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TECHNICAL NOTE ON INSOLVENCY AND CREDITOR RIGHTS

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June 28, 2022

TECHNICAL NOTE

INSOLVENCY AND CREDITOR RIGHTS

Prepared by
Legal Department

This Technical Note was prepared by IMF staff in the context of the Financial Sector Assessment Program (FSAP) in Ireland. It contains technical analysis and detailed information underpinning the FSAP's findings and recommendations. Further information on the FSAP program can be found at http://www.imf.org/external/np/fsap/fssa.aspx.

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Glossary

CCMA	Code of Conduct for Mortgage Arrears
CRO	Companies Registration Office
CLRG	Company Law Review Group
CSI	The Courts Service of Ireland
DETE	Department of Enterprise, Trade and Employment
DoF	Department of Finance
DoJ	Department of Justice
DSTI	Debt-service-to-income
EU	European Union
IMF	International Monetary Fund
ISI	Insolvency Service of Ireland
LTMA	Long-term Mortgage Arrears
MARP	Mortgage Arrears Resolution Process
NPL	Non-performing loan
PDH	Primary Dwelling Home
PIA	Personal Insolvency Arrangement
Revenue	The Irish Revenue Commissioners
SCARP	Small Company Administrative Rescue Process
SME	Small and Medium Enterprise
UNCITRAL	United Nations Commission on International Trade Law
WB	World Bank

EXECUTIVE SUMMARY[1]

This note analyzes select aspects of the system for insolvency and creditors' rights in the context of an overall assessment of the Irish financial sector. It focuses on two areas: (i) the use and effectiveness of the corporate restructuring regime (examinership) and (ii) the resolution of mortgage related NPLs. Corporate restructuring was considered particularly relevant given that the authorities are currently in the process of amending their insolvency system to incorporate the provisions of the European Directive on Preventive Restructuring Procedures (the "EU Directive") and have recently adopted a new debt resolution regime for small and micro-sized enterprises. The mission team also focused on the resolution of mortgage related NPLs, given that they constitute 46 percent of all NPLs (total loans) in the retail banking system and pose a challenge to the effectiveness of the overall system for debt resolution and creditors' rights. This analysis has been conducted against the international insolvency standard (the "Standard"), where relevant.[2]

Ireland's corporate insolvency regime is largely in line with international best practice, although the regime is little used, and a review is in order. The legal framework is sophisticated and well-established, and, particularly after adoption of the Small Company Administrative Rescue Process (SCARP)—the special procedure for small and micro-enterprises—provides debtors and creditors with a wide-ranging menu of debt resolution options. However, use of corporate reorganization procedures is limited and costly, and certain aspects are not consistent with the Standard and should be addressed. Additional changes will be required to incorporate the EU Directive into national legislation. Policy makers should also consider creating a hybrid procedure to complement reorganization and reduce the need for judicial intervention, subject to constitutional constraints, in light of the spirit of the EU Directive. SCARP is a welcome development, although key aspects—such as the ability of public creditors to opt out—may limit effectiveness, and expectations for what it can achieve should be realistic. Overall, data on corporate insolvency procedures is scarce, and work to collect and publish meaningful data points would support more effective analysis and inform policy. The institutional framework could also benefit by dedicating more judges to insolvency-related matters, and current modernization programs to support electronic filings and remote hearings should continue.

The issue of long-term mortgage arrears is complex and will require further development of an overall strategy, with multiple government bodies playing a role. While mortgage arrears are largely a legacy issue from the 2008 crisis, the failure to fully resolve these arrears has the potential to undermine credit growth and affordability, given the impact on credit risk of higher uncertainty of realizing collateral. A key hindrance to creditors' rights remains the inability of financial institutions to predictably and efficiently enforce mortgage security on primary dwelling homes (PDH). While repossession is not the optimal solution for many borrowers, and resolution of the long-term

[1] This note was prepared by Chanda DeLong (Legal Department).

[2] The international standard is composed of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (the "World Bank Principles") and the recommendations of the UNCITRAL Legislative Guide on Insolvency Law ("UNCITRAL Legislative Guide").

mortgage arrears issues necessitates further engagement from both borrowers and lenders, a more efficient enforcement regime is also crucial to an effective creditors' rights system. In that regard, enforcement should be streamlined and simplified. Recommendations to improve the process include clear rules and guidelines for judges with respect to proceedings and ensuring hearings take place in a timely manner (e.g., through more frequent court sessions).[3] The courts should strengthen data collection and publication on repossession cases to allow policy makers to better understand and address bottlenecks, where they exist. More broadly, the Government should adopt a coordinated, multi-agency strategy for resolving mortgage arrears, informed by the granular data available on the financial situation and debt servicing capacity of borrowers. Published guidance on expected solutions based on financial indicators, and broader social support would be critical to this approach and possible strategy.

[3] The allocation of court resources is ultimately an issue for the Judiciary.

Table 1. Ireland: Main Recommendations

#	Recommendation	Responsible Institution(s)	Timeline*	Priority**
1	Conduct a review of examinership given limited usage, the EU Directive and identified gaps vis a vis the Standard. Consider introducing a new hybrid procedure in line with the "spirit" of the EU Directive. (¶10)	DETE; CLRG	I	M
2	Monitor implementation of SCARP with a focus on possible impediments and revisit law as experience is gained and data is collected. (¶12-13)	DETE	ST-MT	M
3	Issue clear guidelines on participation of public creditors in SCARP. (¶12)	Revenue	I	H
4	Create a more extensive systematic data collection system for corporate insolvency procedures, including SCARP. (¶14)	DETE; CRO; CSI	I	H
5	Strengthen the institutional framework for insolvency by increasing the number of judges specialized in enterprise insolvency matters, while recognizing that such allocation is a matter for the judiciary and is subject to available resources, and accelerating modernization plans to increase use of electronic filings and remote hearings. (¶15)	CSI, DETE	ST-MT	M
6	Eliminate legal and institutional barriers to timely, efficient system for enforcement of secured credit. (¶26)	DoJ; courts	ST-MT	H
7	Strengthen data collection and publication on enforcement procedures to allow policy makers to better understand and address any possible bottlenecks. (¶26)	CSI, courts	I	H
8	Further develop the government strategy, ensuring coordination across multiple responsible agencies, to provide targeted solutions to LTMA borrowers based on their financial situation and debt servicing capacity, taking into account the experiences of the last decade, increased data collection and the entrance of non-banks into the area. (¶28-29)	CBI, DoF, DoJ, ISI, in consultation with relevant agencies	ST	H
9	As part of an overall strategy to address LTMA, the Review of the Personal Insolvency Act 2012, now underway, should examine whether further statutory interventions are required to ensure that after the satisfactory completion of the PIA, the remaining mortgage debt agreed to be payable between the parties is sustainable. (¶30)	DoJ	ST	M

* I = Immediate (within one year); ST = Short Term (within 1-3 years); MT = Medium Term (within 3-5 years).
** H = High; M = Medium; L = Low.
[1] Recommendation implemented after the FSAP mission.

INTRODUCTION

1. This technical note assesses select aspects of the Irish insolvency and creditor rights system against the international insolvency standard and comparative country practice. [1] Considering the risks and priorities identified in the 2022 FSAP, the mission focused on the following issues: First, the use and effectiveness of corporate restructuring procedures, with a special emphasis on (i) micro and small business rehabilitation, given Ireland's recent adaption of a targeted resolution procedure for such enterprises and (ii) ongoing work to incorporate the EU Directive into the domestic legal framework by July 2022. Second, the mission analyzed issues affecting the resolution of long-term mortgage arrears, given the longstanding effect of such arrears on the financial system and household indebtedness.

2. The mission engaged in extensive meetings with both the public and private sector. Meetings were held with public sector agencies with competencies related to insolvency and creditors' rights, including the Central Bank of Ireland (CBI), the Department of Enterprise, Trade and Employment (DETE), the Department of Justice (DoJ), the Insolvency Service of Ireland (ISI), the Department of Finance, the Revenue Commissioners, as well as the Courts Service of Ireland (CSI) and the Companies Registration Office (CRO). Other key stakeholders included the Company Law Review Group (CLRG)[2], retail banks, NPL servicers, private sector attorneys, insolvency practitioners and associations, judges, consumer protection agencies and advocates, and small business representatives.

OVERVIEW OF THE IRISH INSOLVENCY SYSTEM

3. The Irish insolvency system consists of five procedures in statute law for corporate debt resolution and four procedures for personal insolvency. The five corporate debt resolution procedures include (i) examinership; (ii) SCARP, a newly adopted restructuring procedure for small and micro-enterprises; (iii) schemes of arrangement; (iv) receivership and (v) liquidation (both voluntary and compulsory). Personal insolvency procedures include the (i) debt relief notice; (ii) debt settlement arrangement; (iii) personal insolvency arrangement; and (iv) bankruptcy (Table 2).

[1] The FSAP mission team recognized that in designing the insolvency system, the authorities prioritize balancing the sometimes competing rights of debtors and creditors, including those set forth in the Constitution. Any further changes would need to strike a similar balance.

[2] The Company Law Review Group (CLRG) is a statutory advisory body charged with advising the Minister for Business, Enterprise and Innovation on the review and development of company law in Ireland.

Table 2. Ireland: Debt Resolution Procedures for Corporates and Natural Persons

Proceeding	Eligible Debtors	Debt Limit	Claims Resolved	Maximum Repayment Plan or Discharge Period
Corporate Insolvency Procedures*				
Examinership	Corporates	No limit	All (preferential, secured, unsecured)	N/A
Schemes of Arrangement	Corporates	No limit	All (preferential, secured, unsecured)	N/A
SCARP	Small and Micro Enterprises**	No limit	All (preferential, secured, unsecured) Tax claims are excludable if Revenue opts out.	N/A
Liquidation	Corporates	No limit	All (preferential, secured, unsecured)	N/A
Personal Insolvency Procedures				
Debt Relief Notice	Individuals	€35,000 maximum	Unsecured	3-year supervision period before debts discharged
Debt Settlement Arrangement	Individuals	No limit	Unsecured Tax claims are excludable if Revenue opts out	5-year (+1) repayment plan
Personal Insolvency Arrangement	Individuals	No limit for unsecured debt; €3 million max. for secured debt (i.e., total amount that can be resolved) unless all secured creditors agree otherwise	Unsecured and secured Tax claims are excludable if Revenue opts out	6-year (+1) repayment plan for unsecured debt; No limit to repayment plan for secured debt
Bankruptcy	Individuals	Minimum debt of €20,000 to qualify	Unsecured and secured (secured debt is not discharged)	Debts discharged after one year

Source: Adapted from materials provided by DETE, DoJ, and ISI.

*Receivership is not included in this table, given that it is not an insolvency procedure *per se,* although it can be used as a resolution tool as discussed below.

** A small company is one which meets at least two of the following three conditions: (a) No more than 50 employees, (b) Turnover must not exceed €12 million, and (c) Balance sheet must not exceed €6 million. A micro company is one that, in its most recent financial year fulfils 2 or more of the following requirements: (a) turnover of the company does not exceed €700,000; (b) balance sheet total of the company does not exceed €350,000; and (c) average number of employees does not exceed 10.

4. Responsibility for Ireland's insolvency regime is shared between the DETE, the DoJ and the ISI. DETE is responsible for corporate insolvency, while the DoJ is responsible for personal insolvency and bankruptcy. The ISI is an independent public agency, created by the Personal Insolvency Act of 2012 (the Act), which is responsible for all matters concerning the operation of the personal insolvency system, including monitoring arrangements reached under the Act, supervising and regulating personal insolvency practitioners, and contributing to development of policy in this area. Bankruptcy is also a function of the ISI. The Courts Service of Ireland is responsible for the administration and management of the courts.

5. Judges in the high court and circuit courts of Ireland have primary jurisdiction for hearing insolvency cases, depending on the nature of the case and the amount. The High Court has primary jurisdiction for all bankruptcy cases (only individuals), examinerships (unless the company's liabilities are less than €317,434, in which case the Circuit Court has jurisdiction), and personal insolvency matters above a certain value.[3] For all other insolvency matters, it is the Circuit Court that has primary jurisdiction. The Circuit Court also hears cases for repossession of a mortgage over a primary residence. The Personal Insolvency Act of 2012 provides for the appointment of up to eight specialized insolvency judges in the Circuit Court to hear personal insolvency cases, of which there are currently two. There are judges with specialization in this area that are dedicated to corporate insolvency cases (either at the Circuit or High Court level), personal insolvency or bankruptcy, although they are also responsible for other matters.

CORPORATE DEBT RESOLUTION

A. Description of the System

6. Debt resolution for corporations in Ireland may take place under five different procedures, brief overviews of which are provided below:

- **Examinership.** Examinership, adopted in the 1990s, is the standard corporate reorganization procedure in Ireland.[4] A business may use the procedure if it is judged by the court to be unable, or likely to be unable, to pay its debts as they fall due, but ultimately has a "reasonable prospect" of survival. An examiner is appointed over the company, and an automatic stay against creditor action is put in place for the entirely of the procedure, which is initially 70 days, and may be extended up to 150 days.[5] Creditors are divided into preferential, secured, and unsecured creditors and can be further sub-divided by the examiner. The examiner proposes a scheme of arrangement for restructuring the debts of the company, which requires approval from at least one class of impaired creditors, by way of majority in number and value. To

[3] The High Court has primary jurisdiction over a Debt Settlement Arrangement or a Personal Insolvency Arrangement if the total liabilities of the debtor are in excess of €2.5 million.

[4] See Part 10 of the Companies Act.

[5] The extension to 150 days is a temporary amendment brought in by the Companies (Miscellaneous Provisions) (Covid-19) Act of 2020. The stay can normally only be extended to 100 days.

approve the plan, the court must be assured that the plan is "fair and equitable", which requires a judgment that creditors receive at least liquidation value, and that the proposals are not "unfairly prejudicial" to any interested party.

- **Schemes of Arrangement:** A Scheme of Arrangement under Chapter 1, Part 9 of the Companies Act provides another statutory mechanism for a company to reach agreement with its creditors to restructure its debt obligations. Unlike examinerships, reaching a Part 9 scheme of arrangement is not a court-led process and there is no automatic stay on creditor action. Debtors need not be insolvent to apply and need not demonstrate a reasonable prospect of survival as a going concern. Schemes must be approved by a majority in number representing at least 75 percent in value of the creditors or class of creditors present and voting on the plan at the creditors' meeting and be sanctioned by the court.

- **SCARP:** Available only for small and micro-sized companies, SCARP is a special administrative procedure, designed to allow for a quicker, less court-involved process than examinership. It entered into effect on December 7, 2021. The procedure is initiated by a resolution of the Company's Board of Directors, which appoints an insolvency practitioner who is responsible for engaging with creditors to formulate a rescue plan. There is no automatic stay on creditor action. The rescue plan is approved without the requirement for court approval, provided that a majority in value of an impaired class of creditors vote in favor of the proposal and no creditor raises an objection within 21 days of the proposal's announcement. However, if a creditor objects during this period, the company must seek the court's review and approval of the plan. Additional creditor protections include the "best interests of creditors" test (i.e., creditors must receive at least liquidation value). The process is shorter than examinership (aiming to conclude within 70 days). Public creditors have a right to "opt out" of inclusion of their claims at the outset of the procedure and not be restructured.

- **Corporate Receivership:** Corporate receivership may take place when a company defaults on the repayment of a secured debt and the creditor exercises a contractual remedy to appoint an independent representative (a "receiver") to take over the administration of the company to recover the debt. Where possible, the receiver will sell the assets securing the debt (subject to a statutory duty to obtain the highest price) and use the money to repay the creditor, as well as the cost of the receivership. A company petition for examinership will halt a receivership, but only if such petition is presented within three days of the receiver's appointment.[6]

- **Liquidation/Winding Up:** The Irish insolvency regime also provides for liquidation proceedings, both voluntary and compulsory: Members' voluntary liquidation (which only applies to solvent companies); creditors' voluntary liquidation (which arise when directors initiate it because the company is insolvent or when a members' voluntary liquidation is converted given the company's insolvency); and court-ordered liquidation (which is initiated by the court at the

[6] SCARP has an analogous provision (558M of the Companies Act), which allows a Process Adviser to petition the Court to remove a receiver where he/she is appointed for less than 3 days.

petition of an interested party—e.g., creditor, debtor, or shareholder—and includes the judicial appointment of a liquidator).

B. Use and Practice

7. Use of reorganization procedures is limited in Ireland. As highlighted in Table 3, an average of only 29 petitions for examinership were filed over the last four years. Discussions with stakeholders revealed various reasons for this low usage. Overall, stakeholders indicated that while examinership is a sophisticated, well-established procedure, it works best for large companies, given its procedural complexity and high cost (including cost of entry). Indeed, these two factors informed the establishment of SCARP.[7] Stakeholders also noted that examinership could benefit from a review aimed at modernization, particularly recent reforms in well-established insolvency jurisdictions (e.g., the UK and the Netherlands).

Table 3. Ireland: Data on Corporate Resolution Procedures*

	2017	2018	2019	2020
Examinership	26	38	26	27
Corporate Receiverships	344	167	144	84
Liquidations:				
-Creditors' Voluntary	653	484	611	443
-Court-Ordered	67	59	67	49

Source: CRO Annual Report 2020

**With respect to examinership, data refers to total number of applications; for receiverships, data refers to number of companies over which a receiver was appointed; for liquidations, the number refers to the number of procedures initiated. Data on schemes of arrangement are not available; anecdotal data suggests schemes are used infrequently.*

C. Analysis and Recommendations

8. Examinership is generally well-aligned with international best practice, and a few changes would enhance its consistency with the Standard and limit uncertainty in its application. As examinership is a well-established procedure, some of the issues highlighted below have been resolved through practice and precedent. However, making the legislation clear would serve to reduce uncertainty and lower costs. The follow areas would benefit from clarification:

- ***Approval of Reorganization Plans*****:** Principle C14.3 of the World Bank Principles provides that plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities, and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding. While the concept of "fair and equitable" under examinership has been interpreted to require liquidation value in a restructuring, the requirement that the plan must not be

[7] See *Report Advising on a Legal Structure for the Rescue of Small Companies,* CLRG, October 22, 2020.

"unfairly prejudicial" to any party is not a clear criterion. Setting forth specific rules regarding inter-class equity (e.g., absolute priority) would address this gap and further compliance with the EU Directive, as discussed below.

- ***Ipso Facto Clauses:*** The Companies Act is silent on the enforceability of automatic termination and acceleration clauses of executory contracts upon insolvency. Such clauses generally serve as a deterrent to early filings and negatively impact the possibility of successful business rescue. Principle C.10.2 of the World Bank Principles recommends that contract provisions that provide for the termination of the contract upon an application for commencement or commencement should be unenforceable, except in special cases such as financial contracts (e.g., derivatives, repos).

- ***Valuation and Treatment of Secured Claims:*** The Companies Act is silent on how encumbered assets are valued for purposes of determining secured v. unsecured claims. The UNCITRAL Legislative Guide principal 179 states that "[t]he insolvency law should provide that the insolvency representative may determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset." If the value of the encumbered asset is insufficient to satisfy the secured creditor's claim, the secured creditor may participate as an ordinary unsecured creditor. While users of the system indicated that valuation is generally not an issue in practice, the law could usefully address this point.

- ***Adequate Protection for Secured Creditors:*** The Companies Act is silent on provision of adequate protection for secured creditors during the period of the automatic stay and does not clearly state the grounds on which a stay can be lifted by creditors. While the practical application of the absence of such a provision is limited given the short initial period for the stay (70 days), the Standard is clear that the insolvency law should specify that, upon application to the court, a secured creditor should be entitled to protection of the value of the assets in which it has a security interest, and that relief from the stay should be provided "by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor's interests in its collateral are not achieved" (Principle C5.3).

- ***Post-commencement Financing:*** The UNCITRAL Legislative Guide recommends that there should be incentives for post-commencement financing, including priority at least ahead of unsecured creditors and that such priority should also be recognized in case the reorganization proceeding is converted to liquidation.[8] Such a priority for all post-commencement financing should be recognized in the Irish regime.[9]

9. The EU Directive will necessitate additional changes to examinership. The EU Directive establishes minimum standards for European insolvency laws, with a focus on preventive restructuring mechanisms, as well as a limited subset of other insolvency-related matters, such as

[8] UNCITRAL Legislative Guide, Part Two, Chapter II, Paras 63-69. See also World Bank Principle C9.

[9] Examinership does provide for a priority for costs and expenses of the procedure, including in subsequent liquidation.

data provision and early warning mechanisms (Box 1). The impetus for the EU Directive stemmed from the global financial crisis, where in many countries, judicial systems did not have sufficient capacity to deal with the wave of insolvency cases. The goal, therefore, was to introduce preventive restructuring frameworks in all member states, in addition to full formal insolvency proceedings (i.e., so-called "hybrid" restructurings, which combine aspects of informal and formal procedures). Ultimately, the final text of the EU Directive was the result of substantial compromise, and now provides considerable discretion to member countries on implementation. There is a wide range of policy and technical options on which policy makers may decide. For example, while the goal of the EU Directive is to introduce a "hybrid" preventive procedure, national policy makers could technically. comply with the "law" of the EU Directive by introducing targeted changes to reorganization procedures and continue to rely only on formal procedures in practice

10. While the authorities could comply with the EU Directive by making targeted changes to examinership, consideration should be given to the introduction of a "hybrid" procedure. At a minimum, the examinership procedure will have to be amended to change, at least, provisions regarding the approval of restructuring plans (e.g., adopting either absolute priority, relative priority, or absolute priority with some exceptions); the treatment of essential contracts; and the design of the stay (including conditions for lifting the stay). Policymakers should also consider including in legislation explicit protection for interim finance, given its importance to the success of restructuring. Moreover, given the limited use and high cost of examinership, and to comply with the "spirit" of the EU Directive, the authorities should consider introducing a hybrid restructuring procedure, with limited court involvement, to complement examinership. This, along with SCARP (discussed below), would increase options for companies who may want a cheaper, less procedurally cumbersome, option than examinership, as well as the more debtor-friendly provisions, such as an automatic stay, that are not available in Part 9 schemes of arrangement (discussed above).

Recommendation 1: Conduct a review of examinership given limited usage, the EU Directive and identified gaps vis a vis the Standard. Consider introducing a new hybrid procedure in line with the "spirit" of the EU Directive.

11. The adoption of SCARP, a hybrid procedure for small and micro-enterprises, is a welcome addition to Ireland's insolvency toolkit. During discussions with the FSAP team, stakeholders were overwhelmingly positive about the prospect of a leaner, less costly alternative to examinership, particularly given the possibility of post-COVID distress in the SME sector. The adoption of SCARP is in line with other jurisdictions with advanced insolvency systems, such as the U.S. and Spain, which have adopted—or are in the process of adopting—regimes tailored specifically to small enterprises, which have characteristics that may make them less well suited for traditional reorganization procedures. The World Bank Principles have also been recently updated to include specific principles related to small and micro enterprises.[10]

[10] See principles C18-C20.

Box 1. European Directive on Preventive Restructuring and Insolvency

The European Directive on restructuring and insolvency (Directive 2019/1023) (the "EU Directive") was adopted on June 20, 2019. The result of long and complex negotiations amongst member states, the EU Directive establishes some minimum standards for preventive debt restructuring mechanisms, debt discharge for individual entrepreneurs, and a limited subset of other insolvency issues. Member states must incorporate the EU Directive in their national insolvency laws by July 17, 2021 (with the possibility for a one-year extension). Select key provisions include:

Early Warning Mechanisms: The EU Directive requires member states to introduce "early warning" systems to identify early signs of enterprise debt distress. Examples in the Directive include alert mechanisms when the debtor hasn't made payments, advisory services, and incentives for third parties (e.g., accountants) to flag negative developments to the debtor. Countries should choose one of two prevalent models for early warning systems (self-assessment tools or intervention mechanisms), define indicators for debt distress, and establish connections between the early warning system and insolvency/debt restructuring.

Preventive Insolvency Procedures: Member states must incorporate or adapt existing procedures to allow enterprises to restructure their debt without full court intervention and before they are insolvent. The overall objective is to maximize the use of hybrid restructuring, which combines judicial actions at key points in the process with debtor-creditor negotiation. Key elements of such a procedure include:

- **Access:** The debtor must only have a "likelihood" of insolvency. To prevent abuse of the procedure, member states can introduce barriers to access, like basic eligibility or "viability" tests (e.g., evidence of positive earnings in past fiscal years).

- **Debtor in Possession:** Debtors must remain totally or partially in control of their assets and day-to-day operations, with a limited role for insolvency practitioners.

- **Automatic Stay:** While the Directive requires that an automatic stay on creditor action be granted for an initial period of no more than four months, member states have significant discretion as to the scope and ultimate duration of the stay.

- **Restructuring Plans:** The Directive gives significant flexibility as to the formation of classes and requirements for approval of restructuring plans. One major consideration includes how to ensure protection of creditor classes, e.g., whether to use the "absolute priority" v. "relative priority" rule. Absolute priority ensures shareholders get nothing if unsecured creditors are crammed down; relative priority could allow shareholders to receive some value, as long as unsecured creditors get more. An alternative is to allow absolute priority, with targeted exceptions.

- **New Finance:** As a general principle, the Directive requires member states to ensure that new and interim financing are adequately protected. However, it gives discretion on whether to give new financing priority in a subsequent insolvency relative to other creditors. Failure to give some priority to new finance will likely undermine necessary financing for restructuring.

Data Collection: Data collection is fundamental for the assessment and design of insolvency systems. The EU Directive requires limited data collection on the number and outcome of procedures, as well as the average length. Member states are encouraged to go beyond these mandatory categories and collect data on the core indicators of time, cost and recovery rate.

Source: Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive, Garrido et al, IMF Working Paper, May 2021.

12. While SCARP is well-designed, there are several aspects that may limit its effectiveness. First, while the legislation allows for a stay (injunctive relief) via recourse to the courts, it is not automatic due to the need for the legislation to be in conformity to the Irish constitution, which may limit companies' incentives to use the procedure.[11] Second, the standard for rejection of executory contracts may be too high. While the court may set aside key contracts, they must make a judgment that this is necessary for the survival of the company. Third, there is no priority for interim finance. Given that new financing for distressed SMEs will be crucial to the success of any restructuring plan, granting priority may be particularly crucial to the success of the procedure. Lastly, the Revenue Commissioners has the option of "opting out" and excluding its claims. While there are limited grounds on which it may decide to do so, there is sufficient discretion to add uncertainty for debtors on the benefits of using the procedure. This may be problematic given that 93,000 businesses have warehoused debt in the amount of €2.9 billion as of December 2021, meaning that many small and micro enterprises may have tax debt that may need to be resolved when it comes due.[12] While the FSAP mission recognized that the "opt out" provision reflected a calibrated policy choice in the design of legislation, at a minimum, Revenue should develop and publish clear guidelines as to its participation to limit uncertainty for all parties. While the focus on restructuring is welcome, the authorities should also analyze whether there are any potential complexities or sources of high costs in liquidations for small and micro enterprises, and determine whether simplified *liquidation* procedures are also required.

13. Moreover, expectations regarding SCARP's effectiveness need to be realistic. Small and micro-enterprises make up 98 percent of Irish enterprises by count (Figure 1). Many of them are likely not to be in corporate form, and as such, are not eligible for SCARP. Many take the form of sole traders, in which case personal insolvency procedures and bankruptcy (discussed above) will be the only applicable solution. Moreover, there are no provisions in SCARP that contemplate the interaction between corporate and personal insolvency. Given that many small and micro enterprises may have debt secured or guaranteed by assets of a principal shareholder or director, SCARP's interaction with personal insolvency will be important to monitor. Moreover, the limited cross-country experience with specialized procedures for SMEs generally suggests that while they are a useful tool, they will only be appropriate for a particular set of companies with high going concern value. For example, the Small Business Reorganization Act of 2019 in the United States had only 1278 cases in 2020. Policy makers will thus need to ensure that traditional tools (e.g., winding up for

[11] The World Bank Principles (C5.2) state that "[t]he commencement of insolvency proceedings should prohibit the unauthorized disposition of the debtor's assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets. The injunctive relief (stay) should be as wide and all-encompassing as possible, extending to an interest in assets used, occupied, or in the possession of the debtor."

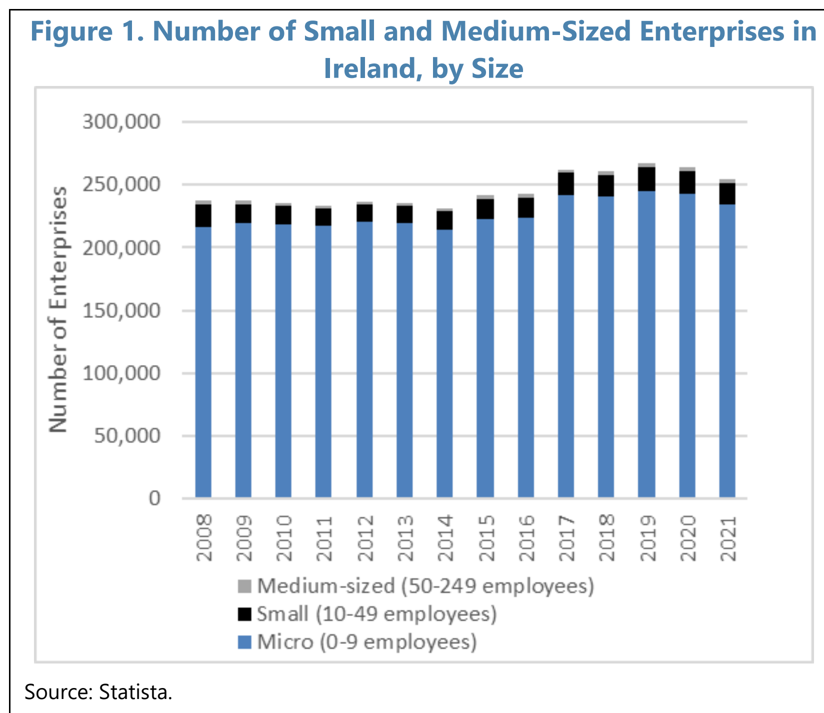
[12] Tax debt "warehousing" allows certain tax debts owed from the start of the Covid-19 pandemic in early 2020 through December 31, 2021 to be parked until December 31, 2022. Debtors may pay these debts in accordance with tailored phased payment arrangements, beginning in 2023, at a significantly reduced interest rate of 3 percent per annum. Some businesses which continued to rely on Covid-19 supports can have debts from 2020 to April 30, 2022 parked until April 30, 2023.

corporates and bankruptcy for individual entrepreneurs), complemented by informal restructurings, are being used effectively and that SCARP is not being used to merely postpone the inevitable.

Recommendation 2: Monitor implementation of SCARP with a focus on possible impediments and revisit law as experience is gained and data is collected.

Recommendation 3: Issue clear guidelines on participation of public creditors in SCARP.[13]

Figure 1. Number of Small and Medium-Sized Enterprises in Ireland, by Size



Source: Statista.

14. A more systematic data collection and publication system on corporate resolution procedures would increase understanding of frictions in the system. While the CRO collects some data on insolvencies,[14] additional data would inform policy making, and facilitate the assessment of newly introduced procedures, such as SCARP. Additional data collection will be required under the EU Directive, although further expanding on those categories would be beneficial. Key data points could include, e.g., economic and sectoral analysis (e.g., size and industry of the companies using the procedures); court decisions taken; number of appeals (and at which stage); timelines for each stage of the process; plans approved v. unapproved; companies liquidated

[13] After the FSAP mission, the authorities published guidelines, available at https://www.revenue.ie/en/tax-professionals/scarp/index.aspx

[14] See here.

after previously having been restructured, etc. The mission provided the authorities with cross-country examples of data collection systems.

Recommendation 4: Create a systematic data collection system for corporate insolvency procedures, including SCARP.

15. The Irish court system is well-functioning and stakeholders broadly commended High Court judges for the caliber of their decisions. However, private sector stakeholders did note that the system could benefit from greater specialization in insolvency matters at both the High Court and Circuit Court levels. While the Circuit Court does have two judges specialized in *personal insolvency* matters, there is no similar requirement that enterprise insolvency cases be heard by specialized judges. The introduction of a new procedure for small enterprises—SCARP—while designed to limit court involvement, does involve judges at key points in the process, and may necessitate increased expertise. With respect to court efficiency, while many matters have moved to online hearings and electronic filings, the mission team understands this is not universal to all courts. Ensuring electronic filings in all courts, and wider use of remote hearings, consistent with Ireland's court modernization plan, will be crucial, particularly if insolvency filings increase in the post-pandemic period.

Recommendation 5: Strengthen the institutional framework for insolvency by increasing the number of judges specialized in enterprise insolvency matters, while recognizing that such allocation is a matter for the judiciary and is subject to available resources, and accelerating modernization plans to increase use of electronic filings and remote hearings.

MORTGAGE ARREARS RESOLUTION

A. Description of the System

16. Mortgage-backed arrears in Ireland are largely a legacy from the global financial crisis, when, at the height of crisis, the NPL ratio for the banking system reached almost 26 percent.[15] Over the last decade, the authorities have made significant efforts to support debt resolution for borrowers in mortgage distress, and a combination of tools has been effective at reducing the stock of long-term mortgage arrears (LTMA), to 25,900 accounts[16] as of December 2021, from a maximum of over 60,000 in 2014.[17] This represents 4 percent of all Primary Dwelling Home (PDH) mortgages in the entire financial system. This is broken down by 8,515 held by retail

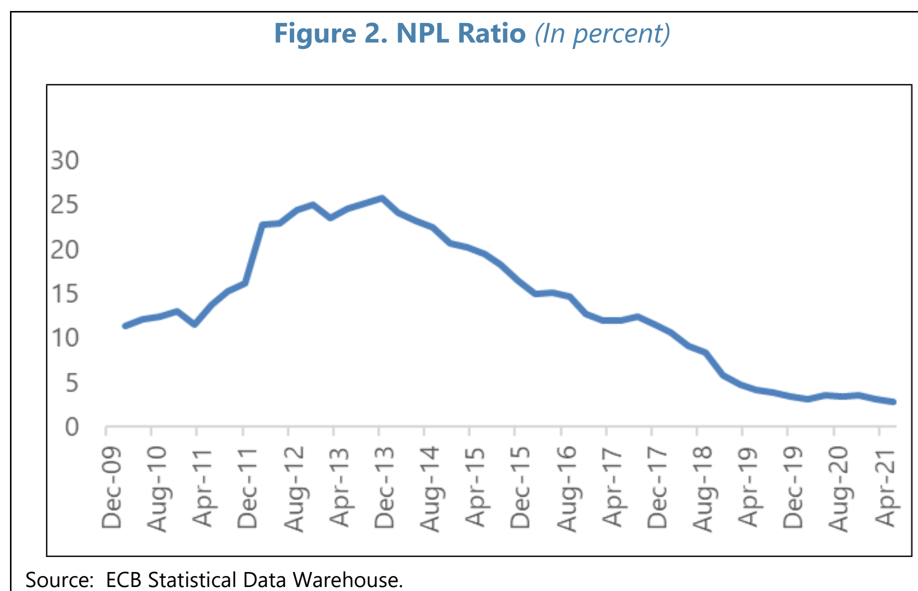
[15] For the subset of retail banks, the peak NPL ratio was close to 32 percent.

[16] Where a borrower is on a split mortgage restructure arrangement, the mortgage will be split into two parts. Repayments are made on one part (Part A), while the remainder is warehoused (Part B) to be repaid / reviewed at a later date. This implies that one split mortgage arrangement will be reported as two mortgage accounts within the statistics.

[17] LTMA are defined as those mortgage-backed loans in arrears for more than one year.

banks and 17,383 held by non-banks, which have become a significant player in the area over recent years. Over 55 percent of LTMA are over five years old (Table 4).

Figure 2. NPL Ratio *(In percent)*



Source: ECB Statistical Data Warehouse.

Table 4. Ireland: Quarterly & Yearly Change in PDH Accounts in Arrears, as at end-December 2021

	Number of accounts	Q on Q change	Y on Y Change
Total PDH mortgage accounts	721,738	-1,148	-10,250
Number of accounts in arrears	47,062	-618	-7,924
Of which days past due:			
- up to 90 days	14,504	1,006	-1,697
- 91 to 180 days	3,284	-34	-998
- 181 to 365 days	3,376	-425	-1,079
- 1 to 2 yrs	4,223	-109	-844
- 2 to 5 yrs	7,308	-345	-1,618
- 5 to 10 yrs	8,961	-687	-1,828
- over 10 yrs	5,406	-24	140

Source: *Residential Mortgage Arrears and Repossession Statistics, end-December 2021, Central Bank of Ireland*

17. The authorities have pursued a multi-faceted strategy since the crisis to support the resolution of mortgage-backed arrears. The strategy has included: (i) *consumer protection elements*, including a Code of Conduct for Mortgage Arrears (CCMA), which outlines the Mortgage

Arrears Resolution Process (the MARP), which provides the steps creditors[18] must follow in dealing with a borrower in mortgage arears; (ii) *debtor support and advisory services,* including MABS and the Abhaile Scheme, which provides borrowers access to professional legal and financial advice to assist in resolving their mortgage arrears; (iii) *a personal insolvency procedure,* introduced in 2012, which includes the ability to reach a court-approved personal insolvency arrangement (PIA) to reschedule debt backed by a primary residence, even over the objection of creditors; (iv) *social support schemes,* including mortgage-to-rent for the most vulnerable debtors; and (iv) *supervisory tools and oversight,* including, in the past, time-bound targets for mortgage backed NPL resolution, and currently, active engagement with creditor institutions to encourage LTMA resolution. *Repossession* of PDH has been used sparingly by creditors, given that public policy seeks, where possible, to achieve the objective of keeping debtors in their homes; the length and cost of enforcement procedures; and banks' business preferences. Irish banks have also pursued a wholesale strategy to offload NPLs from their balance sheets.[19] As of December 2021, over 67 percent of LTMA are held by non-bank entities, including investment funds. While this strategy reduces the NPLs on bank portfolios and therefore reduces risks to the supply of new credit by the banking system due to elevated levels of NPLs, it does not ensure a quicker resolution for the borrowers in arrears. The acquisition of such mortgages by non-banks has the potential to offer different and more versatile solutions for LTMA. Given that this is a relatively recent development, however, the practical working out of these LTMA mortgages by non-banks remains to be seen.

B. Use and Practice

18. Both public and private stakeholders highlight the considerable challenges in resolving LTMA, particularly given the social implications. The primary issue is that most debtors with LTMA are simply unable to afford their mortgage, in part due to the need to pay unsecured borrowings. Using one metric, the debt-service-to income ratio (DSTI), half of LTMA borrowers owe more than 43 percent of their monthly take-home income on debt repayments (including non-mortgage debt), with the mean DSTI being 61 per cent. While there is no universally agreed threshold for identifying a debt burden as being "high-risk", practitioners often cite a ratio of one-third of net monthly income as being a prudent level. Further work by the CBI (Table 5), indicates that 25 percent of borrowers generate so little income that they can pay less than 50 percent of their mortgage by retirement age, and about 18 percent of borrowers can pay nothing at all.[20]

[18] The CCMA applies to all regulated entities, including non-bank entities.

[19] European regulations incentivize banks to offload NPLs from their balance sheets. See, e.g., CRR Backstop; ECB Addendum; ECB Supervisory Expectations.

[20] See *Long-term mortgage arrears: Analytical Evidence for Policy Considerations,* CBI, FS Note Vol.2021, No. 8 which provides a number of metrics on the affordability of LTMA.

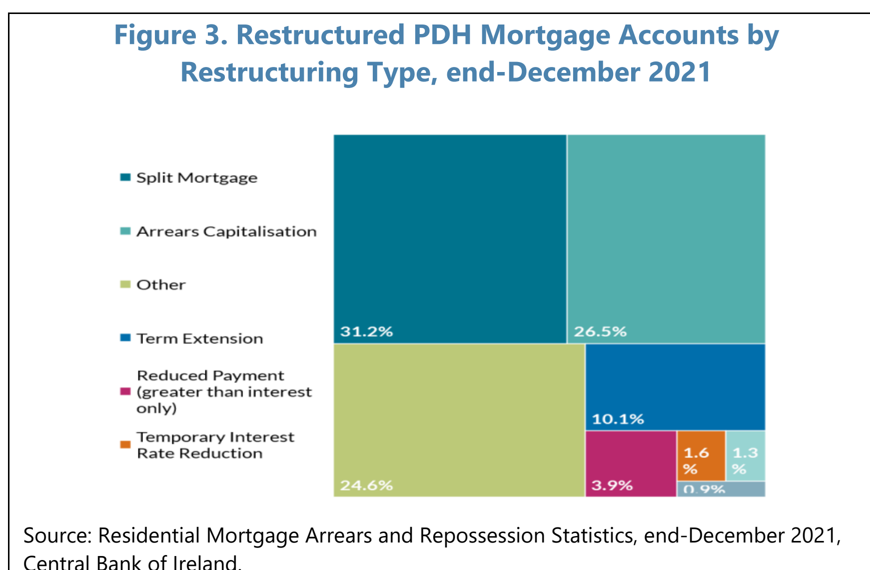
Table 5. Ireland: LTMA Based on Debt Servicing Capacity

Debt Repayment Capacity Over Lifetime to Retirement	Proportion of Households
More than 50 percent of the total balance can be cleared	56.8%
Less than 50 percent but more than 0 can be cleared	25.3%
No mortgage balance can be cleared	17.9%

Source: *Long-term mortgage arrears: Analytical evidence for policy considerations*, Kelly, et al., Financial Stability Notes of the Central Bank of Ireland, July 2021. Authors divided borrowers into three groups: (i) those that had sufficient income to make full repayments until age 65 or those that could not repay the balance in full, but could pay at least 50 percent; (ii) those that have little to no capacity to make their monthly payments, such that less than 50 percent could be cleared; and (iii) those that have no capacity to make any repayments.

19. However, banks have traditionally been unwilling to address this fundamental affordability problem. Banks have avoided giving nominal haircuts on the outstanding mortgage balance, or even interest rate reductions, often citing moral hazard concerns. Instead, they have generally offered a reduced set/waterfall of restructuring options such as "split mortgages," arrears capitalization and, to a lesser extent, term extensions (Figure 3).[21] While these are viable options for many borrowers, for those with LTMA, they are often not enough. The absence of providing appropriate solutions by financial institutions is a significant element in seeking to resolve LTMA.

Figure 3. Restructured PDH Mortgage Accounts by Restructuring Type, end-December 2021



Source: Residential Mortgage Arrears and Repossession Statistics, end-December 2021, Central Bank of Ireland.

[21] As of end-December 2021, only 1.6 percent of LTMA have been granted interest rate reduction, and only 4 percent have been restructured through reduced payments beyond interest only. 31 percent of restructured LTMA have been achieved using "split" mortgages, where the mortgage is split into two parts: repayments are made on one part (Part A), while the remainder is warehoused (Part B) to be repaid / reviewed at a later date. The split mortgage arrangement is then reported as two mortgage accounts within the statistics). Almost 27 percent of restructurings have been through arrears recapitalization, and 10 percent through term extension.

20. Additionally, many creditor institutions have not actively pursued repossession. Creditors often do not take action to repossess a PDH, even in the face of a debtor's inability to pay or non-cooperation to find a solution, given the government's policy aim of keeping as many debtors as possible in their homes, creditors' reputational concerns, and the length and unpredictability of repossession procedures. Ireland also suffers from a shortage of affordable housing, including social housing.[22] While personal insolvency is an option for borrowers who want to reschedule their mortgage and keep their home, cases have thus far been limited. This combination of factors results in many cases that are simply "stuck" in LTMA status, with no solution in perspective.

21. The sale of NPLs from retail banks to non-bank entities such as investment funds may change this equilibrium. As many non-bank entities bought LTMA from the retail banks at a significant discount, they may be willing to offer borrowers more effective solutions, including long-term extensions that are cash-flow positive for the creditor, or even, principal haircuts. While anecdotally, stakeholders indicate that, indeed, non-bank entities are more amenable to offering borrowers more aggressive solutions, data is too sparse to confirm, as non-banks have only recently become the dominant player in LTMA. Moreover, while long-term mortgage extensions may be beneficial for creditors given that they may be able to repackage cash-flow positive loans and resell them to other investors, this may leave debtors with a housing loan that they may be repaying for the rest of their lives. Principal and interest haircuts are clearly necessary for many borrowers. However, even that may not be enough for every borrower to create a sustainable payment solution (Table 5).

C. Analysis and Recommendations

22. While LTMA are largely a legacy issue from the crisis, failure to create a predictable, efficient system for mortgage resolution creates negative externalities for the financial system. The cost of mortgage credit in Ireland is significantly higher than that of its peers. The average mortgage rate was 2.44 percent in October 2021, the second highest rate among EA-member countries, while most other EA-members have rates around 2 percent or much lower (Figure 4). The higher cost of mortgage borrowing in Ireland reflects a number of factors, in part the higher risks of mortgage loans for banks, given reduced possibility of recovery in event of non-payment and the time needed to recover collateral (see discussion of enforcement proceedings below[23]). Moreover, LTMA, along with other factors in the banking industry (e.g., lower for longer

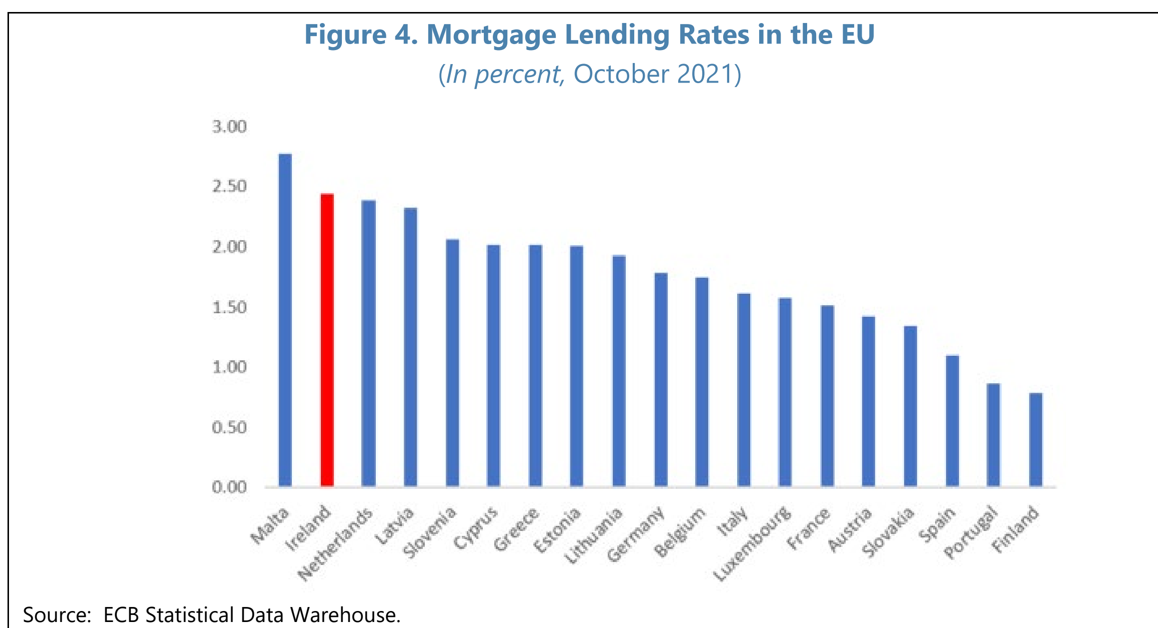
[22] The Irish Government has adopted a "Housing for All" strategy, which promises to address the housing affordability problem by increasing supply, aiming to deliver 33,000 homes a year through 2030, with 90,000 social homes to be delivered by the end of 2030.

[23] The Irish authorities have indicated that it is also impacted by the relatively higher operating costs for Irish banks, levels of financial services competition, and higher capital requirements arising from the GFC. They have also indicated that charges and fees imposed on borrowers in jurisdictions outside Ireland may mean that mortgage rates between different EU countries are not always fully comparable.

interest rates, higher operating costs) contribute to Irish banks' low profitability, although this impact has lessened as the level of LTMA has declined. The failure to have a more timely solution for mortgage arrears also creates vulnerabilities that could manifest in the future if currently performing mortgages in the financial sector were to suffer widespread defaults, particularly given CBI analysis, which indicates that among borrowers that are current on their PDH mortgages, one in eight are likely to have a balance shortfall at the end of their mortgage term.[24]

Figure 4. Mortgage Lending Rates in the EU

(*In percent,* October 2021)



Source: ECB Statistical Data Warehouse.

23. LTMA resolution will require an overall government strategy, involving multiple government agencies, as well as the Court system. Any strategy should be informed by the following fundamental principles of insolvency, many of which are already reflected in the Irish system:

- *Understanding the problem:* Any engagement requires clarity and a shared agreement across government and the financial institutions as to the nature of the problem to be addressed. This can form the basis for an appropriate strategy.

- *Creditors should realize their losses:* Creditors must acknowledge the reality that some of their debts are uncollectable, and thereby internalize the costs of their lax over-lending. There has been some recognition of this with the sale of loans to non-banks, but further recognition of losses is likely to be required. Fully internalized costs act as a disciplining mechanism that may prevent banks' over-lending in the future. Timely recognition of losses reduces investors' perception of uncertainty over bank balance sheets.

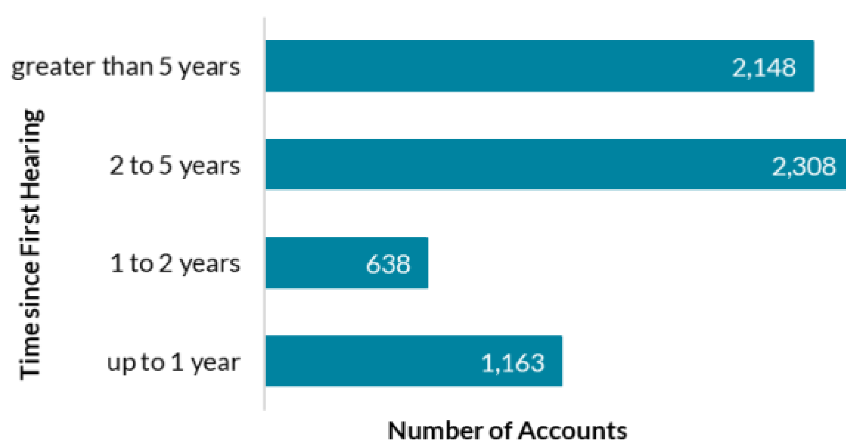
[24] "Mortgage borrowers facing end of term repayment shortfalls," David Duignan and Allan Kearns, July 2021, *Behind the Data,* CBI.

- *Debtors should be relieved from the burden of their unsustainable debt*. When burdened with a debt they cannot repay, debtors are less productive economic actors, as they do not have the incentive to maximize income when they know this will go towards repayment of such debt. They may also hide income from creditors and seek work in the gray economy.

- *Financial sector policy, by itself, is an inefficient and distortionary tool to use, with potential financial stability implications, to deal with LTMA*. Insolvency and creditors rights' regimes should not by themselves substitute for other approaches, including effective social housing policy for people chronically unable to generate enough income to afford their homes. Any strategy to resolve LTMA needs to recognize the limits of dealing with this issue through the financial system, instead of a combination of input from the financial system and through wider social policy.

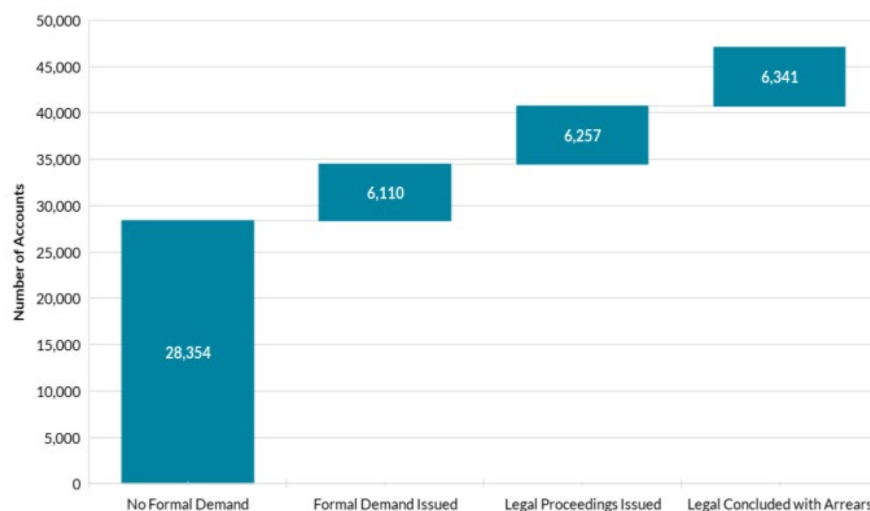
24. As part of an overall strategy, an effective system of enforcement of secured credit must be created. While repossession of PDH is not the optimal solution for most mortgage loans, the lack of a timely repossession option impedes the effectiveness of the overall resolution process. Discussions with stakeholders (from both the *consumer advocacy* and the *financial sector* side) consistently highlighted the length of enforcement proceedings, as well as their lack of predictability, as a key impediment to resolution of mortgage-related arrears. Indeed, of the PDH cases currently in the legal system, the majority (4,456 accounts) have been in the legal system for over 2 years, with almost 50 percent of those accounts in the court system for over 5 years (Figure 5). Moreover, most PDH mortgage accounts remain in arrears for years without the banks ever bringing a legal proceeding (Figure 6). Banks indicated that given the length and unpredictability of resolution procedures, they often do not pursue this as a viable avenue. This may also reflect their incentives to sell on such loans due to regulatory incentives. Lack of engagement by banks with borrowers and the inefficiency of the enforcement system may reduce borrowers' incentives to cooperate with creditors to find a sustainable solution, further extending resolution timelines.

Figure 5. Period Accounts Have Been in the Legal System, as of December 2021



Source: *Residential Mortgage Arrears and Repossession Statistics, end-December 2021, Central Bank of Ireland*

Figure 6. Legal Status of Current PDH Mortgage Accounts in Arrears, end-December 2021



Source: *Residential Mortgage Arrears and Repossession Statistics, end-December 2021, Central Bank of Ireland*

25. **Private-sector stakeholders pointed to several impediments to efficient enforcement procedures.** These include wide judicial discretion to grant adjournments**.** Adjournments are often granted, for example, for a debtor to obtain legal advice or for the financial institution to seek a negotiated solution or voluntary repossession. The Land and Conveyancing Act was recently amended in 2019 to require judges to take account of a debtor's overall circumstances (including efforts made to resolve their arrears), before making an order for repossession of a PDH.[25] Stakeholders pointed to the frequency of adjournments at both county registrar and circuit court levels.[26] Judges also rotate among courts in a given circuit, and may not "sit" in a particular court or hear enforcement cases for weeks at a time, depending on the rotation. In addition, banks themselves often unilaterally delay the proceedings to try to reach a solution with the borrower.

[25] For example, the judge considers whether the making of the enforcement order would be "proportionate" in all the circumstances; the circumstances of the mortgagor and his or her dependents (if any) in respect of whom the subject of the proceedings is their principal private residence.

[26] For example, the Land and Conveyancing Law Reform Act 2013 provides that a judge may adjourn repossession proceedings, in the case of a debtor's PDH, for an initial period not exceeding two months, in order to allow the debtor to engage with a personal insolvency practitioner with a view to resolving their arrears via a Personal Insolvency Arrangement.' Stakeholders indicated that the county registrars, upon receiving a repossession case, also routinely grant initial adjournments of six months.

26. Given its length and unpredictability, The Irish enforcement system would benefit from improvements to further align with the Standard. The World Bank principles provide that "enforcement systems should provide *efficient, cost-effective, transparent, and reliable methods* (both non-judicial and judicial) for enforcing a security interest over assets. Enforcement proceedings should provide for *prompt realization of the rights obtained in secured assets, designed to enable maximum recovery according to market-based asset values*" [Principle A5.2]. Steps to bring the Irish system more in line with the Standard could include, e.g., (i) creating clear guidelines for county registrars and circuit court judges on grounds for adjournments in enforcement (including eliminating automatic adjournments at the country registrar level); (ii) increasing the number of sessions where enforcement cases are heard in each circuit; and (iii) narrowing the grounds in the Land and Conveyancing Act for which delays can be granted. The judiciary, in the near term, could issue very clear interpretive rules and guidance as to the scope of its application. Moreover, government agencies should work with the courts to collect and publish data on the overall length of proceedings and the length of each stage in process to better understand and address any identified bottlenecks.

Recommendation 6: Eliminate legal and institutional barriers to timely, efficient system for enforcement of secured credit.

Recommendation 7: Strengthen data collection and publication on repossession cases to allow policy makers to better understand and address potential bottlenecks at different stages of the process.

27. More broadly, the government should use the granular data about LTMA to develop targeted solutions for borrowers, with multiple agencies involved. The CBI has done remarkable analysis of the significant financial information about mortgage borrowers, which again reveals the limits of viewing the LTMA issue as solely a financial sector one. As Table 5 above demonstrates, more than 43 percent of LTMA borrowers cannot afford to pay even 50 percent of the loan balance by retirement age, with 18 percent *unable to pay anything at all*. Clearly, the solutions for those groups of borrowers will look significantly different than those for borrowers who have higher debt servicing capacity and may require limited interventions. For those with no debt servicing capacity, no financial sector intervention short of wholesale cancellation of the loan or repossession and relocation into social housing would be appropriate.

28. Government agencies should focus on "groups" of borrowers to identify what adjustments or alternative solutions may need to be developed for them. For example, for those who can pay over 50 percent, only term extensions, or term extensions coupled with rate reductions and write-downs on principal may be appropriate. Those that can pay less may require those solutions, supplemented by additional measures in order for creditors to offer sustainable loan restructuring plans. For example, in the U.S. in the wake of the 2008 crisis, targeted programs

were implemented.[27, 28] Importantly, any government support should only be granted if the mortgage is made sustainable by the creditor (e.g., based on a debt servicing metric determined by policymakers) through term extensions, rate reductions, and write-downs (e.g., in line with a CBI published waterfall). Those that can pay nothing will need more significant social support beyond financial sector policies, which could include access to social housing. While the subset of borrowers that are "free riding" on the system is likely limited, any debtors that can pay some or all of their mortgage but refuse to do so should be enforced against. Moreover, an effective repossession system is essential to create the right incentives so that borrowers agree to sustainable restructuring plans that they can afford.

29. Coupled with the above, consideration could be given to publishing more granular guidelines on sustainable solutions to be offered to borrowers, based on capacity to repay parameters, if creditors fail to provide sustainable solutions in the near term. For example, if entities do not offer sustainable solutions to borrowers, as expected, the CBI could consider issuing clear guidance on the expected mortgage solutions to be offered, based on basic parameters such as sustainability, reasonable living expenses, DSTI-ratios, etc.[29] The CBI's engagement with banks and non-bank entities on LTMA could be guided by that published guidance. If engagement with banks/non-banks along those lines does not lead to satisfactory results within a reasonable timeframe, the CBI could consider issuing stricter targets, as it did in the past, for resolving NPLs. Alternatively, the CCMA could be amended by mandating solutions that must be offered based on financial situation of borrower.[30]

Recommendation 8: Further develop the government strategy, ensuring coordination across multiple responsible agencies, to provide targeted solutions to LTMA borrowers based on their financial situation and debt servicing capacity, taking into account the experiences of the last decade, increased data collection and the entrance of non-banks into the area.

30. To encourage resolution of mortgage debt, solutions that allow minimal payments for a debtor's entire lifetime should generally be discouraged. A small number of recent high-profile cases in the Irish courts have allowed for payments beyond the agreed duration of the PIAs for the entire lifetime of the debtor, with minimal monthly payments, with the objective of allowing

[27] See, for reference, the Home Affordability Mortgage Program (HAMP), which aimed to reduce households' monthly mortgage payments to 31 percent of their gross income via write-down, rate reduction and term extension, based on a standard waterfall published by US Treasury. Treasury provided limited financial support to encourage these restructurings. A positive externality of the program was that HAMP set standards for what constitutes a sustainable modification across the mortgage industry and led many lenders to offer similar modifications to a broader set of borrowers without any Treasury support.

[28] Subsidies to borrowers would have to be well-targeted, and only granted if the mortgage was made sustainable (e.g., based on a debt servicing metric determined by policymakers) through term extensions, rate reductions, and write-downs (e.g., in line with a CBI published waterfall). However, it is recognized that as capacity to repay is not always easy to measure and varies over time, any system established requires controls and revisions to adapt to changes in income-generating capacity of debtors.

[29] See *Id*., for a discussion of the benefits of publishing a standard waterfall to guide restructuring solutions.

[30] Based on discussions with the CBI, this would likely necessitate legislative changes as well.

the debtor to remain in the home and allow the bank to collect the remaining balance of the mortgage upon the debtor's death.[31] It is not clear at this point whether such arrangements also further the objective of insolvency law to relieve debtors from the burden of their unsustainable debt, while recognizing that in some cases, it may be the least bad outcome, given broader social considerations. The review of the Personal Insolvency Act should examine the nature of such arrangements, where sufficient evidence is available to them, with a view to ensuring that after completion of the PIA, the remaining mortgage debt is sustainable, as part of an overall strategy, including social policy, to address LTMA.

Recommendation 9: As part of an overall strategy to address LTMA, the Review of the Personal Insolvency Act 2012, now underway, should examine whether further statutory interventions are required to ensure that after the satisfactory completion of the PIA, the remaining mortgage debt, agreed to be payable between the parties, is sustainable.

[31] See here and here and here.