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**An Bille um Thithíocht Incheannaithe agus Cóirmhorgáiste, 2018**  
**Affordable Housing and Fair Mortgage Bill 2018**

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*Mar a tionscnaíodh*

*As initiated*

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**AN BILLE UM THITHÍOCHT INCHEANNAITHE AGUS CÓIRMHORGÁISTE, 2018**  
**AFFORDABLE HOUSING AND FAIR MORTGAGE BILL 2018**

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**AN BILLE UM THITHÍOCHT INCHEANNAITHE AGUS CÓIRMHORGÁISTE, 2018**  
**AFFORDABLE HOUSING AND FAIR MORTGAGE BILL 2018**

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# **Bill**

*entitled*

An Act to highlight the State’s adherence to EU law and the European Convention on Human Rights in regard to the present emergency in the housing sector and, in particular, in dealing with mortgage arrears; to provide for a platform for an open market- “the national affordable cooperative housing exchange”- in which mortgagees and purchasers of home loans and security housing must deal; to secure for preferred not-for-profit housing providers a purchasers first refusal on such sales via a non-compulsory purchase order call option; to designate the Registrar of Friendly Societies as the exchange point for such sales; to promote not-for-profit third sector non-state provision of affordable housing ranging from mutually funded to internationally funded in the ethical bond market; to allow for the broadening of the Mortgage to Rent mortgage rescue model to be available without any local authority involvement to voluntary, mutual and not-for-profit housing providers funded privately and without recourse to public funds or state guarantee; and to provide for reconfiguring Abhaile as a mortgage resolution agency. 5 10 15

WHEREAS in respect of property comprised of dwelling houses or apartments there are at present legal rights which are in conflict, in particular the right of an owner or mortgagee to recover vacant possession of such a dwelling where the occupant is not making payments for his or her accommodation (or has not the means to satisfy a judgment charged against his interest), and the rights of such occupants (whether mortgagors or tenants) to fair treatment where non-payment is for reasons outside their control, and where dispossession and eviction of same is at a cost both to such occupants and to the State which is otherwise avoidable: 20 25

AND WHEREAS there is an acute shortage of alternative accommodation anywhere, and in most cases no alternative accommodation at all within a reasonable distance of such dwelling:

AND WHEREAS it is public policy to keep families in their homes, but also that the statutory insolvency processes have to date proved to be largely ineffective in resolving 30

debt issues without the sale of the debtor’s house:

AND WHEREAS construction targets (in themselves inadequate to cope with demographic and earnings trends) for social (public authority) and affordable housing are unlikely to be met for at least ten years, and great dislocation and inequity in management of housing lists will inevitably result from the number of evictions likely to take place in early course: 5

AND WHEREAS the principal housing finance sources are deleveraging and are unable, for prudential reasons, to accommodate housing related debt through further forbearance:

AND WHEREAS given the international availability of funding at historically low interest rates for bodies providing housing and the potential to refinance housing debt from this source rather than accept as unavoidable the sale of portfolios to private investment funds and the likelihood that ultimate resolution of these short-term measures will be at a significant long-term cost to the economy: 10

AND WHEREAS given that the Oireachtas is of the view if there is a better way, that way should be chosen, offering a fresh start to those in debt and at risk of eviction: 15

**Be it enacted by the Oireachtas as follows:**

## PART 1

### GENERAL

#### **Citation** 20

1. This Act may be cited as the Affordable Housing and Fair Mortgages Act 2018.

#### **General**

2. The purpose of this Act is to allow for the broadening of the mortgage-to-rent rescue model to be available, without any local authority involvement, to voluntary, mutual and not-for-profit housing providers funded privately and without recourse to public funds or State guarantee. 25

#### **Definitions**

3. In this Act, unless the context otherwise requires—  
“Abhaile” is the scheme established in 2016 by the Government whereby a homeowner can access free, independent expert financial and legal advice and support, including a Personal Insolvency Practitioner (PIP), with the objective of finding a sustainable solution to mortgage arrears; 30



“Act of 2012” means the Personal Insolvency Act 2012;

“BTL” means buy-to-let, denoting or relating to a property;

“Compulsory Purchase Order (CPO)” is a a legal function that allows certain statutory bodies which need to take land or property to do so without the consent of the owner; 5

“Code of Conduct on Mortgage Arrears” means the Revised Code of Conduct on Mortgage Arrears published by the Central Bank pursuant to section 117 of the Central Bank Act 1989 and which became effective on 1 January 2011;

“debtor” means a natural person who is unable to pay his or her personal debt;

“family home” means any real property, building, or any structure, vehicle or vessel (whether mobile or not), or part thereof, ordinarily occupied by a person or persons as a principal private residence, and includes any garden or portion of ground attached to and usually occupied with the property or otherwise required for the amenity or convenience of the property; 10

“European Convention on Human Rights (ECHR)” is the international treaty effective from 3 September 1953; 15

“European Court of Human Rights (ECtHR)” is an international court established by the European Convention on Human Rights;

“financial institution” means any bank regulated by the Central Bank Act 1942, as amended, or any credit union regulated by the Credit Union Act 1997, as amended, or any building society regulated by the Building Societies Act 1989, as amended; 20

“Minister” means the Minister for Justice and Equality;

“Money Advice and Budgeting Service (MABS)” is the Agency established in 1992 by the Government whereby Money Advisers work with clients experiencing difficulties with a wide range of personnel debts including personal loans, mortgages, credit card debt, catalogue debts, debts to legal moneylenders and hire purchases; 25

“mortgage” means any charge or lien on any property for securing money or money’s worth;

“Mortgage to Rent” is the transaction whereby a homeowner voluntarily surrenders ownership of their home to their lender and rents it back from the lender, from a housing authority, from an ethically funded not-for-profit SPV or from an approved housing body; 30

“mortgagor” means any person deriving title to the mortgaged property under the original mortgage or entitled to redeem the mortgage;

“mortgagee” means any person having the benefit of a charge or lien and any person deriving title to the mortgage under the original mortgagee; 35

“NAMA” means the National Asset Management Agency established by the National Asset Management Agency Act 2009;

“personal debt” means a debt or debts incurred by a natural person through his or her personal consumption or in the course of his or her business, trade or profession that— 40

(a) is or are for a liquidated sum or sums payable either immediately or at some certain future time, and

(b) is or are not secured debt or debts or excluded debt or debts;

“PDH” means Principal Dwelling Home;

“Personal Insolvency Practitioner” is defined by the Personal Insolvency Act 2012 and included on the Personal Insolvency Register; 5

“Registrar” means the Registrar of Friendly Societies;

“Report of Expert Group on Mortgage Arrears and Personal Debt” is the report published on 16 November 2010 by the expert group that was established by the Government in February 2010 and was tasked with making recommendations to the Minister for Finance on options for improving the situation for families with mortgage arrears on their principal private residence and with personal debt; 10

“Strategic Default” means default by a borrower whose SFS disclosed a historical capacity to make mortgage payments as they fell due (without reducing his or her means otherwise available to a figure which is less than that specified by the insolvency service guidelines issued under sections 23 and 26 of the Personal Insolvency Act 2012) but who nevertheless defaulted, unless such default was occasioned by *force majeure*. 15

## PART 2

### THE APPLICATION OF EU LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 20

#### **Fundamental rights**

4. The Oireachtas hereby declares its clear understanding that the Common Good to which all Fundamental Rights defer now finds expression in the human rights articles of the European Convention on Human Rights and in EU Law as informed by the provisions of the EU Charter of Fundamental Rights. 25

#### **Article 28 of Directive 2014/17/EU**

5. This legislation is enacted pursuant to Article 28 of Directive 2014/17/EU on Credit Agreements for Consumers relating to Residential Immovable Property to encourage creditors to exercise reasonable forbearance and comply with the provisions of any code before possession proceedings are initiated. 30

#### **Interference with the ECHR Article 8 rights**

6. Interference with the ECHR Article 8 rights shall not be permitted where the proposed measures are disproportionate in any way identified in the case law of the ECHR, and no interference shall occur until the Court has made a finding confirming its legality. For the purposes of such evaluation the Oireachtas declares the following to be legitimate policy objectives against which the proportionality of the proposed interference shall be judged: 35
- (a) the need to protect a lender’s entitlement to be repaid the loan. Said entitlement

shall however be modified if the loan has been assigned, and the repayment entitlement of the assignee shall be an entitlement to receive from the borrower only such sums as were paid by the assignee to the original lender;

- (b) eviction shall be disproportionate when a mortgagor can satisfy the Court that he can sustainably afford a rental payment sufficient to produce a gross yield of 5 per cent per annum on the mortgagee's investment net of tax savings through write off; 5
- (c) eviction shall be disproportionate when a mortgagor offers to redeem the mortgage (or in the case of an assigned mortgage, the sum paid by the assignee thereof to the mortgagee of first instance) either himself or where a not-for-profit housing provider offers him a mortgage-to-rent switch; and 10
- (d) no occupant shall be treated merely as a tolerated trespasser. Instead, in the case of unexecuted Possession Orders, the occupants shall be deemed to hold on a lease from the mortgagee (or its successor) on terms to be fixed by the Residential Tenancies Board. 15

## PART 3

### LEGAL PRINCIPLES

#### **Temporary suspension of pertinent Fundamental Rights**

- 7. The Oireachtas *inter alia* hereby legislates for temporary suspension of pertinent Fundamental Rights in the interests of the Common Good. 20

#### **Existence of an emergency**

- 8. There is a housing crisis. Pursuant to the provisions of the Protection of the Community (Special Powers) Act 1926 the Government shall declare the existence of an emergency of such character that it is expedient in the public interest that extraordinary measures be taken to ensure the due supply and distribution of the essentials of life to the community. 25

#### **Necessity of credit to economy**

- 9. The Oireachtas also hereby declares that an economy needs credit and that in well-functioning credit markets effects of systemic importance caused by avoidance of moral hazard behavioural checks are best avoided by fair insolvency processes but in instances of reckless lending, not to the extent of eviction from the home when the debtor in default can avail of a mortgage to rent solution which is sustainable after the capital loss is shared fairly (and where the loan has been sold the price realised shall be the measure of the fair outstanding balance then owed by the borrower). 30

#### **Temporary suspension of pertinent Fundamental Rights *inter alia***

- 10. The Oireachtas legislates as follows *inter alia* in the Common Good for temporary suspension of pertinent Fundamental Rights. 35

### **Exclusion of Mortgagors from protections and options**

11. Mortgagors in default shall be excluded from the benefit of the protections and options hereinafter provided for if the Court is satisfied that they have defaulted strategically.

### **Mortgagee entitlement to sell interest in loan secured by mortgage**

12. Nothing in this Act shall operate to limit the entitlement of a mortgagee to sell his interest in the loan secured by the mortgage, as part of a portfolio or otherwise, with or without the benefit of the underlying security, save to the extent that no charitable exemption from stamp duty on such sale shall be available. 5

### **Right of Mortgagor to redeem**

13. Nothing in this Act shall detract from or limit the availability to the mortgagor of his or her right to redeem, and this right is hereby confirmed as a matter of Statute Law and to that extent section 100 of the Land and Conveyancing Law Reform Act 2009 is hereby amended and is also to be hereinafter interpreted as including, as an incident of such equitable right, the entitlement of the mortgagor to remain in possession of the mortgaged property until the window of opportunity to redeem is finally shut. 10  
15

### **Power of sale of Mortgagee**

14. Any provision in a loan contract or mortgage deed providing for the mortgagee's power of sale being exercised other than in conformity with the foregoing provision shall be *prima facie* voidable as unfair and unreasonable unless or until a Court of competent jurisdiction declares otherwise having regard to the Unfair Contract Terms regulation S.I. 27/1997. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the context or weak bargaining position. Terms listed in the First Schedule hereto shall be presumed to be unfair. 20

### **Tenancy of dwellings**

15. For the avoidance of doubt, it is confirmed that all forms of tenancy of dwellings are consumer contracts. Also deemed to be consumers for all purposes are personal guarantors contracting at the request of a lender and as a condition of a loan to a borrower who is a member of the guarantor's family. 25

### **Guidelines or directives issued by regulatory bodies**

16. Where regulatory bodies have been established by Statute with supervisory and prosecutory functions in the field of regulation, any code of good practice or other formal guidelines or directives issued by such body shall enjoy the character, but not the status, of delegated legislation and shall, *prima facie*, have full force of law and be cognisable, justiciable and actionable at the suit not only of the regulator concerned but also of citizens directly affected by breach thereof. 30  
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PART 4

POSSESSION AND EXECUTION

CHAPTER 1

*Possession*

**Liability of plaintiff**

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17. The plaintiff will be deemed, as and when a Possession or Execution Order is sought, to accept a liability to indemnify the State against any claims for breach of the State's duty to fully respect the other party's rights to fair procedures.

**Provisions of Act of 2009**

18. The provisions of Part 10 of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") and of this Act shall apply hereinafter to all mortgages whether same predated the commencement of the Act or not. 10

**Amendment of Chapter 3 of Act of 2009**

19. The 2009 Act is amended in Chapter 3 of Part 10 by substituting the following for section 97: 15

“97. (1) Subject to section 98, a mortgagee shall not take possession of the mortgaged property without a Court Order granted under this section, unless the mortgagor consents in writing to such taking not more than 7 days prior to such taking.

(2) A Possession Order shall not issue except with a stay on execution pending the date for completion of the sale of the property. 20

(3) A mortgagee may apply to the court for an Order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit. 25

(4) In granting, adjourning, varying, postponing, suspending or executing an Order for Possession of a family home which is the subject of a housing loan, or attaching terms or conditions to such an Order, the court shall have regard to all of the circumstances of the case, including those listed in the Law Reform Commission's Consultation Paper of March 2004, namely— 30

(a) the financial means of the judgment creditor,

(b) the financial means of the non-debtor owner,

(c) the financial means of the family of the non-debtor owner residing in the property, 35

(d) whether, upon a sale of the property, sufficient proceeds would be available to the non-debtor owner to purchase reasonably similar

- accommodation in the same locality,
  - (e) the amount of the judgment mortgage as a proportion of the value of the property,
  - (f) the ability of the judgment debtor to provide reasonable alternative accommodation from the proceeds of sale of the property, 5
  - (g) any other matters which seem relevant to the Court,
  - (h) whether the housing loan contract contains unfair terms, and
  - (i) the proportionality of the Order or proposed Order.
- (5) In considering the proportionality of the order or a proposed order under subsection (4), the factors to be considered by the Court shall include, without limitation, the following: 10
- (a) whether the Order being sought pursues a legitimate aim;
  - (b) whether the Order being sought—
    - (i) is justifiable by reference to a pressing social need, and
    - (ii) is proportionate to the legitimate aim being pursued; 15
  - and
  - (c) the matters and circumstances listed in the Second Schedule to this Act.”.

## CHAPTER 2

### *Execution* 20

#### **Unexecuted Execution Orders**

- 20.** As of the date of commencement hereof, unexecuted Execution Orders are hereby cancelled, and no fresh Execution Order shall issue in replacement thereof until the Court conducts a European Convention on Human Rights Article 8 inquiry.

#### **Possession Orders**

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- 21.** Possession Orders shall not be executed until an Article 8 inquiry has been conducted.

#### **Article 8 inquiries**

- 22.** (1) Article 8 inquiries shall be on notice to all occupants of full age.
- (2) Having regard to the ruling of the ECtHR in *Airey v Ireland* 1980 EHRR 305, the Court shall first determine the extent to which the Article 8 inquiry might be overly complex for a litigant in person and shall secure that legal aid is available to such person where necessary. 30
- (3) An Article 8 inquiry shall be charged with addressing whether the decision making process was fair, afforded due respect to the interests safeguarded to the individual by Article 8, and fairly judged the proportionality of the eviction as legitimate and 35

addressing some pressing social need in a democratic society.

### **Evictions during emergency**

23. During the currency of the emergency referred to in section 8, evictions shall not be ordered where there is no evidence of the availability of suitable alternative accommodation. 5

### **Amendment of Act of 2012**

24. No Execution Order shall issue until the debtor's Fresh Start entitlement has been the subject of the appropriate Insolvency Act process, and the Personal Insolvency Act 2012 is amended in section 115A (as inserted by section 21 of the Personal Insolvency (Amendment) Act 2015) by the substitution of the following for subsection (1): 10

“(1) Where—

- (a) a proposal for a Personal Insolvency Arrangement is not approved in accordance with this Chapter, and
- (b) the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt, the Debtor may, where the personal insolvency practitioner considers that there are reasonable grounds for the making of such an application, make an application to the appropriate Court for an Order under subsection (9).” 15

### **Issuing of Execution Orders** 20

25. (1) No Execution Order shall be issued until the Court shall have first reviewed the Court file, on motion on notice to the defendant, and satisfy itself that the original deed of mortgage is accurately reflected in the possession order.
- (2) No Execution Order in respect of an order for possession shall issue unless prior notice of application for same has been served on the Registrar. 25

### **False representation**

26. It shall be an offence for any person to purport to represent himself or herself as a duly authorised Sheriff or Sheriff's messenger entitled to execute a possession order, or making request for An Garda Síochána for assistance in that regard, without such representation. 30

PART 5

MORTGAGE RESCUE

CHAPTER 1

*Affordable Housing*

**Interpretation (Part 5)**

5

27. (1) In this Part—

“affordable housing” means—

- (a) low cost rental accommodation (defined by *subsection (2)*),
- (b) low cost home ownership accommodation (defined by *subsection (3)*).

“Community Land Trust”, means a body corporate which satisfies the conditions below. In those conditions “local community” means the individuals who live or work, or want to live or work, in a specified area: 10

- (a) condition 1, is that the body is established for the express purpose of furthering the social, economic and environmental interests of a local community by acquiring and managing land and other assets in order— 15

- (i) to provide a benefit to the local community, and
  - (ii) to ensure the assets are not sold or re-developed except in a manner which the trust’s members think benefits the local community;

- (b) condition 2, is that the body is established under arrangements which are expressly designed to ensure that— 20

- (i) any profits from its activities will be used to benefit the local community (otherwise than being paid directly to members),
  - (ii) individuals who live or work in the specified area have the opportunity to become members of the trust (whether or not others can also become members). 25

“equity percentage arrangements” means arrangements under which:

- (a) the owner of a freehold or leasehold interest in residential property (“the seller”) conveys it to an individual (“the buyer”);

- (b) the buyer, in consideration for the conveyance—

- (i) pays the seller a sum (the “initial payment”) expressed to represent a percentage of the value of the interest at the time of the conveyance, 30
  - (ii) agrees to pay the seller other sums calculated by reference to a percentage of the value of the interest at the time when each sum is to be paid, and

- (iii) the liability to make any payment required by the arrangements (apart from the initial payment) is secured by a mortgage; 35



“shared ownership arrangements” means arrangements under a lease which—

- (a) is granted on payment of a premium calculated by reference to a percentage of either the value of the accommodation or the cost of providing it, and
  - (b) provides that the tenant (or the tenant’s personal representatives) will or may be entitled to a sum calculated by reference to the value of the accommodation. 5
- (2) Accommodation is low cost rental accommodation if—
- (a) it is made available for rent,
  - (b) the rent is below the market rate and,
  - (c) the accommodation is made available in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market. 10
- (3) Accommodation is low cost home ownership accommodation if the following conditions are satisfied—
- (a) condition 1 is that the accommodation is occupied, or made available for occupation, in accordance with— 15
    - (i) shared ownership arrangement,
    - (ii) equity percentage arrangements, or
    - (iii) community land trust,
  - (b) condition 2 is that the accommodation is made available in accordance with the rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market. 20

### **Preferred buyers**

**28.** The following bodies providing affordable housing shall be designated preferred buyers:

- (a) housing provided on a cost rental business model; 25
- (b) registered housing charities;
- (c) not-for-profit housing co-operatives on the register of industrial and provident societies;
- (d) approved bodies in the voluntary sector;
- (e) self build societies; 30
- (f) community housing or land trusts;
- (g) cooperative and community benefit societies registered in the United Kingdom under the 2014 Act in regard thereto (chapter 14);
- (h) housing cooperatives affiliated to CECODHAS Housing Europe and regulated anywhere in the European Union; and 35
- (i) for profit housing providers funded ethically at a funding interest rate of not in excess of four percent per annum.

## CHAPTER 2

### *The National Cooperative Housing Exchange*

#### **Register of preferred buyers**

29. (1) The Registrar shall maintain a register of preferred buyers.
- (2) Every registered preferred buyer shall be entitled to exercise a general call option to purchase PDH or BTL loans or their securities being sold by either a mortgagee in the exercise of its statutory or contractual power of sale or by a receiver appointed by such mortgagee. 5

#### **Notification in case of sale**

30. (1) When a mortgagee determines to exercise his or her power of sale, or to appoint a receiver to that end, or when a tenant is notified that his or her tenancy is to be determined so as to enable his or her mortgagor landlord (or his or her receiver) to sell, or when a judgment or equitable mortgage secures a well charging order and order for sale, the mortgagee in each instance shall notify the occupant and shall copy such notification to the Registrar. 10  
15
- (2) The Registrar shall convey the content of the notification of intended sale to every registered preferred buyer.

#### **Role of Registrar**

31. The Registrar shall have the role of market place intermediary and shall where necessary, compulsorily acquire at the request of and for the benefit of a preferred buyer whose offer to a mortgagee has been declined. 20

#### **Contract Models**

32. (1) Contract Model A- “Non-Compulsory Purchase”- subject to appropriate waivers of confidentiality, any preferred buyer may engage with the mortgagee and, if satisfied that the mortgagor has not defaulted on payments for any reason other than inability to pay, may offer to buy the loan and/or security property at the written down value thereof recorded in the mortgagee’s latest audited accounts. There will be no negotiation on price. 25
- (2) Contract Model B- “Compulsory Purchase”- If an offer to purchase made by any preferred buyer is declined by the vendor mortgagee or his receiver the said preferred buyer may require the Registrar to compulsorily acquire and the Registrar shall by order declare his or her intention to so acquire and such order shall operate to confer full power to acquire the housing or loan for and on behalf of the preferred buyer, subject to the payment of compensation by the buyer which, in default of agreement, shall be fixed under and in accordance with the Acquisition of Lands (Assessment of Compensation) Act 1919. Such order shall not issue if the mortgagee applies to sell by court sale. 30  
35
- (3) Contract Model C- If there is a legal challenge to the CPO the preferred buyer may or may not defend, at its discretion. If a challenge is successful (or the CPO is not

defended for whatever reason) any preferred buyer shall still have the option of purchasing the security when it is sold in court supervised open market conditions pursuant to a Court Order.

**Operation of Registrar’s Court Order**

33. The Registrar’s Court Order shall operate to transfer the property to the preferred buyer. 5

**Authority of Registrar**

34. Only the Registrar shall have the authority to exercise the statutory power to compel the purchase but the Registrar shall on no account have authority to bind the State or pledge its credit in regard to any such compulsory purchase order if a purchaser should fail to complete. 10

**Role of Registrar in sale**

35. Other than formally processing the compulsory purchase as aforesaid by the exercise of the statutory power to compel same as between vendor and purchaser the Registrar shall play no legal role in the sale whether as principal or agent or incur any liability to either vendor or purchaser and the vendor shall be compensated out of the purchaser’s own private funds without State financial aid of any sort either direct or indirect as funding guarantor, bond issue underwriter, or the like. 15

**Sales by a mortgagee**

36. Sales by a mortgagee, other than as provided for in Contract Models A and B shall be open market and by Court Order under the supervision of the Court, with properties for sale individually. 20

**Procedural model of Court**

37. The Court shall adopt as its procedural model the procedures already in operation in regard to Court Sales on foot of judgment mortgages and equitable mortgages by deposit of title deeds. 25

**Residual unsecured debt**

38. Where the preferred buyer purchases only the security property and not the right to payment of the debt, residual unsecured debt shall continue as such and be subject to other debt recovery proceeding or insolvency resolution.

CHAPTER 3 30

*Tenant Ownership*

**Option to buy**

39. The business of all preferred buyers shall be, for all cases, to deal with occupants not just as tenants but as tenants with an option to buy. The option to buy ownership of the dwelling (with or without new mortgage finance) will be exercisable at any time within 35

the perpetuity period on payment to the preferred buyer the then market value of the dwelling. Any sum outstanding on the loan shall not be forgiven, save for allowing credit for all rental payments received in the interim.

**Mortgagors whose dwellings have been purchased by a preferred buyer**

40. Mortgagors whose dwellings have been purchased by a preferred buyer shall formally deliver up possession of same and apply to be tenant thereof on standard terms in accordance with the laws of landlord and tenant save insofar as such tenancy shall not give rise to any statutory long lease, and that the landlord's covenants to the tenant shall not include any implied or express term as to the state of the dwelling or in respect of any ongoing maintenance thereof, and the lease shall expressly declare the parties' agreement that under no circumstances will the landlord be liable for disrepair or accident or other incident of public or private liability, the tenant fully indemnifying the landlord against any such claim. 5 10

**Purchase of Mortgagee's entitlement to payment of the loan under Contract Model A**

41. Where the preferred buyer has, under Contract Model A above, purchased the Mortgagee's entitlement to payment of the loan or judgment secured on the dwelling, the liability of the tenant (formerly the Mortgagor) shall remain as his or her liability to the preferred buyer, with interest thereon compounded at the preferred buyer cost of funds plus 1 per cent, though the preferred buyer will undertake not to sell same to any third party without offering the debtor first refusal at the then written down value thereof. 15 20

**Mortgaged property occupied by tenants**

42. In the case of mortgaged property which is occupied by tenants the formal delivery of possession referred to above shall be effected without disturbance to existing letting agreements and the tenants thereof shall not be required to vacate but instead continue as sub-tenants, and their landlord, now tenant of the preferred buyer, shall manage the estate thereinafter, in full compliance with his or her legal obligations as landlord and the rights of his or her tenants. 25

PART 6

MORTGAGE ARREARS RESOLUTION

**Role of Abhaile**

43. (1) Abhaile shall be the arbitrator of Mortgage Resolution and shall be an independent unit within the insolvency service established under section 8 of the Act of 2012 as amended, and it shall have all the necessary powers to carry out the functions conferred on it by this Act. 30
- (2) Subject to the provisions of this Act, a Mortgagor (being a natural person or persons who resides in and is the registered owner of a mortgaged property that is a family home) whose disposable income, non-essential assets and total personal debts are restricted below the prescribed level (in this part referred to as a Financially 35

Restricted Mortgagor) may obtain a Mortgage Resolution Order in respect of a mortgage on that family home.

- (3) The Minister shall, as soon as practicable after the coming into force of this Act, make regulations for the purposes of *subsection (1)* which shall set out the prescribed levels of disposable income, non-essential assets and total personal debts in order for a mortgagor to be categorised as a Financially Restricted Mortgagor. 5
- (4) The Minister shall, from time to time, amend the prescribed level, having regard in particular to the consumer price index.

#### **Financially Restricted Mortgager**

44. (1) A Financially Restricted Mortgagor shall only be entitled to apply for a Mortgage Resolution Order in respect of one mortgaged property, provided that it is his or her family home. 10
- (2) A Financially Restricted Mortgagor may initiate an application for a Mortgage Resolution Order to Abhaile.
- (3) A Financially Restricted Mortgagor may engage with the Money Advice and Budgeting Service (MABS), Personal Insolvency Practitioners and avail of the Abhaile Scheme in order to prepare and complete the application form outlined in *subsection (4)* and subsequent interactions with the financial institution and Abhaile. 15
- (4) A Financially Restricted Mortgagor may prepare and complete a prescribed application form for a Mortgage Resolution Order, based on a Mortgage Resolution Statement issued by Abhaile, which shall confirm that the restricted mortgagor complies with the conditions in *subsection (6)*. 20
- (5) A Financially Restricted Mortgagor shall communicate the application form for a Mortgage Resolution Order to Abhaile which shall determine, in accordance with this Part, whether to make a Mortgage Resolution Order. 25
- (6) A Mortgage Resolution Order may be granted by Abhaile only in respect of a mortgagor who is financially restricted as defined in *subsection (1)* and where that Financially Restricted Mortgagor or Mortgagors—
  - (a) is or are the registered owners of a mortgaged property that is a family home within the State, 30
  - (b) has or have resided in the mortgaged property for two years prior to the making of the application for a Mortgage Resolution Order,
  - (c) has or have provided written confirmation that they shall not lease or sell the mortgaged property without notifying Abhaile,
  - (d) has or have not previously been granted a Mortgage Resolution Order, 35
  - (e) has or have previously corresponded and/or communicated with the financial institution that provided the mortgage for the purpose of seeking to renegotiate or restructure their mortgage, and
  - (f) was or were in arrears on or before 1 January 2017.

## Mortgage Resolution Orders

45. (1) Abhaile may refuse to make a Mortgage Resolution Order where it is of the opinion, based on reasonable grounds, that any of the following conditions exist—
- (a) the Financially Restricted Mortgagor is not financially restricted as provided for in *section 4*, 5
  - (b) the Financially Restricted Mortgagor has, in making the application or in supplying any information or documents in support of the application, made representations which are false,
  - (c) the Financially Restricted Mortgagor has entered into a transaction in respect of the mortgaged property with any person at an undervalue during the period of two years prior to the submission of the application, 10
  - (d) the Financially Restricted Mortgagor has concealed assets with the intention of not meeting his obligations to the mortgagee,
  - (e) the Financially Restricted Mortgagor has engaged in conduct that would, if the mortgagor was adjudicated to be a bankrupt, constitute an offence, or 15
  - (f) there is definitive evidence that the Financially Restricted Mortgagor entered into the mortgage over the mortgaged property knowing at that time that he or she did not have the means to repay the mortgage.
- (2) Abhaile shall require the Financially Restricted Mortgagor to sign a form of release entitling Abhaile to access all bank accounts held, solely or jointly, by or for the benefit of the Financially Restricted Mortgagor with financial institutions or credit unions in the State or abroad. 20
- (3) Where Abhaile refuses an application for a Mortgage Resolution Order, it shall give reasons for the refusal.
- (4) Abhaile may request further information from the Financially Restricted Mortgagor where the office has reasonable grounds to believe that such information is necessary in order to reach a conclusion in relation to the existence of the conditions specified in this section. 25
- (5) Abhaile may refuse to make a Mortgage Resolution Order where the Financially Restricted Mortgagor fails to provide such information when requested. 30
- (6) Abhaile shall presume that all of the relevant conditions in this section are satisfied if that appears to be the position from the Financially Restricted Mortgagor's application and where the Office has no reasonable grounds to believe that the information supplied is inaccurate or incomplete.
- (7) Abhaile may make a Mortgage Resolution Order amending the terms of the mortgage between the Financially Restricted Mortgagor and the financial institution in terms as offered by the financial institution, which said order shall be binding on both the Financially Restricted Mortgagor and financial institution. 35
- (8) Abhaile may, if it thinks appropriate, considering all the circumstances of the Financially Restricted Mortgagor's application, the financial institution's response and any other factors that appear relevant to Abhaile, make a Mortgage Resolution Order that provides for any of the following: 40

- (a) an order that the Financially Restricted Mortgagor make interest only payments on the mortgage for a period of time that shall not exceed four years;
  - (b) an order that the mortgage period be extended by a period of time that shall not exceed twenty years;
  - (c) an order that the mortgage payments due to be made by the Financially Restricted Mortgagor be deferred for a period that shall not exceed one year; 5
  - (d) an order that the terms and conditions of the mortgage be amended so that the interest rate can be changed to a fixed or variable interest rate, including a change to the rate itself, as Abhaile considers appropriate, taking into account prevailing market conditions; 10
  - (e) an order that the principal sum due on the mortgage be reduced in a fair manner provided that the mortgagee be granted a share in the Financially Restricted Mortgagor's equity in the family home, as Abhaile considers appropriate;
  - (f) an order that the Deferred Interest Scheme recommended in the report of the Expert Group on Mortgage Arrears and Personal Debt be applied to the mortgage in accordance with paragraph 4.4.2 of that report, provided that the Financially Restricted Mortgagor meets the eligibility criteria identified at paragraph 4.4.3 of the report; 15
  - (g) an order that the principal sum due on the mortgage be divided into two parts and that the mortgage payments due to be made by the Financially Restricted Mortgagor on one of those parts be deferred for a period that shall not exceed ten years; 20
  - (h) an order that the principal sum due on the mortgage be reduced in a fair manner taking into account the financial capacity of the Financially Restricted Mortgagor, the amount of the principal sum outstanding and all the relevant circumstances affecting the Financially Restricted Mortgagor and the financial institution; 25
  - (i) an order that the Financially Restricted Mortgagor and the financial institution implement the Mortgage to Rent transaction;
  - (j) any other solution that the Abhaile deems appropriate or an order combining any of the orders provided for in *paragraphs (a) to (i)* of this subsection. 30
- (9) A Mortgagor who participates in a Mortgage Resolution Order Process in a manner that involves fraudulent or dishonest conduct commits an offence.
- (10) Without prejudice to the generality of *subsection (1)*, a Mortgagor commits an offence under this section where he or she— 35
- (a) knowingly conceals, or refuses to produce, documents, or produces a falsified document or documents or information when required to do so by Abhaile or the Court,
  - (b) knowingly has made representations which are false in the application to Abhaile,
  - (c) disposes of the property covered by the Mortgage Resolution Order with the intention of defrauding the financial institution that is the mortgagee of the said property, 40

- (d) carries on business in a name other than the mortgagor's own name without disclosing the name under which the Mortgage Resolution Order has been registered in the Mortgage Settlement Register.

#### **Offences**

46. A person who is guilty of an offence under this part of the Act shall be liable— 5
- (a) on summary conviction to a fine not exceeding €3,000 or, at the discretion of the Court in the case of an individual, to imprisonment for a term not exceeding 6 months, or both, or
- (b) on conviction on indictment, to a fine not exceeding €100,000 or to imprisonment for a term not exceeding 5 years, or both. 10

### **PART 7**

#### **MISCELLANEOUS**

#### **Repeal of Act of 1851**

47. Due to oversight the Judgment Mortgage Act 1851 which provides for execution in regard to judgment debts was not repealed at the time of enactment of the Personal Insolvency legislation, which offers creditors modern execution options through debt settlement. The Act of 1851 is hereby repealed in its entirety. 15

#### **Adoption of provisions of EU Fundamental Charter of Human Rights as interpretive guides to relevant EU Law**

48. In adjudicating any challenge to this legislation on grounds of disproportionate infringement of Article 43 Private Property Rights, the Court shall, in addition to weighing the competing claims of the Common Good, adopt as justiciable, and material in this regard, the provisions of the EU Fundamental Charter of Human Rights as interpretive guides to relevant EU Law superior to the provisions of Article 43. 20

#### **Repeal of NAMA provisions**

49. To the extent that NAMA legislation may appear to differentiate between NAMA and other mortgagees in regard to the management and disposal of assets otherwise than as originally agreed by the first mortgagees thereof, or in any other way which occasions detriment to the mortgagor which differs materially from his or her original contractual entitlement, the said provisions are hereby repealed and henceforth NAMA will, as a matter of law, be governed by the general law of mortgages as will hereinafter govern all mortgages. 30

#### **Amendment of Act of 1997**

50. Section 28 of the Central Bank Act 1997 is amended as follows—
- (a) in subsection (1) by the substitution of the following for the definition of “retail credit firm”: 35



“ ‘retail credit firm’ means a person prescribed for the purpose of paragraph (g) of the definition of ‘credit institution’ in section 3 of the Consumer Credit Act 1995, or any other person who holds itself out as carrying on a business of, and whose business consists wholly or partly of, providing credit directly to relevant persons or owning such credit or both, but does not include— 5

- (a) a person who is a regulated financial service provider authorised by a bank or another EEA regulator to provide or own credit otherwise than under this Part,
- (b) a person who is an authorised credit intermediary under Part XI of the Consumer Credit Act 1995 when carrying on the activity of a credit intermediary, 10
- (c) in relation to credit that was originally provided by another person, a Securitisation Special Purpose Vehicle (SSPV) that has obtained all or part of another person’s interest (by direct or indirect assignment, sale or otherwise) in the credit, 15
- (d) a person who provides credit on a once only or occasional basis, but only if the provision of the credit does not involve a representation, or create an impression (whether in advertising, marketing or otherwise), that the credit would be offered to other persons on the same or substantially similar terms, or 20
- (e) a person who is exempted, or who belongs to a class of persons that is exempted, under section 29A from being required to hold an authorisation as a retail credit firm.”.

(b) by the insertion of the following after the definition of “retail credit firm” (as substituted by subsection ): 25

“ ‘Securitisation Special Purpose Vehicle’ or ‘SSPV’ means a corporation trust or other entity, other than a credit institution, organised for carrying out a securitisation or securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPV from those of the originator of the loan or loans, and in which the holders of the beneficial interests have the right to pledge or exchange those interests without restriction but shall not include an entity which carries out loan book servicing activities;”, 30 35

and

(c) by the deletion of subsection (2).

### **Receivers appointed by a Mortgagee**

51. Receivers appointed by a Mortgagee shall not be entitled to require tenants in actual occupation to vacate, but shall be entitled only to receive rents. 40

## FIRST SCHEDULE

### UNFAIR TERMS IN LOAN CONTRACTS, IN MORTGAGE DEEDS AND OTHER SECURITY DOCUMENTATION

1. That a receiver is agent of a mortgagor;
2. That a tracker mortgage, once lost, is not thereafter available;
3. That the loan is assignable to an unregulated entity; 5
4. Exclusion of liability clauses in respect of duties of care to persons who may be unduly influenced (including guarantors) or in instances of obvious inequality of bargaining power;
5. Terms which deprive the consumer of the right to plead force majeure;
6. Excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier; 10
7. Inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; 15
8. Making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone; 20
9. Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
10. Requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation; 25
11. Authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract; 30
12. Enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
13. Automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early; 35
14. Irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
15. Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
16. Providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases 40

giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when contract was concluded;

17. Giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement; 5
18. Excluding or hindering the consumer's right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract; 10
19. Giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

## SECOND SCHEDULE

### EUROPEAN CONVENTION ON HUMAN RIGHTS ARTICLE 8 PROPORTIONALITY ASSESSMENT FACTORS

1. The impact of an Eviction Order on the Human Rights of the borrower and other household members by reference to the rights which they can expect to enjoy pursuant to the European Convention on Human Rights and the EU Charter of Fundamental Rights, including but not limited to consideration of the following factors—
  - (a) the availability of suitable and affordable alternative accommodation that will allow the family or household to continue to live together, 5
  - (b) where there are older persons, persons with disabilities, other vulnerable persons, or dependants in the household—
    - (i) the extent to which such alternative accommodation will ensure their independence, social and occupational integration and participation in life of the community, 10
    - (ii) the extent to which care and support arrangements in place for children and vulnerable members, and dependants in the household, and 15
    - (iii) evidence of an examination of the impact of relocation or repossession on such persons, including whether the best interests of any children have been prioritised,
  - (c) the extent to which an order will affect the physical and mental health of all members of the household, 20
  - (d) the extent to which an order will intrude into the personal sphere of the household, including the effect on the maintenance of relationships with others, and
  - (e) the extent to which an order will impact the future aspirations and opportunities of all members of the household. 25
2. Whether the interference caused to the borrower is proportionate to the aims pursued.
3. Whether the order being sought is the least onerous means of achieving the legitimate aim, to include consideration of the following factors—
  - (a) the application of the forbearance measures set out in guidance on non-performing loans published by the European Central Bank. 30
  - (b) the suitability or otherwise of the rent to mortgage scheme,
  - (c) the suitability or otherwise of a lifetime mortgage,
  - (d) the suitability or otherwise of the sale of the existing loan to an approved housing body, 35
  - (e) the suitability or otherwise of a Personal Insolvency Arrangement,
  - (f) whether the borrower would accept that the transfer to the creditor of the security, or proceeds from the sale of the security, would be sufficient to repay the outstanding debt in full.
4. The extent to which original lending decisions, made at the time of granting the 40

- mortgage application, were reasonable and responsible, and such an assessment shall include an evaluation of the application of—
- (a) any unfair terms and any appropriate adjustments,
  - (b) Consumer Protection Codes of 2006 and 2012,
  - (c) the Code of Conduct on Mortgage Arrears, and 5
  - (d) obligations imposed on regulated lenders under European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (S.I. No. 142 of 2016) as if such obligations applied to the transactions under adjudication, Regulation 42 notwithstanding.
5. Examination of all the circumstances surrounding the execution of the mortgage contract—level and extent of information provided, position of the parties, legal advice given in relation to the mortgage contract and vulnerability of the consumer. 10
  6. The extent and availability of State support to the enforcing entity in grants, tax relief on non-performing loans, subvention, Central Bank support, or other State supports.
  7. The estimated costs, per week, to the State of providing— 15
    - (a) emergency accommodation and alternative housing to the household, and
    - (b) support services to the household from State resources per week.
  8. Where the enforcing entity is not the credit institution which first granted the loan or mortgage to the Mortgagor, in considering the proportionality of the order or a proposed order, the factors to be considered by the Court shall include, without limitation, the following— 20
    - (a) the amount paid by the enforcing entity for the purchase of the loan or mortgage by reference to the amount of debt outstanding in respect of that loan or mortgage;
    - (b) in circumstances where paragraph (a) applies, whether the loan or mortgage was also offered for sale at that reduced cost to the Mortgagor; 25
    - (c) the value of the loan or mortgage on the enforcing entity’s balance sheet, and the market value of the property at time of Court hearing;
    - (d) the availability of tax relief for the enforcing entity in relation to the relevant non-performing loan, or in respect of non-performing loans generally. 30

An Bille um Thithíocht Incheannaithe agus  
Cóirmhorgáiste, 2018

# BILLE

(*mar a tionscnaíodh*)

*dá ngairtear*

Acht do dhíriú aird ar an Stát do bheith ag cloí le dlí AE agus leis an gCoinbhinsiún Eorpach um Chearta an Duine maidir leis an éigeandáil atá san earnáil tithíochta faoi láthair agus, go háirithe, maidir le déileáil le riaráistí morgáiste; do dhéanamh socrú maidir le clár le haghaidh margadh oscailte – “malartán an chomharchumainn tithíochta incheannaithe náisiúnta” – ar gá do mhorgáistithe agus do cheannaitheoirí iasachtaí tithíochta agus tithíochta úrrúsaithe déileáil ann; d’áirithiú céad diúltú ceannaitheora do sholáthraithe tithíochta neamhbhrabúis tosaíochta i leith díolacháin den sórt sin trí rogha um ordú ceannaigh neamhéigeantach; d’ainmniú Chláraitheoir na gCara-Chumann mar an pointe malairte le haghaidh díolacháin den sórt sin; do chur soláthar tithíochta incheannaithe neamhbhrabúis tríú hearnáil neamhstáit chun cinn, idir thithíocht arna maoiniú go frithpháirteach agus tithíocht arna maoiniú go hidirnáisiúnta sa mhargadh bannaí eiticiúla; do cheadú an múnla tarrthála morgáiste, Morgáiste go Cíos, a leathnú chun go mbeidh sé ar fáil, gan aon rannpháirtíocht ó údarás áitiúil, do sholáthraithe tithíochta saorálacha, frithpháirteacha agus neamhbhrabúis a mhaoinítear go príobháideach agus gan dul ar iontaoibh cistí poiblí ná ráthaíocht stáit; agus do dhéanamh socrú maidir le Abhaile a athchumrú mar ghníomhaireacht um réiteach morgáiste.

*An Teachta Seán Mac Aonghusa a thug isteach,*

*10 Iúil, 2018*

Affordable Housing and Fair Mortgage Bill  
2018

# BILL

(*as initiated*)

*entitled*

An Act to highlight the State’s adherence to EU law and the European Convention on Human Rights in regard to the present emergency in the housing sector and, in particular, in dealing with mortgage arrears; to provide for a platform for an open market- “the national affordable cooperative housing exchange”- in which mortgagees and purchasers of home loans and security housing must deal; to secure for preferred not-for-profit housing providers a purchasers first refusal on such sales via a non-compulsory purchase order call option; to designate the Registrar of Friendly Societies as the exchange point for such sales; to promote not-for-profit third sector non-state provision of affordable housing ranging from mutually funded to internationally funded in the ethical bond market; to allow for the broadening of the Mortgage to Rent mortgage rescue model to be available without any local authority involvement to voluntary, mutual and not-for-profit housing providers funded privately and without recourse to public funds or state guarantee; and to provide for reconfiguring Abhaile as a mortgage resolution agency.

*Introduced by Deputy John McGuinness,*

*10th July, 2018*

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