

**SUBMISSION BY THE OPEN SOCIETY JUSTICE INITIATIVE, COMMUNITY ACTION NETWORK AND NUI
GALWAY CENTRE FOR HOUSING LAW, RIGHTS AND POLICY, AND JULIE SADLIER
TO THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED
INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF HUMAN RIGHTS
IN RELATION TO HIS THEMATIC REPORT ON PRIVATE DEBT AND HUMAN RIGHTS**

July 31, 2019

Introduction

The Abusive Lending Practices Project¹ (“the Project”) began to engage in Ireland in 2016 with the goal of ensuring that the Irish courts apply EU consumer and human rights law in possession cases. This submission is based on the past three years’ of experience during which collectively we have engaged in strategic litigation, legal education for lawyers, the legal empowerment of people in mortgage distress, and research. The submission includes an illustrative case study, an analysis of EU law in relation to mortgage debt, and recommendations for Ireland.

Ireland offers a prime example of the long term human rights impact of the 2008 financial crash. This is most visibly noted through the ongoing housing crisis in the country. A combination of excessive rent increases, insufficient social housing and lack of affordable homes is leaving tens of thousands homeless². The European Semester Country Report explains that the demand for social housing in Dublin exceeds 70 000 homes and only 10 000 are planned for delivery in 2019³. Linked to this is the pressing risk of losing one’s home over mortgage debt. Currently, there are around 30,000 mortgages that have been in arrears over two years⁴. Even more concerning is the fact that mortgage arrears affect the most vulnerable populations. Research by the Central Bank of Ireland from 2015 indicates that borrowers in long-term mortgage arrears are more likely to be single mothers with three or more children; have lower net incomes and several rely on state benefits; have higher mortgage debt service ratios (monthly repayment over monthly income); and have experienced shocks to the debt service ratio since taking out the mortgage⁵.

¹ The Abusive Lending Practices Project is comprised of the Open Society Justice Initiative, the Open Society Foundation for Europe, the NUI Galway Centre for Housing Law, Rights, and Policy, the Community Action Network, and a number of Irish lawyers. <http://abusivelending.org/>

² Better Alliance Europe Report (2019) explains that: “In January 2019 6,363 homeless adults accessed emergency accommodation while 3,624 children were also homeless”, p. 26

³ The European Semester Country Report reads: “Rapidly rising rents, insufficient residential construction activity and a lack of affordable and social housing have driven up homelessness especially, in Dublin. The shortage of housing has led to a 23.4 % rent increase since 2015, the highest in the EU. Demand for social housing stands at circa 72 000 homes with just 10 000 planned for delivery in 2019. While a further 17 000 persons are to be assisted through Housing Assistance Payment or the Rental Accommodation Scheme, this risks exacerbating rent increases in the already supply-constrained private rental market. (Melia, 2018).” p. 9.

⁴ Padraic Kenna, Simon Kennedy, ‘Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland’, published by Dr Padraic Kenna, Centre for Housing Law, Rights and Policy, National University of Ireland, Galway, December 2017.

⁵ Kelly, R and McCann, F (2015): ‘Households in long-term mortgage arrears: lessons from economic research’, Central Bank of Ireland, Economic Letter Series, Vol 2015, No 11, 2, available at

<https://centralbank.ie/docs/default-source/publications/economic-letters/economic-letter---vol-2015-no-11.pdf?sfvrsn=10>. Ireland’s mortgage debt crisis is not isolated. As noted by FEANTSA, in the European context, the proportion of poor households in mortgage arrears is particularly high, around 21% in Greece, 17% in France, 12% in Ireland and Cyprus, as well as 11% in Austria and the United Kingdom. See: ‘Fourth Overview of Housing Exclusion

A Case Study

While, as noted above, stories of mortgage distress abound in Ireland, we share the following example. The Grants story illustrates the plight of tens of thousands of homeowners in Ireland.

Geraldine and Martin Grant owned their home outright when in 2004 they decided to take out a mortgage for €70,000 from GE Capital Woodchester Home Loans Ltd. to pay for improvements to the heating system and to insulate the house. They were both employed at that time and able to make full payments but subsequently became unemployed due to a redundancy and ill-health. Three years later, they were cold-called by a mortgage broker and refinanced the original loan – which they were already having difficulty paying – and consolidated a number of other debts (a car loan and a credit union debt) into a new mortgage for €130,000. The lender knew of their repayment difficulties but at that time, their home was valued at €280,000. They signed the loan papers in the presence of a law firm appointed by the lender, but it is alleged that they did not receive any meaningful legal or financial advice from this firm. The Grants never met a representative of the lender or the broker. Over the course of the loan, the interest rate varied on 11 occasions, rising to a peak of 7.75% even though there was no mention in their loan document of the criteria by which the interest rate would be determined. A vulture fund, Pepper Finance Corporation, purchased their loan in 2012 and, two years later, filed for repossession⁶. Despite making payments over 12 years, Pepper claims that the Grants still owe €145,000. At the time of the repossession order, the home was valued €144,000.

When they were served with the Civil Bill for Possession in 2014, the Grants did not have any money to pay for lawyers and were not legally represented at any of the appearances in court. Legal aid in Ireland does not prioritize mortgage repossession cases and the Grants did not know that they had any rights under the Unfair Contract Terms Directive or European law.

The Grants have nowhere else to live. They applied for social housing to prevent them from becoming homeless, but County Laois did not have any accommodation for them at the time nor could they guarantee that they would have suitable accommodation at any point in the future (due to disability, they need ground floor accommodation). At the time of their application for judicial review, there were approximately 1,700 people on the housing waiting list in Laois, with about 360 individuals or families becoming homeless in the last year. There is little or no emergency accommodation in the county with many homeless being accommodated in hostels and B&Bs in neighboring counties.

When the Open Society Justice Initiative became aware of the Grants case, we began to support Julie Sadlier (solicitor) and Gary Fitzgerald (BL), and Eileen Barrington (SC) to represent the Grants in judicial review proceedings to challenge the entry of the possession order in violation of EU consumer and human rights law.

in Europe 2019', March 2019, Published by FEANTSA, available at: https://www.feantsa.org/public/user/Activities/events/OHEEU_2019_ENG_Web.pdf.

⁶ It is worth noting that significant numbers (estimated at 30-40,000) of distressed mortgages have been sold by Irish lenders to international private equity or “vulture funds,” particularly many ‘sub-prime’ type loans and those in long term arrears. <https://www.rte.ie/news/your-money/2018/0418/955498-so-a-vulture-fund-bought-your-mortgage-whats-next>. Remarkably, **these funds enjoy tax free status in Ireland**, but political pressure has resulted in legislation in 2018 requiring these to register with the Central Bank of Ireland as credit servicing firms – and 38 of these have recently registered, alongside the six firms already registered. <http://registers.centralbank.ie/DownloadsPage.aspx>

Consumer and Human Rights Protections under EU Law

EU law contains consumer protection and human rights defenses applicable to people in mortgage distress that Irish courts have not been enforcing. The EU's Unfair Contract Terms Directive (UCTD)⁷ aims to protect consumers against abuses of power by sellers or suppliers and, in particular, against standard terms in contracts that have not been individually negotiated, including mortgage agreements.⁸ The CJEU has also held that domestic courts must carry out an own motion assessment of the terms of the contract for fairness. Article 7 of the UCTD requires that Member States ensure that "adequate and effective means exist to prevent the continued use of unfair terms in contracts."

When states are acting within the scope of EU law, as they are when implementing the UCTD, the EU Charter of Fundamental Rights (CFREU) applies (Art. 51). Article 38 of the EU Charter of Fundamental Rights provides that "[u]nion policies shall ensure a high level of consumer protection". Moreover, the Charter assures the right to an effective judicial remedy (Art. 47 CFREU) and the right to respect for one's private and family life (Article 7 CFREU), which includes the right to respect for one's home⁹. In fact, the CJEU has applied the rights in Article 7 CFREU in mortgage consumer law cases. In Case C-34/13, *Monika Kušionová v SMART Capital as*, the CJEU held (at paras 63–65) that "the loss of a family home is not only such as to seriously undermine consumer rights (...), but it also places the family of the consumer concerned in a particularly vulnerable position". This case stands for the proposition that domestic courts must ensure that possession is a proportionate response to the breach.¹⁰ Criteria for determining proportionality were developed in social housing cases brought under Article 8 of the European Convention on Human Rights (ECHR). This body of law is also applicable in EU-law judgments¹¹. Amongst other things, the ECHR has considered the following factors to be relevant in determining the proportionality of an eviction case:

- individual's: identity, self-determination¹²;
- physical and moral integrity;
- ability to maintain relationships with others and have a settled and secure place in the community;
- the extent of the intrusion into the personal sphere of the applicant;
- age and health.¹³

In *Ceesay v Spain*¹⁴, a case involving social housing, the European Court of Human Rights also took a proactive approach, requesting the details of what housing and social care arrangements the State of

⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁸ For Spain, see for example: Judgment of 14 March 2013, *Aziz*, C-415/11; for Slovakia, see: Judgment of 10 September 2014, *Kušionová*, C-34/13; for the Czech Republic, see: Judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14; for Romania, see for example: Judgment of 3 September 2015, *Costea*, C-110/14; for France, see: Judgment of 23 April 2015, *Van Hove*, C-96/14; for Hungary, see for example: Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13.

⁹ Other relevant fundamental rights from the CFREU include the right to human dignity (Art. 1); rights of the child (Art. 24); rights of the elderly (Art. 25).

¹⁰ Case C-34/13, *Monika Kušionová v SMART Capital*, p. 63.

¹¹ Art. 52(3) CFREU.

¹² In *Yordanova and Others v. Bulgaria* (Application no. 25446/06).

¹³ *Bjedoc v Croatia* (Application No. 42150/09).

¹⁴ *Ceesay and Others v Spain*, (App. No 62688/13), Interim Decision 15 October 2013.

Spain was making for a household with children who were being evicted from a squatted property owned by a Spanish nationalized bank.

Finally, **access to justice is a core fundamental human right** and a central concept in the broader field of justice. It is also an official UN indicator falling under the Sustainable Development Goal 16 on “Peace, Justice and Strong Institutions.” Access to justice is recognized in a range of international human rights instruments, including Article 6 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union, and Article 14(1) of the International Covenant on Civil and Political Rights.

The failure of the Irish courts to comply with EU fundamental rights protections

The effectiveness of EU consumer law is systematically undermined by the current court process in Ireland in relation to mortgage proceedings¹⁵. In Ireland, the Circuit Court is the competent court for housing loan mortgages. The revised Circuit Court Rules of 2016¹⁶ state that the failure of a defendant in a home loan mortgage arrears case to appear in Court can result in a summary judgment involving the loss of home without any court consideration of the circumstances of the debtor¹⁷. It can be argued that this procedure undermines the principle of effectiveness of the Unfair Contract Terms Directive¹⁸, as the operation of the rules could mean that a debtor loses their rights to a defense, and the opportunity to have the mortgage contract examined by a court for unfair terms¹⁹. When borrowers do come to court to fight their cases, they are informed that they need to file written defenses in an affidavit, a procedure that is beyond the capacity of most unrepresented litigants. Even when litigants file affidavits in these cases, the County Registrars can determine that they have not raised arguable defenses and move forward with the entry of a possession order.

Some progress has been made in Ireland since 2016. In March 2019, The High Court issued a decision in the Grant case, discussed in the case study above, which had been pending for over two years. This decision acknowledged that Irish courts are required to conduct own motion assessments for unfair terms and recognized that the remedy of possession provided for by domestic law must be proportionate and must vindicate borrowers’ Article 7 CFREU rights. However, despite efforts by lawyers and unrepresented litigants, there is no evidence that Irish courts are implementing this decision.

In July 2019, legislation was enacted to require Irish courts to conduct proportionality assessments before entering possession orders. The Land and Conveyancing Law Reform (Amendment) Act contains 6 factors that courts must take into consideration when determining whether to make or refuse possession orders,

¹⁵ See more on ‘Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland’, note 1, p. 24.

¹⁶ SI No 171 of 2016: Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016.

¹⁷ SI No 171 of 2016: Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016, p 5: ‘PLEASE NOTE that unless you file an Appearance with the County Registrar and file the replying affidavit as set out above, you will be held to have admitted the said claim, and the Plaintiff may proceed with the claim against you and judgment may be given against you in your absence without further notice.’

¹⁸ Directive 93/13 on unfair terms in consumer contracts (Unfair Contract Terms Directive (UCTD)).

¹⁹ Article 7 of the Directive states that EU Member States have a duty to ensure that adequate and effective means exist to prevent the continued use of unfair terms. See Case C-415/11 *Aziz v Caixa d’Estalvis de Catalunya*, para. 50.

or may take into account in any other orders including whether the making of the order would be proportionate in all the circumstances.²⁰

While the Grant decision and this passage of this law represent a step forward for borrowers in Ireland, the burden is still on people in mortgage distress to ensure that the law is applied in their case and the vast majority of these people are representing themselves and up against bank lawyers in their cases. **Over 70% of people facing eviction due to mortgage default in Ireland do not have lawyers representing them** according to Access to Justice and the ECB, a report by Dr Padraic Kenna and Simon W. Kennedy²¹. Additionally, a report by the Community Action Network (CAN) 'House Hold: Life in Mortgage Distress' highlights that over 70% of people have not consulted a lawyer, and over 80% have not retained a lawyer to represent them in court. Over 90% have not applied to legal aid for a lawyer, most because they have been told that they are not eligible. CAN's report describes courts as being intimidating, difficult to understand, daunting and largely intolerant of unrepresented plaintiffs and lay litigants.

Legal aid is not normally available for 'property-related' disputes in Ireland. Section 28 of the Civil Legal Aid Act 1995 precludes legal aid from being granted in proceedings which are 'disputes concerning rights and interests in or over land', save if any of the exceptions in 28(9)(c) apply, whereby it 'may' be granted and only under very specific circumstances²². Moreover, applicants for legal aid have to pass a "merits" test and until the passage of the bill requiring a proportionality assessment, it was commonly believed that there were no meritorious defenses available to borrowers in possession cases. Abhaile, the current legal advice in Ireland, operated by the Money Advice and Budgeting Service (MABS), only grants a short consultation on legal advice and does not cover legal representation before a court. This scheme has been of limited value as once again, the view has been that there are no meritorious defenses available to borrowers in possession cases.

CAN's report, 'House Hold: Life in Mortgage Distress', referred to above, found that the majority of properties at the risk of possession in Ireland are long standing family homes, with 56% in their homes for over 10 years and a further 36% for 20 years. Just under half (49%) of these homes have one or more children living with them and just under a quarter (23%) have one or more persons with a disability. A significant number (17.5%) purchased the home that is in possession with a spouse or partner who is no longer in the home – an indication of the many difficulties that people are often living with through

²⁰ (a) whether the making of the order would be proportionate in all the circumstances;
(b) the circumstances of the mortgagor and his or her dependants (if any) in respect of whom the principal private residence the subject of the proceedings is their principal private residence;
(c) whether the mortgagee has made a statement to the mortgagor of the terms on which the mortgagee would be prepared to settle the matter in such a way that the mortgagor and his or her dependants referred to in paragraph (b) could remain in the principal private residence;
(d) the details of any proposal made, whether prior to or following the commencement of the proceedings by, or on behalf of, the mortgagor to enable the mortgagor and his or her dependants to remain in the home; (i) to remain in the principal private residence, including any proposal for participation by the mortgagor in a designated scheme, or (ii) to secure alternative accommodation;
(e) the response, if any, of the mortgagee to any proposal referred to in paragraph (d)(i); (f) 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.

And any additional matters the Court consider relevant.

²¹ "Access to justice for the right to housing", report by the Human Rights Council, A/HRC/40/61, 15 January 2019.

²² See more on 'Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland', note 1.

mortgage distress. **Two-thirds (66%) say that if they lose their homes, they cannot afford to rent privately.** These numbers further indicate the linkage between mortgage distress and homelessness.

In light of the foregoing, the submitters recommend that:

- Irish courts consider and respect human rights defenses available to borrowers with mortgage loans under EU law, and therefore, judges comply with their EU law obligations to review loan documents on their own motion and void unfair terms and possession cases, and to conduct proportionality assessments required under EU and Irish law to ensure that eviction is a proportionate response to the breach by the borrower;
- The Irish legislature should ensure that persons at risk of losing their home should have effective access to justice and legal representation where necessary:
- Ireland develops litigant support programs for litigants to inform them of their rights and assist them with accessing the court system to defend their cases when they do not qualify for legal aid and cannot afford a private lawyer;
- Ireland ensures effective access to social and affordable housing for all those in housing need who are unable to access adequate and affordable housing in the market.

Submitted by:

The Open Society Justice Initiative

<https://www.justiceinitiative.org/what-we-do>

The National University of Ireland Galway Centre for Housing Law, Rights, and policy

<http://www.nuigalway.ie/chlrp/>

Community Action Network

<http://www.canaction.ie/home/> and

Julie Sadlier, Solicitor

<http://www.kieranmulcahysolicitors.com/julie-sadlier-pioneering-tracker-mortgage-claims-for-mortgage-holders/>

Annexes:

ANNEX 1: Report by the European Commission, 'Country Report Ireland 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances', SWD (2019)

ANNEX 2: Report by ABHAILE, 'Aid and Advice for Borrowers in Home Mortgage Arrears', First Annual Report, 17 October 2017

ANNEX 3: Report by ABHAILE, 'Aid and Advice for Borrowers in Home Mortgage Arrears', First Annual Report, Second Annual Report, 18 November 2018

ANNEX 4: Better Europe Alliance, 'Irish Civil Society Organisations for a Social and Sustainable Europe, Response to European Commission', 2019 Country Report for Ireland, April 2019

ANNEX 5: Report by the Community Action Network and the Centre for Housing Law, Rights and Policy Research, NUI Galway, 'Comments on Ireland's 16th National Report on the Implementation of the European Social Charter', April 2019

ANNEX 6: Report by the Government of Ireland, '16th National Report on the implementation of the European Social Charter', 31 October 2018

ANNEX 7: Report by the Community Action Network, 'House Hold: Life in Mortgage Distress', November 2018

ANNEX 8: Kelly, R and McCann, F (2015): 'Households in long-term mortgage arrears: lessons from economic research', Central Bank of Ireland, Economic Letter Series, Vol 2015, No 11, 2