., Busch-Geertsema, V. and Nasarre-Aznar, S. Pilot Project – Promoting Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions (VT/2013/056). Final report (2016). European Commission, DG EMPL.

⁸⁸ "Where the credit purchaser or, where applicable, its representative designated in accordance with Article 19 appoints an entity referred to in Article 2(5), point (a)(i) or (iii), or a credit servicer, to perform credit servicing activities in relation to the transferred creditor's rights under a non-performing credit agreement, or the non-performing credit agreement itself, Member States shall require that credit purchaser or its representative to inform the competent authorities of its home Member State of the identity and address of the entity referred to in Article 2(5), point (a)(i) or (iii), or of the credit servicer, at the latest on the date on which the credit servicing activities start."

⁸⁹ Article 11 (3).

⁹⁰ Article 12 (1)(a).

⁹¹ Article 12 (1)(a).

⁹² Article 12 (1)(c).

subject to the authorisation and supervision of the ‘home’ State competent authority, even if activities are outsourced.⁹³ The credit servicer must have access to the information relating to activities, and if the outsourcing agreement is terminated, the credit servicer must be able to provide the outsourced activities.⁹⁴

e. Authorisation, “passporting” and cross border regulation

The Directive introduces a complex arrangement for authorisation and “passporting” of credit purchasers and credit servicers in the EU secondary market for NPLs, as well as some innovative methods for regulating these activities.

The credit servicer (who could be authorised/passported in Ireland or in any EU Member State) will take over the role of the original lender in dealing with consumers in arrears. Since the credit purchaser, the credit servicer and the consumer could very well be in three different EU Member States the system of supervision will become critical in protecting consumers’ and home-owners’ rights. The Directive creates a complex regulatory framework whereby a credit service provider may be authorised or “passporting” in one Member State, the loans concerned are located in another (host) Member State, while the credit purchaser may even be in a third Member State, or indeed based in a non-EU location.

While consumers holding the NPLs in the original Member State will, in theory, be protected under domestic consumer legislation, there is an obligatory but complex complaint system governing all three component Member States.⁹⁵ The Directive states that cross-border cooperation among regulatory authorities will remedy any weaknesses in consumer protection. However, that arrangement is unlikely to be harmonised for all transactions.⁹⁶ In the context of Member States’ different languages and widely varying practices for debt collection, consumer protection, notary sales, extra judicial enforcement of homeloan mortgage security, and varying levels of access to legal remedies for unlawful evictions, the application of this Directive will require close scrutiny by the Central Bank of Ireland. This will also require the fullest consumer and human rights protection to be put in place by the Minister for Finance and the Central Bank of Ireland to protect Irish homeloan borrowers whose loans will be sold to third parties under these provisions of EU law.

f. Regulation of Cross-Border Credit Servicing activities

Member States, through their competent authority, must ensure that authorised credit servicers may carry out servicing activities in any other host Member State by ensuring scope for adherence to relevant national law provisions on authorisation.⁹⁷ Authorised credit servicers that intend to carry out activities in a host Member State must submit detailed branch and address information to their home Member State, as well as compliance with anti-money laundering provisions.⁹⁸ The home Member State must furnish this information to the host Member State within 45 days of receiving it and the host Member State must provide an acknowledgement of receipt without delay.⁹⁹ The credit servicer may begin providing activities in the host Member State upon confirmation of receipt from the host Member State or, if no

⁹³ Article 12 (1)(d) and (e).

⁹⁴ Article 12 (1)(f) and (g).

⁹⁵ Article 24.

⁹⁶ DIRECTIVE (EU) 2021/2167 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU. OJ L 438/1 8.12.2021. Article 5 (1)(b)(iv).

⁹⁷ Article 13 (1).

⁹⁸ Article 13 (2).

⁹⁹ Article 13 (3).

receipt arises, within 2 months of submitting the information above.¹⁰⁰ The credit servicer must also notify home Member States of any changes to the above information.¹⁰¹

Member States are obliged to give satisfactory powers to their competent authority to withdraw authorisation if the credit servicer fails to act upon the authorisation or is not carrying it out.¹⁰² Competent authorities in host Member States that withdraw authorisation must immediately notify the competent authority in the credit servicer's home Member State of such action.¹⁰³ Where the credit had been granted in neither the credit servicer's home or host Member State, the granting Member State's competent authority must be notified also.¹⁰⁴ There are therefore potentially three regulatory competent authorities involved across three Member States on any complaints process, perhaps using three different European languages. While many have taken inspiration in developing this EU secondary market from the US, it's important to note that in the US all States operate in a similar language. Thus applying this system across the 24 official languages of EU Member States may present significant logistical and timely supervisory challenges.

Member States are required to empower competent authorities to carry out investigations, supervision and administer penalties against credit servicers to ensure compliance with the Directive.¹⁰⁵ Member States must ensure that home and host Member States, along with the Member State that has granted the credit if in a separate territory, cooperate with each other to achieve proper functioning of the Directive's aims.¹⁰⁶

Competent authorities of home Member States can receive assistance in investigating a credit servicer by requesting an on-site inspection by the host Member State.¹⁰⁷ The practicalities of these inspections and level of assistance shall be determined by the host Member State on a case by case basis.¹⁰⁸ However the risk of a "race to the bottom" in terms of supervision cannot be ignored.

Competent authorities of host Member States are obliged to inform the home Member State of the findings of an inspection or investigation without delay, irrespective of whether it has been self-initiated or not.¹⁰⁹ Where a competent authority of a host Member State identifies infringements of the credit servicer, they must transmit evidence of the breaches to the competent authority of the home Member State, but this does not extinguish national provisions pertaining to handling of infringements in the host territory.¹¹⁰ Where an infringement occurs in the Member State where the credit was granted, details of such infringement and a request to take necessary action should be provided to the competent authority of the home Member State.¹¹¹ Home Member States' competent authorities must notify their host Member State counterpart of any actions that have or haven't been taken against a credit servicer after notification of non-compliance with obligations.¹¹² Where home Member State competent authorities do not take action after being notified of continuous infringements, the host Member State competent authority may then levy administrative

¹⁰⁰ Article 13 (5).

¹⁰¹ Article 13 (6) and (7).

¹⁰² Article 8 (1).

¹⁰³ Article 8 (2).

¹⁰⁴ Article 8 (2).

¹⁰⁵ Article 14 (2).

¹⁰⁶ Article 14 (4).

¹⁰⁷ Article 14 (5).

¹⁰⁸ Article 14 (6).

¹⁰⁹ Article 14 (7) and (8).

¹¹⁰ Article 14 (9).

¹¹¹ Article 14 (10).

¹¹² Article 14 (11).

sanctions or penalties as appropriate.¹¹³ This will be allowed where no adequate steps have already been taken against the credit servicer, or where there is urgent action required in order to address a serious threat.¹¹⁴ These penalties can be in addition to any home Member State competent authority sanctions.¹¹⁵ Host Member State competent authorities may suspend activities of a credit servicer that impinge upon obligations under the Directive.¹¹⁶

g. Consumer Protection

There is a commitment to consumer protection in Recital 52 of the Directive, which states that it is designed - "In order to ensure a high level of consumer protection, Union and national law provide for a number of rights and safeguards related to credit agreements granted to a consumer". Borrower rights should also not be altered if the transfer of the credit agreement between a credit institution and a credit purchaser takes the form of contract novation:

As a general principle, it should be ensured that borrowers are not worse off following the transfer of their credit agreement from a credit institution to a credit purchaser. This Directive should not prevent Member States from applying stricter provisions in order to protect borrowers.¹¹⁷

Recital 55 states:

The importance placed by the Union legislator on the protection provided for consumers in Council Directive 93/13/EEC and in Directives 2008/48/EC and 2014/17/EU, means that the assignment of a creditor's rights under a credit agreement, or of the credit agreement itself, to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way.

Recital 56 points out that Directives 2008/48/EC and 2014/17/EU are amended by this Directive to establish that Member States should require creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated:

...When deciding which forbearance measures to take, creditors should take into account the individual circumstances of the consumer, the consumer's interests and rights and the consumer's ability to repay the credit, including in particular if the credit agreement is secured by residential immovable property that is the consumer's primary residence. Forbearance measures should be able to consist of certain concessions to the consumer, such as a total or partial refinancing of a credit agreement, or a modification of its existing terms and conditions including, among others, an extension of its term, a change of the type of credit agreement, a deferral of payment of all or part of the instalment repayment for a period, a change of interest rate, an offer of a payment holiday, partial repayments, currency conversions, partial forgiveness and debt consolidation. Member States should have appropriate forbearance measures in place at national level.... Where after foreclosure proceedings outstanding debt remains, Member States should ensure the protection of minimum living conditions and put in place measures to facilitate debt repayment while avoiding long-term over-indebtedness. At least where the price obtained for the residential immovable property affects the amount owed by the consumer, Member States should encourage creditors to take reasonable steps to obtain the best efforts price for the foreclosed residential immovable property in the context of market conditions.

¹¹³ Article 14 (12).

¹¹⁴ Article 14 (12).

¹¹⁵ Article 14 (12).

¹¹⁶ Article 14 (12).

¹¹⁷ Recital 52.

Member States should not prevent the parties to a credit agreement from expressly agreeing that the transfer of the security to the creditor is sufficient in order to repay the credit, in particular when the credit is secured by the consumer's primary residence.¹¹⁸

Article 22 of the Directive preserves all existing consumer and civil law protections for borrowers.

With regard to credit agreements falling within its scope, this Directive shall not affect contract law principles nor civil law principles under national law with regard to the transfer of a creditor's rights under a credit agreement, or of the credit agreement itself, nor the protection granted to consumers or borrowers pursuant in particular to Regulations (EC) No 593/2008 and (EU) No 1215/2012, and Directives 93/13/EEC, 2008/48/EC, 2014/17/EU and the national provisions transposing those Directives or other relevant provisions of Union and national law relating to consumer protection and borrowers' rights.

Member States are obliged to ensure ongoing compliance and adequate supervision through competent authorities for credit servicers by transposing the Directive.¹¹⁹

Credit purchasers and servicers are required to maintain a relationship with the NPL borrowers in which they act fairly,¹²⁰ distribute accurate information,¹²¹ protect borrowers' personal information,¹²² and communicate in a way which does not harass or coerce the borrower.¹²³ Credit purchasers and servicers should not harass nor give misleading information to consumers, and they should not charge fees to consumers that exceed the costs directly related to managing the debt.¹²⁴ Member States must not place any additional requirements on credit purchasers, other than those from transposing this Directive and applicable consumer protection, contract, civil and criminal laws.¹²⁵

Adoption of these measures will not infringe upon national powers over credit registers which Member States may have in place to monitor the credit purchaser, creditor or credit agreement itself.¹²⁶

Member States must ensure that credit servicers establish and maintain effective procedures for handling borrower complaints.¹²⁷ These procedures must be free of charge for borrowers and must record the complaints and measures taken to alleviate the issues. – although the need to ensure the complaints system is in the language is not specifically addressed.¹²⁸

¹¹⁸ Recital 56.

¹¹⁹ Article 21 (1).

¹²⁰ Article 10 (1)(a).

¹²¹ Article 10 (1)(b).

¹²² Article 10 (1)(c).

¹²³ Article 10 (1)(d).

¹²⁴ Article 10 (1).

¹²⁵ Article 17 (2).

¹²⁶ Article 17 (3).

¹²⁷ Article 24 (1). Competent authorities must also establish and publish procedures for handling complaints from borrowers, credit purchasers and credit servicers. Article 24(3).

¹²⁸ Article 24 (2).

h. Inclusion of Forbearance Measures into the Mortgage Credit Directive¹²⁹

The Directive extends the protection for mortgage borrowers in distress, by inserting the previous “soft law” Guidance set out in Article 28(1) of the Mortgage Credit Directive (MCD)¹³⁰ into new legally binding provisions. This will create a new Article 28a retrospectively into the MCD which will read:

1. Member States shall require creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated. Such forbearance measures shall take into account, among other elements, the consumer’s circumstances and may consist of, among other possibilities:

(a) a total or partial refinancing of a credit agreement;
(b) a modification of the existing terms and conditions of a credit agreement, which may include among others:

- (i) extending the term of the credit agreement;
- (ii) changing the type of credit agreement;
- (iii) deferring payment of all or part of the instalment repayment for a period;
- (iv) changing the interest rate;
- (v) offering a payment holiday;
- (vi) partial repayments;
- (vii) currency conversions;
- (viii) partial forgiveness and debt consolidation.’

This new Article 28a is inserted into the MCD on consumers’ rights on assignment or assignment of the credit agreement itself.¹³¹ There are also protections for consumers when lenders retrospectively modify the terms of loan agreements set out in Article 28. This inserts a new Article 27a into the MCD on the information to be provided regarding the codification of the terms and conditions of a credit agreement.¹³² The operation of the Directive will be evaluated by end 2026 by the European Commission.¹³³

¹²⁹ European Parliament and Council Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (Mortgage Credit Directive) [2014] OJ L 60/34.

¹³⁰ Section 28(1) MCD states: “Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.” The EBA had prepared Guidelines on these measures.

¹³¹ “1. In the event of an assignment to a third party of the creditor’s rights under a credit agreement, or of the credit agreement itself, the consumer shall be entitled to plead against the assignee any defence which was available to the consumer as against the original creditor, including set-off where the latter is permitted in the Member State concerned. 2. The consumer shall be informed of an assignment referred to in paragraph 1, except where the original creditor, by agreement with the assignee, continues to service the credit vis-à-vis the consumer”.

¹³² “Without prejudice to other obligations provided for in this Directive, Member States shall ensure that, prior to modifying the terms and conditions of the credit agreement, the creditor communicates the following information to the consumer: (a) a clear description of the proposed changes and, where applicable, of the need for consumer consent or of the changes introduced by operation of law; (b) the timescale for the implementation of the changes referred to in point (a); (c) the means for complaint available to the consumer regarding the changes referred to in point (a); (d) the time period available for lodging any such complaint; (e) the name and address of the competent authority to which the consumer can submit that complaint”.

¹³³ Article 30.

Section 2. The Irish Context

a. Overview

Some 15 years after the 2007/2008 financial crisis, the Directive is being transposed to facilitate the sale of NPLs, including homeloan mortgages. Over this period, significant legal and policy changes have taken place in Ireland to protect homeloan borrowers who face eviction for their homes. This must not only be recognised in the transposition of the Directive but in the arrangements made by the Minister for Finance and the Central Bank of Ireland for its implementation. It is also incumbent on professionals who advise sellers and purchasers of NPLs and who prepare the information associated with these sales to provide accurate information on the Irish legal and policy context that impacts the enforcement of the security of any housing loan mortgage.

The overall judicial framework of mortgage enforcement and forbearance in Ireland is derived from constitutional, legislative, case-law, regulatory, personal insolvency and consumer measures. Evictions from homes by mortgage lenders (or others) must comply with Article 40.5 of *Bunreacht na hEireann* – the Irish Constitution which states: “The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.” Similar to most European constitutions and Article 8 ECHR, this protection has been interpreted as including “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”.¹³⁴

b. Two-thirds of homeloan repossessions do not take place on foot of a court order

In Ireland, two-thirds of homeloan repossessions do not take place on foot of a court order, meaning they occur outside the prescribed judicial process even though the protection of borrowers’ right to home requires a judicial process before being evicted. Instead, these repossessions of homes have taken place as a result of “voluntary surrender” or abandonment, and not as a result of a court order. Of the 9,968 owner-occupier dwellings repossessed by lenders between 2010 to 2021 only 33% were repossessed on foot of a court order. Most were repossessed in the period between 2015 to 2018, with numbers declining quickly after that time, following declining overall repossessions. This overall drop could be attributed to the growing awareness of consumer law defences, and to the development of the personal insolvency system.¹³⁵

¹³⁴ *Irish Life and Permanent PLC v. Duff* [2013] IEHC 43 at 44: *Fagan v ACC Loan Management* [2016] IEHC 233.

¹³⁵ There were also significant numbers of buy-to-let dwellings repossessed with tenants evicted, although Central Bank of Ireland research does not address these situations.

Table 1: Dwellings Repossessed by Lenders - Central Bank of Ireland Statistics¹³⁶

Year	On foot of court order		Voluntary 'surrenders'/abandoned	
	Bank	Non-bank	Bank	Non-bank
2010	74	28	162	96
2011	129	67	303	109
2012	134	59	344	66
2013	200	51	443	72
2014	220	95	889	107
2015	603	123	696	113
2016	417	75	1,035	166
2017	455	71	814	77
2018	203	47	576	52
2019	74	70	343	48
2020	21	15	72	50
2021	21	3	39	41
Totals	2,551	704	5,716	997

Since 2005 there have been significant legislative and regulatory changes governing mortgages in Ireland, with key developments in 2009, 2012, 2013, 2015, 2018 and 2019.

c. Preventing enforcement proceedings - Code of Conduct on Mortgage Arrears

Originally issued on 2013, the Code of Conduct on Mortgage Arrears¹³⁷ (CCMA) is applicable to all regulated lenders, except credit unions, and to “the mortgage loan of a borrower which is secured by their primary residence”. It imposes an obligation on the lender to engage with the borrower in an attempt to put in place arrangements to resolve the arrears problem through a Mortgage Arrears Resolution Process (MARP). This process deals with arrears and pre-arrears situations, and continues to apply even if the mortgage has been sold to a non-bank, as these protections remain with the loan. The four steps of the MARP are 1. Communication with the borrower; 2. Compilation of financial information on the circumstances of the borrower; 3. Assessment of any potential solutions or alternative repayment method; and 4. Resolution, which in some cases could mean legal proceedings for eviction.

The CCMA sets out the procedural requirements on default where the lender seeks repossession in paragraphs 56-60:

56. Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower’s primary residence, where:

(a) the lender has made every reasonable effort under this Code to agree an alternative arrangement with the borrower or his/her nominated representative; and (b)

(i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or (ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29.

...58. A lender, or its legal advisors on its behalf, must notify the borrower on paper or another durable medium immediately before it applies to the Courts to commence legal proceedings for the repossession of the primary residence.

¹³⁶ <https://www.centralbank.ie/search-results?indexCatalogue=mainenglish&searchQuery=mortgage%20arrears>

¹³⁷ <https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf>

59. Where legal proceedings have commenced, a lender must continue to maintain contact with the borrower or his/her nominated representative periodically. If an alternative repayment arrangement is agreed between the parties before an order in relation to the repossession of the property is granted, the lender must seek an order from the court to put the legal proceedings on hold, for the period during which the borrower adheres to the terms of the alternative repayment arrangement.

The information specified above must be provided to the borrower in a timely manner following the completion of the disposal.

The CCMA also provides for an appeals process, but this is outside the MARP. If these steps have been exhausted and the lender intends to repossess the dwelling, CCMA rules in section 55-60 govern repossession proceedings.

Under the CCMA, the lender must inform the borrower of other available options, such as voluntary surrender, trading down, mortgage-to-rent or voluntary sale, and the implications of each option for the borrower and his/her mortgage loan account. The borrower must also be informed that legal proceedings may commence three months from the date the letter is issued or eight months from the date the arrears arose, whichever date is later, and that, irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs.¹³⁸

The current position in relation to the legal status of the CCMA was set out in *Pepper Finance Corp. v Cannon*¹³⁹ by O' Malley J. in the Supreme Court.

A series of Codes of Conduct issued by, firstly, the Financial Regulator and, in more recent years, the Central Bank, under the terms of s.117 of the Central Bank Act 1989, as amended, have imposed various obligations on lending institutions dealing with consumers. One primary obligation, which came to the fore during recent years as a result of the number of borrowers falling into arrears during the recession, is to refrain from seeking repossession of a dwelling until a specified period has elapsed. Breach of a Code is a regulatory offence, but for some years there was doubt about the effect of a breach on the enforceability of the contract as between the lender and the borrower. In 2015 this Court held that a court could not properly consider and facilitate an application for an order for possession brought before the moratorium period was over (see *Irish Life & Permanent v. Dunne* [2015] IESC 46). This position is now entrenched by statute – under the terms of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 the creditor must exercise reasonable forbearance before initiating possession proceedings and shall, at a minimum, comply with the provisions of any Code or similar measure put in place by the Central Bank.

d. Land and Conveyancing Law Reform Act 2009

The Land and Conveyancing Law Reform Act (LCLRA) 2009 introduced a uniquely Irish homeloan mortgage regime covering mortgages for the acquisition or development of housing for the borrower or their household. This effectively changed how such mortgages are structured and handled, including requiring a court order for possession. The legislation overrides any mortgage conditions to the contrary and sets out the procedural requirements

¹³⁸ Para 45.

¹³⁹ [2020] IESC 2 at para 136. https://www.courts.ie/acc/alfresco/4d4f8f26-fca7-48a3-ba7d-41ebb4e1e2d3/2020_IESC_2.pdf/pdf#view=fitH

for enforcing the security (with a court order required) and for the subsequent sale of the property.¹⁴⁰

The definition of a ‘housing loan’ is set out in section 96(3) LCLRA, which draws from the Consumer Credit Act 1995. This defines a “housing loan” as:

- (a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land—
 - (i) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependants, or
 - (ii) for the purpose of enabling the person to improve a house that is already used as the principal residence of that person or that person's dependants, or
 - (iii) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependants, or
- (b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a)(i), (ii) or (iii), or
- (c) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants, or
- (d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer.

Section 96 LCLRA lays down general principles which govern exercise of a mortgagee’s statutory powers and rights in Ireland, and preserves the rule under the Conveyancing Act 1881 that these powers and rights apply to all mortgages created by deed. Sections 97 to 111 LCLRA impose further restrictions on exercise of particular remedies, even in cases of mortgage payment default. Section 97 LCLRA states that, unless the property is abandoned, “a mortgagee shall not take possession of the mortgaged property without a court order granted under this section, unless the mortgagor consents in writing to such taking not more than 7 days prior to such taking.” The Court has considerable discretion on whether to grant a possession order on a housing loan in default. Section 97(2) LCLRA provides that “A mortgagee may apply to the court for an order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit.” Section 94 LCLRA entitles a mortgagor to seek an order for sale of the land, but again, this will be subject to the discretion of the court as a possession order will normally be required. The procedure for obtaining possession of a mortgaged property, where it involves a “housing loan” (see above), is also different from other mortgages.

Section 92 LCLRA abolishes the mortgagee’s right to consolidate housing loan mortgages, i.e. the right to insist that the mortgagor pays off all mortgages held with the same mortgagee, or none at all. The section confirms that a mortgagor can redeem any housing loan mortgage without having to redeem any other mortgage, whether it relates to the same or other property mortgaged to the same mortgagee.

¹⁴⁰ Land and Conveyancing Law Reform Act 2009, s100.

e. Personal Insolvency Act 2012

The Personal Insolvency Act 2012 modernised the law on personal insolvency in Ireland, with a significant impact on distressed homeloan borrowers. Section 99 of the Act of 2012 provides for a Personal Insolvency Arrangement (PIA) which will not “require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants”. These reasonable living standards constitute an amount of income (which can be earned income or social assistance) which cannot be attached, and which provides for a person’s “physical, psychological and social needs.”¹⁴¹ The PIA provides that both secured (up to €3m.) and unsecured debts can be restructured or settled to devise an affordable payment scheme, which must be approved by the court.

The Act aims to protect debtors’ ability to remain in their home. Section 104 of the Act provides that a Personal Insolvency Practitioner (PIP) shall, insofar as reasonably practicable, formulate the PIA on terms which “will not require the debtor to dispose of or cease to occupy all or part of the principal private residence and the PIP shall consider all alternatives, including the costs of remaining in the home, debtors circumstances, ability of others in the home to contribute, reasonable living costs and cost of alternative accommodation”.¹⁴² Crucially, where the costs of remaining in the home are disproportionately high, the PIP will not be required to prepare a PIA on terms that will require the debtor to leave the home. A PIA shall not contain terms providing for the disposal of the debtor’s interest in the home, unless the debtor has received legal advice and all relevant provisions of the Family Law Acts are complied with.

When calculating reasonable living expenses used to determine PIAs, the Insolvency Service of Ireland (ISI) includes set costs that apply to everyone, such as clothing, food, utilities, and transportation; other costs that vary by circumstance, such as housing, childcare, and home or motor vehicle insurance; and special costs, such as education and care for elderly or disabled household members.¹⁴³ As shown in the table below, these monthly set costs are based on household composition and need for a motor vehicle (essential in many parts of Ireland).

¹⁴¹ Insolvency Service of Ireland, ‘Reasonable Living Expenses Background Information’ 6. https://www.isi.gov.ie/en/ISI/RLEs_Guidelines_August_2020.pdf/Files/RLEs_Guidelines_August_2020.pdf

¹⁴² The term “principal private residence” is defined in s.2 of the Act as follows: - “‘principal private residence’ means a dwelling in which the debtor ordinarily resides and includes (a) any building or structure, or (b) any vehicle or vessel (whether mobile or not), together with any garden or portion of ground attached to and occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling; ...”

¹⁴³ Insolvency Service of Ireland, Guidelines on a reasonable standard of living and reasonable living expenses, <https://backontrack.ie/wp-content/uploads/2022/11/Reasonable-Standard-of-Living-and-Reasonable-Living-Expenses-Guidelines-24-November-2022.pdf>

Table 2: ISI Reasonable Living Expenses (Nov 2022)¹⁴⁴

Household Composition	Motor Vehicle Required	Motor Vehicle Not Required
	Adult Set Costs	
Single Adult (No Children)	€1,084.93	€1,296.02
Couple (No Children)	€1,764.37	€1,897.62
Single Adult (With Children)	€1,065.88	€1,354.51
Couple (With Children)	€1,506.58	€1,700.34
	Children Set Costs	
Infant	€216.51	€216.51
Pre-School	€72.36	€72.36
Primary School	€245.15	€233.45
Secondary School	€454.48	€442.88

Monthly set costs are added to the monthly costs of housing, childcare, home insurance, motor vehicle insurance, and special costs to determine the household's monthly reasonable living expenses. Remaining income beyond the amount needed to cover the household's reasonable living expenses is allocated toward paying down the household's debt. After 6 years the remaining debt covered by the PIA is adjusted (which may involve a write-off)¹⁴⁵ so that repayment are manageable.

ISI figures show over 12,000 PIA arrangements launched between the beginning of the scheme in 2013 and the third quarter of 2022, with over 6,000 approved.¹⁴⁶ These involved extending or restructuring mortgages, and in some cases, partially reducing the principal sum. By analysing a representative sample, the ISI found that 100% of those entering a PIA remained in their home in 2021.¹⁴⁷

The ISI initiated a publicity campaign in early 2023 aimed at resolving long-term arrears cases as new figures show €4bn. in mortgage and other debt have been resolved by the PIA structure in a decade, including €1.78bn. in the past 3 years.¹⁴⁸ The campaign will be run through *Abhaile*, a free, State-funded financial and legal advice and support service offered to insolvent borrowers in danger of losing their homes due to arrears.¹⁴⁹ Among other services, *Abhaile* offers people vouchers to receive initial financial advice from a PIP.

¹⁴⁴ Ibid.

¹⁴⁵ Insolvency Service of Ireland, Personal Insolvency Arrangement, available at https://backontrack.ie/wp-content/uploads/2022/06/ISI_PIA_2022.pdf

¹⁴⁶ Insolvency Service of Ireland, Statistics report Quarter 3 2022, available at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/244623/2dc19ba6-6fd0-43c1-bfd8-734f0ed52aee.pdf#page=null>

¹⁴⁷ Insolvency Service of Ireland, 2021 Annual Report, available at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/232711/54cca9b5-70e8-49dc-82d0-e6e35fbd030d.pdf#page=null>

¹⁴⁸ Typical PIAs involve total debts of about €357,000 with an average home mortgage debt of €230,000 and an average write-off of €158,00. *The Irish Times*, February 6 2023. "Debt writeoff deals to target people in long-term arrears". <https://www.irishtimes.com/ireland/social-affairs/2023/02/06/debt-write-off-deals-to-be-promoted-to-20000-people-in-long-term-mortgage-arrears/>

¹⁴⁹ *Abhaile* is State-funded scheme specifically established to assist borrowers in mortgage arrears, and is part of the State Money Advice and Budgeting Service (MABS), which assists with financial advice. The *Abhaile* scheme provides vouchers for clients to see Personal Insolvency Practitioners, legal or financial advisers. In addition, MABS supports clients at all of the repossession court sittings in the country as Court Mentors.

Table 3: Personal Insolvency Arrangements Approved 2014 - 2021¹⁵⁰

2014	2015	2016	2017	2018	2019	2020	2021
126	619	697	733	959	1,055	1,020	925

Recent PIAs approved by the courts have extended the repayment period for 30 years on a reduced interest rate,¹⁵¹ during which time the borrower can remain in the mortgaged home.

f. Land and Conveyancing Law Reform Act 2013

The Land and Conveyancing Law Reform Act (LCLRA) 2013 created a pathway for courts in mortgage possession proceedings to provide a 2-month adjournment where the Court could refer the case for a possible PIA. In effect, this suspends the possession process and, through the PIA, enables the debtor to devise a repayment plan based on non-attachment of a sufficient level of household income, classified as reasonable living expenses.

g. Bankruptcy (Amendment) Act 2015

The Bankruptcy (Amendment) Act 2015 further updated the PIA system and limited creditors' rights to prevent a court from adopting a PIA. A review process permits the High Court to review a creditor-rejected PIA proposal, and, where satisfied as to its reasonableness, make an order confirming the PIA.

h. Consumer Protection (Regulation of Credit Servicing Firms) Act 2015

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 required that credit servicing of certain loans including mortgages sole by credit institutions to non-banks be undertaken by a regulated credit servicing firm, which would be subject to authorisation and regulation provisions exercised by the Central Bank of Ireland. Credit servicing includes: notifying the borrower of changes in interest rates or in payments due under the credit agreement or other matters that the relevant borrower is to be notified further to the terms of the credit agreement, and taking any necessary steps for the purposes of collecting or recovering payments due under the credit agreement from the borrower, managing or administering repayments under the credit agreement and any charges imposed under the credit agreement, dealing with errors made in respect of the credit agreement or complaints made by the borrower, addressing financial difficulties, alternative repayment arrangements, restructuring, assessing the borrower's ability to repay and communicating with the borrower in respect of any of the foregoing. All the consumer protections which exist with the original lender are deemed to transfer with the loan, and be inherited by the credit purchaser. Loan purchasers were not required to be regulated, provided that they appointed an authorised credit servicing firm.

¹⁵⁰ See Insolvency Service of Ireland Statistics:

<https://www.isi.gov.ie/en/ISI/2019%20Q4%20ISI%20Statistics%20>

¹⁵¹ <https://www.irishtimes.com/business/debt-ruling-allows-waterford-man-pay-93-mortgage-per-month-1.4705055?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fbusiness%2Fdebt-ruling-allows-waterford-man-pay-93-mortgage-per-month-1.4705055>

i. Consumer Protection (Regulation of Credit Servicing Firms) Act 2018

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 extended the provisions of the 2015 Act to require loan purchasers to be authorised and registered with the Central Bank of Ireland and included in the Register of Credit Servicing Firms. “Credit servicing” is now deemed to include holding legal title to credit and managing or administering such credit, including by determining the overall strategy for the management and administration of a portfolio of credit agreements, or maintaining control over key decisions relating to such portfolios. The Central Bank of Ireland publishes an updated list of Credit Servicing firms on its website.¹⁵²

j. European Union Consumer Mortgage Credit Agreements Regulations 2016

Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (the Mortgage Credit Directive) was transposed into Irish law under the European Union Consumer Mortgage Credit Agreements Regulations¹⁵³. This has been cited in the Supreme Court case of *Pepper Finance Corp. v Cannon*¹⁵⁴ as to require lenders to exercise reasonable forbearance before initiating possession proceedings, which must, at a minimum, comply with the provisions of any Code or similar measure put in place by the Central Bank, such as the CCMA.

k. Land and Conveyancing Law Reform (Amendment) Act 2019

The Land and Conveyancing Law Reform (Amendment) Act 2019 introduced an obligation on all courts to carry out a prescribed form of proportionality assessments in granting or executing any orders for possession, especially where the PIA process fails or is not agreed by the lender. This requires Courts dealing with mortgage possession cases on principal private residences to consider a set of factors, including the proportionality of granting a possession order. It requires the borrower to have sought assistance from the State bodies through the *Abhaile*¹⁵⁵ scheme or the Mortgage-to-Rent scheme¹⁵⁶, but the proportionality test must be applied even where these have failed to resolve the matter. The Court must also consider whether the mortgagee has made a statement to the mortgagor of the terms on which the mortgagee would be prepared to settle the matter in such a way that the mortgagor and his/her dependents could remain in the principal private residence, and any proposals by the borrower to settle the matter and the response, if any, of the mortgagee to any such proposal.¹⁵⁷

¹⁵² <https://registers.centralbank.ie/DownloadsPage.aspx>

¹⁵³ S.I. 142/2016. <https://www.irishstatutebook.ie/eli/2016/si/142/made/en/print>

¹⁵⁴ [2020] IESC 2 at para 136. https://www.courts.ie/acc/alfresco/4d4f8f26-fca7-48a3-ba7d-41ebb4e1e2d3/2020_IESC_2.pdf/pdf#view=fitH

¹⁵⁵ *Abhaile* is State funded scheme specifically established to assist those in mortgage arrears, and is part of the State Money Advice and Budgeting Service (MABS) which assists with financial advice. The *Abhaile* scheme provides vouchers for clients to see Personal Insolvency Practitioners, legal or financial advisers. In addition, MABS supports clients at all of the repossession court sittings in the country as Court Mentors.

¹⁵⁶ The Mortgage-to-Rent scheme involves a social housing or private body acquiring the loan from the lender and offering a long term social housing tenancy at an affordable rent to the distressed borrower.

¹⁵⁷ The LCLRAA commenced on 1st August 2019 under SI. No. 397/2019.

Section 3. Responses to Public Consultation Questions

Question 1: Do you think that Ireland should exclude public notaries, bailiffs and lawyers from the application of the Directive as transposed into Irish law?

It would be contrary to established EU consumer and human rights law to exclude any entities dealing with NPLs that could result in loss of home or other consumer right protections from the supervision and regulatory arrangements set out in the Directive (see above). Indeed, the potential for credit servicers authorised in other EU Member States to engage such professionals who may have poor knowledge of the Irish context, and vice versa, are strong grounds for bringing these under the scope of the Directive as transposed.

Indeed, since many credit servicers operating in Ireland will have a home State that operates notary sales and extra-judicial enforcement of the security of a mortgage and evictions, may consequently seek to apply that type of process to Irish borrowers it is all the more necessary to spell out clearly that such notaries, bailiffs and lawyers be included in the application of the Directive as transposed into Irish law.

Question 2: Do you think that credit servicers authorised in Ireland under this Directive should be allowed to receive and hold funds from borrowers, or should be prevented from doing so?

This may be useful so long as the activity is appropriately regulated by the relevant competent authorities.

Question 3: Do you think that Ireland should require credit servicers to keep and maintain relevant records for a period of more than five years after the termination of a credit servicing agreement with a credit purchaser?

The Directive requires that after the credit servicing agreement is terminated, the credit servicer must keep records of correspondence with the borrower.¹⁵⁸ The Directive requires the credit servicer to hold these records for at least 5 years, but no longer than 10 years, while also requires the credit servicer to furnish these records to the relevant competent authority if requested.¹⁵⁹

Central Bank of Ireland statistics show the length of time mortgage arrears cases have been in proceedings, with 1,477 cases less than one year, 312 cases between one and two years, 1,864 cases between 2 and 5 years and 2,255 cases over 5 years.¹⁶⁰ One quarter of borrowers cases in the legal system are there for more than 5 years, and the majority of borrowers in mortgage arrears are outside of the legal system.¹⁶¹ Due to the lengthy nature of legal proceedings and the need for transparency and accountability, relevant records should be kept and maintained for 10 years in Ireland (see above).

Equally, it is vital that all files relating to repayment and forbearance arrangements are included in the documentation to be transferred to the credit purchasers on sale.

¹⁵⁸ Article 11 (4).

¹⁵⁹ Article 11 (4) and (5).

¹⁶⁰ https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2022q2_ie_mortgage_arrears_statistics.pdf?sfvrsn=afa5941d_3

¹⁶¹ See Duignan, D., Hopkins, A., Meehan, C. & M. Sherman, (2020). 'New insights into those in long-term mortgage arrears'. Central Bank of Ireland Behind the Data, September 28 2020. <https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/understanding-long-term-mortgage-arrears-in-ireland>

It is also essential in dealing with issues of potential money laundering that records be kept for 10 years after the termination of a credit service agreement with a credit purchaser, instead of 5 years.

Question 4: Do you think that Ireland should exercise this discretion and provide that EU based credit purchasers should appoint credit servicers under this EU framework in respect of credit agreements other than non-performing agreements concluded with consumers?

This EU framework will not apply to the sale of performing loans originated by credit institutions, to the sale of performing or non-performing loans originated by non-credit institutions, to the sale of non-performing loans originated by credit institutions before 30 December 2023, or to the sale of non-performing loans by EU credit institutions to other EU credit institutions before 30 December 2023. The Directive has been created to deal with the issue of NPLs across the EU and has put in place a framework for regulating and supervising these activities. The Directive was not created as a means of allowing the sale on secondary markets of performing loans and it would be wholly inappropriate to extend the Directive to this area.

Question 5: Do you think Ireland should exercise this discretion to allow natural persons to service credit agreements which fall within the scope of this Directive?

Recital 27 of the Directive sets out the context of the authorisation process being developed under the Directive.

To avoid a reduction in borrower protection and in order to promote trust, the conditions for granting and maintaining an authorisation as a credit servicer should ensure that credit servicers, persons who hold a qualifying holding in the credit servicer, and members of its management or administrative organ, have a clean police record in relation to relevant criminal offences linked to, among others, crimes against property, crimes related to financial activities, money laundering, fraud or crimes against physical integrity, and are not subject to an insolvency procedure nor have previously been declared bankrupt, unless they have been reinstated in accordance with national law. Compliance with the requirement for members of the management or administrative organ of credit servicers to have been transparent, open and cooperative in their past business dealings with supervisory and regulatory authorities should be assessed based on the information available to, or within the knowledge of, the competent authority at the time the authorisation is granted. If no information is available, or if there is no knowledge of any information, or if there is no past interaction with supervisory and regulatory authorities at that time, then the requirement is deemed fulfilled.

The Directive provides that a natural person, subject to national supervision and regulation, may carry out the credit servicing activities of a credit purchaser within a Member State but will not have the power to perform these activities in another Member State.¹⁶² Should there be non-compliance with these obligations by the credit purchaser, Member States may require their credit servicer to comply in their absence.¹⁶³

However, in practice there is potential for such persons acting as outsourced credit servicers to act in breach of consumer and human rights protection, or in some cases to engage in intimidation or unlawful evictions (see above). The arrangements for supervision of such persons by the Central Bank of Ireland and competent authorities in other EU Member States

¹⁶² Article 17 (4).

¹⁶³ Article 17 (5).

are likely to be challenging and slow. The Minister for Finance should not facilitate natural persons to be employed as credit servicers, or indeed as outsourced entities by credit servicers.

Question 6: Do you think Ireland should allow a credit servicer to comply, on behalf of the credit purchaser, with the obligations of the credit purchaser including in relation to credit registers?

The Consumer Protection (Regulation of Retail Credit Firms) Acts 2018 requires the holder of the legal title to the loans sold be credit institutions to be authorised by the Central Bank of Ireland as a credit servicing firm. Thus, the question is whether this arrangement meets the requirements of the Directive, and whether it adequately protects consumers and is in the public interest. One particular area of concern is the failure of credit purchasers to register as the owners of charges on land in the Land Registry in Ireland. This undermines the mirror principle of the land registration system. It also means that the parties to a home possession case are not in fact the parties who are the owners and borrowers of the mortgage. Indeed, the term foreclosure will be transposed, which in fact has been abolished in Irish law since 2009.

To ensure full consumer protection, transparency and protection against money laundering, it is essential that the Central Bank of Ireland holds full information on credit purchasers of Irish mortgages directly, rather than through credit servicers, particularly when these are based outside the EU.

Question 7: Do you think Ireland should exercise this discretion and not provide for all of the identified forbearance measures in the transposition of the new Article 16a of the Consumer Credit Directive?

Recital 56 provides that the list of forbearance measures provided in this Directive, as amendments to Directives 2008/48/EC and 2014/17/EU, is not exhaustive, and therefore Member States remain free to provide for additional measures. Likewise, it is open to Member States not to provide for a specific measure if so foreseen at national level, as long as a reasonable number of measures remains available.

Indeed, all the forbearance measures outlined in the Directive which will lead to a revised Article 28A of the Mortgage Credit Directive (MCD) are already included in the Code of Conduct on Mortgage Arrears (CCMA) (described above) and accepted as part of the legal protection under the MCD transposed into Irish law under the European Union Consumer Mortgage Credit Agreements Regulations.¹⁶⁴ This has been cited in the Supreme Court case of *Pepper Finance Corp. v Cannon*¹⁶⁵ to require lenders to exercise reasonable forbearance before initiating possession proceedings, which must, at a minimum, comply with the provisions of any Code or similar measure put in place by the Central Bank of Ireland. Thus, to reduce the available forbearance measures in the transposition of this Directive would be to diminish existing consumer protections.

There is an obligation to ensure that after possession proceedings have taken place, and outstanding debt remains, Member States should ensure the protection of minimum living conditions and should put in place measures to facilitate debt repayment while avoiding long-

¹⁶⁴ S.I. 142/2016.

¹⁶⁵ [2020] IESC 2 at para 136. https://www.courts.ie/acc/alfresco/4d4f8f26-fca7-48a3-ba7d-41ebb4e1e2d3/2020_IESC_2.pdf/pdf#view=fitH

term over-indebtedness. Article 28 MCD provides the remedy of *datio in solutum*, whereby a borrower can return the keys to a mortgaged home in full satisfaction for the debt. The MCD provides that this remedy cannot be prevented by a Member State: “Member States should not prevent the parties to a credit agreement from expressly agreeing that the transfer of the security to the creditor is sufficient in order to repay the credit, in particular when the credit is secured by the consumer’s primary residence”.¹⁶⁶

In transposing this Directive in Ireland, the Minister for Finance should ensure that the wide range of forbearance measures already accepted in Irish law through the CCMA, case law and the Mortgage Credit Directive Regulations 2016 are not diminished. The Minister should also facilitate the introduction of non-recourse mortgages and the remedy of *datio in solutum*, as set out in Article 28 MCD and in this Directive.

Question 8: Do you think that Ireland should allow creditors to (i) define and impose charges on a consumer arising from default, (ii) if so, require that those charges shall be no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default, (iii) allow creditors to impose additional charges on the consumer in the event of default and (iv) if the answer to (iii) is in the positive, what cap should be placed on those charges?

The Directive allows Member States to provide higher levels of consumer protection and the Minister for Finance in Ireland should avail of this opportunity to limit the charges lenders can impose in cases of default – which in many cases simply add to the arrears and make the situation worse. Poor and unemployed borrowers are in a weak position to challenge the unfair imposition of levies and charges often arising from expensive legal actions by lenders. In any case, some of these charges could amount to unfair contract terms. It is a bitter irony that some Irish homeloan debtors can end up paying the legal costs of the financial entities enforcing the security on the loan while they themselves cannot afford legal representation (see above).¹⁶⁷

Question 9: Similar to Question 7, do you think Ireland should exercise this discretion and not provide for all of the identified forbearance measures in the transposition of the amendment to Article 28 of the Mortgage Credit Directive?

Similar to Question 7, all the forbearance measures outlined in the Directive which will lead to a revised Article 28A of the MCD are already included in the CCMA (described above) and accepted as part of the legal protection under the Mortgage Credit Directive transposed into Irish law under the European Union Consumer Mortgage Credit Agreements Regulations.¹⁶⁸ This has been cited in the Supreme Court case of *Pepper Finance Corp. v Cannon*¹⁶⁹ to require lenders to exercise reasonable forbearance before initiating possession proceedings, which must, at a minimum, comply with the provisions of any Code or similar measure put in place by the Central Bank. Thus, to reduce the available forbearance measures in the transposition of this Directive would be to diminish existing consumer protections (see above).

Question 10: Do you think that Ireland’s existing national authorisation and regulatory regime in respect of credit servicing firms (i) is equivalent to, or stricter than, those established in this

¹⁶⁶ Article 28(4) MCD.

¹⁶⁷ Kenna, P. (2020) *A Lost Decade - Study on Mortgage Possession Court Lists in Ireland*. NUI Galway. <https://static.rasset.ie/documents/news/2020/05/nuig-a-lost-decade-report-on-mortgage-possession-cases-in-ireland-.pdf>

¹⁶⁸ S.I. 142/2016.

¹⁶⁹ [2020] IESC 2 at para 136. https://www.courts.ie/acc/alfresco/4d4f8f26-fca7-48a3-ba7d-41ebb4e1e2d3/2020_IESC_2.pdf/pdf#view=fitH

Directive for credit servicing activities and (ii) if so, should such regulated entities be automatically recognised as authorised credit servicers?

The regulation and supervision of credit servicers in Ireland has already raised many public interest questions especially in relation to the raising of interest rates on loans serviced by these entities sooner, and to higher levels, than credit institutions in 2023.¹⁷⁰

According to the Central Bank of Ireland Register of Credit Servicing Firms at 13 February 2023,¹⁷¹ there were 21 Credit Servicing Firms registered. These were BCMGlobal ASI Limited t/a BCMGlobal; Cabot Financial (Ireland) Limited; Coralfin Limited; Dengrove DAC; Fitzwilliam Loan Management Unlimited; Havbell DAC; Hudson Advisors Ireland DAC; Lapithus Management DAC; Mars Capital Finance Ireland DAC t/a Mars Capital; OCM EmRu Debtco DAC; Promontoria (Aran) Limited; Promontoria (Arrow) Limited; Promontoria (Field) Designated Activity Company t/a Promontoria (Field) DAC; Promontoria (Finn) Limited; Promontoria (GEM) DAC; Promontoria (Oyster) DAC; Promontoria (Pluto) Limited; Promontoria Scariff AC; Promontoria Servicing Ireland Limited; Seaconview DAC; Situs Asset Management Ireland DAC.¹⁷² However, the information published is limited to the Irish postal addresses for these credit servicers and credit purchasers and does not provide any details of their overall activities – essential for consumer protection, transparency and anti-money laundering obligations.

The Irish Times on 24 February 2023 stated that an organisation called Pepper was servicing “about Irish 80,000 mortgages owned by investment funds such as Carval, Goldman Sachs and Pimco.... .. Many of the underlying borrowers are unable to refinance at lower rates with mainstream lenders because they are considered higher-risk borrowers.” However, the Central Bank of Ireland list of Credit Servicing Firms does not include any entity called Pepper, although Pepper Finance Corporation (Ireland)¹⁷³ is listed under Retail Credit Firms/Home Reversion Firms.¹⁷⁴ There is no reference to Carval, Goldman Sachs or Pimco in the Central Bank List of Credit Servicers at that date.

In that context, It would seem appropriate for a higher standard of authorised, registration and publication were imposed on the national authorisation and regulatory regime, avoiding confusion and greater distress for borrowers in arrears as to who in fact were the owners of their mortgages. Increased accountability, transparency, consumer protection and respect for citizen’s rights ought to be the guiding principles, rather than administrative convenience and corporate secrecy. For consumers whose mortgages are sold in the secondary market, the situation become even more traumatic when credit servicers authorised in a distant EU Member State outsource their debt collection services there or elsewhere, as they may do under Article 16 of the Directive. Controls on such outsourcing of credit servicing debt collection agencies that operate across a number of EU Member States is likely to be a challenge for competent authorities, including the Central Bank of Ireland. The proposal by the Department of Finance to retain the existing national credit servicing regulatory framework, as provided for in the Consumer Protection (Regulation of Retail Credit Firms) Acts 2015 and 2018 and the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 may well be inadequate to protect Irish consumers (see above).

¹⁷⁰ See RTE Primetime – <https://www.rte.ie/news/primetime/2023/0202/1353478-its-a-cage-mortgage-prisoners-fear-more-rate-hikes/>.

¹⁷¹ <http://registers.centralbank.ie/DownloadsPage.aspx>

¹⁷² <https://registers.centralbank.ie/DownloadsPage.aspx>

¹⁷³ C37043. Pepper Finance Corporation (Ireland) DAC t/a Pepper Asset Servicing, Pepper Money, Pepper Advantage 4th Floor, Two Park Place, Hatch Street Upper Dublin 2.

¹⁷⁴ <https://registers.centralbank.ie/DownloadsPage.aspx>

Section 4. Conclusions

One significant weakness in the Directive (which could have been resolved in the transposition into Irish law) is the failure to recognise that the rights of tenants in properties where the owner has a NPL. Tenant protection is patchy across Europe and many are vulnerable people. In Ireland, this situation has led to major increases in homelessness among tenant families. Central Bank of data shows that **there were some 8,000 buy-to-let (BTL) mortgage accounts in arrears of over one year** - 10% of all BTL accounts in Ireland at September 2022, with outstanding balances of €2.2 billion.¹⁷⁵ Of these some 20% were overdue by between 2 and 5 years, a further 26% were in arrears by between 5 and 10 years and 18% were in arrears over 10 years. Non-banks held 70% of all BTL accounts in arrears and 84% of BTL accounts with accumulated arrears greater than ten years. The risks to tenants who have no defence against a notice of termination when the landlord or the loan owner wants to sell the dwelling are clear, and the potential for increased homelessness were these loans to be sold in the secondary market is obvious.

By classifying all NPLs as the same (not distinguishing between consumer, homeloan and other NPLs) the Directive does not respect the right to home for borrowers or tenants as set out in Article 7 of the EUCFR. This could have been addressed in the transposition of the Directive.

In many cases of distressed debt, the named borrower may have left the home, as a result of family breakdown or separation, and the remaining household members, including any children, will not be protected, as they are not the consumer/borrower. These situations also need to be recognised in the transposition of the Directive, with the Central Bank and Department of Finance provide adequate protections. Central Bank research reports also need to address such equality issues in their analysis of the data on mortgage arrears.

It is significant to note that in Ireland some two-thirds of home possessions involve surrenders and do not take place on foot of a court order. This presents major concerns when faced with outsourced debt collectors in Ireland, authorised in another (distant) part of the EU and using a different language.

The potential for abuse of consumer protection and citizen's rights is clear. It is entirely possible that many of the **63,000 homeloan mortgages described above, as potentially at risk of not being fully paid, and the 8,000 BTL mortgages in long term arrears may sold as NPLs on the secondary market created by this Directive – potentially through online auctions** (although it is not clear what minimum size tranches of loans will be allowed). The purchaser can be based in any Member State or outside the EU, and so long as there is a credit servicing agreement with a credit servicer passported by any EU Member State (who may use an outsourced entity), then EU law permits this sale of mortgages on people's homes. In order to prevent a "race to the bottom" in terms of consumer and housing rights protection the application of EU consumer and EUCFR rights are critical.

There does not appear to be any emergency procedure whereby the Central Bank of Ireland can intervene in such cases, except through a lengthy and inter-country complaints procedure. The regulator does not appear to have any powers to seek emergency injunctive relief for borrowers/consumers where such abuse is taking place. Neither are there any provisions for punitive damages to be sought in cases of deliberate breaches of the Directive. Similar

¹⁷⁵ Central Bank of Ireland, Residential Mortgage Arrears & Repossessions Statistics – Q3 2022
https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2022q3_ie_mortgage_arrears_statistics.pdf?sfvrsn=35bb9b1d_3

mortgage/credit servicers in the US have been held to have failed to provide timely and accurate notices of payment charges, fees, proofs of claim, final accounting of payment during bankruptcy cases and unnoticed loan modifications for borrowers resulting in overpayments, denying homeowners the opportunity to challenge the accuracy of mortgage payment increases, mortgage servicing abuses as well as payment application errors.¹⁷⁶

One significant obligation on the credit servicer is the requirement to issue a statement to the borrower to the effect that all relevant Union and national law concerning in particular the enforcement of contracts, consumer protection, borrower's rights and criminal law continues to apply.¹⁷⁷ However, this statement will have limited effect without a reference to the actual laws which apply, covering constitutional, human rights and EUCFR rights. This is especially significant in relation to evictions being arranged by credit servicers on behalf of offshore purchasers of NPLs.¹⁷⁸ Such a statement could have been made a requirement were the Directive to be transposed as primary legislation in Ireland.

¹⁷⁶ US Department of Justice (2021) National Mortgage Servicer Settlements available at: <https://search.justice.gov/search?query=mortgage&op=Search&affiliate=justice>. Also 'Seven examples of unfair practices and other violations by mortgage servicers: CFPB supervision activities uncover red flags', at <https://www.consumerfinance.gov/about-us/blog/seven-examples-unfair-practices-and-other-violations-mortgage-servicers-cfpb-supervision-activities-uncover-red-flags/>: See also Glantz, A. (2020) *Homewreckers*, (New York, Custom House).chapter 7.

¹⁷⁷ Article 10(2).

¹⁷⁸ Kenna, P. (2020) *Integrating EU Charter Housing Rights into EU Economic Governance and Supervision*. <https://www.universityofgalway.ie/media/housinglawrightsandpolicy/files/Briefing-Paper-3-Integrating-EU-Charter-Housing-Rights-into-EU-Economic-Governance-and-Financial-Supervision-.pdf>