FROM PILLAR TO POST

A Series of Papers on issues arising in new and existing consumer debt cases in light of the Covid 19 pandemic

Paper Two:

Ten Years and Counting

Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland

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promoting access to justice

A SERIES OF PAPERS

FROM PILLAR TO POST PAPER TWO:

TEN YEARS AND COUNTING:

CONCLUSIONS FROM A DECADE OF ATTEMPTING TO RESOLVE FAMILY HOME MORTGAGE ARREARS IN IRELAND

A SERIES OF PAPERS ON ISSUES ARISING IN NEW AND EXISTING CONSUMER DEBT CASES IN LIGHT OF THE COVID 19 PANDEMIC

FREE LEGAL ADVICE CENTRES,
AUGUST 2021

TITLES OF THE SERIES OF PAPERS

—PAPER ONE—

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— About FLAC —

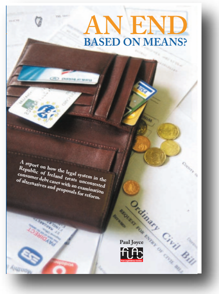
FLAC (Free Legal Advice Centres) was founded in 1969 and is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. FLAC works in a number of ways, it:

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information.
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum.
- Is an independent law centre that takes cases in the public interest, mainly in the areas of homelessness, housing, discrimination and disability.
- Operates a legal clinic for members of the Roma Community.
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that provides a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect the marginalised and disadvantaged.

FLAC's vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. FLAC makes policy recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

FLAC reports in the areas of debt and credit:

An End Based on Means
A Report on how the legal system in Ireland treats uncontested debt cases with an examination of alternatives and proposals for reform (May 2003)



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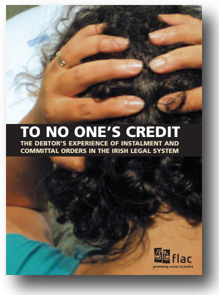
The Debtor's experience of Instalment and Committal Orders in the Irish legal system (June 2009)



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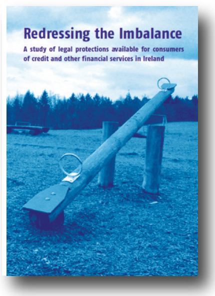
A study of legal protections available for consumers of credit and other financial services in Ireland (March 2014)



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For more of FLAC's work in the area of consumer credit law reform visit https://www.flac.ie/priorityareas/consumer-credit-law-reform/

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— Paper Two —

Ten years and counting:

Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland

—Paper One—

SETTING THE CONTEXT:

a critical examination of data relating to consumer debt, welfare, labour market and the economy

Paper One, together with a Foreword and an Introduction to the series, was published on June 30th, 2021.

Paper One can be accessed and downloaded from: –

https://www.flac.ie/publications/flac-pillar-to-post-paper-one/

Paper Two:
Ten years and counting: Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland

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Recommendations

Recommendation 1:

The CBI should carry out an audit of regulated lenders, retail credit firms and credit servicing firms to determine whether they are complying correctly with the data gathering guidelines on PDH mortgage arrears set out by the Bank *(See Section 2.2. Deep arrears cases)*

Recommendation 2:

The CBI should provide more detail and seek more data from lenders on the various sub-categories it has described in its 'legal proceedings concluded' figures. Within this category are a number of cases that have been in arrears and in proceedings for some time but do not ultimately result in a Possession Order. *(See Section 2.6. 'Concluded' legal proceedings)*

Recommendation 3:

The CBI should require lenders in its data guidelines to provide a quarterly update within this 'legal concluded' category, of cases where a Possession Order has been granted but the lender has yet to execute the order. *(See Section 2.6. 'Concluded' legal proceedings and Section 2.7. Repossession and voluntary surrender)*

Recommendation 4:

A figure is no longer provided for new repossession proceedings brought in each quarter. The CBI should remedy this deficiency and provide quarterly figures of new repossession cases both into the future and retrospectively for 2019 and 2020. *(See Section 2.7. Repossession and voluntary surrender)*

Recommendation 5:

The CBI should explain in relation to these datasets to what extent it tests the accuracy of the data provided to it by lenders, for example by way of inspections of the relevant records and documentation, particularly when it shows up anomalies. *(See Section 2.8. Restructures)*

Recommendation 6:

Although the CBI data provides figures for the number of restructures across the arrears categories, a breakdown of those restructures across those categories is not provided and this is a matter that the CBI might remedy. There is a significant difference in effectiveness between the durability of a short-term and a long-term restructure, as the CBI has frequently observed. *(See Section 2.8. Restructures)*

Recommendation 7:

The CBI should investigate the reasons for the reduction of close to 5% in the number of restructures between Q.3 and Q.4 2021, which were primarily in the area of the long term restructures. Further data would be useful more generally on: (i) the factors that bring long term restructures to an end; (ii) the cause(s) of any failure, and (iii) the context for any such failure. *(See Section 2.9. Overall performance of restructured mortgages).*

Recommendation 8:

The CBI should explore with lenders why a significant number of less serious arrears cases (where the borrower is deemed to be co-operating with the lender) do not currently have a restructure in place, and emphasise the need for early resolution of these accounts. Equally, there is a very significant number of households in deep arrears also deemed to be co-operating with their lender but who do not have a restructure in place; the reasons for this should also be explored. *(See Section 2.10. Unrestructured accounts)*

Recommendation 9:

The CBI should seek to clarify with lenders what levels of payments are currently being made on accounts in arrears of over two years where the borrower is deemed to be co-operating but the account is not classified as restructured. *(See Section 2.10. Unrestructured accounts)*

Recommendation 10:

The CBI might seek to investigate what factors caused co-operating borrowers to be in the legal process and what were the causes of a significant decrease in the number of co-operating borrowers in the legal process between Q.3 and Q.4 2020. (See Section 2.10. Unrestructured accounts)

(Section 2.10. Unrestructured accounts)

Recommendation 11:

The CBI and the government should ensure that regulated lenders are obliged to work to find an alternative repayment arrangement with borrowers whose capacity to repay is impaired by loss of income due to Covid or other factors beyond their control. Further, the sale of such loans to third parties should not be allowed until the lender has demonstrated that every effort has been made to agree a sustainable restructure. For this purpose, there should at the very minimum be a compulsory time period during which the existing lender must work with the borrower to reach an accommodation before a loan can be sold on.

(See Section 2.12. Mortgage sales to non-bank entities)

Recommendation 12:

The CBI should regularly seek the perspectives and views of those experiencing mortgage arrears as a matter of course. This should be a core component of developing its policy evidence base in line with its consumer protection remit. Incorporating a more longitudinal method by following a representative sample of households in arrears over time (in line with the 'panel' approach incorporated by the Central Statistics Office within its Survey on Income and Living Conditions)[1] would in our view provide insights not provided by cross-sectional enquiries. The CBI should consider adopting such an approach. *(See Section 2.13. Update – Quarter One 2021 mortgage arrears figures)*

Recommendation 13:

The CBI should require the mortgage lenders / loan owners that it regulates to provide a greater level of (verifiable) data that would provide a more dynamic picture of the evolving arrears situation post-Covid. Clearer questions should be asked of each lender and these might include:

- How many accounts ceased to be in arrears during the quarter?
- How many accounts went into arrears (either for the first time or again) during the quarter?
- What were the developments upwards and downwards in the respective categories of restructure?

It would also be helpful if the CBI accompanied these data releases with a commentary of its own, indicating what its own analysis might be and what additional measures and supports it suggests are required.

(See Section 2.13. Update – Quarter One 2021 mortgage arrears figures).

Recommendation 14:

The CBI should examine the feasibility of adding extra criteria to the mortgage arrears data to provide greater insight into restructure patterns; for example, factors such as the borrower's age or the loan to value ratio of the mortgage. If this is not feasible, a representative sample might be drawn.

(See Section 2.14. Summary)

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1 See: https://www.cso.ie/en/releasesandpublications/ep/p-silc/surveyonincomeandlivingconditionssilc2019/backgroundnotes/

Recommendation 15:

In its recently published paper - Behind the Data: Mortgage borrowers facing mortgage shortfalls – the CBI suggested that 'there was a reporting gap for retail credit and credit servicing firms that hold PDH mortgages'. It would be helpful if the CBI clarified both the nature and extent of this reporting gap.

(See Section 2.15. Update - Mortgage borrowers facing end of term repayment shortfalls)

Recommendation 16:

The data published in 'Mortgage borrowers facing mortgage shortfalls' illustrates the need for further data concerning the viability of split mortgages. The CBI should seek detail from lenders/loan owners on (i) the current number of arrangements where there is agreement in advance as to how the shortfall will be paid on a split mortgage when the split portion comes to an end; and (ii) the full profile of existing split mortgages, identifying items such as the 'split portion, warehouse portion' percentages, borrower/s age, and other factors affecting resolution.

(See Section 2.15 Update – Mortgage borrowers facing end of term repayment shortfalls)

Recommendation 17:

The CBI, which regulates mortgage lenders, and the ISI, which regulates the personal insolvency legislation, should together conduct an audit of how many family home mortgage arrears cases have been resolved through the process of applying for a Personal Insolvency Arrangements (PIA), and ongoing quarterly figures should be provided in this regard.

[See Section 3.1 – The role of the Personal Insolvency Act 2012 (as amended)]

Recommendation 18:

It is now almost two years since the Land and Conveyancing Law Reform (Amendment) Act 2019 was commenced in August 2019, and there is still no clarity in terms of the procedures that apply to the detailed assessment that the Circuit Court is obliged to make prior to deciding whether to grant a Possession Order or not. We recommend that the Department of Justice and the Courts Service collectively update the position and move urgently to introduce the necessary regulations and Practice Directions to enable this legislation to properly function.

[See Section 3.2 – The role of the Land and Conveyancing Law Reform (Amendment) Act 2019]

1

SECTION

1. INTRODUCTION AND OVERVIEW

We present, today, 18th August 2020, the second paper in this series of papers intended to assess the difficulties facing consumer borrowers whose payment capacity is now or remains impaired following the economic damage inflicted by the pandemic. The subject of this paper is the vexed question of mortgage arrears, about which there are strong and in some instances quite polarised views. In our view, the recent history of attempts at resolving the mortgage arrears problem in the wake of the Global Financial Crisis of 2008 can teach us much about how new debt cases that arise from Covid should be approached, as well as how ongoing arrears cases might be better resolved. As a result, this paper looks back as well as forward, and the data produced by the Central Bank of Ireland (CBI) on a quarterly basis over recent years provides a detailed source of information upon which to reflect.

Ultimately, it also illustrates that consumer over-indebtedness in a market economy is now a kind of continuum,[1] with the level of problem debt subject to the ebb and flow of economic trends and unforeseen events (Covid serving as the ultimate example of the latter). Thus, to the mortgage arrears cases that existed prior to the arrival of Covid will likely be added some new 'first time' cases of arrears and some of the existing arrears cases will have worsened. Other existing arrears cases on the other hand may have improved or even been resolved, particularly for those who managed to maintain their income while reducing their expenditure during the pandemic. In short, personal debt difficulty seems destined to remain a feature of Irish society and we have to work decisively to resolve it. Thus, regardless of the degree of difficulty experienced, consistency of approach and a realistic assessment of what households in poor financial circumstances can afford to pay should be the cornerstone of the State's response.

At the time of writing, the latest Q.1 2021 CBI data tells us that there are over 52,000 principal dwelling house (PDH) mortgages in arrears in Ireland, with almost 25,000 of these in deep arrears i.e. arrears of over two years or more. According to a recent paper, also from the CBI, a total of over 95,000 PDH mortgage accounts (one in eight) are forecast to have a 'balance shortfall' at the end of the mortgage term. It is likely that this figure of 95,000 includes the 52,000 accounts in arrears, together with a sizeable number of restructured mortgages that are not meeting the terms of the restructure, and other restructures that may be meeting the terms but where this will not be sufficient to pay off the mortgage. Thus, it is important to note that some 43,000 accounts (the difference between these two numbers) are not classified as being in arrears but, in many cases, face very serious shortfalls at the end of their mortgages.[2]

The ongoing troubles of housing policy in Ireland have, once again, come prominently to the fore, with the realisation that significant tracts of land and large numbers of properties are owned by "cuckoo funds" and real estate investment trusts. These entities have been the beneficiaries of generous tax treatment from the State over an extended period, and appear intent on using their superior financial power to acquire more properties upon which to charge high rents while the opportunity presents. Recent government proposals to attempt to remedy this situation have so far been met with mixed reaction, and at the time of writing a new housing strategy plan is due to be published.

Ironically, it was the proposed publication of an 'Affordable Housing Bill' that moved these issues back into the spotlight. Public housing has remained largely on the back foot where it has dwelled since the boom years, when the State chose to focus on a private sector construction boom lasting in perpetuity at a time when surplus funds were available to facilitate the building of public housing for a rainy day.

[1] This can be defined as 'a continuous sequence in which adjacent elements are not perceptibly different from each other, but the extremes are quite distinct'.

[2] Duignan, D. and Kearns, A. (2021). *Behind the data: Mortgage borrowers facing end of term repayment shortfalls*. Dublin: Central Bank of Ireland, July 2021. This paper is discussed in the introduction to Section 2 and it is also reviewed in detail in Section 2.15 below.

Meanwhile, two of the five pillar banks have signalled their intention to withdraw from the Irish market, citing concerns around profitability. In terms of the first of these, a reported review by Ulster Bank's parent Nat West suggested that *'it would not achieve an acceptable level of returns going forward'.*[3] Further, following the subsequent announcement of KBC's intended withdrawal, an article in the Irish Times suggested that '*although KBC and Ulster Bank have the lowest mortgage rates in Ireland, their rates are still far higher than those charged by their parent groups in Belgium and the UK respectively. Despite these high rates they can't generate sufficient profits, because a significant group of customers are unable or unwilling to pay their mortgage and repossessing a home here is a tortuous process.*'[4]

There is a big difference between being unable and being unwilling, and while there are some borrowers who may engage in what is described as 'strategic default', there is little evidence that their numbers are significant. As discussed below, in our view it is an over-simplification to present "inability" and "unwillingness" as a dichotomy, given that both context and circumstance are important nuancing factors. In a helpful contribution to the debate that is now undoubtedly urgently required, not just on how to seek to resolve existing pre-pandemic family home mortgage arrears cases but also new cases of such arrears that may arise as a result of the pandemic, a further paper recently published by the CBI presents a more balanced picture of the struggles that many borrowers in mortgage arrears have faced and continue to face over recent years.[5] This paper will be discussed in greater detail in Section 4. There is also a significant European Union dimension to this discussion and it is well described in that CBI paper as follows:

'Since 2014, supervision of significant institutions in Ireland is a joint competency of the Single Supervisory Mechanism (SSM) in Frankfurt and the Central Bank of Ireland. An important innovation of the SSM in recent years has been the Non-Performing Loan (NPL) guidance, the 2018 Addendum to which sets out a provisioning "calendar" under which banks must provide for increasingly large loss levels for each year that NPLs are held on their balance sheets. After seven years as an NPL, provision coverage for a secured loan should be one hundred per cent. This calendar implies that the cost of retaining loans that do not return to performing classification will rise with each passing year. Recent IFRS 9 accounting reforms also imply that performing loans with restructuring arrangements in place must carry a higher provision than performing loans with no such restructuring'.[6]

This means, as we understand it, that the continued existence of non-performing loans on a lender's loan book is penalised in a way that reduces the relevant institution's capacity to make profits by lending out from its capital. No doubt the European Central Bank (ECB) can cogently argue that this is justified in the name of both financial stability and consumer protection. However, it is also worth noting that the institutions of the European Union manifestly failed to regulate mortgages at the time that much of the damage was done to borrowers in Ireland in the first decade of the millennium. At that time, property prices were inflated here – a trend that has returned – and, in order to get on the housing ladder, people were encouraged to borrow unsustainable multiples of their incomes to compete with buy-to-let investors. It was not until 2014 that the EU Mortgage Credit Directive was agreed by the Member States to regulate mortgages for the first time on an EU wide basis,[7] citing that '*a series of problems have been identified in mortgage markets within the Union relating to irresponsible lending and borrowing*

[3] 'Ulster Bank confirms exit from Irish market', *RTÉ News*, 19th February 2021.

[4] 'Exits of KBC and Ulster Bank leave other banks free to hike rates: Mortgage market must be more attractive to foreign lenders', *Irish Times*, 19th April 2021.

[5] McCann, F. and O'Malley, T. (2020). 'Resolving mortgage distress after Covid-19: some lessons from the last crisis', *Financial Stability Notes*, Vol. 2020, No 7, September 2020. Dublin: Central Bank of Ireland.

[6] *Ibid*, p4.

[7] Note that it was transposed in Ireland by secondary, rather than primary legislation, via the European Union (Consumer Mortgage Credit Agreements) Regulations, SI 142/2016, thereby depriving the Houses of the Oireachtas of the opportunity to discuss its terms, including a number of discretionary items.

and the potential scope for irresponsible behaviour by market participants including credit intermediaries and non-credit institutions'.[8]

By putting in place these 'capital provisioning' rules to apply to loans that were drawn down in a previous era, the ECB exerts a powerful influence on the domestic climate in individual Member States, leading lenders to offload impaired loans to third party funds and, perhaps, influencing their eventual exit from the market. With our legacy mortgage arrears problem and our fractured housing market, it is arguable that this has had a disproportionate influence on a small economy such as Ireland, which was clearly targeted by sub-prime lenders during the boom and an assortment of "vulture" funds and trusts thereafter. In our view, there should be more sympathetic treatment for small EU Member States still trying to recover from the Global Financial Crisis (GFC), especially countries that took their medicine when it was far from palatable. Have successive governments and the CBI lobbied on these issues with the ECB and other institutions of the European Union and, if so, what has been the outcome?

One way or another, blaming borrowers desperately trying to hold onto their homes is picking on an easy target, especially in a dysfunctional housing market where accommodation is in such short supply. And there should be no ambiguity about it – the broader problem of housing supply is a critical context in terms of the mortgage arrears problem. The narrative therefore that if only repossession was easier to achieve, many of our problems would be solved and new lenders would arrive on our shores to offer good value interest rates to new borrowers, is a questionable one. Nonetheless, with the planned departure of two of the pillar banks, the refrain has vigorously returned to the agenda, namely that it is too difficult to repossess family homes in Ireland.

Under a number of headings that follow below, we examine in detail current and recent mortgage arrears and restructure data provided by the CBI on a quarterly basis, which is now quite extensive. In our view, this analysis shows that the efforts of the State at resolution over a substantial period have been partially successful but have lacked and still lack a sufficiently coherent and decisive approach. Recourse to the legal system seems to have been a mixed blessing for all parties. It can also be inferred from the available data that lenders have failed in some cases to take the opportunity presented by the Mortgage Arrears Resolution Process (MARP) of the Code of Conduct on Mortgage Arrears (CCMA) to put in place an affordable alternative repayment arrangement, a view backed up to some extent in commentary provided by the Central Bank itself. As evidence, a substantial percentage of the borrowers currently in arrears who are deemed to be co-operating by their lender - around two in every three — have not been offered a restructure by their lender.

There is also some evidence of policy confusion in terms of the array of initiatives that have been put in place to attempt to resolve these problems, and this may to some extent result from different views and approaches by an array of state actors, including successive governments, the Departments of Finance and Justice, and the Central Bank. A notable case in point is the passing of the Land and Conveyancing Law Reform (Amendment) Act 2019 in August 2019,[9] legislation which has yet to make any noticeable impact. While this remains a potentially far-reaching piece of legislation that in principle improves the prospects of a borrower successfully defending repossession proceedings against him / her, it remains to our knowledge largely unused and untested. The arrival of Covid is one reason why this legislation has not been litigated to any significant extent but there are other significant factors: for example, it was not subject to any detailed debate in the Houses of the Oireachtas before being passed with haste into law. In addition, a failure thus far to put in place the infrastructural supports that would be required to utilise it — for example, regulations on applicable court procedures and processes, and access to civil legal aid for defendant borrowers – may result in borrowers being unsure how they might raise it in their defence and how that might risk their position, let alone how the provisions might be interpreted.

[8] See Point 4 in the preamble to the Directive – EUR- Lex – 32014L0017- EN.

[9] No 22/2019, commenced on August 1st 2019.

The cumulative effect is that a substantial number of legacy arrears cases remain unresolved and un-restructured, despite the borrower's co-operation with the processes that apply, with a substantial number remaining mired in the legal process. Some new cases of arrears are bound to arise as a result of Covid 19 related financial difficulties, although on the evidence thus far of available payment break data and the high percentage of expired payment breaks on family home mortgages,[10] these seem unlikely to be as numerous as might be envisaged. However, it is important not to take these data too much at face value, as the most recent available data is not conclusive.[11] Broadly, our review would suggest that we need to look again at creating a coherent and consistent system of out-of-court resolution with enforceable and properly regulated rules. The courts are not the ideal place for mortgage arrears cases, particularly for unrepresented defendant borrowers, unless there is a legal dispute between the parties and this seldom occurs in family home mortgage arrears cases. There may now be a strong case for going back to the drawing board, where the factors that have adversely affected the borrower's payment performance can be examined and a sustainable solution binding on the lender devised, subject to a right of appeal.

[10] The next paper in this series – Paper 3 – looks in detail at the available payment break data.

[11] For example, the number of accounts in arrears of 0-90 days *increased* by **670** between the end of September and the end of December 2020, indicating a new arrears cohort. Between the end of December 2020 and the end of March 2021, however, the number of accounts in arrears of 0-90 days *decreased* by **1,776,** suggesting the reverse. We suggest later in this paper – see Section 2.13 – that this may be indicative of some arrears cases being resolved and a (lower) number of new arrears cases arising during Covid.

2

SECTION

2. ANALYSIS OF MORTGAGE ARREARS DATA

Introduction

The Central Bank's Code of Conduct on Mortgage Arrears (CCMA)[12] defines arrears as follows. **'Arrears: arise on a mortgage loan account where a borrower has not made a full mortgage repayment, or only makes a partial mortgage repayment, in accordance with the original mortgage contract, by the scheduled due date'.**

In principle this looks like a straightforward definition. Missed or partially missed payments mean a family home mortgage goes into arrears and remains so until those arrears are cleared. Thus, on June 17th 2021, the Central Bank of Ireland (CBI), in its routine family home mortgage quarterly arrears data release for the end of Q.1 2021, records a total of **52,148** principal dwelling house (PDH) accounts to be 'in arrears'. The CBI's data releases on family home mortgage arrears also separately provide quarterly updates on the payment performance of restructured mortgages and the relevant figures are reviewed at Section 2.9 below.

As this FLAC paper was being finalised, new research data, some pertaining to mortgage debt and Covid 19, were published by the CBI on 13th July 2021. One of these pieces, referred to in the introduction to this paper, is entitled ***'Behind the Data: Mortgage borrowers facing mortgage shortfalls'.***[13] It is not proposed to consider this CBI research piece in any depth at this point – a review of it can be found at Section 2.15 below – but it is important in the context of our analysis of the mortgage arrears data which follows below that we give a basic account of its principal findings. These are as follows:

- **95,000** PDH accounts, equating to 13% of all PDH loans and representing €14.5 billion in total balance due, are assessed by the CBI to be facing a payment shortfall at the end of the mortgage term;
- Some 32,000 of these accounts face a balance shortfall of **10% or less;**
- The remainder of 63,000 accounts face a balance shortfall of **greater than 10%;**
- 54% of the 63,000 accounts (over 34,000) are not restructured;
- 45% of the 63,000 accounts (over 28,000) are in arrears for longer than one year.[14]

So although **95,000** PDH accounts face a payment shortfall at the end of the mortgage term, only (a maximum of) of just over **52,000** of these PDH accounts are classified as being in arrears. **By extension therefore, (at least) 43,000 of these 95,000 accounts are not classified as being in arrears, though they appear to be in considerable financial difficulty. Thus, a mortgage does not have to be classified as being in arrears to be distressed. Furthermore, a significant number of restructured accounts, which may have the appearance of being resolved, are in fact currently on a path to a substantial shortfall; this is indicative of the limitations even of long term restructures, where the borrower's ability to pay has been over-estimated or where further adverse events have impacted on financial capacity. And this raises an inevitable question: how many family home mortgages have had any form of write-down since the Global Financial Crisis (GFC) that might enable a long term restructure to be more sustainable?**

[12] Central Bank of Ireland (2013). *Code of Conduct on Mortgage Arrears.* Dublin: Central Bank of Ireland.

[13] Ibid.

[14] Extract from CBI guidance to lenders provided to FLAC on request in November 2020'.

2.1 Headline mortgage arrears figures

The Central Bank of Ireland (CBI) has been collecting and collating detailed data on *accounts* in mortgage arrears from the lenders it regulates since Q3 2009,[15] and has published quarterly reports in their current form since September 2012, albeit with several modifications over time.[16] The figures on 'Principal Dwelling House' (PDH) or family home mortgage arrears at end December 2020 (Quarter 4, 2020), which are based on returns made by lenders and loan owners to their regulator,[17] are summarised in the final column of Table 1 below.

Please note that while the analysis below was being completed, a further set of mortgage arrears figures (those for Q.1 2021) was published by the CBI in June 2021. While our review broadly focuses on the position to Q.4 2020, we do provide an update on issues of significance arising out of the Q.1 2021 figures below (See Section 2.13).

TABLE 1: MORTGAGE ARREARS DATA (PDH): Q3 AND Q4 2020

PDH accounts in arrears	Q3-2013	Q3-2020	Q4-2020
Up to 90 days	42,331	15,531	16,201
91-180 days	16,680	4,159	4,282
181-365 days	22,665	4,720	4,455
361 -720 days	28,010	5,267	5,067
More than 720 days	31,834	25,771	24,981
TOTAL	**141,520**	**55,448**	**54,986**

Source: Central Bank of Ireland

In broad terms, it can be said that the figures in Table 1 above represent significant progress in attempting to resolve a very deep mortgage arrears crisis that engulfed borrowers following the Global Financial Crisis (GFC). There has been an apparent reduction of over **86,000** in the number of accounts in arrears over the period for example. However, our examination of the CBI mortgage arrears data from 2013 to 2020 below raises serious concerns at a remove of eight years. A brief summary of these concerns which are developed in more detail in this section include:

- A significant percentage of long-term restructured accounts which are **'not meeting the terms'** of the restructured arrangement (one in seven);
- A number of mortgages classified as restructured which are **still in arrears** (almost one in five);
- Only **one in four cases** currently classified as being in arrears **is restructured** and only **10%** of accounts in the **most serious arrears** (of over two years) has a restructure;
- A substantial percentage of the borrowers currently in arrears who are **deemed to be co-operating** by their lender - two out of every three – **are not in a restructure**;
- Although the number of accounts in arrears has significantly decreased, the **percentage of accounts in deep arrears** (of over two years) is now twice as high as it was at end Q.3 2013 (45% of the total as compared with 22%);
- A significant number of households have **lost their family homes** as a result of legal action over the period covered by the dataset as a whole, namely 2013 to 2020 (an estimated total of well over **8,000**);

Thus, as we await the potential fallout in terms of over-indebtedness from Covid 19 (and perhaps Brexit), it is apparent there are a substantial number of close to 25,000 very difficult legacy mortgage arrears cases that remain to be resolved, in addition to some 30,000 other

[15] See: https://www.bis.org/ifc/events/ws_micro_macro/cassidy_paper.pdf , p3.

[16] https://www.centralbank.ie/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/previous-statistical-releases

[17] Our understanding is that all regulated lenders/loan owners/loan servicers make specific data returns to the CBI on a quarterly basis according to a set of guidelines drafted by the CBI that each entity must follow.

accounts that are in less serious arrears. The evolution of attempts over the past decade to resolve consumer over-indebtedness are well documented in the mortgage arrears arena and these can act as an important marker for future attempts to resolve any spike of debt that Covid may bring. Thus, what follows below is a detailed assessment of how these matters have been handled over an extended period and where it has brought us to in 2021.

2.2 Deep arrears cases

Up until Q.2 2020, the 'two years plus' arrears category had been presented with no further breakdown in terms of the length of arrears, though it had always proved to be not only the deepest category but also the slowest to resolve. We have known for some considerable time that many of these accounts have been in arrears of over five years and longer, as the arrears problem would have begun in many instances in the years following the Global Financial Crisis (GFC). Ultimately, the Q.2, Q.3 and Q.4 2020 figures have remedied this data deficit and, in so doing, have provided us with a stark illustration of the enduring legacy of family home mortgage arrears from that recession. Thus, of the 24,981 accounts in question at the end of 2020, the following breakdown is provided (with the Q.3 2020 figures also provided for comparison purposes):

TABLE 2: DEEP ARREARS CASES (PDH): Q3 AND Q4 2020

PDH accounts in arrears	Q3-2020	Q4-2020
2-5 years	9,268	8,926
5-10 years	11,489	10,789
More than 10 years	5,014	5,266
TOTAL	**25,771**	**24,981**

Source: Central Bank of Ireland

It may be useful at this juncture to set out the working definition that the CBI provides to lenders in terms of assessing the length and/or the amount of arrears, which states as follows:[18]

> *For this section of the return, accounts in arrears should be broken down by length of time in arrears. Classification by length of time in arrears is based on contractual payments not made since the inception of the mortgage, i.e. the value of arrears (payments not received by the contractual due date) expressed as equivalent days past due. For example, if an account is classified as in arrears of over 90 days, this does not necessarily signify that the borrower has not made any mortgage payments for the last three months. The borrower could be making partial repayments on a monthly basis but may still have an arrears balance equivalent to over 90 days past due.*

This guideline is troubling at first glance. It begins by stating that *'arrears should be broken down by length of time in arrears'* but then goes on to somewhat contradict that instruction by advising that the measurement is not the actual length of time the account has been in arrears but the amount of those arrears expressed as the total cumulative number of contractual instalments that are now outstanding.[19] Whether the reporting lenders are actually clear on this and always apply this measurement in practice is perhaps a matter for the CBI to test and to clarify, together with other aspects of the data guidelines provided to lending institutions. **We therefore recommend that the CBI should carry out an audit of regulated lenders, retail credit firms and credit servicing firms to determine whether they are complying correctly with the data gathering guidelines on PDH mortgage arrears set out by the Bank.**

What this means, for example, is that an account said to be in arrears of five years may have actually first gone into arrears a full ten years ago, if, for example, the borrower has been paying on average half the monthly contractual instalment over that ten year period. Equally, where an account is said to be in arrears of five

[18] Extract from CBI guidance to lenders provided to FLAC upon request in November 2020.

[19] In our experience, there are few borrowers in financial difficulty who pay nothing at all over long periods, especially clients of the Money Advice and Budgeting Service (MABS), given that the core task of money advice staff is to assess current payment affordability and to work towards improving the borrowers' financial circumstances and those payments over time.

years and the borrower has been paying on average one-quarter of the monthly contractual instalment since the arrears began, those arrears would have first begun some 6.66 years (or 80 months) ago.[20]

The critical point here is that these data are indicative of widespread and long-term struggle to hold on to family homes. Ultimately, the toll that these late stage arrears cases has taken on the mental and physical health of family members and in terms of the welfare, personal development and lost opportunities for young adults and children can be very significant,[21] and the overarching financial costs to society - in terms of healthcare, disability payments and education costs for example - are likely to be considerable were they ever to be subjected to an objective and detailed assessment.

With public housing options in limited supply and subject to substantial waiting lists, and private rented accommodation both limited and expensive and an increasing amount of it now in the control of real estate investment trusts (REITs), people in longer-term arrears have little choice. And for the many who diligently paid their mortgages until the Crash impacted negatively on their payment capacity, a sense of deep injustice still endures in taking the personal fall for global financial practices that were both irresponsible and poorly regulated.[22]

2.3 Current legal activity

Table 3 below sets out the position in relation to the occurrence of repossession proceedings in terms of each account in arrears at the end of Q.4 2020.

TABLE 3: CURRENT LEGAL ACTIVITY (PDH): Q4 2020

Current legal activity	Q4-2020
No 'formal demand'[23]	34,275
'Formal demand' but legal proceedings yet to issue	6,418
Legal proceedings in progress	7,301
Legal proceedings issued, concluded and arrears still outstanding	6,992
TOTAL	**54,986**

Source: Central Bank of Ireland

Perhaps the most telling statistic here is that almost three-quarters (over 40,000) of the accounts that are currently in arrears are not the subject of legal proceedings and it is likely that this number incorporates the significant majority of the less advanced arrears cases. It is possible that new cases may be added to this category through the second half of 2021 given a combination of the conclusion of payment breaks, the tapering of income supports such as the Pandemic Unemployment Payment (PUP), and the longer term economic effects of Covid 19 on borrower payment capacity.[24]

It is important to emphasise here that these figures are expressed in terms of the number of *accounts,* not the number of *dwellings*. Thus, where reference is made to 7,301 accounts at end Q.4 in respect of which legal proceedings were in progress for example, this does not mean 7,301 individual Civil Bills for Possession. Many borrowers will have topped up their mortgage at some point and will therefore have two (or perhaps even more) accounts on the one dwelling. On this matter the CBI has informally estimated that *'in broad terms, for mortgage accounts in arrears there is an average of 1.2 accounts per underlying property'.*[25] It may therefore be estimated that 7,301 accounts where legal proceedings are in progress relates

[20] Neither of these very basic calculations take into account any additional interest that might be potentially be charged by the lender on those arrears.

[21] 'Life with mortgage arrears in Ireland: I had 'seizures from stress', *Irish Times,* 2nd February 2019. https://www.irishtimes.com/life-and-style/homes-and-property/life-with-mortgage-arrears-in-ireland-i-had-seizures-from-stress-1.3777654. Some three years into the post GFC crisis, a piece of MABS research identified a number of emerging personal and familial impacts of mortgage arrears: Norris, M. and Brooke, S. (2011). *Lifting the Load: Help for people with mortgage arrears*. Dublin: Citizens Information Board, MABS NDL and Waterford MABS, p.86-91.

[22] See: Downey, D. (2013) *Irish Housing and the Global Financial Crisis of Urbanisation,* PhD thesis, Department of Geography. Dublin: Trinity College.

[23] Defined in the release as 'the issuing of a legal letter for demand' and generally understood as a notification that a lender will send as a formal matter of course to a borrower prior to issuing any legal proceedings to repossess a property'.

[24] The next paper – Paper 3 - in this series will examine available payment break data in detail.

[25] See https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/understanding-long-term-mortgage-arrears-in-ireland - September 2020.

to some 6,084 discrete households/sets of repossession proceedings (7,301 divided by 1.2), since lenders do not bring separate repossession cases on each account but rather one Civil Bill for Possession on the relevant property secured by the loans.

The release also provides a detailed breakdown of legal activity within the respective arrears categories and logically one would expect that very few proceedings would have been issued in respect of accounts that have been in arrears for a relatively short period of time. To begin with, the lender has in principle to adhere to the processes and timelines in the Code of Conduct on Mortgage Arrears (CCMA)[26] before declaring a borrower in arrears to be outside the terms of its Mortgage Arrears Resolution Process (MARP), and must then wait at the very least another three months before initiating any legal action.[27] The data shows that the accounts that have been in the deepest arrears for the longest period of time are generally the ones most likely to be the subject of litigation, which is as we would expect.

2.4 Duration of legal proceedings

The CBI's explanatory notes that accompany the data release in terms of court proceedings state as follows:[28]

"Legal proceedings have been issued:

Means that a formal application has been made to a court to begin repossession proceedings, or that legal proceedings are currently ongoing. This includes:

- *Civil Bill lodged/entered at Circuit Court or High Court: accounts where a Civil Bill has been lodged or entered at the Circuit Court or High Court. This is the first time the Bill has been lodged for a particular account, and has been assigned a unique case number.*
- *Court Hearings in progress (at least 1 court hearing has taken place): is the number of accounts where at least one court appearance has occurred. Frequently, the first hearing and in some cases the first number of hearings will result in an adjournment. In cases where the first hearing be adjourned, this will still count as a hearing for the purposes of this statistical collection."*

The reference here to the High Court in addition to the Circuit Court is somewhat concerning.[29] The legal proceedings here exclusively concern dwellings which are the family home (or 'principal private residence') of the borrower/s. In principle therefore, due to the current applicable legislative framework which provides that repossession proceedings on family homes must be brought in the Circuit Court area where the borrower resides, there should be very few, if any, of these repossession cases before the High Court at this point, unless they are the subject of an appeal.[30] The data in Table 4 below are compiled from excel

[26] See: https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf

[27] Unless the borrower is deemed by the lender to be not co-operating.

[28] Central Bank of Ireland (2020). *Residential Mortgage Arrears and Repossessions Statistics Explanatory Notes, December 2020*. Dublin: Central Bank of Ireland.

[29] Repossession proceedings in the High Court are actually brought by way of a 'Special Summons' not a Civil Bill.

[30] Section 101 (5) of the Land and Conveyancing Law Reform Act 2009 provides that an application by a mortgagee (lender) for an order for possession and/or an order to exercise the power of sale in relation to a 'housing loan mortgage' must be brought to the Circuit Court. However, this obligation only applied to mortgages issued after 1st December 2009 when that Act was commenced. Subsequently, Section 3 of the Land and Conveyancing Law Reform Act 2013 retrospectively corrected this error and provided that proceedings in relation to the principal private residence of the mortgagor (borrower) where the mortgage was created before 1st December 2009 must also be brought in the Circuit Court.

statistical tables published and updated by the Central Bank to accompany its quarterly mortgage arrears reports. This Table demonstrates the increasing percentage of cases where a Non-Bank entity is the applicant seeking repossession, now almost equal with Bank cases. What leaps out thereafter from this data is the length of time that cases have been in the system without a finite outcome. Thus, in respect of 40% of the accounts affected, it is between 2 and 5 years since the first hearing of the case took place. In respect of 30% of accounts, it is over five years and counting. And this does not appear to include the length of time that pre-court processes from the first occurrence of arrears – the various steps of the MARP engagement – took, nor the time lag between the service of legal proceedings and when the case was first reviewed by the relevant Circuit Court County Registrar.

TABLE 4: DURATION OF LEGAL PROCEEDINGS BY LENDER TYPE

Time since first hearing	Bank	Non-Bank	Total
Less than one year	918	333	1,251
1-2 years	430	525	955
2- 5 years	1,120	1,794	2,914
Over 5 years	1,499	682	2,181
TOTAL	**3,967 (54%)**	**3,334 (46%)**	**7,301**

Source: Central Bank of Ireland, mortgage arrears statistics, December 2020.

In respect of the lengthy timeframes suggested by these figures, these reflect two main factors: (i) the large number of repossession cases amongst an array of other civil business being dealt with by the relevant Circuit Court County Registrars and; (ii) the extreme seriousness and implications of the application, which may see the eviction of a household from its home, with all the adverse future consequences that this entails for the members of that household and for broader housing, social and economic policy. Before attempting to make sense of these data, some explanation concerning the procedures that apply in family home repossession cases is required. These procedures and the perceived delays that they may give rise to, are not contextualised within the CBI release. Thus, while the dataset may document, it does not always explain.

2.5 The Circuit Court repossession process

Proceedings to seek the repossession and sale of family homes involve the service of a Civil Bill for Possession on the defendant borrower and are conducted in accordance with legislative provisions and detailed Circuit Court rules.[31] As provided for under s.100 (4) of the Land and Conveyancing Law Reform Act 2009, applications for a Possession Order and an Order for Sale may be made simultaneously. Two specific 'Practice Directions' have also been issued by the President of the Circuit Court that are also relevant to these proceedings.[32] The first of these (CC11) provides that there must be a minimum of eight weeks between the date the Civil Bill is issued in the relevant Circuit Court office and the 'return date' when the matter first comes before the County Registrar, the court official who is responsible for the administration of the case.

In practice, this time period may be longer, depending on how busy the civil proceedings lists are in the relevant circuit. This Practice Direction goes on to state that, unless the defendant borrower consents, no Possession Order shall be made on the return date and that on that date the County Registrar shall adjourn to such later date as s/he 'considers just in the circumstances' and this is generally called a 'Practice Direction' adjournment. The effect of this is that there may be an interval of a number of months from the date the Civil Bill is served to the date that the case will be properly considered for the first time.

As noted in the overview to this paper, concern is often expressed by lenders, regulators and indeed the European Central Bank (ECB) that it is too difficult to obtain a Possession Order in the legal system in Ireland, but nonetheless many

[31] See Circuit Court Rules (Actions for Possession and Well-Charging Relief) Statutory Instrument No. 264/2009 as amended by SI's 358/2012; 346/2015 and 171/2016. SI 499/2017 – Circuit Court Rules (Jurisdiction) - sets out the relevant legal documents used for this procedure.

[32] These are CC11 - Actions for Possession (12/11/2009) and CC17 – Proceedings for possession or sale on foot of a mortgage (10/08/2015). Practice Directions are intended to complement the rules of court and are issued to inform parties what the court expects of them in respect of the practice and procedure of the courts.

such orders are obtained and executed.[33] It is pointed out that lenders have first to go through a compulsory 'Mortgage Arrears Resolution Process' (MARP) before they can issue repossession proceedings and then have to face repeated delays in the courts while a County Registrar deliberates on when or whether it may be appropriate to grant a Possession Order or escalates the matter to a Circuit Court judge to decide to grant or not to grant an order.

However, the County Registrar is a legally qualified officer of the Court tasked with assisting the administration of justice, and in a given case will generally first want to enquire into the history of the mortgage, how the arrears arose, the payments now being made, the number and the situation of dependants, engagement with services like MABS and Abhaile[34] and related matters. **Almost invariably, the defendant does not have access to legal representation, given in particular that civil legal aid from the state is not generally available in repossession cases, an inequality of arms that is in need of urgent reform.** Under the terms of the Abhaile scheme, a Duty Solicitor will usually be present in or around the court to offer some assistance to defendant borrowers in repossession cases. However, there is no solicitor/client relationship between the Duty Solicitor and the defendant borrower and, under the terms of the scheme, that solicitor cannot represent the borrower in the case. It is also important to note that many defendant borrowers are very ably supported by Dedicated Mortgage Arrears Advisers (DMA) and Court Mentor staff attached to the state-funded Money Advice and Budgeting Service (MABS) to present their case and this service has kept many borrowers in their homes, even though these MABS staff do not have a specific right of audience in the courts.

Adjournments and often multiple adjournments are granted by the County Registrar to see how matters progress, in particular whether financial circumstances improve and payment levels increase. Cases can sometimes be settled and struck out by mutual agreement for example. Part of the County Registrar's enquiry may also be to question how seriously the lender has taken its obligation to find a solution that might avoid repossession, the key objective in theory of the 'Mortgage Arrears Resolution Process' (MARP). As will be suggested below, it is clear that in some cases lenders have treated the MARP as largely a box ticking exercise before the borrower could be exited from the process, **particularly where the borrower's genuinely difficult financial circumstances presented a greater challenge to resolution.** Indeed, it may be suggested in some instances that if a lender had its time again, it might have taken the MARP engagement more seriously instead of opting for proceedings in the Circuit Court, where it might not have expected to encounter resistance in obtaining a Possession Order.

Throughout this time nonetheless, the toll on many households is considerable, as adjournment follows upon adjournment and the pressure mounts on the defendant borrower to find more money; we are aware of many who have given up the struggle, eventually succumbing to the odds against them. Other borrowers have simply not engaged with the process, though this has become much less common in recent times. Although failure to engage is not helpful and some commentators have cited this as evidence of strategic default by borrowers, fear, guilt and shame associated with over-indebtedness are major factors in our experience. One leading personal insolvency expert who has researched this topic in depth over time has observed: *"The original psychology of debt research opened up a new perspective helping advisors to consider the mental impact and stress of debt on the debtor. The new research aims to look at the emotions, particularly shame and guilt, behind debt and how it affects those who are suffering from unmanageable debts. Our research identified that time spent helping people address their debt problems can also help their overall health and wellbeing."*[35]

Broadly speaking, a Possession Order is often, though not always, considered to be a last resort by the County Registrar. **Although repossession may be a satisfactory outcome in many cases for the lender, it is – by and large – a bad**

[33] See further detail in Section 2.7. below

[34] See https://www.mabs.ie/en/abhaile/

[35] From 'Navigating through the emotion of debt', a series of four seminars held in Dublin in 2014 and presented by Gareth Neill, a partner with Grant Thornton UK.

outcome for society, especially one where access to subsidised public housing is very limited and access to private rented accommodation is often prohibitively expensive for the evicted borrower.

2.6 'Concluded' legal proceedings

As already alluded to, the percentage of accounts in arrears that were the subject of repossession proceedings (as of Q.4. 2020) is comparatively low at **7,301** accounts, 13% of the overall total of accounts in arrears of 54,986 (Table 3). To this figure, however, should be added **6,992** accounts (also approx. 13% of the total) described as 'legal concluded'. Taken together, these figures suggest that just over one in every four of the accounts in arrears either are or have been the subject of legal proceedings.

Applying the 1.2 accounts per household formula to this 'legal concluded' cohort suggests that these 6,992 accounts concern some **5,827** family homes. However, although these proceedings have concluded, it should be noted that these accounts are still classified as being in arrears in the CBI figures.

The CBI's explanatory notes that accompany the data release in terms of court proceedings state as follows in relation to accounts where legal proceedings are concluded (and arrears remain outstanding):

This data reflects the number of accounts for which court proceedings have been concluded. It includes cases for which an order for possession or sale has been obtained, or court proceedings have concluded because:

- *Proceedings have been struck out;*
- *Settlement agreement has been entered on the record;*
- *Proceedings have been adjourned generally (i.e. proceedings may have been settled, but the settlement remains a matter of agreement between the parties and does not form part of the court record. In such cases the lender will be able to recommence proceedings if the borrower does not comply with the agreement);*
- *Proceedings have been dismissed;*
- *Judgement has been entered in favour of the lender, including where an order for possession or sale has been granted by a court (includes orders obtained with a stay of execution).*

A more exact confirmation of these categories and a breakdown of the figures within each category should be provided in future CBI datasets, as there is too little precision and a danger of some overlap between them. It is notable, nonetheless, that **four of the five categories** – the exception being the grant of a Possession Order where it has not been executed – seem to envisage the proceedings coming to an end without an outcome that would result in the eviction of the household. However, it should also be said that it may be overstating it to categorise these cases as *concluded.* For example, a case 'adjourned generally' is not concluded as such and, as the explanatory notes explain, would be likely to come back before a Circuit Court County Registrar if the payment terms that led to the adjournment were not adhered to by the borrower.

Nonetheless, what is both interesting and concerning about this classification is that it seems to confirm that a number of cases go through the arrears resolution processes and into the litigation process over very significant periods of time and yet either an accommodation is reached, sometimes late in the day, or the lender fails to get an order. What then, it must be asked, was it all in aid of, and could the same outcome not have been achieved earlier and in a less confrontational and costly manner for borrower, lender and taxpayer alike?

The category where the Possession Order is granted but not enforced is a source of some contention. It may come as a surprise to some that having gone through a lengthy legal process culminating in a Possession Order, a lender can sit back and decide not to execute that order until a future point of their choosing. However, Circuit Court rules currently provide that any 'decree' of the court may be 'executed' for up to 12 years from the date the order was obtained. Once six years has elapsed since the order was made, the lender must formally apply for leave to execute the order and must notify the defendant borrower of the application.[36]

One of the main reasons why a lender/loan owner might wish to delay enforcing a Possession Order lies in the vagaries of the property market itself. Where a property is in negative equity (i.e. worth less than the amount owed by the borrower), and the lender will also incur the costs of sale – including advertising, auctioneering, legal and insurance elements – there will be a shortfall following sale of the property. Given that the borrower/s are functionally and legally insolvent, and bankruptcy with a one year discharge period may eventually be available to write off that shortfall, the chances of recovering that debt in many cases are very slim. So in a number of instances, in the past at least, lenders have chosen to wait for property prices to recover. Indeed, in some cases, loans have been sold on by the original lender to a Fund with a Possession Order on the relevant file that has not, as of yet, been executed.

The uncertainty, distress and worry this creates for borrowers is obvious. On the other hand, remaining in the property on some kind of agreed payment basis may sometimes unfortunately be the best of very limited options, particularly where access to alternative accommodation, whether in the form of public or private housing, is restricted as is currently the case. **It is recommended that the CBI seek more detail from lenders on the numbers in this category and that lenders provide an explanation of their practices in such cases.**

2.7 Repossession and voluntary surrender

It is important to emphasise at this point that the data provided by the Central Bank on the extent of legal proceedings examined above concerns only the 54,986 family home mortgage accounts that were in arrears at the end of December 2020. Cases where Possession Orders have already been obtained and enforced by the lender and where the borrowers have had to vacate the property and have lost their homes are not included in these figures. Neither are cases where the response of the borrower to legal action against him/her was to surrender the property to the lender, to voluntarily sell it by agreement with the lender or to abandon it. Lastly, these figures do not include cases where the proceedings have been struck out by the lender in the past, following some form of settlement on agreed payment terms with the borrower.

Any analysis of the recent history of legal activity concerning the repossession of family homes is incomplete without an account of the number of such dwellings that have actually already been repossessed, whether by voluntary sale or surrender following the issue of Civil Bills for Possession or by the execution of Possession Orders by lenders, since the Central Bank began to release these datasets. Equally, the number of cases struck out would also be relevant to any such analysis, but that range of data does not seem to be available in precise terms, whether from the CBI or from Courts Service Annual Reports.[37]

It might be noted here too that some aspects of

[36] See Order 36.9 of the Circuit Court Rules which states that *'Every decree of the Court, and every judgment in default of appearance or defence, shall be in full force and effect for a period of twelve years from the date thereof, and an execution order based on any such decree or judgment may be issued in the Office within the said period, but not after the expiration of six years from the date of such decree or judgment without leave of the Court. An application for such leave shall be made by motion on notice to the party sought to be made liable'.*

[37] However, it is worth noting that the CBI recorded in its quarterly figures between Q.2 2015 and Q.2 2020 (a period of five years) that in respect of over 10,000 accounts, court proceedings were concluded but arrears remained outstanding.

the figures published by the CBI have been subject in the past to the criticism that they overstated the numbers of repossession proceedings. For example, the second Abhaile Report notes that the CBI figures *'can include court dates where the repossession proceedings are adjourned. This can cause repossession proceedings against a specific house to be counted more than once in the Central Bank statistics.'*[38] There is in our view much substance to this criticism. Thus, for example, in its mortgage arrears Q.1 2018 figures, the CBI included a revised footnote to define the 'legal proceedings' figure as follows:

> *'Legal proceedings record steps to repossess a property and include cases where a formal application has been made to a court to begin repossession proceedings, along with subsequent adjournments and judgement proceedings'.*[39]

The implications of this classification were very concerning. Thus, what had appeared for over five years as a figure for new repossession cases included, not just new cases, but subsequent adjournments and judgement proceedings in existing cases.[40] Up to and including the Q.3 2018 figures, the quarterly statistical reports continued to record these cases in the body of the text as *'legal proceedings issued to enforce the debt/security on PDH mortgage accounts'.* In the Q.4 2018 figures, the text was changed to read *'PDH mortgage accounts where legal activity was recorded to either begin repossession proceedings or to continue legal proceedings to enforce the debt / security'.*

From 2019 up to Q.3 2020, as far as we can see, no figures have been provided under the 'new legal proceedings issued' heading and this entry appeared to have been discontinued. However, the Q.4 2020 release then recorded that *'some 253 PDH accounts entered legal proceedings in the fourth quarter of 2020'.* Moreover, given that the original troublesome footnote – *'Legal proceedings record steps to repossess a property and include cases where a formal application has been made to a court to begin repossession proceedings, along with subsequent adjournments and judgement proceedings'* – reappeared with this entry, **it is difficult to take that figure at face value without further clarification and we recommend that the CBI provides such clarification.**

TABLE 5: POSSESSION ORDERS AND VOLUNTARY SURRENDER: 2013-2020

Year	Orders granted	Orders executed	Voluntary surrenders
2013	626	251	525
2014	968	313	998
2015	1,517	726	809
2016	1,222	493	1,201
2017	1,220	526	891
2018	851	260	633
2019	567	122	386
2020	384	36	123
TOTAL	**7,355**	**2,727**	**5,566**

Source: Central Bank of Ireland.

Taking all the above into account, and on the basis of records that we have maintained of quarterly CBI datasets issued since the beginning of 2013, we set out above (Table 5) the totals of Possession Orders granted, Possession Orders executed and Voluntary surrenders/abandonments that have occurred in respect of family homes over the last eight years[41]. **Note that we do not provide a figure for new repossession cases brought since 2013 on the basis that it could not be accurately calculated from the figures provided by CBI.**

From these data it is clear that the number of

[38] Government of Ireland (2018). *ABHAILE Aid and Advice for Borrowers in Home Mortgage Arrears, Second Annual Report,* November 2018. Dublin: Government of Ireland, p57.

[39] https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2018q1_ie_mortgage_arrears_statistics.pdf?sfvrsn=11 , p5.

[40] The term Judgement proceedings is not explained but we take it to mean cases that are referred by the relevant County Registrar to the Circuit Court Judges List.

[41] It is also worth noting here that in a recent paper the CBI itself has provided a figure of **9,983** cases of loss of home ownership between 2011 and 2020, via either a court-ordered or voluntary loss of ownership. This would suggest that some 1,700 losses of family homes occurred in 2011 and 2012, if our figure for 2013 to 2020 is subtracted from the CBI's figure for 2011-2020. See McCann and O'Malley (2020), *ibid.*

borrowers who voluntarily surrendered or abandoned their family homes at some stage of the litigation process is approximately double the number of cases where the lender executed the Possession Order (5,566 as against 2,727).[42] The total of these two categories when added together is **8,293** family homes. If we apply the ratio of 1.2 mortgage accounts for each household, in reverse this time, this equates to **almost 10,000** (**9,952**) accounts where loss of the family home has been the outcome over the last eight years.

What is striking about this Table is the sharp decline in Possession Orders granted, Possession Orders executed and voluntary surrenders occurring, from significant numbers in 2014 to 2017, to a much smaller volume in 2019 and particularly in 2020 when 159 family homes were repossessed, although the impact of Covid on the progress of proceedings may be a significant factor in explaining the low number for 2020.[43] This pattern nevertheless seems to coincide with the above finding that a number of 'concluded' cases do not result in a Possession Order being granted and/or executed and that many cases are variously settled or struck out, even after a substantial period of years in the system. However, as already suggested above, additional data from the Central Bank providing a more exact breakdown of these categories would be necessary before drawing any sweeping conclusions here.

On a separate note, given that broadly speaking, the ratio of orders granted to orders executed between 2013 and 2020 is not far off 3 to 1, it is clear that there are a number of Possession Orders that have been granted but have yet to be executed, though some of these may have resulted in voluntary surrender. There does not appear be any data immediately available on how many Possession Orders remain unexecuted. As already set out above, we recommend that the CBI should insist in its data guidelines on requiring lenders to provide a quarterly update on this figure.

An obvious question that follows from the decline in orders, execution of orders and voluntary surrenders is what may have changed over recent years to cause this? Evidently, there are likely to be less new cases being brought as the years recede since the Crash, and in this regard, **we recommend that the CBI should insist that lenders provide a quarterly figure, both into the future and retrospectively for 2019 and 2020, of new repossession cases brought.** A second potential factor is that borrowers in arrears and defendant borrowers are likely to be better prepared and advised than heretofore, particularly through the services provided under the Abhaile Scheme by the MABS Dedicated Mortgage Arrears Advisors (DMA) and other MABS staff. In such cases, evidence of the borrower's financial situation in the form of a standard financial statement, a clear explanation of the relevant personal and family circumstances and ongoing assessment of payment capacity will each likely be available for the court. In turn, DMA's themselves and their clients also have access to a wider range of advice and support services, including Consultation and Duty Solicitors and Personal Insolvency Practitioners. It follows that the levels of engagement by borrowers with the proceedings are likely to be better. This combined with a reluctance by the Court to evict households when they are engaging with the system may provide some context and explanation.

It is also the case in some instances that lenders, and the increasing number of credit servicing and retail credit firms operating on behalf of loan purchasers, do not always fully appreciate that the extent to which they have properly engaged with the borrower and assessed the defendant borrower's financial and other circumstances is an important factor in the Court's decision making process. This brings us on to examine the dual questions of the levels of engagement by borrowers in arrears with lenders and the restructures that may (or may not) be by offered by lenders/loan owners in response.

[42] It is our assumption here that this figure does not include surrenders of properties prior to any legal proceedings being brought.

[43] It is notable that in the Dublin Circuit alone, three separate dates for hearing in the County Registrar's Possessions List were arranged for June 2021, comprising 166 cases previously adjourned from March, April and May 2020.

2.8 Restructures

Turning to the related processes of borrower engagement and loan restructuring, there is a wealth of information in a discrete Table included with the CBI's Q4-2020 mortgage arrears statistics.[44] However, it requires careful scrutiny to arrive at any concrete conclusions, such are the diverse and even sometimes contradictory indicators within it. We have re-presented the data in tabular form (in our Table 6 below) to assist our analysis.

As an initial observation, it is notable again that the CBI merely presents this information and largely avoids analysing or arriving at any conclusions relating to it, at least in the dataset itself. However, it should be said that analysts at the Bank have, particularly in recent years, published papers that give a clearer indication of its current thinking.[45] Before attempting to provide some assessment of these data ourselves, we feel it is important to reiterate that this information is provided by mortgage lenders, retail credit firms and credit servicing firms to the CBI, according to criteria set down by the bank itself. **The extent to which this information is verified by the CBI in terms of testing its accuracy, for example by inspections of the relevant records and documentation, is not known and we recommend that some detail of how rigorously it interrogates the data it receives, particularly when it shows up anomalies, should be provided.**

As Column 2 of Table 6 shows, around 25% (almost 14,000) of accounts in arrears were classified as restructured at the end of 2020. This Table clearly demonstrates that length of arrears is a key determinant in obtaining or not obtaining a restructure. There is no further breakdown provided on the types of restructure and this is

TABLE 6: RESTRUCTURES AND EXTENT OF ARREARS, Q.4 2020

Extent of Arrears	Restructured	Not Restructured	Total
< 90 days	6,047	10,154	16,201
91-180 days	1,982	2,300	4,282
181-365 days	1,872	2,583	4,455
1 to 2 years	1,646	3,421	5,067
2 to 5 years	1,554	7,372	8,926
5 to 10 years	536	10,253	10,789
Over 10 years	315	4,951	5,266
TOTAL	**13,952**	**41,034**	**54,986**

Source: Central Bank of Ireland.

a significant omission,[46] given that there is a big difference in terms of potential resolution between a short-term and a long-term restructure, a point that the CBI itself has regularly reiterated. **It would therefore be helpful to see a breakdown of restructures across the range of arrears categories and we recommend that the CBI seek this information from lenders.**

Overall, it is disappointing to see that only one in four cases currently classified as in arrears is restructured, many years after the 2013 Code of Conduct on Mortgage Arrears (CCMA) with its obligatory Mortgage Arrears Resolution Process (MARP) was put in place.[47] This is particularly so, given that this is a specific mechanism introduced in principle to resolve mortgage arrears problems outside the courts by providing a framework for the agreement of affordable 'alternative repayment arrangements'.

A significant majority (83%) of the restructured cases involved arrears of less than two years (Column 2). In stark contrast, only 10% of the almost 25,000 accounts in arrears of over two years had a restructure, indicating again that it is much more difficult for a borrower in long-term arrears to get such an outcome.

[44] Table 5 of the CBI's Q4 2020 mortgage arrears data excel tables, which contains summary detail for every PDH mortgage arrears case across the country as of end December 2020.

[45] Note that the standard approach with such publications has generally been to insist that the views expressed are those of the author/s only and do not represent official views of the CBI itself. In Section 4 below, we review in detail one such paper – 'Resolving mortgage distress after Covid-19: some lessons from the last crisis'.

[46] The dataset does provide elsewhere a breakdown of the types of restructures that apply overall to 72,866 existing mortgage accounts, but this larger figure clearly incorporates a running total of accounts that have been restructured over time, having been in arrears in the past.

[47] The 2013 CCMA was 'effective' i.e. applied from July 1st 2013.

2.9 Overall performance of restructured mortgages

A total of **72,866** family home mortgages were classified as restructured at end Q.4 2020; this represents a reduction of around 4.5% from Q.3. The release states that this quarterly decline *was 'driven primarily by a reduction in the number of permanent restructure arrangements such as arrears capitalisation and term extensions'*. Although the overall figure has been reducing over time since reaching a peak in Q3-2016 when a total of 121,140 PDH restructures were reported,[48] it is somewhat curious that it was reduced by this amount during a global pandemic and that the reduction concerned primarily long term restructures. **What factors gave rise to this reduction? It would be useful if the CBI teased out issues such as this in its figures.**

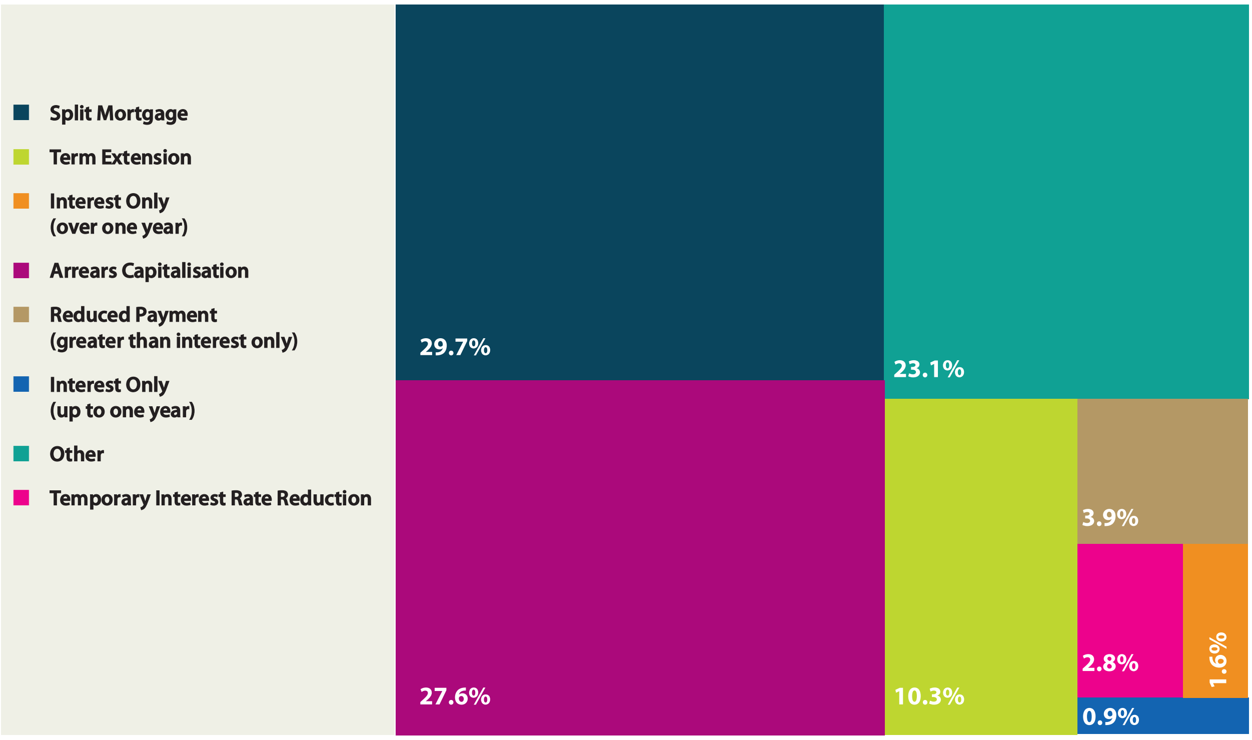
The vast majority of restructures (91%) are reported to be long term, and four in five of all restructures involve "split" mortgages,[49] arrears capitalisations[50] and term extensions as shown in Chart 1 below.[51]

[49] A "split" mortgage involves part of the capital balance on the mortgage being 'warehoused' or 'parked' to be paid at a later date.

[50] Arrears capitalisation involves the recalculation of the monthly instalment upwards (in some cases substantially) over the remaining lifetime of the mortgage.

[51] The "Other" category comprises over a fifth of restructures. An explanatory note in the Q.2 2020 dataset states that the 'Other' category manly comprises accounts that have been offered a long term solution, pending the completion of six months of successful payments. When these accounts transition into their permanent status, the figures will be updated accordingly. The 'Other' category also includes a small number of simultaneously-agreed term extensions and arrears capitalisation arrangements.

CHART 1: Restructured PDH Mortgage Accounts by Restructure Type, end-December 2020



[48] https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/residential-mortgage-arrears-and-repossessions-statistics-september-2016.pdf?sfvrsn=9

Over time, a reasonably consistent percentage (between 10 to 15% on average) of PDH restructures are reported as not meeting the terms of the arrangement. This trend was continued for the last quarter of 2020, where the figure is just short of 14% (Table 7 below).

TABLE 7: PERCENTAGE OF PDH RESTRUCTURES 'MEETING THE TERMS OF THE ARRANGEMENT' (END-DECEMBER 2020)

Type of restructure	Meeting terms	Not meeting terms
Total	86.3	13.7
Interest only – up to one year	87.5	12.5
Interest only – over one year	91.8	8.2
Deferred Interest Scheme	75.0	25.0
Reduced Payment (less than interest only)	83.3	16.7
Reduced Payment (greater than interest only)	89.3	10.7
Temporary Interest Rate Reduction	83.5	16.5
Payment Moratorium	97.6	2.4
Arrears Capitalisation	79.3	20.7
Term Extension	91.1	8.9
Permanent Interest Rate Reduction	85.9	14.1
Split Mortgage	92.8	7.2
Other	82.8	17.2

Source: Central Bank of Ireland

There have been concerns for some years about the viability of a number of these restructures, some of which were proposed to borrowers at a time when they were very vulnerable and where repossession was presented as the alternative. First and foremost, the number of capitalisation of arrears arrangements offered by lenders has always been a worry, given that the relevant borrower/s would generally have to have had a substantial 'uplift' in their finances to sustain the increase in mortgage payments involved in such an arrangement. Anecdotally, the speed with which it was offered in some cases had more to do perhaps with lenders meeting their targets under the CBI's former programme of Mortgage Arrears Resolution Targets (MART)[52] than any robust assessment of the borrower's repayment capacity. This is not to say that significant numbers of households did not have such an uplift as the economy recovered following the Crash, but the continuing failure rate of around one in five clearly indicates that for a significant number, this restructure option is just not realistic. This one in five failure rate is also likely to be a strong indication of the pressure that is coming on some borrowers to sustain this most onerous of long term alternative repayment arrangements during Covid.

It is also notable, however, that the number of capitalisation arrangements overall fell by 7% between the end of Q.3 2020 and Q.4 2020 from 21,667 to 20,138. This seems to be following a definite trend in decreases, having been at 26,801 such arrangements at the end of 2019. This significant reduction in number is not commented on in the release and, again, we wonder to what it is attributable.

Also of concern is the future viability of a number of split mortgages. Quite apart from the capital sum in the 'warehouse' that will become due when the split mortgage comes to an end,[53] it is also again the case that some splits were agreed by borrowers under considerable pressure and without proper regard by the mortgage lender to the borrower's debts to unsecured creditors, leaving a number of households in danger of insolvency. At the end of 2020, there were 21,641 split mortgages in place with a payment failure rate of more than 7% or one in fourteen.

Finally, the number of term extensions in place is down by 17% from Q3 to Q4 2020. The potential reasons again are not examined, though it is conceivable that some of these borrowers returned to full payments on the original term, such was the improvement in their finances during Covid, or that the extended term came to a natural end. However, the payment failure rate of just under 9% on existing term extensions, is again concerning.

52 See: https://static.rasset.ie/documents/business/arrears.pdf

53 It is worth noting that interest is still being charged on this capital sum in limited instances.

It does not appear, from what we can see, that the status of these long term restructure payment arrangements has been specifically examined in the Central Bank's data on payment breaks.[54] How many other capitalisation of arrears arrangements, split mortgages, and other forms of long term restructures have been adversely affected by the long lockdown from January to May 2021? We recommend that further research data be provided by the Central Bank on: (i) the factors that bring long term restructures to an end; (ii) the cause(s) of any failure, and (iii) the context for any such failure.

Quite apart from concerns arising on the sustainability of existing payments on long term restructures, further worries concern the payment shortfalls that may arise at the end of the term of the restructure, particularly with split mortgages, and how they will be dealt with. The CBI itself has highlighted this issue in marked terms in its very recent paper – *Mortgage borrowers facing end of term repayment shortfalls – and this is reviewed in detail below.*[55]

2.10 Unrestructured arrears accounts

As shown in **Column 3** (of Table 8 below), almost half of the accounts in arrears (over 26,000), all of which are classified by their lender as co-operating, do not have a restructure in place. A significant number of these – just over a third (36%) – were in arrears of less than three months. Although it is likely that negotiations were in progress and restructures may be pending in a number of these cases, it is nonetheless disturbing that this figure is so high on what are, in principle, the least serious arrears cases. Why is it taking so long to put restructures in place in these cases when the borrower is co-operating? Put simply, these accounts should not be allowed to drift into the more serious arrears categories and an early focus on a fair and sustainable resolution between the parties should be imperative. Similarly, we know that there are some accounts that will go into arrears due to payment difficulties caused by Covid 19 and resolving those cases early should be prioritised.

Particularly notable amongst the remainder of those who are deemed by their lender to be co-operating but who are not in a restructure, is the total of **over 11,000** accounts which are in arrears of over two years. This is a very significant

TABLE 8: UNRESTRUCTURED ACCOUNTS AND EXTENT OF ARREARS, Q.4 2020

Extent of Arrears	Restructured+ cooperating	No restructure + co-operating	No restructure + not cooperating + in legal process	No restructure + not co-operating + *not* in legal process	Total in arrears
< 90 days	6,047	9,425	68	661	16,201
91-180 days	1,982	1,726	83	491	4,282
181-365 days	1,872	1,772	140	671	4,455
1 to 2 years	1,646	2,071	329	1,021	5,067
2 to 5 years	1,554	4,096	1,302	1,974	8,926
5 to 10 years	536	5,001	3,031	2,221	10,789
Over 10 years	315	2,013	1,894	1,044	5,266
TOTAL	**13,952**	**26,104**	**6,847**	**8,083**	**54,986**

Source: Central Bank of Ireland

[54] The Central Bank's research data on payment breaks is reviewed in Paper 3 of this series.

[55] See Section 2.15.

number of households in deep arrears co-operating with their lender but apparently getting nowhere and likely to be both deeply frustrated and very distressed by their situation. To be deemed to be co-operating by their lender, these account holders must in principle have provided the appropriate documentation and continued to engage with their lender under its 'Mortgage Arrears Resolution Process' (MARP). It would seem, however, that despite their co-operation, there is not an agreed restructure in place in terms of any one of the list of 'alternative repayment arrangements' set out in Rule 39 of the CCMA.[56] It seems unlikely, despite this, that these borrowers are making no payments of any kind, otherwise one would expect that repossession proceedings would have already been brought by the lender against them.

Just because an account is not officially classified as restructured does not mean that no payments are not being made on it. So what is happening with these cases in practice? Resolving them without significant family home loss presents a major challenge for the State and all involved in debt resolution. And the question clearly arises – if this is what a household in financial difficulty receives in return for co-operation and engagement, what exactly is the advantage of engaging and co-operating, apart perhaps from not being served with legal proceedings, at least for the time being? We recommend that the CBI seek to clarify with lenders what levels of payments are currently being made on "unrestructured" accounts in arrears of over two years where the borrower is deemed to be co-operating.

Column 4 shows that at end Q.4 2020 there were a considerable number of arrears accounts (**nearly 7,000**) with three characteristics: (i) no restructure in place; (ii) classified as not co-operating and; (iii) in the legal process. The vast majority of such accounts (over 90%) are in arrears of over two years or more. Of the remaining 10%, almost half have arrears of under one year. It seems clear from this that being in a less serious arrears category does not always prevent repossession proceedings being brought. It would be worth exploring why such comparatively mild arrears cases are the subject of repossession proceedings.

Column 5 shows that a final cohort of accounts **(8,000)** have (i) no restructure in place and (ii) are classified as not co-operating but these accounts are classified as <u>not being in the legal process</u>. However, it would appear to us that this classification may be misleading, given that there were close to 7,000 accounts at the end of 2020 where legal proceedings had been brought <u>and had concluded, but where the account is still counted as an arrears case.</u>[57] **Perhaps therefore this category should more accurately read <u>'not or no longer'</u> in the legal process.** By a process of deduction, it may be suggested therefore that the number of accounts within this cohort that have never at any point been the subject of legal proceedings is around 1,000.

Further deductions that may be made from Table 8 above include the following:

- *Legal proceedings were in progress in relation to a total of **7,301** accounts at end Q.4 2020.[58] Column 4 shows that **6,847** accounts in the legal process were not co-operating. It should follow therefore that the remainder of cases in the legal process, close to **500** accounts, involved co-operating borrowers;*
- *This figure of co-operating borrowers in the legal process was closer to **1,000** accounts at the end of Q.3 2020 (7,938 – 6,965). Over a three month period, it more than halved. The reasons for this decrease would be worth investigating;*
- *The number of accounts which were the subject of repossession proceedings also decreased between Q.3 and Q.4 2020 by over **600** accounts (7,938-7,301). It is conceivable therefore that a number of repossession cases in progress against co-operating borrowers accounts may have been struck out over this period. The effect of Covid and the possibility that some of these cases were struck out as a result of improved financial circum-stances may be a factor here.*

[56] For the full list see CCMA 2013, Rule 39, Page 17.

[57] See Table 3, Section 2.3 on current legal activity.

[58] See also Table 3, Section 2.3

The CBI might seek to investigate what factors caused co-operating borrowers to be in the legal process and what were the causes of a significant decrease in the number of co-operating borrowers in the legal process between Q.3 and Q.4 2020.

2.11 "Co-operation" and "Non-cooperation"

Table 8 above illustrates that almost three-quarters (73%) of arrears accounts were classified as co-operating (including restructures), with the remainder (27%) categorised as not co-operating. The term 'not co-operating' here refers to the definition set out in the CBI's Code of Conduct on Mortgage Arrears 2013, the Code that obliges all regulated mortgage lenders to have a 'Mortgage Arrears Resolution Process' (MARP) in place to handle arrears cases on family homes. This definition is long and multi-faceted – it is set out in full in the Box below – and, in our view, gives scope for a negative assessment of the borrower's conduct at an early stage of the resolution process where a lender might be so inclined.

In a previous research piece on this issue in 2017, FLAC raised a number of concerns about the premature classification of borrowers as "non-cooperating". Our analysis examined a dataset produced by the CBI for the years 2014 and 2015 on levels of alternative repayment arrangements, declarations of not co-operating and appeals under the Mortgage Arrears Resolution Process.[59] To our knowledge, this is the only piece of its kind that the CBI has published containing comprehensive figures on MARP outcomes and it is regrettable that there is not more data to examine here in respect of the years subsequent to 2014 and 2015.

We reproduce our findings of that review in the appendix. In summary, we made the following observations:

- In approaching **20,000** cases in the years 2014-2015, the relevant borrower was not offered an alternative repayment arrangement (ARA) by the lender following the MARP engagement;
- In almost **10,000** of the cases where an arrangement was offered, the borrower/s rejected it. No further data is provided on the reasons for these rejections and, to our knowledge no affected borrowers were interviewed to garner their perspectives and experiences. It is likely, however, that a significant number of borrowers rejected the proposed ARA because they did not consider it sustainable for their financial circumstances. In our experience, in some of these instances, the unsecured debts of the borrower were not taken into account in framing the ARA, leaving the borrower under huge pressure from other creditors, a factor that the CBI itself has subsequently highlighted as a deficiency in resolution processes;[60]
- Approaching **50,000** borrowers were said to have been warned on not co-operating in 2014-2015, and over **30,000** borrowers were declared as not co-operating under MARP during this period.[61] This is a very large number of borrowers classified as 'not co-operating' at an early stage of the arrears resolution process, but the various potential reasons for this are not explored in the CBI's summary. Only a small number of borrowers appealed this decision (about 5% of the total) to the relevant lender's Appeals Board and it is notable that close to one-third of these appeals were successful.

[59] See: Central Bank of Ireland (2016). *'Consumer Protection Bulletin', Code of Conduct on Mortgage Arrears, Edition 3 May 2016.* Dublin: Central Bank of Ireland.

[60] See Section 4 below.

[61] Rule 28 of the CCMA provides that prior to classifying a borrower as not co-operating, a lender must write to the borrower and inform the borrower that he/she will be classified as not co-operating if specific actions are not undertaken within 20 business days. This letter is not required to be served by registered post and there is no specific obligation on the lender to copy this letter to the borrower's representative, such as a MABS money advisor. In some cases, borrowers claim to have never received the warning letter in the first place.

- A declaration of not co-operating has the immediate effect of removing the borrower from the protections of the MARP and legal proceedings to repossess can in principle commence immediately.[62]

Every MABS adviser who has dealt with MARP cases can relate instances where items of the borrower's documentation, including the key Standard Financial Statement (SFS) in some cases, were lost or mislaid by the lender, sometimes multiple times. In some cases, the borrower, fed up with repeating the process and having the same frustrating conversation with different employees in the lender's Arrears Support Unit (ASU), then found they were on the wrong side of a declaration of not co-operating, having allegedly failed to furnish a further document or relevant information in the time-frame set by the lender. Many did not realise that they could appeal against the declaration of not co-operating; some did not think it would make any difference and others were already too anxious and upset by their evolving debt situation to do so.

According to the CBI figures already discussed in detail (See Table 8 and commentary above), close to half (just under 11,500) of accounts in arrears of over two years were classified *as not in a restructure* and the borrower *as not co-operating* at the end of 2020. Legal proceedings are in process in just over half (54%) of these non-cooperating cases and the remainder (46%) are not currently the subject of legal proceedings, although it is likely that many of these have been the subject of such proceedings that have already concluded, but where arrears remain outstanding. There is, however, no further information in the CBI data that actually confirms this.

A key question is whether a number of these accounts should ever have reached the legal process at all? **It is conceivable that a premature declaration of failure to co-operate, facilitated by a Code that gave the lender the power to unilaterally decide the issue largely undisturbed by regulatory supervision, actually hindered the prospects of arriving at a solution in at least some of these cases.** And it is worth remembering, despite the existence of some cases of 'strategic default', that it is not difficult to alienate a borrower, who is often in significant personal as well as financial distress due to over-indebtedness, by showing little regard for that person's predicament and insisting upon swiftly implementing what has in some cases in our experience been a 'going through the motions' process. This and other perceived imbalances in the CBI's Code of Conduct on Mortgage Arrears 2013 and recommendations for reform will be considered in more detail in the final Paper Four in this series.

DEFINITION OF "NOT CO-OPERATING"

Not co-operating: A ***borrower*** can only be considered as ***not co-operating*** with the lender when:

1. any of the following apply to his/her particular case:
   a) the ***borrower*** fails to make a full and honest disclosure of information to the lender, that would have a significant impact on his/her financial situation;
   b) the ***borrower*** fails to provide information, relevant to the ***borrower***'s financial situation, within the timeline specified by the lender in accordance with Provision 34; or
   c) a three month period elapses:
      i) (A) where the ***borrower*** has not entered into an alternative repayment arrangement, and during which the ***borrower:***
         (i) has failed to meet his/her mortgage repayments in full in accordance with the mortgage contract ; or
         (ii) meets his/her mortgage repayments in full in accordance with the mortgage contract but has an ***arrears*** balance remaining on the mortgage; or
      (B) where the ***borrower*** has entered into an alternative repayment arrangement, and during which the ***borrower*** has failed to meet in full repayments as specified in the terms of an alternative repayment arrangement; and
      ii) during which the ***borrower***:
      (A) has failed to make contact with, or respond to any ***communication***s from, the lender or a third party acting on the lender's behalf; or
      (B) has made contact with, or responded to ***communication***s from, the lender or a third party acting on the lender's behalf but has not engaged in such a way that enables the lender to complete an assessment of the ***borrower***'s circumstances;

and

2. the warning letter, required in accordance with Provision 28, has been issued to the ***borrower*** and the ***borrower*** has not carried out the action(s) specified in that letter.

Source: Code of Conduct on Mortgage Arrears 2013, Central Bank of Ireland.

[62] See Rule 29, CCMA.

TABLE 9: NON-BANK ENTITIES AND PDH MORTGAGES IN ARREARS: DECEMBER 2017 TO DECEMBER 2020	December 2017	December 2018	December 2019	December 2020
% of all PDH mortgages	7%	11.5%	12%	13%
% of all PDH mortgages in arrears	20%	27%	36%	43%
% of all PDH mortgages in arrears >90 days	24%	30%	42%	50%
% of all PDH mortgages in arrears >720 days	25%	34%	48%	57% (i)

Source: Central Bank Mortgage Arrears Statistics, various years.

(i) As of December 2020, non-bank entities held 68 per cent (3,566) of PDH accounts with arrears over ten years (5,266). See: https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/residential-mortgage-arrears-and-repossession-statistics-december-2020.pdf?sfvrsn=4 p.3.

2.12 Mortgage sales to non-bank entities

One result, whether direct or indirect, of the perceived difficulties in assessing alternative repayment arrangements, obtaining Possession Orders and repossessing properties in mortgage arrears cases, is that the pillar banks have in essence voted with their feet and have sold on or plan to sell on many impaired loans to investment/vulture funds, details of which are usually notified to the borrower by post.

This is not of course the only factor that influences such decisions. Broadly speaking, the greater the percentage of so called non-performing loans (NPL's) on a lender's books, the more capital it has to set aside or 'provision', on the instruction of the European Central Bank (ECB) under the Single Supervisory Mechanism (SSM) process, in order to mitigate the risk of default from these troubled borrowings. On the face of it, this prudential supervision makes sense, particularly given the fallout from the Global Financial Crisis and the necessity to protect the financial system generally and the deposits of account holders in particular. However, we would argue that it has had a disproportionate effect on borrowers in a small country like Ireland, so adversely affected by reckless lending and seeking to survive in the wake of that crisis.

It has also served to legitimise the practice of loan sales to non-Bank entities and it has already been speculated in some quarters that the sales of loans generally will be accelerated across Europe as a result of the fallout from Covid, as payment performance by borrowers on a variety of loans may become impaired. In this regard, it is also worth noting that a draft proposal for a Directive on 'credit servicers, credit purchasers and the recovery of collateral' is currently in the legislative process in the European Union, although the proposed '*accelerated extrajudicial collateral enforcement procedure*' that it envisages will not apply to loans secured on the borrower's home.[63]

For some time now, given the prevalence of the sale of impaired mortgages, the CBI datasets have recorded separate arrears figures in respect of family home mortgages owned or serviced by what are termed 'Non-Bank Entities', which were originally in turn sub-divided into "Retail Credit Firms" and "Unregulated loan owners". From the Q2 2019 release onwards, the category of 'unregulated loan owner' category was replaced by "credit servicing firms", to reflect the fact that these newly regulated credit servicing firms now managed a number of loans on behalf of investment/vulture funds based outside the State. Existing retail credit firms are also involved in credit servicing on behalf of such funds, as well as managing mortgage loans they originated themselves and mortgages they purchased from other lenders.

Table 9 above illustrates the increasing percentage of loans in arrears owned by non-Bank entities between December 2017 and December 2020. Of particular note is that in the *two years plus* arrears category, the ratio has more than doubled over the period. Recent announcements by AIB Group PLC of further imminent sales may be likely to push up these

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[63] COM/2018/0135 final - 2018/063 (COD), March 14th 2018.

percentages significantly in due course.[64] This trend of sales by pillar banks to entities that have no retail 'High Street' banking business with which to concern themselves, poses increased dangers of litigation and potential eviction for the households who currently live in these dwellings. Indeed, in amongst some of these portfolios are loans that are already in the legal process and others where a Possession Order has already been granted but has not yet been 'executed' i.e. enforced by the original loan owner.

In our earlier analysis of legal proceedings (see Section 2.4. Table 4 and associated commentary), we saw that accounts in arrears that are currently the subject of repossession proceedings are fairly evenly split between banks (54%) and non-banks (46%). In February 2021, NatWest announced that it intended to wind down the operations of Ulster Bank (the third largest bank in the State) in the Republic of Ireland over the next two or so years. There had been much speculation as to where its mortgage book will end up, and the most recent media coverage suggests that PTSB has announced plans to acquire €7.6 billion of loans and 25 branches from Ulster Bank as it withdraws from the Irish market, but that the affected borrowers may have to pay a substantial amount in increased interest.[65] In April 2021, yet another pillar bank – KBC Ireland – gave notice that it too intended to exit the Irish market and it has been said to be in discussions with Bank of Ireland concerning the sale of its loan book.

The trend that has evolved to sell on loans in difficulty has now been exacerbated by large financial institutions exiting the market. Many who took out loans in good faith and paid diligently until their capacity became impaired have quickly found that they are dealing with a less accessible and sometimes more intransigent creditor. Though it has been suggested that the prospect of doing a deal is enhanced with a vulture fund who has bought a portfolio of loans at a significant knockdown, this is simply not an option open to borrowers who remain in financial difficulty and have no access to any kind of capital lump sum.

Stitched into the small print of the mortgage contractual documentation is the right of the original lender to unilaterally sell the mortgage on to an entity of its choice when and as it chooses without explanation, even in cases where the mortgage is not even in arrears. Attempts to limit this 'right' such as the 'No Consent, No Sale' Private Members Bill,[66] proposed by Pearse Doherty, TD, Sinn Fein spokesperson on Finance, in January 2019 have been met with resistance from government and regulatory sources alike.

Inevitably some new cases of family home mortgage arrears (and other consumer credit arrears) will result from the job losses and business closures caused by the pandemic; it is as yet uncertain how many. As illustrated in the figures set out above, we have seen in many instances that sooner or later mortgage lenders appear to lose patience with financial incapacity resolution frameworks and become frustrated with what they perceive to be a slow repossession process in the Irish legal system. Increasingly, it would appear therefore that the position of many creditors will be to cut their losses and sell.[67]

Might we soon face a situation where borrowers who get into financial difficulty because of Covid 19, the ultimate example of a '*force majeure*' event beyond the borrower's control, will see their mortgages (and other loans) sold on to funds, perhaps sooner than later? What is the position of the CBI, the

[64] See AIB Group PLC press release, 19th February 2021 – *'AIB Group plc ("AIB") has agreed to sell a non-performing loan portfolio in long-term default to Mars Capital Finance Ireland DAC ("Mars") as part of a consortium arrangement with Mars and affiliates of Apollo Global Management, Inc'* and *'The portfolio consists of c. 4,000 non-performing customer connections, with an average time since first default of c. 10 years and c. 90% of the portfolio first entering default over seven years ago'.*

[65] Claim that Ulster Bank customers 'could pay €30,000 or more' to PTSB - See Colin Gleeson, www.irishtimes.com, July 23rd 2021.

[66] No Consent, No Sale Bill, No. 2/2019 – An Act to provide that Lenders may not transfer mortgages on residential property without the consent of the borrower and to provide for related matters.

[67] For example, at an online seminar on September 28th 2020 organised by the Central Bank of Ireland in conjunction with the University of Limerick, both of the guest speakers, Mascia Bedendo, Professor of Finance, Università di Bologna, Italy and Alexander Lehmann, Non-resident fellow, Bruegel Research, predicted that Covid 19 was likely to lead to a significant increase in asset management sales across the Europe Union.

Department of Finance and indeed the European Central Bank on this issue?

In our view, regulated lenders should be obliged to work to find an alternative repayment arrangement with borrowers whose capacity to repay is impaired by loss of income due to Covid or other significant factors beyond their control, and should not be allowed to sell such loans on to third parties until they have demonstrated that every effort has been made to agree a sustainable restructure. For this purpose, there should at the very minimum be a compulsory time period during which the existing lender must work with the borrower to reach an accommodation before a loan can be sold on.

2.13 Update - Quarter One 2021 mortgage arrears figures

Arrears

TABLE 10: MORTGAGE ARREARS DATA (PDH): Q3 AND Q4 2020, Q1 2021

PDH accounts in arrears	Q3-2020	Q4-2020	Q1-2021
Up to 90 days	15,531	16,201	14,425
91-180 days	4,159	4,282	4,002
181-365 days	4,720	4,455	4,292
361 -720 days	5,267	5,067	4,930
More than 720 days	25,771	24,981	24,499
TOTAL	**55,448**	**54,986**	**52,148**

Source: Central Bank of Ireland.

At the time of going to print, new data from the Central Bank of Ireland in its Q.1 2021 data release raises some interesting questions. As shown in Table 10 above, between Q3 and Q4 2020, the overall number of accounts in arrears *fell* slightly (by less than 1%), a marginal reduction attributed by the CBI to 'a decline in longer term arrears'. In contrast, the number of cases in the 'early arrears' categories (0-90 days and 91-180 days) *rose significantly* (by around 4% and 3% respectively), which might be indicative of new family home mortgage arrears cases associated with Covid.

However, any fear that this development might become a trend as a result of Covid seems to have been dispelled by the Q.1 2021 figures which were published by the CBI on 17th June 2021. As Table 10 shows, on this occasion there was a *significant reduction* of over 5% in the overall number of accounts in arrears, a decrease driven predominantly by a substantial fall of 11% in the short term (less than 90 days) category though as one moves into the more serious arrears categories, the decreases become much more marginal.[68]

So what does this suggest? On the face of it, the Q.1 2020 figures are good news for the direction of the mortgage arrears problem. A 5% reduction in three months looks like progress in anyone's language. The fact that a majority of that reduction is concentrated in the 0-90 days' arrears category, the mildest one, would suggest that there may be something of a 'Covid effect' at play. Thus, it is possible that this decrease could be reflective of households who, broadly speaking, have not suffered any income reduction during Covid, but have had a decrease in expenditure and may have used that surplus income to clear their arrears. It could also be indicative of lenders engaging earlier and more productively with distressed borrowers, and *vice versa*, which would be a welcome development.

This is of course speculation and guesswork, and the CBI does not comment one way or another in its release. Thus, although the level of data has improved in recent quarters as noted earlier in this paper, there is little attempt at any analysis of that data. Indeed, what is presented is very much a 'binary' approach to the figures. Figures decrease or increase and it is almost always the 'net' position that is presented, without much attempt at any further nuance. Thus, to take a hypothetical example, 1,000 accounts could have cleared their arrears over the course of a quarter and 500 could have gone into arrears over the same period. The way that these figures are presented will merely record that the number of accounts in arrears decreased by 500 over the quarter. **Incorporating a more longitudinal method by following a representative sample of arrears households over time (in line with the 'panel' approach incorporated by the Central**

[68] The 'over 10 years' category is the only one where there has been an increase during the quarter.

Statistics Office within its Survey on Income and Living Conditions)[69] would in our view provide insights not provided by cross-sectional enquiries.

Restructures

The figures provided on restructures do, occasionally, give some sense of progression and regression as shown in Table 11. Again, however, the data are a little difficult to fathom and interpret at times.

TABLE 11: MORTGAGE ARREARS DATA (PDH): Q3 AND Q4 2020, Q1 2021			
Restructures (PDH)	**Q3-2020**	**Q4-2020**	**Q1-2021**
New during quarter	3,954	4,203	4,572
New Capitalisation	(Not stated)	746 (17.7%)	884 (19.3%)
New Reduced payment (greater than interest only)	(Not stated)	906 (21.6%)	810 (17.7%)
Total restructures	**76,305**	**72,866**	**72,342**

Source: Central Bank of Ireland

So, for example, it is specifically noted in each release as shown in Table 11 above that 3,954, 4,203 and 4,572 new restructures respectively were put in place in the last three quarters. Note, however, this figure for new restructures includes *'further modifications of existing restructures'* and this will involve accounts changing to a restructure that might reflect improved financial circumstances or *vice versa*.[70]

The Q.4 2020 and Q.1 2021 releases also provide a specific figure, for the first time that we can see, of the two largest categories of new restructure over the period – capitalisation of arrears and reduced payment (greater than interest only) respectively – but the number of such restructures that came to an end in the quarter is not detailed. However, ancillary CBI data[71] suggest that in the case of capitalisation of arrears, 884 new cases occurred in Q.1 2021 but the overall total declined by 816. Thus, a total of 1,700 capitalisation of arrears restructures appear to have come to an end over the quarter. In the case of reduced payment (greater than interest only), 810 new cases occurred in Q.1 2020 and the overall total increased by 154. Thus, it would appear that a total of 656 reduced payment (greater than interest only) restructures came to an end over the quarter.

Why does this matter, it might be asked? It matters because these 'accounts' are part of the story of people's everyday lives and, behind the digits on the account numbers are the struggles of households to stay in their homes and keep their children and other dependants safe and well. It also matters because if we want to know how we are doing in resolving the ebb and flow of consumer debt that now seems destined to remain an intrinsic part of our society, we need to not just gather the data but also to properly interrogate it. This is particularly the case as we begin to emerge from a pandemic that will have done financial harm to some and improved the financial position of others, and which requires both policy development and strategy implementation to mitigate the damage. Without proper household-level data, how can an informed plan of action to assist people be devised?

The data above suggests:

- That there has been an overall decrease in the number of restructures, though the rate of reduction appears to have slowed;
- That around a fifth of new restructures are capitalisations;
- That a further fifth of new restructures are reduced payment (greater than interest only).

One reading of these figures suggests a possible two-tiered impact of Covid. Over the last two quarters, about 40% of the new restructures are either capitalisation of arrears or reduced payment respectively and these are the two largest categories in both quarters. The new capitalisation of arrears cases (over 1,600 new

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[69] See: https://www.cso.ie/en/releasesandpublications/ep/p-silc/surveyonincomeandlivingconditionssilc2019/backgroundnotes/

[70] A footnote in the Q.3 2020 release specifically states that *'This includes first-time restructures and further modifications of existing restructures'.*

[71] See: https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/mortgage-arrears-data/moa-data-tables-new.xlsx?sfvrsn=68

cases in six months) may be indicative of improved finances, the reduced payment cases (over 1,700 new cases in six months) of impaired ones. In addition, a significant number of existing cases may have been resolved, given the overall reduction in numbers particularly in the 0-90 day's arrears category, but there may also be a number of new arrears cases due to Covid.

The economy and society is opening up and a greater sense of optimism now seems to prevail with more positive economic forecasts predicted, though the ongoing threat of the Delta variant may have tempered this somewhat. There is a long way to go and as the financial safety nets are removed – the PUP payment, the wage subsidy scheme, the Covid Restrictions Support Scheme – it is not likely to be plain sailing for all. It would be helpful therefore if additional information was obtained by the CBI (with the constraints of Covid in mind) and interrogated on an ongoing basis to support policy development.

We recommend that the CBI require the mortgage lenders/loan owners that it regulates to provide a greater level of (verifiable) data that would provide a more dynamic picture of the evolving arrears situation post-Covid. Clearer questions should be asked of each lender which would be helpful in getting a better picture. For example, how many accounts ceased to be in arrears during the quarter? How many accounts went into arrears (either for the first time or again) during the quarter? What were the developments upwards and downwards in the respective categories of restructure? It would also be helpful if the CBI accompanied these data releases with a commentary of its own, indicating what its own analysis might be and what additional measures and supports it suggests are required.

Finally, whatever about an improvement in terms of a reduction in the number of cases in arrears over the quarter, for those remaining in arrears, particularly those in the deepest arrears categories, little change in the core trends in terms of restructures, levels of cooperation and involvement in the legal process has taken place (see Box below).

Comparison of Q4-2020 and Q1-2021 PDH mortgage arrears data

- *In terms of restructures,* ***13,288*** *of* ***52,148*** *accounts in arrears are restructured (as opposed to* ***13,952*** *of* ***54,986*** *at Q.4 2020). This is* ***25.5%*** *as opposed to* ***25.4%****, so there is no tangible change here;*
- *In terms of levels of co-operation,* ***37,309*** *of* ***52,148*** *accounts in arrears are co-operating (13,288 in a restructure, 24,021 not in a restructure). The equivalent figure was* ***40,056*** *of* ***54,986*** *accounts at Q.4 2020 (13,952 in restructure, 26,104 not in restructure). This is* ***71.5%*** *as opposed to* ***72.8%,*** *a marginal dis-improvement;*
- *The number of co-operating borrowers with no restructure has decreased by* ***2,083*** *accounts (26,104 – 24,021). It is conceivable that this decrease may be due to improved finances and/or better lender/borrower engagement;*
- *The number of accounts not restructured, not co-operating and in the legal process has decreased by a mere* ***73*** *accounts (from 6,847 at end Q.4 2020 to 6,774 at end Q.1 2021);*
- *The number of accounts not restructured, not co-operating and not in the legal process has decreased by a mere* ***18*** *accounts (from 8,083 at end Q.4 2020 to 8,065 at end Q.1 2021).*

2.14 Summary

The additional data presented in the latest releases discussed above is very useful but a significant problem is the absence of any published in-depth analysis of it by the CBI itself. In addition, whether discussions take place between the CBI and individual lenders on the progress or lack of progress made towards resolution - and, if so, what these discussions lead to - is unknown. When we have sought details of such engagements in the past, the CBI has usually cited the provisions of Section 33AK

(1A) of the Central Bank Act 1942 as a justification for a refusal to reveal any details of its deliberations with regulated entities.[72]

A further problem with the data is the absence of details on variables that may be likely to be significant in a given mortgage lender's consideration of cases. Two that spring to mind immediately are (i) the borrower's age and (ii) the outstanding balance owed on the mortgage relative to the current market value of the property, i.e. the borrower's equity. Either or both of these factors might adversely affect resolution.

For example, the older the borrower/s are at the time of engagement, the less likely it may be that a meaningful resolution will be put in place, as the lender may fear that a borrower's reduced income down the line at retirement age will be a factor that the lender might find it difficult to subsequently rely upon. If a property is in negative equity (i.e. the amount owed on the mortgage is greater than the value of the property), there is a greater inbuilt motive to negotiate rather than to seek to repossess. On the other hand, if the converse is the case, a quick repossession will see the lender paid the entirety of the mortgage debt. **The feasibility of adding extra criteria to the figures to give us greater insight should be looked at by the CBI; if this not feasible, a representative sample might be drawn.**

In this lengthy review, we have considered, analysed and discussed a lot of data provided by the CBI on family home mortgage arrears over a period of years. Our analysis portrays a less than positive picture of the current success of the lender/borrower engagement to resolve existing mortgage arrears cases. By way of summary, only a quarter of all current arrears cases are in a restructure arrangement. And while close to three in every four borrowers are deemed by their lender to be co-operating, only one in every three of these co-operating borrowers has an agreed restructure in place. The CBI data does not address the question of what kind of payments are being made by borrowers who do not have a restructure in place.

Once an account goes into deep arrears (more than two years in our analysis), the chances of an agreed restructure become particularly bleak. One might expect very significant numbers of repossession cases relating to these accounts to therefore follow, but this is not the case. Only a small minority of accounts in arrears (one in eight) are currently the subject of legal proceedings and it is clear that orders are not granted quickly or easily to lenders in a more impartial setting than the MARP engagement over which they would have previously had control.

It also seems apparent that in a significant number of cases that have concluded, the case has been settled. These include, according to guidance provided by the CBI, cases that have been variously adjourned generally, settled, struck out or dismissed and no Possession Order has been obtained. However, the absence of specific numbers here makes this contention much less certain and a further detailed exploration into what is happening here is badly needed.

Our analysis broadly suggests that Possession Orders are not straightforward to obtain and this is reflected in the figures on repossession recorded in the CBI quarterly statistics that we have followed since the beginning of 2013. Even where a Possession Order has been obtained, in many instances lenders may have decided not to enforce the order and the negative equity of some of the properties in question may be one reason for this. Moreover, twice as many homes are repossessed by way of voluntary surrender or abandonment compared to the enforcement of a Possession Order, indicating that a significant number of borrowers felt they had no option or that the war of attrition inherent in their situation had just become too difficult to sustain.

The comparative difficulty of obtaining a Possession Order is also reflected in the proportion of accounts in arrears sold on by the original (pillar bank) lender to so called non-banks, often servicing these loans on behalf of

[72] This provision reads - (1A) A person to whom subsection (1) applies shall not disclose confidential information concerning- (a) the business of any person or body whether corporate or incorporate that has come to the person's knowledge through the person's office or employment with the Bank, or (b) any matter arising in connection with the performance of the functions of the Bank or the exercise of its powers, if such disclosure is prohibited by the Rome Treaty, the ESCB Statute or the supervisory EU legal acts.

investment/vulture funds. The growing percentage of arrears accounts now owned by the latter – particularly where deep arrears are concerned - is unlikely to favour defendant borrowers and may amount to a substantial barrier to preventing future repossessions.

In conclusion, there are major questions to be asked about this system of resolution. The CCMA/MARP process is reasonable in design but we believe it to have been too one sided in practice, with no independent appeal and too little direct oversight by the regulator, leaving many borrowers without a proper assessment. At the time of writing, it seems likely that new cases of mortgage arrears will arise due to Covid – how many is hard to predict - and these will fall to be dealt with under the MARP/CCMA process. It is imperative that such cases are dealt with both sympathetically and decisively. **In the final Paper 4 in this series, we will set out some proposals for reform of that process that might lead to a fairer engagement that might reduce the level of legal proceedings further.**

2.15 Update - Mortgage borrowers facing end of term repayment shortfalls

As already explained in the introduction to this section, a very recent research report published by the CBI - *'Behind the Data: Mortgage borrowers facing end of term repayment shortfalls'*[73] – expresses a number of serious concerns about the sustainability of long term restructures. In brief, it suggests in headline terms the following:

- **95,000** PDH accounts, equating to 13% of all PDH loans and representing a total balance due of €14.5 billion, are assessed to be facing a payment shortfall at the end of the mortgage term;
- Some 32,000 of these accounts face a balance shortfall of **10% or less** of the current balance;
- The remainder of 63,000 accounts face a balance shortfall of **greater than 10%;**
- 54% of the 63,000 accounts (over 34,000) are not restructured;
- 45% of the 63,000 accounts (over 28,000) are in arrears for longer than one year.

The report begins by explaining that, in early 2020, the CBI initiated a new programme of work for financial services firms ("firms") to reassess all private-dwelling homes (PDH) mortgages to identify accounts with signs of distress or vulnerabilities. Three major factors are identified in terms of a rationale for this study:

- *That mortgage accounts facing difficulties are not exclusively in long-term arrears;*
- *That a mortgage account on an existing restructure can be performing as per those agreed arrangements but not be on a sustainable path to clear the final balance;*
- *That there was a reporting gap for retail credit and credit servicing firms that hold PDH mortgages.*

The paper goes on to explain the two-step process employed.

Step One required firms to undertake *"an assessment of all PDH mortgage accounts in line with guidance provided by the Central Bank'* and that *'there are a number of factors guided to firms by way of reference as to why an account could be assessed as currently facing an end-of-term shortfall'.* Broadly, this is where:

1. *The account is currently in arrears; and/or*
2. *The account has not made full capital and interest monthly payments for the last 12 months under an existing alternative repayment arrangement; and/or*
3. *The repayments under an existing alternative repayment arrangement will not lead to full repayment of the account by the maturity date, and/or*
4. *The account is classified as in default or non-performing under international accounting standards.*

[73] Ibid, See Introduction, Section 2

Step Two required firms to generate a borrower repayment profile, to estimate the size of the shortfall and to categorise the accounts accordingly *'into four groups according to the assessed scale of the shortfall in repaying the final balance'.* Guidance from the Bank suggested that the latest standard financial statement (SFS) be used while accepting that *'there is a qualitative and subjective element to the assessment also in relation to the value to place on any existing agreements'.*

The scale of the shortfall was categorised into four groups as follows:

- *High ability to repay balance: the shortfall is assessed to be 10 per cent or less* – Here 34 per cent of shortfall accounts will have at least 90 per cent of the outstanding balance cleared under the original or alternative repayment arrangement;
- *Moderate ability to repay balance: the shortfall is greater than 10 per cent but less than 50 per cent* – Here 17 per cent of shortfall accounts will have at least 50 per cent but less than 90 per cent of the outstanding balance cleared
- *Low ability to repay balance: the shortfall is at least 50 per cent* – Here 27 per cent of shortfall accounts will have less than 50 per cent of the outstanding balance cleared
- *Uncertain ability to repay: the scale of the shortfall is uncertain because there are not sufficient details or engagement between the firm and the borrower to facilitate the assessment. These borrowers are expected to be primarily in the "low" ability to repay category. Accordingly, the low and uncertain groups are consolidated in the analysis presented in this paper.* 22 per cent of shortfall accounts fall into this group.

Further detail was also sought on "*equity status*", *a point in time assessment of the current loan-to-value on the property'.* The data here illustrated '*that 79 per cent of accounts have positive equity (i.e. the outstanding loan is less than value of property) with the remainder in negative equity. The propensity to be experiencing negative equity is higher the greater the assessed shortfall in the mortgage balance. For instance, the moderate ability to repay balance cohort with 9 per cent of accounts in negative equity compare favourably with 26 per cent for the low and uncertain ability group'.*

Commentary

There is a lot to take in here. The second factor identified in establishing a rationale for this research - *that a mortgage account on an existing restructure can be performing as per those agreed arrangements but not be on a sustainable path to clear the final balance* - is a particularly troubling statement. It suggests that a long term restructure, even though adhered to by the borrower, may have to be followed by a further restructure which will vary in its financial burden according to the extent of the shortfall. Age, earning capacity, illness and the economic damage inflicted by Covid 19, some of which may not as yet have been fully felt, are all factors that might mitigate against further arrangements. It seems likely that the primary focus here is on the future of split mortgages, since in theory at least, a performing capitalisation of arrears or term extension or a combination of both should see the mortgage cleared at the end of the restructure.

The third factor cited – namely a reporting gap for retail credit and credit servicing firms that hold PDH mortgages – passes without any further explanation or comment in the text and this is worrying. What is the nature of this reporting gap? And could it in turn mean that the scale of mortgage arrears cases or restructured cases serviced by such firms has been under-estimated? **It would be helpful if the CBI clarified both the nature and extent of this reporting gap.**

Looking at the criteria underpinning the assessment requirement, these clearly include: (i) accounts currently in arrears (presumably all 52,148 of them) and (ii) existing alternative repayment arrangements that have not made full capital and interest payments for a year. In passing then, it might be noted that this does not seem to include existing alternative repayment arrangements that are failing to make such payments where the period involved is less than

12 months. Conceivably, this may mean that mortgage accounts adversely affected by Covid 19 are not amongst this 95,000 number.

The third criterion here would appear to us to principally concern split mortgages. To reiterate, a split mortgage involves the payment of instalments on a reduced portion of the capital (with interest) over a specific period. At the end of that period, the residual 'warehoused' portion of the capital owed becomes due. It seems clear that from the CBI's point of view a split mortgage is not considered to be a new mortgage that replaces the previous one, rather it is an '*existing alternative repayment arrangement*'. If so, then every split mortgage will be included amongst the 95,000 accounts that are predicted to have a shortfall, except those that have **already entered into an agreed arrangement with their lender to discharge the warehoused amount.** Thus, on this question, the summary further explains that:

> *'Where a firm identified shortfalls for accounts in repaying the full balance, the firm was required to assess also whether they could identify agreed arrangements with the borrower at this point-in-time to address how that shortfall would be repaid. For those accounts with both a shortfall and no agreement to cover it, the mortgage account is included in the cohort of accounts classified as having a repayment shortfall. For example, an account may have a split mortgage arrangement with a warehoused portion which could be covered by a pension lump sum payment or savings, but for which there is not yet an agreement. A more challenging example could be an account in long-term arrears, for which there is no current restructure in place, and therefore both a shortfall without an agreement is evident in this case also'.*

The degree of realism involved here is open to question. We would imagine that there are relatively few split mortgages where the borrower can agree arrangements in advance to cover how the shortfall will be paid when the split portion comes to an end. At the last count at end Q.1 2021, 7% alone (or one in 14) were already not meeting the terms of the split mortgage arrangement itself and, anecdotally at least, in the case of many other split mortgages, finances are very tight. The notion that borrowers with split mortgages might cover the looming shortfall with savings is somewhat strange. Covering the shortfall with a pension lump sum may be more feasible but, in public policy terms, is this what we want for older people at the end of their working life? In addition, the reference in the summary above to a supposedly more challenging example of '*an account in long-term arrears, for which there is no current restructure in place*' seems misconceived here as, by definition, there would be no existing alternative repayment arrangement in place in relation to it.

The negative equity figures provided are equally concerning, and the conclusion that *'the propensity to be experiencing negative equity is higher the greater the assessed shortfall in the mortgage balance'* seems indicative of a cohort who overpaid for family homes, who were lent (and who borrowed) unsustainable multiples of their incomes, who became stranded after the boom went bust, and who have never financially recovered. Ultimately, the authors suggest that these data illustrate that *'the current levels of, and approach to, restructuring by financial service firms are not sufficient to solve the problems for all these borrowers'*, and it is hard to argue with this conclusion.

It is welcome to see such research from the CBI that better articulates the problems many borrowers are facing. These data of course immediately beget other data. We can certainly recall split mortgage offers where the amount of capital in the 'warehouse' was not far off the amount to be serviced. Clearly the greater the amount in the warehouse, the greater the shortfall and the greater the looming problem. It is perhaps worth noting that this research tends to frame the shortfall in terms of the borrower's inadequate repayment profile, when it might also have examined the lender's contribution. **Two additional data pieces would now seem to be required as follows:**

- Detail to be provided by lenders/loan owners on the current number of arrangements where there is agreement in advance as to how the shortfall will be paid on a split mortgage when the split portion comes to an end;

- Detail to be provided by lenders on the full profile of split mortgages (at end Q.1 2021, there were 21,630 of them in place) identifying items such as the 'split portion, warehouse portion' percentages, borrower/s age and other factors affecting resolution.

Ultimately, better describing the extent of the problems and anticipating the difficulties with greater clarity will only get us so far. For example, most people familiar with the evolution of mortgage arrears over the past decade know that split mortgages have been in some instances little more than a sophisticated form of 'kicking the can down the road'. In a further research paper — *Long-term mortgage arrears: Analytical evidence for policy considerations*[74] – also published by the CBI on July 13th (2021), the closing summary is fairly unequivocal in its findings as follows:

- *Among 'Long Term Mortgage Arrears' (LTMA)* (defined as being in arrears of over one year) *borrowers engaging with a retail bank, half have debt repayments larger than 43 per cent of their monthly income, far in excess of payment burdens generally considered affordable.*
- *Despite the price gains of recent years, over a quarter of LTMA borrowers remain in negative equity.*
- *Close to one fifth of engaged LTMA borrowers have incomes so low that they can make no repayments whatsoever, once reasonable non-housing expenses are accounted for. For these borrowers, the only solutions that involve retention of homeownership will be those that lead to significant reductions in monthly repayment obligations.*
- *One quarter of engaged LTMA borrowers are over 60 years of age. For these borrowers, future income generation capacity is minimal, and solutions that retain homeownership while clearing debt balances may need to rely on the value of the property in the future.*

On the same day, in a press release issued by the CBI to coincide with the publication of the new data on distressed mortgage debt,[75] Deputy Governor of the CBI, Ed Sibley, suggested that *'lenders need to do more to resolve long-term mortgage arrears'* but that *'full resolution cannot be delivered solely within the financial system'.* In turn, he identified *'the inadequate use* (by lenders) *of existing tools to deliver sustainable restructures, inconsistencies in the approaches to personal insolvency arrangements, inadequate consideration of diverse borrower demographics and the need for greater collaboration in seeking system-wide solutions for those in the deepest levels of distress'* while also *'urging borrowers to pay what they can towards their mortgage – paying what you can will help reduce the accumulation of arrears, and reduce your financial burden. Borrowers who do not engage, and who do not pay anything towards their mortgage, are most at risk of repossession'.*

There are no direct proposals here as such, but it is arguable that this press release and the conclusions reached in the long term mortgage arrears paper convey strong messages nonetheless. These seem to suggest for example that: (i) the debt burden being carried by some borrowers is excessive and must be relieved; (ii) some were facilitated to borrow so much that they still owe more than their property is worth; (iii) only write down of mortgage debt will be sufficient to enable some borrowers to remain in their homes and: (iv) for the older cohort of borrower where properties may be in positive equity, 'debt for equity' swaps are a possible option.

To remedy these intractable difficulties, it is clear that further reform of the personal insolvency legislation will be required. In addition, the comment that *'full resolution cannot be delivered solely within the financial system'* is worth noting. Perhaps this may indicate that a role for the State to step in and assist the funding of debt resolution is required.

[74] Kelly, J., Lyons, P., McCann, F. and O'Brien, E. (2021). 'Long-term mortgage arrears: Analytical evidence for policy considerations', *Financial Stability Notes*, Vol. 2021 No.8. Dublin: Central Bank of Ireland, July 2021.

[75] "More action is needed by lenders to resolve long-term mortgage arrears, to support distressed borrowers and improve the functioning of the mortgage market for all", *Press release*, 13th July 2021, Central Bank of Ireland.

3

SECTION

3. MORTGAGE ARREARS AND RECENT LEGISLATIVE DEVELOPMENTS

3.1 The role of the Personal Insolvency Act 2012 (as amended)

Personal Insolvency Arrangements

Repossession proceedings against the borrower become a more likely prospect, once the Mortgage Arrears Resolution Process (MARP) is concluded and an alternative repayment arrangement (or restructure) has not been offered or agreed. In particular the Code of Conduct on Mortgage Arrears (CCMA) provides that legal proceedings may commence three months from the date the lender notifies the borrower that it has concluded that the mortgage is not sustainable and an alternative repayment arrangement is unlikely to be appropriate.[76] In such cases, the borrower will be attempting to prevent an order being granted, usually without the benefit of legal representation, though s/he is entitled to a range of services available to borrowers in late stage mortgage arrears and at risk of losing the family home. These include the services of MABS Dedicated Mortgage Arrears Advisors (DMA), access to legal advice via a voucher with a Consultation Solicitor and access to personal insolvency advice via a voucher with a Personal Insolvency Practitioner (PIP), each components of the Abhaile scheme.[77]

Section 2 of the Land and Conveyancing Law Reform Act 2013 allows the Circuit Court to adjourn what it terms a Principal Private Residence (PPR) repossession case to allow the defendant borrower to consult with a Personal Insolvency Practitioner (PIP), with a view to proposing a Personal Insolvency Arrangement (PIA) to his/her creditors under the insolvency legislation. The theory being that a successful PIA application, which covers all relevant creditors, both secured and unsecured, would lead to the repossession proceedings being struck out and a statutory, legally binding agreement being put in place. This avenue however was severely compromised by the fact that, in 2013, there was no right of appeal to a court for an insolvent debtor, where his/her PIA application was rejected.

Alternatively, there is nothing to prevent a borrower in mortgage arrears from attempting to avail of his/her PIA options prior to repossession proceedings being brought. Indeed, it is expressly provided for in the CCMA that when exiting a borrower from the MARP, a lender must inform the borrower (on paper or another durable medium) of his or her right to consult with a PIP.[78] The introduction of 'free to the user' vouchers via the Abhaile Scheme for borrowers who are insolvent and at risk of losing their homes to access PIPs has at least facilitated this option. Anecdotally, however, this has not been an option frequently exercised by borrowers before repossession proceedings are brought and it would be useful if some data was available on the timing of the use of these vouchers. Part of the reason for this, again anecdotally, may have been the perception that an application for a PIA represents something of a last resort to keep in reserve while in the repossession process and before a Possession Order is granted.

The introduction of an amendment to s.2 of the 2013 Act through adding a new Section 2A, via the Land and Conveyancing Law Reform (Amendment) Act 2019, allows in theory for a more pro-active use of this option. Hence, even if the relevant borrower has explored the PIA option to no avail, it is mandatory in principle in the 2019 amendment Act that the Circuit Court *must* consider six specific designated matters before deciding whether it will grant or refuse to grant a Possession Order. Thus, a defendant borrower who has already applied unsuccessfully for a PIA, is still entitled in principle to have those six matters explored, which pertain largely to the engagement between - and the conduct of - the parties in the arrears resolution process. Indeed, even the rejection of the PIA proposal itself would also appear to be a matter that the Court

[76] See Rule 45 d) CCMA.

[77] See: https://www.mabs.ie/en/abhaile/

[78] See Rule 45 g) CCMA.

can in theory consider.[79] The purpose and effect of the 2019 amendment Act is also reviewed in the next section (3.2) that follows below.

Appeals to the Circuit Court

For an insolvent debtor whose application for a PIA is rejected, a right of appeal was eventually allowed against that rejection to the Circuit Court under s.115A of the Personal Insolvency Act 2012 (as amended), should s/he meet the qualifying conditions, as a result of changes introduced under the Personal Insolvency Act (Amendment) Act 2015.[80] Access to civil legal aid through a solicitor's panel of private practitioners operated by the Legal Aid Board is available on a merits tested basis for debtors in such appeals, both in the Circuit Court and potentially in any further appeal to the High Court, under the criteria set out in the Abhaile Scheme, though some concerns have recently been again expressed that access to counsel/barristers to make the legal arguments on behalf of the applicant borrowers in complex cases is being increasingly restricted.[81]

However, not all rejections of PIA proposals can be appealed. For example, there is no appeal available where no class of creditors has voted in favour of the PIA proposal. A further and increasingly relevant limitation to the right of appeal was that the relevant insolvent debtor in respect of whom the application is being made, must have been in arrears with his or her payments on 1 January 2015, or having been in arrears before that date, must have entered into an alternative repayment arrangement with the secured creditor concerned. The net effect of this limitation has been that a debtor whose PDH mortgage went into arrears for the first time just after January 1st 2015, some six and a half years ago, was not entitled to appeal the rejection of his or her PIA application to the Circuit Court under Section 115A.

An amendment to redress this obvious deficiency had been long overdue and has only recently been approved. The Personal Insolvency (Amendment) Bill 2020,[82] was initiated in the Seanad on 16th December 2020. Although the progress of this Bill through the legislative process had been initially very slow, it has recently been prioritised and was passed by the Dáil on May 19th 2021. On this issue, it has amended s.115A to provide that the applicant debtor, in addition to the other qualifying conditions, must simply be in arrears with his or her payments on the mortgage, or having been in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned. Thus, there is now no mandatory time period of arrears before a rejection of a PIA proposal can be appealed.

Welcoming the passage of the Bill by both Houses the Minister of State for Law Reform, Youth, Justice and Immigration, James Browne TD said:

> *"Perhaps the most important change made by the Bill relates to insolvent homeowners who are struggling to pay their home mortgage arrears. The Personal Insolvency (Amendment) Act 2015 introduced a key protection for these borrowers. It allowed them a right to seek review by a court, if their mortgage lender, or other creditors, refuse a reasonable proposal for a personal insolvency arrangement. However, this protection currently only applies to home mortgage arrears dating from before 1 January 2015. So a person at risk of losing their home, whose financial difficulties first arose from the COVID-19 pandemic, would be unable to apply for the court review. The Bill removes the condition that the borrower's home mortgage arrears must pre-date 1 January 2015, in light of these changed economic circumstances."*

The reference to a borrower '*whose financial difficulties first arose from the COVID-19*

[79] However there would appear to be something of a jurisdictional conundrum here if the defendant borrower has already unsuccessfully appealed the rejection of his/her PIA application to the self-same Circuit Court.

[80] No. 32 of 2015.

[81] https://www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/abhaile/.

This aspect of the Abhaile Scheme is called the 'Personal Insolvency Arrangement Review Legal Aid Service'. Barristers are also often briefed to act in these appeals and there is also therefore a barristers' panel operated by the Board, which covers all types of civil legal aid work.

[82] No.76 of 2020.

pandemic' now being in a position to apply for a court review where his/her application for a PIA rejected, is notable. It indicates that, in principle, pro-active use of the PIA mechanism may be envisaged as an avenue to resolve new family home mortgage arrears cases that may arise as a result of Covid.

Data on PIA's in resolving family home mortgage arrears cases

Throughout the detailed review of the mortgage arrears data published by the CBI under a number of headings above, we have made no reference to Personal Insolvency Arrangements (PIA). This is because there is no such explicit reference in the CBI data itself that we can find.

We have seen at Section 2.6 above that a significant number of repossession proceedings are recorded as concluded but that arrears are said to remain outstanding. According to CBI guidance notes, a number of these do not result in a Possession Order being granted but they may variously have been either struck out; settled; adjourned generally or dismissed. We have also seen that in each set of CBI quarterly figures, a figure is also provided for new restructures agreed in the quarter.

It is conceivable that some cases in both these categories – particularly if they are long-term restructures – may have resulted from matters relating to a PIA. However, there are no specific figures provided in the Central Bank data releases for either pre-litigation mortgage arrears cases or repossession cases in progress that are resolved because the borrower, as an insolvent debtor, has successfully applied for a PIA (whether by approval of voting creditors or by having to appeal into the courts). A further unknown is the number of PIA related negotiations or proposals that result in an *informal settlement* being agreed with the mortgage lender, as opposed to a formal PIA.

It is possible that such personal insolvency related arrangements or settlements are not part of the data request criteria issued by the CBI to mortgage lenders, and if this is the case, it should be remedied. Moreover, the absence of this kind of information might prompt questions about the level of the working relationship between the CBI and the ISI (the Insolvency Service of Ireland who oversee the personal insolvency legislation). In our view, both these state organisations have critical roles to play in the resolution of difficult family home mortgage arrears cases and need therefore to liaise with each other to provide clear information on outcomes.

Further concerns arise on this question when viewing the data on the ISI's website. Its 'Case Management Quarterly Statistics' releases carry a running total of PIA applications and arrangements approved.[83] From these data releases, we can see that out of a total of 9,894 applications, 5,468 PIA's (55% of applications) have been approved between 2014 and the end of Q.1 2021, a period of seven years and three months. It is worth noting that the success rate of applications has improved in recent years. However, we can find no data on the ISI website or its related 'Back on Track' link[84] that provides a statistical analysis of the 5,468 PIA's that have been agreed under the legislation since its inception.

One of the key criteria that a proposal for a PIA must meet under the legislation is that it must not require that the debtor dispose of his or her interest in his/her principal private residence or to cease to occupy such residence.[85] This latter criterion of continuing to occupy the family home has been interpreted as allowing a PIA that contains a mortgage-to-rent arrangement (MTR), in that it allows the applicant to continue living in that home, even though MTR would see the borrower dispose of his/her interest in it.

In order therefore to gauge the effectiveness of the PIA mechanism, which has arguably delivered disappointing numbers over its

[83] See: https://www.isi.gov.ie/en/isi/pages/media_&_statistics. Data is also provided in respect of Debt Relief Notices (DRN) and Debt Settlement Arrangements (DSA). Figures on court ordered bankruptcies are also featured, as the office of the Official Assignee in Bankruptcy is now part of the ISI.

[84] See: https://backontrack.ie/.

[85] See Section 99 (2) (h). There are two exceptions to this requirement: 1) that the debtor confirms in writing to the personal insolvency practitioner that he or she does not wish to remain in occupation of his or her principal private residence, or 2) the personal insolvency practitioner, has, having discussed the issue with the debtor, formed the opinion that the costs of continuing to reside in the debtor's principal private residence are disproportionately large.

lifetime thus far,[86] more detailed data should be forthcoming on how the PIA has worked as an intervention in family home mortgage arrears cases. Questions occur here, to which there do not appear to be ready answers at the time of writing. For example, how many of the 5,468 PIA's were agreed at a point when repossession proceedings were in progress against the applicant borrower and at what stage of those proceedings? How many were agreed at a point before any repossession proceedings were brought? How many involved a write-down on the principal amount owed under the mortgage, as the legislation allows for?

Together, the CBI, which regulates the relevant lenders, and the ISI, which oversees the operation of the personal insolvency legislation, should be able to research these questions and provide this information. Again, quite apart from the substantial number of legacy mortgage arrears cases reviewed in some detail above, there will be some new arrears cases caused by Covid that will need robust and decisive resolution. Auditing how fit for purpose the relevant processes are should therefore be a priority.

Finally, on this question, it should be noted that the most recent Third Abhaile Report,[87] provides an update on outcomes for borrowers in late stage mortgage arrears availing of services under Abhaile up to the end of 2019 and it will be reviewed in the forthcoming Paper Four of this series.

Commentary

The headings above attempt to outline how the personal insolvency legislation conceivably knitted into the already existing mortgage arrears resolution process and how that has evolved in recent years. However, in our view, there was a conservatism and a choreographed caution in the approach to resolution that was at work back in those critical years of 2012 -2013 in how these provisions were assembled as follows:

1. The CBI revises the CCMA/MARP process with effect from **1st July 2013** by expanding the range of available alternative repayment arrangements that may be offered to borrowers in arrears, but largely nullifies this development by leaving it up to the lender to decide which of these options, if any, it wishes to offer. Any appeal a borrower might wish to make remains from the lender's Arrears Support Unit (ASU) to the lender's Appeals Board. Borrowers were still not specifically entitled to written details of the lender's deliberations to assist them formulate such 'appeals', a notable deficit in terms of fair procedure.

2. The relevant parts of the Personal Insolvency Act 2012 passed by the Oireachtas are commenced on **31st July 2013.** They allow a PIA to be proposed incorporating a family home mortgage but the debtor must consult with and, if required, pay for their own insolvency practitioner. No right of appeal is available for the debtor where the secured creditor rejects the PIA proposal. It is not until early 2016 that this is changed and, even then, this right is qualified, as explained above, until a very recent amendment.

3. The LCLR (Amendment) Act 2013 is also commenced on **July 31st 2013**. Inter alia, it allows a repossession case to be adjourned for the defendant borrower to propose a PIA. However, the rejection of such a PIA proposal could not be appealed. A defendant who exercises this option but to no avail ran the risk of having his/her repossession case accelerated.

These were critical times when many borrowers rendered insolvent by the financial fallout of the Crash desperately needed radical long-term

[86] It is perhaps worth reiterating here that the CBI itself in a recent press release to coincide with the publication of four papers relating to mortgage arrears identified lender '*inconsistencies in the approaches to personal insolvency arrangements*' – See Section 2.15 above

[87] Abhaile Aid and advice for borrowers in home mortgage arrears, Third Report, July 2018 to December 2019, Government of Ireland, published September 2020.

restructures of mortgages and other debts. The legislative infrastructure assembled by the State largely left it to the banks to decide whether they would get them or not. The principal brake on bank discretion was the introduction, around the same period on **13th March 2013**, of 'Mortgage Arrears Resolution Targets' (MART), essentially the setting of performance targets for regulated lenders by their regulator, the CBI, a process that operated behind closed doors and to which borrowers or their advocates had no input.

In its initial MART document, the CBI stated that it *'will consider regulatory action, including the imposition of additional capital requirements, for Specified Credit Institutions that fail to meet targets or which demonstrate poor resolution strategies or poor execution against their strategies'.*[88] It is not clear whether such regulatory action was ever taken, though a subsequent answer to a parliamentary question suggests that it was not.[89]

3.2 The role of the Land and Conveyancing Law Reform (Amendment) Act 2019

Data analysis from the CBI in 2017 long before the arrival of Covid had suggested that some two-thirds of the long term mortgage arrears group had 'loss of ownership' flagged as the relevant bank's resolution path.[90] About one sixth of these were flagged as potential voluntary surrender cases, though some lenders provided no information on the proposed 'resolution' path. For remainder of these cases, it appears that the outcome envisaged by the lender was loss of ownership following legal proceedings, i.e. obtaining and executing a Possession Order.

In terms of actual figures, assuming the CBI general estimate of 1.2 mortgage accounts per household is accurate, some 25,000 accounts that have been in arrears for over two years as at Q.4 2020 equates to some 21,000 households. That would suggest based on end 2020 figures that some 14,000 households (two-thirds) are flagged by their lenders as destined for loss of home ownership, over 2,300 (i.e. one-sixth) via voluntary surrender and close to 11,700 through repossession proceedings in the courts. While this may have been the relevant bank's resolution plan at that time (and the sale of mortgages to funds since will have affected it), it is clearly not - on the basis of our analysis of the repossessions data above - currently a realistic one. Moreover, since this forecast in 2017, a further piece of legislation – the Land and Conveyancing Law Reform (Amendment) Act 2019 - has added a potentially substantial further hurdle for lenders before a Possession Order may be granted.

In summary, these amendments oblige the Circuit Court to take account of six designated matters, broadly related to the circumstances of the borrower/s and dependants and the history of the engagement between borrower and lender concerning the arrears (and 'such additional matters it considers appropriate'), when considering whether to make or refuse to make an order for possession. This is subject to a condition that the borrower has participated in a designated scheme such as the Abhaile or the Mortgage to Rent Scheme (MTR).[91]

These six matters are:

- whether the making of a Possession Order/Order for sale would be 'proportionate' in all the circumstances (broken down into further criteria in s. 2A (4));
- the circumstances of the borrower and dependants residing in the Principal Private Residence (PPR);
- whether the lender has made a statement to the borrower of the terms on which it would be prepared to settle the matter in such a way that the borrower/s and dependants could remain in the PPR;
- the details of any proposal made (before or after the issue of the repossession proceed-

[88] Central Bank of Ireland (2013). *Mortgage Arrears Resolution Targets, 13 March 2013*. Dublin: Central Bank of Ireland.

[89] See PQ 21986/19, 21st May 2019 from Michael McGrath, TD (Fianna Fail) to Minister for Finance Paschal Donohoe TD.

[90] See: O'Malley, T. (2018). 'Long-Term Mortgage Arrears in Ireland', *Financial Stability Notes*, No.7 2018. Dublin: Central Bank of Ireland.

[91] See Section 3 inserting a new Section 2A into the 2013 Act.

ings) by or on behalf of the borrower 1) to remain in the PPR, including participation by the borrower in a designated scheme, or 2) to secure alternative accommodation;

- the response, if any, of the lender to any proposal made by the borrower to remain in the PPR;
- the conduct of the parties to the mortgage in any attempt to find a resolution to the issue of dealing with arrears of payments due on foot of the mortgage.

It is notable that none of these six designated matters focus on the merits of any legal issues concerning the mortgage contract and, indeed, the ongoing occurrence of arrears is a pre-requisite to invoke them. Essentially then, the court is charged here with a new statutory obligation to make an assessment of the circumstances of the borrower and the conduct of the parties in negotiating a potential solution to the arrears problem. As a result, prior to the advent of Covid at any rate, there was some uncertainty amongst money advice staff, lenders and legal practitioners alike as to how this assessment might be made, particularly as it might be more likely that it would fall to a Circuit Court judge, rather than a County Registrar, to carry out the task. Our understanding therefore is that despite these amendments having been in place since August 1st 2019, there is little evidence of them having being litigated. This was not helped by the absence of any new related Circuit Court regulations that might set out in further detail the procedures that would apply to invoke and to argue these grounds, for example in terms of the filing of affidavits and related matters.[92] In addition, the virtual suspension of legal activity on repossessions that followed the advent of Covid has also restricted any impact.

A further matter of concern relates to the absence of any significant debate on the legislation, prior to its enactment. The Bill was moved throughout the legislative process by former Minister of State at the Department of Public Expenditure and Reform, Kevin 'Boxer' Moran, rather than then Senior Justice Minister, Charles Flanagan TD. It is possible that this Bill was not necessarily supported at all levels of government and that there was therefore an urgent need to ensure that it was passed, before any such opposition gained traction. The Bill was subject to a relatively short discussion at Committee stage and amendments tabled by opposition TD's, primarily based on submissions made by FLAC surrounding uncertainties in some of the wording of the legislation, were swiftly defeated at Report and Final Stage, which were taken together towards the end of the Dáil term on 2nd July 2019.

From a debtor advocacy perspective, it is useful that this legislation, at least in theory, seems to provide a final opportunity for the borrower to argue against the granting of a Possession Order. **However, viewed in retrospect, it might be suggested that this opportunity, while both welcome and necessary, may be presented too late in the process.** In effect, the new Section 2A is intended to put the conduct of both the borrower and the lender under the spotlight, particularly in terms of their respective attempts to put in place sustainable alternative repayment arrangements to avoid repossession. However, the assessment envisaged by the legislation is only to be made <u>after</u> repossession proceedings have been brought. The Act does not specifically set out at what point in the legal process it is to be made and, to our knowledge, no clarity in this regard has been provided by any decision of the Court since.[93] It is also not clear whether this decision can be made on the papers, including any affidavits sworn, or whether an oral hearing is envisaged. Finally, it is not clear whose job it is to make the assessment. Should the County Registrar, who is not a judge, but who is empowered under an array of measures to make legally binding orders, carry out this task?[94]

92 This organisation wrote to the Courts Service in September 2019 seeking clarity on when or whether new regulations would be put in place and, to date, has yet to receive a reply.

93 A search for relevant judgments on www.courts.ie on June 10th 2021 returned '0' results.

94 See for example Order 18 of the Circuit Court Rules and, in particular, Rule 7 (1) (e) (as amended) of SI 264/2009 (Circuit Court Rules – Actions for Possession and Well-charging Relief) which states that '*where an appearance has not been entered or an affidavit in accordance with Rule 5 (2) setting out a defence has not been filed and delivered*' the County Registrar may '*make an order for possession in accordance with paragraph (xxxiii) or (xxxiv) of the Second Schedule to the Courts and Courts Officers Act 1995*'

Broadly speaking, it would be logical that the decision to grant or to refuse to grant the Possession Order is more likely to be made by a Circuit Court judge, as it involves the application of specific statutory criteria. If this is correct, it is also therefore more likely to occur at the end of the proceedings and after a significant number of reviews and adjournments by the relevant County Registrar. By this time, the defendant borrower and his/her dependants will likely have been significantly traumatised by the ongoing battle to stay in their home; the lender may have spent significant amounts retaining legal professionals to act on its behalf; and the State, through Abhaile and MABS and other related services, may also have disbursed funds in trying to support the borrower through the process.

The fact that we are posing these questions in August 2021, two years since this legislation was commenced in August 2019, sums up the information deficit in relation to its potential use and this is just not good enough. We recommend that the Department of Justice and the Courts Service collectively update the position and move urgently to introduce the necessary regulations and Practice Directions to enable this legislation to properly function.

We also suggest, however, that the overarching policy objective should be not just to avoid the repossession of family homes but also to *avoid the occurrence of repossession proceedings wherever possible.* Our analysis of the CBI mortgage arrears data above suggests that the court repossession process overall does not benefit any party – whether borrower, lender or taxpayer. The six criteria in the 2019 amendment Act are both humane and sensible but there may be a case for deploying them much earlier, perhaps in a non-court adjudicative body setting. In the fourth (and final) paper in this series, we will return to a further discussion of this issue.

4

SECTION

4. REVIEW OF CENTRAL BANK OF IRELAND PAPER – RESOLVING MORTGAGE DISTRESS AFTER COVID 19: SOME LESSONS FROM THE LAST CRISIS

In addition to providing quarterly mortgage arrears figures, staff at the Central Bank of Ireland have been analysing trends in restructures, borrower and lender engagement, payment performance and related issues concerning PDH or family home mortgages for some time. Recent research conducted by the Bank's Macro-Financial Division would suggest that this has led to something of an evolution in thinking founded on both empirical data analysis and a more rational appraisal of the borrower's predicament. What follows is a more nuanced assessment that is timely in the context of the pandemic and the new consumer debt problems that may arise from it and which is set out in a recent paper which we review here.[95]

Published in September 2020, this work takes as its starting point that the recent history in Ireland of the resolution and restructuring of mortgage debt '*prompts a stock-taking exercise as Covid-related payment breaks begin to expire*' and explains that '*in this Note, we use linked loan-level and household balance sheet data to highlight a number of key patterns from the mortgage restructuring in Ireland from 2012 onwards*' while predicting that debt restructuring '*will be required again as many sectors struggle in the aftermath of Covid-19*'.

Trends in Restructuring

Referring to the history of engagement on family home mortgage arrears cases over the past decade, the opening abstract to this paper observes that '*lenders favoured short-term mortgage modifications at the beginning of the decade and three-quarters of performing mortgages with short-term modifications in 2011-2012 remained performing at end-2017. However, close to half of these cases involved a subsequent longer-term restructure, consistent with concerns that short-term modification alone is not sufficient to ensure mortgage sustainability. In other cases, an over-reliance on unsustainable short-term arrangements translated into longer-term arrears accumulation*'.

This extract in our view provides a succinct assessment of the flaws of mortgage arrears resolution processes following the Global Financial Crisis, which serves to at least partially explain why we still have over 52,000 PDH mortgage accounts in arrears, close to 25,000 of which are in deep arrears of over two years. Largely left to their own devices under a Code which gave them free rein to determine what would be offered to distressed borrowers, some lenders chose 'kicking the can down the road', in many cases through repeated short-term 'interest only' arrangements, which failed to acknowledge the reality that many borrower's finances would be impaired in the long term. The paper thus observes that '*between 2010 and 2019, short-term arrangements moved from accounting for close to 70 per cent of outstanding restructures, to less than 15 per cent. This shift followed a heightened emphasis from the Central Bank on the need for sustainable solutions, suited to individual borrower circumstances*'.

In the context of new arrears cases that may result from COVID-19, it is suggested that '*a short-term restructure may in some cases be justified, where there is a clear rationale for why such an arrangement will allow a borrower to return to full repayment of capital and interest.*' However, it is further warned that '*where short-term arrangements are arrived at, it is crucial that firms have capacity and plans to assess longer-term prospects and to move to putting in place sustainable and longer-term arrangements where they are appropriate to the depth of financial distress being experienced*'.

This advice for dealing with any fresh outbreak of mortgage arrears that might be caused by Covid-

[95] McCann, F. and O'Malley, T. (2020). 'Resolving mortgage distress after Covid-19: some lessons from the last crisis', *Financial Stability Notes*, Vol. 2020, No 7, September 2020. Dublin: Central Bank of Ireland.

19 is clearly based on the CBI's examination of past and recent evidence. Where a new arrears problem caused by Covid persists, sustainable long-term arrangements for the borrower in financial distress will be essential. The question that immediately arises however is whether this approach will be enforced, if necessary. In our view, the CCMA/MARP would have to be revisited for this to happen, an issue we return to in the concluding paper to this series. It is also apparent that earlier and more pro-active use of statutory Personal Insolvency Arrangements (PIA) under the Personal Insolvency Act 2012 (as amended) might also be necessary to achieve this aim, and further amendments to that legislation will be required.

While this guidance for the resolution of any new cases is clear, our analysis of current CBI mortgage arrears data suggests, using approximate figures, that at the end of 2020:[96]

- Over 26,000 accounts, all of which were classified by the relevant lender as co-operating (almost half of the total number in arrears of 55,000), did not have a restructure in place;
- Only one in every three accounts in arrears where the borrower is classified as co-operating (14,000 of 40,000) had a restructure;
- Only one in every four accounts in arrears (14,000 of 55,000) was restructured and;
- Only one in every ten accounts in arrears of over two years (2,400 of 25,000) had a restructure.

Thus, whatever about the treatment of new arrears cases, it is apparent that the manner in which lenders (and loan owners) are currently treating pre-Covid arrears cases does not necessarily meet the standards suggested by this paper. Though it is acknowledged in the commentary that mistakes have been made in this regard, it is notable that allowance is made for the unprecedented nature of the situation post-Crash. Thus, it is suggested that:

> *'The early years of the crisis were characterised by an over-reliance on repeated short-term forbearance options (e.g. temporary interest-only periods), which on their own did not lead to sustainable long-run outcomes across the population of financially distressed borrowers. The prevalence of forbearance over longer-term or permanent modifications had a number of explanations. There was a lack of organisational capacity or sufficient experience in arrears management across the banking sector at that time. By favouring short-term measures over longer term restructures, banks also delayed loss recognition, preserving capital while not acting necessarily in borrowers' long-term interest at a time of sustained losses across all asset classes'.*

Experience of arrears management is no longer an issue. The more intractable question of how the pre-Covid legacy cases, many in very deep arrears, some of which may have been exacerbated by Covid, can now be resolved may be like trying to put the genie back into the bottle. It is also a task that is impeded by European Central Bank (ECB) rules on capital provisioning and the widespread sale of distressed loans to vulture funds. Nonetheless, the material in this CBI paper does provide some food for thought on these questions.

Affordability

On the question of affordability and given that the authors had access to the Standard Financial Statements (SFS) completed by 'engaging' (or co-operating) borrowers across four retail banks, the observations made on financial capacity are largely unequivocal and speak for themselves.

For example, in the Abstract, the authors observe that *'turning to the financial distress of households seeking a resolution to their arrears, we find an average income fall of roughly one third since mortgage origination and that one third had already reduced their non-housing expenditures to below the recommended minimum level used in the personal insolvency system. Finally, we show that larger cuts in repayment burdens and lower ex-post payment-*

[96] See Table 8 above, Section 2.10.

to-income ratios are both highly predictive of successful long-term restructures'.

Further it is stated that *'many borrowers engaged over the last decade in deep levels of financial distress. Many were already spending at or below "reasonable living" levels, had high debt burdens relative to income, and minimal capacity to save or service debt'.*

Critically, the failure to attempt to resolve all debts and not just the mortgage is candidly identified in stating that *'Non-mortgage consumer debts were substantial among borrowers engaging to resolve mortgage distress. Sustainable solutions should take into account the entire indebtedness of borrowers'.*

The extracts quoted above reflect the typical features of crushing personal insolvency – substantial loss of income, cutting expenditure to the bone to find some money for creditors, multiple creditors competing for payment – that are a blight on the lives of all members of the affected households.

Engagement

Turning to the vexed but key question of engagement, with its connotations of strategic default, the paper suggests that *'the data in this Note suggest that borrower engagement has been strong over the last decade, with over one hundred and twenty thousand owner-occupier mortgage accounts restructured by 2016. This has been supported by an institutional set of supports, including the Abhaile scheme of the Money Advice and Budgeting Service (MABS)'.*

However, that observation is then qualified as follows: *'Over twenty-six thousand owner-occupier mortgages were in long-dated arrears of more than two years at the onset of COVID-19, many having accumulated more than five years of arrears. Despite the generally positive message on engagement across the population, this pattern is at least partially explained by the inability or unwillingness of borrower and firm to engage meaningfully in an attempt to arrive at resolution.'*

The reference to the *'inability or unwillingness of borrower and firm to engage meaningfully'* here is an important observation in that it implicates not just the borrower but also the lender and, once again, there is a world of difference between inability and unwillingness and the many points in between.

In terms of inability, the mortgage arrears data we have reviewed in considerable detail above shows clearly that very significant numbers of co-operating borrowers in arrears do not have a restructure in place. It is likely that in many of these instances, there is little money available and that may be the reason for the lack of a restructure. As we have pointed out above, there is no data in the CBI quarterly figures that expands on this point and this should be remedied. **Specifically, what kind of payments are being made by co-operating borrowers who are not classified as being in a restructure?** Ongoing and possibly chronic financial incapacity may be a significant factor here.

An obvious solution in at least some of these cases, despite the fact that it involves loss of ownership, is the mortgage-to-rent scheme, incorporating a potential buy back option for the former borrower, now tenant. As of 31st March 2021, 5,749 cases have been submitted under the scheme since 2012, with 1,179 successfully completed, 1,079 are being actively progressed and 3,491 either ineligible or not pursued.[97] The MTR scheme as a potential solution will also be examined in the final Paper of this series.

In terms of the borrower's perceived unwillingness, the lender is often looking for more than the borrower can reasonably afford to pay and the CBI Paper's observations on failing to factor in unsecured debt and allow for reasonable living expenses are an important recognition of this reality. Before discussing the paper's observations on strategic default, in our view the price of unwillingness is not shared equally by the parties. The unwilling borrower currently faces protracted stress, traumatic litigation and potential loss of the family home; by comparison the unwilling lender faces less severe sanctions, though it will face both legal costs and a difficult battle to repossess the dwelling should current trends continue.

[97] http://www.housingagency.ie/housing-information/mortgage-rent-statistics

Strategic default

The paper goes on to provide a brief review and assessment of the concept of 'strategic default' in an Irish context in observing that '*Economic theory suggests that when the both the benefit of paying and the cost of default are low then a rational borrower is more likely to "strategically default". This may have been perceived to be the case by many in Ireland in the past decade given widespread negative equity, large falls in income, and the low likelihood of home repossession. Evidence for the existence of such default has been provided in both the United States and Ireland, where legal changes that reduce the costs of defaulting for borrowers have been shown to lead to increased default (Ghent and Kudlyak (2011), Mayer et al. (2014), O'Malley (forthcoming).*

The authors however broadly conclude that '*despite evidence that such behaviour does exist in some settings, the evidence we present in this Note based on LLD and SFS data suggests that, on aggregate, strategic default among those who "could pay" is not a first-order concern in Ireland*'. On the contrary, it is observed that '*the evidence suggests that Irish borrowers were much more willing to engage (defined as either having completed an SFS, having a restructure arrangement in place, or both) with their bank than to default without engaging*'.

Further context is then provided by the observation that '*despite the above findings, there does remain a group of non-engaged borrowers in long-dated arrears, which represents among the most intractable issues remaining from the last decade*' and that '*the data available to us allow the classification of a borrower as non-engaged if their loan has no SFS file associated, nor is there any record of a restructure arrangement in place*'. Further that '*the incidence of non-engagement by this metric is higher among those in deeper states of arrears… and close to 40 per cent of those in long-term mortgage arrears (greater than two years past due) are measured to be "non-engaging" or "non-cooperating" across two different studies in recent years. Among those with arrears of ten or more years, "non-cooperating" rates are over fifty per cent*'.

It is notable that the definition of 'engaging' used here is that the loan has an SFS (Standard Financial Statement) file associated or there is a record of a restructure arrangement in place, or both. **It is not clear whether this refers to a current SFS and/or a current restructure arrangement in place and it would be useful if this was clarified, particularly as there are borrowers who initially engage and then may cease to co-operate for various reasons including inability to meet the terms of an arrangement.** In Section 2.11 above, we refer to CBI research published in 2016 which classifies the outcome of MARP engagements in the years 2014 and 2015. Briefly, this data records that:

- In almost **10,000** of the cases where a restructure arrangement was offered, the borrower/s rejected it
- Over **30,000** borrowers were declared as not co-operating under MARP during this period.

We suggested, based on anecdotal evidence from working with MABS money advisors at that time that a number of borrowers refused the restructure offered on the grounds they did not consider it sustainable for their financial situation. Further, that other borrowers encountered multiple difficulties and frustrations engaging with lender's Arrears Support Units (ASU) in terms of loss of documentation and inconsistent application of rules and some were ultimately declared as not co-operating on spurious grounds. **How many of these borrowers, who started out by trying to engage with their lender, find themselves some six to seven years later, classified in the *"non-engaging" or "non-cooperating"* bracket defined above?**

Again, this is not to say that there is not strategic default but we believe that there is little evidence of it in terms of a strategy. It is notable that this paper goes on to suggest that from these cases of non-engagement '*a warning signal also emerges, reflective of the operating environment where legal avenues for collateral enforcement function slowly*'. It might be pointed out that, in many cases, the resolution processes also functioned slowly, not to mention in an often imbalanced way. As already outlined above, the court must be satisfied that a Possession Order which will result in the loss of the family home is appropriate and if an initially slow to engage borrower has changed course, s/he should be given the chance to do so. In any event, County Registrars do not tolerate the Court's time being wasted.

In conclusion on this question, the authors suggest that '*a policy priority should be to ensure that institutional features and policy programs are functioning appropriately to facilitate resolution of these legacy cases, while on a parallel track ensuring that newly-distressed borrowers rolling off COVID-19 payment breaks do not accumulate similar longer-dated, difficult-to-resolve arrears*'.

It is hard to disagree with this. The critical question is how this 'policy priority' will be further articulated, committed to and resourced from hereon in.

5

SECTION

5. CONCLUSION

The mortgage arrears resolution processes put in place following the Global Financial Crisis (GFC) and the legislative developments subsequently introduced to improve those attempts at resolution, are indicative of an ambivalent attitude to the repossession of family homes amongst policy makers, including government, public servants and regulators. This ambivalence may stem from a mentality that tries to simultaneously hold two irreconcilable positions, namely that: (i) banks should not be compelled to write down debt and incur losses if at all possible and; (ii) borrowers should not be forcibly evicted from their homes in any significant number. The significant moral dimension to this problem – the reckless provision of credit during the boom by those same institutions, facilitated by poor regulation, which effectively 'sank' large numbers of households – may have been buried under a clean sweep of new borrowing limits but a fragile institutional memory still endures. The wider context, throughout, is a society belatedly striving to increase housing supply but determined that this will be driven largely by the private sector.

The result has been the ongoing management of the problem for over a decade now, where by virtue of an array of initiatives introduced as events evolved, the low hanging fruit was picked but the higher branches remained out of reach. The common thread throughout has been an insistence that the lender remains in control of the decision making, albeit prompted periodically to up its game but never presented with adverse consequences if it does not. Thus, where a lender did not deem a resolution appropriate in the CCMA/MARP engagement, it could move the file into the legal system, where the borrower - without access to legal representation and exhausted by the effort to stay in their home - might agree to a voluntary surrender, or a Possession Order might be granted by the Court and executed.

But then further changes were made that began to impact more substantially on the lender's right to enforce its security. A Personal Insolvency Arrangement could be proposed and if rejected could be appealed to the Circuit Court and onwards. With the help of MABS, Abhaile services and a reasonably sympathetic County Registrar, borrowers could become better advised and might continue the struggle, as our analysis of the CBI figures above demonstrates. Further the courts are now provided with a power at the final stage to refuse to grant a Possession Order on as yet unexplored grounds.

This delay and uncertainty is frustrating for lenders of course but more pertinently, fundamentally distressing for the borrower and his or her dependants and arguably in breach of human rights standards[98], in addition to being costly for society as a whole on a wide array of levels. Passing the parcel onto the courts to deal with, even though the problem is usually not about determining legal right or wrong (the normal business of the courts), is a State failure to take responsibility for the outcomes of the lending model that was allowed to wreak such havoc, one that yielded spectacular tax returns when transactions surged but ended up costing our society very dearly on so many levels. Effectively asking the courts to act as a brake and then blaming them when they do smacks of policy dysfunction.

Broadly speaking, the data we have examined throughout this Paper demonstrates that the current system of resolution is not working effectively for borrower or lender, or indeed the taxpayer. Further mortgage arrears (and general personal insolvency) cases arising out of Covid 19 may present a significant challenge but they may also present an opportunity. Apart from treating these new cases with the compassion and decisiveness they deserve, given that the

[98] Article 11 of the International Convention on Cultural, Social and Economic Rights requires States 'to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

Article 8 of the European Convention on Human Rights and Fundamental Freedoms declares that 'everyone has the right to respect for his private and family life, his home and his correspondence'.

ultimate event outside of the borrower's control – a global pandemic – has given rise to them, there is an opportunity to re-examine the legacy cases in a more open and systemic way and to reach resolutions in as many cases as possible for once and for all. This opportunity will necessitate changes both in approach and in law and we will examine such potential changes in Paper Four, the final paper in this series.

APPENDIX

APPENDIX

FLAC ANALYSIS OF CBI DATA FROM 2014-2015 MORTGAGE ARREARS RESOLUTION PROCESS (MARP) OUTCOMES

In May 2016, the CBI published a Consumer Protection Bulletin which gave specific details of MARP outcomes in the two calendar years 2014 - 2015. To our knowledge, such an exercise has not been replicated since, at least not in the form of publicly accessible data. This Bulletin revealed as follows:

MARP OUTCOMES – 2014-2015

MARP outcomes	1st half 2014	2nd half 2014	1st half 2015	2nd half 2015	Total
MARP completed	57,005	44,716	39,166	23,075	163,962
ARA[1] offered	50,598	39,007	34,860	19,978	144,443
ARA not offered	6,407	5,709	4,306	3,097	19,519
ARA accepted	40,070	33,403	30,569	16,342	120,384
ARA rejected	3,548	2,952	1,832	1,587	9,919[2]
Appeals[3]	3,570	2,347	1,302	829	8,048
Upheld/partly upheld	1,315	820	410	193	2,738
Rejected	2,704	1,784	1,051	658	6,197
Warned on co-operation	21,124	10,642	10,605	5,173	47,544
Declared not co-operating	14,768	6,879	7,531	3,127	32,305
Appeals	1,010	384	176	115	1,685
Upheld/ partly upheld	298	141	62	48	549
Rejected	675	372	128	74	1,249

Source: Central Bank of Ireland 'Consumer Protection Bulletin', Code of Conduct on Mortgage Arrears, Edition 3 May 2016

[1] Short for Alternative Repayment Arrangement.

[2] When ARAs accepted and rejected are added together, the total is 130,303. This is some 14,000 short of the number given for those offered an ARA of 144,443. There is no explanation provided for this disparity.

[3] These are presumably appeals either rejecting the offer from the lender or appealing against the failure of the lender to make an offer – There is no further breakdown of these two categories.

An important caveat when considering the data in this table is that we do not know the extent to which the information provided in the *Bulletin* was subject to any verification process by the CBI. The Bank does not normally engage with individual borrowers about their MARP experience, preferring to get information from the mortgage lenders it regulates.[99] It is possible therefore that the figures were simply provided by the 19 relevant lenders/loan owners and accepted by the Bank without further verification. In any case, at face value, these figures indicate that:

- In **19,519** cases through 2014-2015, the relevant borrower was not offered an alternative repayment arrangement (ARA) by the lender following the MARP engagement.
- In **9,919** of the cases where an arrangement was offered, the borrower rejected it. There was no breakdown provided of the kinds of alternative repayment arrangements offered that were rejected by borrowers. It is likely, however, that many borrowers rejected these arrangements as they did not consider them sustainable in their financial circumstances.
- A further **32,305** borrowers were declared as not co-operating under the MARP during 2014-2015. Only a small number appealed this decision (about 5% of the total) but it is notable that close to one-third of these were successful. The reasons for the low appeal rate are not explored. Neither is the comparatively high appeal success rate, which obviously saw the relevant lender reverse its original decision that the borrower was not co-operating. There is no information available either to test any causal connection between cases where either 1) the lender refused to offer an alternative repayment arrangement or 2) rejected the borrower's appeal against such a refusal and any subsequent declaration that the borrower was not co-operating.

The Bank's data suggest that **47,544** borrowers were warned on co-operation in 2014-2015, with **32,305** declared as not co-operating.[100] Undoubtedly, there were many who did not co-operate, but nonetheless this is a very large number of borrowers alleged to be not co-operating at a preliminary stage of the process.

As alluded to above, the definition of 'not co-operating' in the CCMA is very wide, complex and multi-stranded and allows any one of a number of acts or omissions to be classified as not co-operating, and is certainly open to manipulation by lenders as they alone make this call, subject to a right of appeal to an Appeals Board each lender appoints and controls itself.

Two other points are also potentially relevant to the high level of such declarations:

- The 20-business day warning letter that the lender was/is required to send to the borrower prior to such a declaration is not specifically required to be copied to the person nominated by the borrower as his/her designated representative, such as, for example, a MABS advisor.
- There is no requirement to send this letter by registered post and in the welter of correspondence that a person with financial difficulties will have received, it is possible that the long-term significance of this warning letter will not have been appreciated.

[99] An exception to this came by way of a press release issued by the CBI of 21 February 2013 titled 'Research highlights positive experience of borrowers engaged in mortgage arrears resolution process'. To our knowledge, no research report or methodology used was ever provided to back up this assertion and the very limited detail that followed in the press release merely specified that 'consumer research was independently

[100] Rule 28 of the CCMA provides that prior to classifying a borrower as not co-operating, a lender must write to the borrower and inform the borrower that he/she will be classified as not co-operating if specific actions are not undertaken within 20 business days.

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