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# The EU's new Credit Servicers Directive – where are we now?

March 2020

# **The EU's new Credit Servicers Directive** – a (slow) step in the right direction or more challenging times ahead?

After a relatively quiet period, the last few months have been very eventful as far as progress on the Credit Servicers Directive is concerned. For an update of what happened up to this point, one should read this Client Alert, and any updates to it, in conjunction with our coverage from April 16, 2019[1]. In this Client Alert, we look at the way forward to what is a far-reaching set of changes to how servicers and purchasers of credit exposures operate.

## So where are we now?

Despite the name, the EU-27-wide regime in the Directive applies to credit servicers, credit purchasers and also the recovery of collateral. Moreover, while the proposal stems from workstreams from the EU's Action Plan on NPLs, it is likely to have considerable impact on all types of exposures, regardless of whether they are performing or not. This EU-wide Directive – like the European Central Bank's (**ECB**) work on NPLs that borrowed from what it considered the "best practices" of Irish and Spanish rules on reducing NPLs, which ultimately led to the EU-27 NPL Action Plan – will likely be familiar to those that have followed the Irish and Spanish rules on credit servicing standards.

Consequently, some stakeholders as well as policymakers have raised questions as to why, after 10 years of falling NPL stocks, does the EU need to take action now? The response, including from the ECB, has been that the Directive, which is a Capital Markets Union and European Commission priority, is about harmonizing best practice across the EU by levelling the playing field as well as preventing future build-up of NPLs. It remains to be seen how quickly this Directive will continue to progress given that domestic political turmoil in Germany is causing concern that some momentum may be lost in Brussels. This is problematic as the original legislative proposal envisaged that the Directive would be transposed into national law by December 31, 2020, with implementing measures to be in place by January 1, 2021. Regardless of the timing, the Directive's provisions will require action from a range of stakeholders.

Some of the Directives' changes may present business opportunities. This includes those that arise from the proposed EU passporting regime for credit servicers, which is aimed at lowering existing barriers of entry into this market, as well as building liquidity in cross-border secondary markets for non-performing loans and exposures (collectively, **NPLs**)[2]. Other changes, however innovative, are not without difficulty, and are thus viewed by some stakeholders as controversial[3]. Chief amongst these contentious points is the tool known as an "accelerated extrajudicial collateral enforcement procedure (**AECE**)[4]" that is designed to speed up the recovery of collateral. The co-legislators, due to lack of progress on the original proposals for the AECE, decided to split the consideration of the AECE from the rest of the Directive. That split has not necessarily meant resolution. Given all of the above, the Directive remains a core deliverable for completing the Banking Union and the Capital Markets Union . As a result, do not expect the Directive to be derailed, even if it looks like it could suffer some delays.

After the procedure in the Directive was split into two parts focusing respectively on (1) credit servicers and credit purchasers (secondary markets) and (2) AECE, June 2019 saw the publication of a progress report[5] by the Council. More recently, the assigned European Parliament's ECON committee finally rendered an opinion or more precisely two reports with proposed amendments, namely a Draft Report of November 2019[6] containing Amendments 1-203 (the **Draft Report**) and a Draft Report with Amendments 204-648 of January 2020[7] (the **Amendments Report**). This means that in total 648 amendments were proposed, many made to serve a specific political agenda – notably from Matt Carthy (a Sinn Fein MEP from Ireland, who also sits as a substitute on the ECON Committee) and Dimitrios Papadimoulis (13th Vice President of the parliament, a Syriza MEP from Greece and a member of the ECON Committee). Both reports contain very few explanatory statements on the reasons for the said amendments. Out of the 648 amendments, we found 19 to be particularly important and these are analyzed below.

2 Dentons is a member of the EU Commission's Working Group on NPL Transaction Platforms and has also contributed to various sub-working groups.

3 What is important to note is that the rapporteurs responsible for this EU Directive in the EU's influential Economic and Monetary Affairs (ECON) Committee of the European Parliament were Italy's Roberto Gualtieri (from the center-left S&D political grouping) who has been a critic of the ECB's and EBA's NPL Action Plans/efforts, as well as Esther de Lange (from the center-right EPP political grouping) from The Netherlands.

4 The legal basis for the AECE has also been assessed by the Court of Justice of the European Union (CJEU aka ECJ) as to its compatibility with the core of constitutional principles, EU competences and subsidiarity principles regulating the relationship between EU and national law as set out in the Treaty of Functioning on European Union (TFEU), in which the CJEU concluded that AECE could be compatible but just with a different part of the TFEU than those originally proposed.

5 Available here.

6 Available here.

7 Available here.

## Revisions to the Recitals

The first amendments of both documents, amounting to a total of 103, are focused on the changes to be made to the Directive's Recitals. Twelve of these are quite important and are in turn analyzed below. In their amended version, the Recitals appear to be used as a means of introducing operative provisions, when their designated purpose is to support and give background and context to the Articles that follow.

An example of this is the newly introduced Recital 9b. It states that forbearance measures should aim to return the borrower to a "sustainable performing repayment status". There are several problems with this statement. Firstly, there is no definition on what counts as sustainable. Secondly, as stated above, this amendment, as well as many of the ones that follow, appear to mirror closely the Irish Consumer Code on Mortgage Arrears' (**CCMA**) rules on non-performing loans (**NPL**).

| Original text | Proposed amended text |
|---|---|
| **[None]** | (9b) Forbearance measures should aim to return the borrower to a sustainable performing repayment status, having regard to the fair treatment of the consumer and to all relevant national and EU consumer protection requirements that may be applicable. When deciding on which steps or forbearance measures to take, credit institutions should take into account the interests of consumers and comply with consumer protection requirements, including those set out in Article 28 of Directive 2014/17/EU, in the EBA Guidelines on arrears and foreclosure and in the EBA final guidelines on the management of nonperforming and forborne exposures. |

The new Recital 9b, however, does tie in with the European Banking Authority (**EBA**) guidance on the subject[8], which states that any forbearance measures should be granted only when they aim to restore sustainable repayment by the borrower and are thus in the borrower's interests. The EBA guidance further states that when making the assessment the importance of ensuring the fair treatment of consumers and compliance with any consumer protection requirements should be taken into account, including those set out in Article 28 of Directive 2014/17/EU32[9] and in the EBA Guidelines on arrears and foreclosure[10]. Despite that, the ECB-supervised banks will be held to the ECB's standard of its own NPL Guidance, which read like rules and which are drafted more proscriptively than the EBA's publications.

In terms of credit servicers, whilst the Servicing Directive's authorization requirements, as further elaborated in Recital 9, may build upon EU principles and obligations applicable to other financial services market participants, there are differences. These differences will likely require specialist legal and regulatory input for applicants when drafting an application and the regulated business plan, along with other core documents and policies that are submitted or which are to be implemented and maintained by a servicer following receipt of its license.

Moving further along, the new Recital 9c, also heavily inspired by the CCMA, fits in with the ECB's rules on NPLs[11], namely the new forbearance measures closely follow the list of most common forbearance measures, as set out by the ECB, something which hardly comes as a surprise. The ECB list covers more measures and has split those up into long- and short-term measures in a non-exhaustive list. Recital 9c on the other hand, introduces two forbearance measures: (1) a total or partial refinancing of a credit agreement or (2) a modification of the previous terms and conditions of a credit agreement, performed in one of five ways.

8 See the EBA's Guidelines on management of non-performing and forborne exposures, available here.
9 Available here.
10 Available here.
11 See the ECB's Guidance to banks on non-performing loans, available here.

| Original text | Proposed amended text |
|---|---|
| **[None]** | (9c) Forbearance measures may include the following concessions to the consumer:<br><br>(a) a total or partial refinancing of a credit agreement;<br><br>(b) a modification of the previous terms and conditions of a credit agreement, which may include among others:<br><br>i. extending the term of the mortgage;<br><br>ii. changing the type of the mortgage (such as, changing the type of mortgage from a capital and interest mortgage to an interest only mortgage); iii. deferring payment of all or part of the instalment repayment for a period;<br><br>iv. changing the interest rate up to a certain cap; v. offering a payment holiday. |

The new Recital 16a is in turn closing the gap, by making a cross-reference to MiFID II. The Draft Report first introduced the Recital in November, which focused on allowing member states to regulate the credit servicing activities that do not fall within the scope of the proposed Directive by imposing requirements equivalent to those in the Directive and by making clear that such entities would not benefit from passporting their services.

| Original text | Proposed amended text |
|---|---|
| **[None]** | (16a) It is open to Member States to regulate the credit servicing activities that do not fall within the scope of this Directive, such as services offered for credit agreements issued by non-credit institutions or credit servicing activities performed by natural persons, including by imposing requirements equivalent to those under this Directive. Those entities, however, would not benefit from the possibility to passport such services to other Member States. |

There are two further amendment proposals introduced in the Amendments Report in January which state that: (1) the Directive would not affect the restrictions in national laws regarding the transfer of creditors' rights under a non-performing credit agreement, and made clear that it is open to member states to regulate the transfer of performing credit agreements, including by imposing requirements equivalent to those under the Directive; and (2), as proposed by Dimitrios Papadimoulis and Matt Carthy, entities engaging in credit servicing are to be subject to the same rules, be it specialized credit servicers, banking institutions or credit purchasers. This in turn was seen as a direct consequence of subjecting credit servicing activities to MiFID rules.

| Original text | Proposed amended text |
|---|---|
| **[None]** | (16a) Similarly, the Directive does not affect the restrictions in national laws regarding transfer of creditor´s rights under a non-performing credit agreement or the credit agreement itself that is not terminated in accordance with national civil law with the effect that all amounts payable under the credit agreement become immediately due, where this is required for the transfer to an entity outside the banking system. This way, there will be Member States where, taking into account the national rules, the acquisition of non-performing credit agreements that are not past due, are less than 90 days past due or are not terminated in accordance with national civil law by non-regulated creditors will remain limited. It is open to Member States to regulate the transfer of performing credit agreements, including by imposing requirements equivalent to those under this Directive. |
| **[None]** | (16a) Entities engaging in credit servicing activities shall be subject to the same rules, be it specialised credit servicers, banking institutions or credit purchasers. This could be a direct consequence of subjecting credit servicing activities to MiFID rules. |

The newly-introduced Recital 17a sounds like a statement of practice, issued at EU level or by the member states, and may ultimately provide further compliance requirements. The Recital states that "to guarantee

a well-functioning internal market of loans and a high level of consumer protection member states should ensure a good reputation of credit purchasers." A very humanitarian-focused provision, it remains to be seen how this would be implemented in practice. There are four versions amending Recital 18. The November amendment differs very slightly from the original Commission proposal and places emphasis on national in addition to the applicable Union provisions when stating that the aim is for consumers to retain the same level of protection as provided under Union law, regardless of the law applicable to the credit purchaser or credit servicer.

| Original text | Proposed amended text |
|---|---|
| (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the **creditor's** rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. Credit purchasers and credit servicers should therefore comply with Union law as applicable to the initial credit agreement and the **consumer** should retain the same level of protection as provided under Union law or as determined by Union or national conflict of law rules **regardless of the law applicable to the credit purchaser or credit servicer.** | (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the **credit** rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. Credit purchasers and credit servicers should therefore comply with **applicable** Union **and national** law as applicable to the initial credit agreement and the borrower should retain the same level of protection as provided under **applicable** Union **and national** law or as determined by Union or national conflict of law rules. |

The three January amendments focus respectively on (1) deleting this sentence completely, (2) placing the emphasis on ensuring the respective level of consumer protection is safeguarded by Member States, and adding that the Directive should not restrict Member States in applying stricter consumer protection provisions to credit servicers or credit purchasers, and (3) following closely the November amendment while also adding that "national competent authorities must ensure that no borrower is worse off following the transfer of their credit agreement from a credit institution to a credit purchaser or credit servicer." This last sentence introduces a very difficult standard to achieve, as such it remains to be seen whether this could be done via providing a legal opinion.

| Original text | Proposed amended text |
| --- | --- |
| (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the **creditor's** rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. **Credit purchasers and credit servicers should therefore comply with Union law as applicable to the initial credit agreement and the consumer should retain the same level of protection as provided under Union law or as determined by Union or national conflict of law rules regardless of the law applicable to the credit purchaser or credit servicer.** | (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the **credit** rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. |
| (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council29, Directive 2008/48/EC of the European Parliament and of the Council30 and Council Directive 93/13/EEC31 means that the assignment of the creditor's rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. Credit purchasers and credit servicers should therefore comply with Union law as applicable to the initial credit agreement and the consumer should retain the same level of protection as provided under Union law or as determined by Union or national conflict of law rules regardless of the law applicable to the credit purchaser or credit servicer. | (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council29, Directive 2008/48/EC of the European Parliament and of the Council30 and Council Directive 93/13/EEC31 means that the assignment of the creditor's rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. **Member States should ensure that** credit purchasers and credit servicers should therefore comply with Union law as applicable to the initial credit agreement and **Member States should ensure that** the consumer should retain the same level of protection as provided under Union law or as determined by Union or national conflict of law rules regardless of the law applicable to the credit purchaser or credit servicer. **This Directive should not restrict Member States in applying stricter consumer protection provisions to credit servicers or credit purchasers.** |

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|---|---|
| (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the creditor's rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by Union law to consumers in any way. Credit purchasers and credit servicers should therefore comply with Union law as applicable to the initial credit agreement and the consumer should retain the same level of protection as provided under Union law **or as determined by Union or national conflict of law rules** regardless of the law applicable to the credit purchaser or credit servicer. | (18) The importance placed by the Union legislature on the protection provided for consumers in Directive 2014/17/EU of the European Parliament and of the Council, Directive 2008/48/EC of the European Parliament and of the Council and Council Directive 93/13/EEC means that the assignment of the creditor's rights under a credit agreement or of the agreement itself to a credit purchaser should not affect the level of protection granted by **national and** Union law to consumers in any way. Credit purchasers and credit servicers should therefore comply with **national and** Union law as applicable to the initial credit agreement and the consumer should retain the same level of protection as provided under **national and** Union law regardless of the law applicable to the credit purchaser or credit servicer. **National competent authorities must ensure that no borrower is worse off following the transfer of their credit agreement from a credit institution to a credit purchaser or credit servicer.** |

As always the option of automatically recognizing providers as authorized credit servicers if a Member State has rules in place that are equivalent or stricter than the ones established in the current directive is outlined in a new Recital, namely Recital 23a. A newly drafted Recital 24a explicitly states that conditions for granting and maintaining an authorization for a credit purchaser should be the same as those for a credit servicer. Competent authorities are also encouraged to take into account information that is already available to them by other means, especially if credit institutions are concerned. A credit purchaser will be considered as a credit servicer when he manages and enforces the rights and obligations related to the creditor's rights under a credit agreement or the credit agreement itself.

## Amendments to the Articles

As with the analysis of the Recitals, the following paragraphs assess only the most important amendments to the Articles of the Directive. There are four proposed amendments to Article 1(1)(a), which reach the same outcome in slightly different wording and are then repeated as one of the two amendments to Article 2(1)(a). These aim to prevent the transfer of performing credit agreements with consumers to third parties. The proposal comes from a number of MEPs but is likely to get pushed back as it would kill the secondary loan market trading for such loans.

| Original text | Proposed amended text |
|---|---|
| (a) credit servicers **acting on behalf** of **a** credit **institution or a credit purchaser in respect of a** credit agreement issued by a credit institution **or by its subsidiaries**; | (a) credit servicers **of creditor's rights under a non-performing** credit **agreement or of the non-performing** credit agreement **itself** issued by a credit institution **established in the Union, who act on behalf of a credit purchaser**; |
| (a) credit servicers **acting on behalf of a credit institution or a credit purchaser in respect of** a credit agreement issued by a credit institution **or by** its subsidiaries; | (a) credit servicers **of creditor's rights under** a credit agreement **or of the credit agreement itself,** issued by a credit institution, its subsidiaries **established in the Union or other creditors, who are creditors or act on behalf of a credit purchaser or a credit institution**; |
| (a) credit servicers **acting** on behalf of a credit institution or a credit purchaser **in respect of a credit agreement issued by a credit institution or by its subsidiaries**; | (a) credit servicers **of creditor's rights under a non-performing credit agreement or of the non-performing credit agreement itself issued by a credit institution established in the Union, who act** on behalf of a credit institution or a credit purchaser; |
| (a) credit servicers acting on behalf of a credit institution or a credit purchaser in respect of a credit agreement issued by a credit institution **or by its subsidiaries**; | (a) credit servicers acting on behalf of a credit institution or a credit purchaser in respect of a **non-performing** credit agreement issued by a credit institution **established in the Union**; |

The new Article 2(2a) proposal, which does not deal with third parties, introduces a primary residence mortgage carve-out, which is an important development that goes well beyond the law in certain Member States. Unusually, there is a justification for making this amendment, namely that taking a home loan is an important and risky decision and that "including such credit contracts in the scope of the single secondary market for non-performing loans would expose distressed borrowers to dealing with credit purchasers and credit servicers who are established, regulated and supervised abroad", leading to unfair treatment and possible home foreclosure. These changes, however, seem to be contradicted by the next three amendments which focus on Article 2(3a), stating that the Directive will not affect the national restrictions regarding the transfer of creditors' rights under a non-performing credit agreement that is not past due, or is less than 90 days past due. There is also no concept, as for example in the CCMA, of what happens when a loan that was non-performing has turned back to performing but then became non-performing again.

| Original text | Proposed amended text |
|---|---|
| **[None]** | 3a. This Directive shall not affect the [existing] restrictions in the Member States' national laws regarding the transfer of creditor's rights under a nonperforming credit agreement that are not past due, or are less than 90 days past due or are not terminated in accordance with national civil law, or the transfer of creditor's rights under such a nonperforming credit agreement. |
| **[None]** | 3a. This Directive shall not affect the restrictions in the Member States' national laws regarding the transfer of creditor's rights under a non-performing credit agreement that is not past due, or is less than 90 days past due or is not terminated in accordance with national civil law, or the transfer of such a nonperforming credit agreement. |
| **[None]** | 3a. This Directive shall not affect the requirements in the Member States' national laws regarding the servicing of creditor's rights under a credit agreement or of the credit agreement itself, when the credit purchaser is a securitisation special purpose entity, as defined in Article 2 (2) of Regulation (EU) 2017/2402. |

Amendment 69 of the Draft Report and Amendment 297 of the Amendments Report are exactly the same and introduce a new point in Article 3(1), namely point 7a. Point 7a defines a "credit servicer" as the person who carries out an activity of informing the borrower of any changes in interest rates, charges or of payments due related to the creditor's rights under a credit agreement or the credit agreement itself and lists a number of activities that a credit servicer can carry out. The new point poses an issue as this definition and the activity listed in (iv), which is informing the borrower of any changes in interest rates, could cover a number of entities that are, say, benchmark administrators but are not carrying out any of the activities listed in (i)-(iii) of point 7a, which are namely (i) collecting or recovering payments, (ii) renegotiating and (iii) administering complaints. The same applies in respect of limb (ii) for appointees of another. Amendments 70 of the Draft Report and 298 of the Amendments Report propose to delete Article 3(1) point 8 of the Commission text, which introduced a different list of activities as part of the definition of a credit servicer, such as (a) monitoring the performance of the credit agreement and (d) enforcing the rights and obligations under the agreement on behalf of the creditor in the place of the current (iii) and were much more reasonable and workable.

| Original text | Proposed amended text |
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| **[None]** | (7a) 'credit servicer' means a legal person who, in the course of its business, manages and enforces the rights and obligations related to the creditor's rights under a non-performing credit agreement or the non-performing credit agreement itself on behalf of the creditor or on behalf of itself and carries out at least one or more of the following activities:<br><br>(i) collecting or recovering payments due related to the creditor's rights under a credit agreement or to the credit agreement itself from the borrower where it is not a 'payment service' as defined in Annex I of Directive 2015/2366, in accordance with national law;<br><br>(ii) renegotiating, in accordance with the requirements provided in the national law, of the terms and conditions related to the creditor's rights under a credit agreement or of the credit agreement itself with borrowers in line with the instructions given by the creditor, where he is not a 'credit intermediary' as defined in Article 4(5) of Directive 2014/17/EU or point (f) of Article 3 of Directive2008/48/EC;<br><br>(iii) administering any complaints in relation to the creditor's rights under a credit agreement or to the credit agreement itself;<br><br>(iv) informing the borrower of any changes in interest rates, charges or of payments due related to the creditor's rights under a credit agreement or the credit agreement itself. |
| (8) ‚credit servicer' means any natural or legal person, other than a credit institution or its subsidiaries, which carries out one or more of the following activities on behalf of a creditor:<br><br>(a) monitors the performance of the credit agreement;<br><br>(b) collects and manages information about the status of the credit agreement, of the borrower and of any collateral used to secure the credit agreement;<br><br>(c) informs the borrower of any changes in interest rates, charges or of payments due under the credit agreement;<br><br>(d) enforces the rights and obligations under the credit agreement on behalf of the creditor, including administering repayments;<br><br>(e) renegotiates the terms and conditions of the credit agreement with borrowers, where they are not a ‚credit intermediary' as defined in Article 4(5) of Directive 2014/17/EU or Article 3(f) of Directive 2008/48/EC;<br><br>(f) handles borrowers' complaints. | [Deleted] |

The new Article 3a concerning the conditions for the sale of non-performing residential mortgages also goes beyond the current law in most Member States and notably in Article 3a(4) presents a duplication of processes for joint borrowers, stating that each borrower shall be approached individually and given a reasonable time within which to give or decline to give their consent. Article 3a(3) on the other hand dictates that firms will need to have their documentation approved by a NCA. Moreover, a creditor must provide a statement to the borrower containing sufficient information in order to make an informed decision. This statement must be approved in advance by the NCA

| Original text | Proposed amended text |
|---|---|
| **[None]** | **Article 3a Forbearance measures and foreclosure**<br><br>1. Creditors shall make every effort to avoid transferring consumer non-performing loans to third parties. Notably, Member States shall ensure that creditors exercise reasonable forbearance towards the distressed borrowers, in accordance with Article 28 of Directive 2014/17/EU and the EBA guidelines on arrears and foreclosure EBA/GL/2015/12.<br><br>2. Forbearance measures may include the following concessions to the consumer: (a) a total or partial refinancing of a credit agreement; (b) a modification of the previous terms and conditions of a credit agreement, which may include among others: i. extending the term of the mortgage; ii. changing the type of the mortgage (such as, changing the type of mortgage from a capital and interest mortgage to an interest only mortgage); iii. deferring payment of all or part of the instalment repayment for a period; iv. changing the interest rate up to a certain cap; v. offering a payment holiday. 3. Definition of non-performing loans adopted by the Commission Implementing Regulation (EU) 2015/227 shall be without prejudice to the creditors' forbearance obligations. 4. In case of foreclosure, when the credit is secured by the consumer's primary residence, return or transfer to the creditor or a third party of the security or proceeds from the sale of the security shall be sufficient to repay the credit. Article 28(4) of Directive 2014/17/EU shall be amended accordingly.<br><br>Article 3a Conditions for the sale of non-performing residential mortgages<br><br>(1) A loan secured by the mortgage of a residential property in any Member State shall not be transferred to a credit purchaser or credit servicer or any third party without the written consent of the borrower.<br><br>(2) When seeking consent from either an existing or a new borrower the creditor must provide a statement to the borrower containing sufficient information in order to make an informed decision. |

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| | (3) The statement provided pursuant to subsection (2) must be approved in advance by the national competent authority and shall include: (i) a clear explanation of the implications of a transfer including with respect to the borrower's membership status where the lender is a building society; and (ii) how the transfer might affect the borrower.<br><br>(4) Each borrower shall be approached individually and shall be given a reasonable time within which to give or decline to give their consent. |

Amendment 333 introduces a new Article 5a which outlines an important reputation criteria and lists the factors which should be taken into account that may cast doubt on an applicant's good repute, those which have an impact on the propriety of an applicant in past business dealings and the situations impacting past and present business performance and financial soundness. Three proposed amendments introduce a new Article 6a. One of those is entitled "specific requirements for business to borrower credit servicers", the second "requirements for credit servicers, creditors and credit service providers on conduct of business and debt collection" and the third one, also proposed by Dimitrios Papadimoulis and Matt Carthy like the first one, is called "debt buy-back". As can be gleaned from the titles, all three proposals deal with debt collection and in turn draw on the EU minimum common standards in debt collection. Naturally, this may be problematic for certain legacy contracts when evidence needs to be provided of the undefined term of a "credit contract".

| Original text | Proposed amended text |
|---|---|
| **[None]** | **Article 6a Specific requirements for business to borrower credit servicers**<br><br>1. The competent authorities of the home Member State shall supervise the business to borrower credit servicers compliance with the following minimum EU common standards for debt collection.<br><br>2. EU minimum common standards in debt collection include the obligation to:<br><br>(a) provide evidence of the debt, based on a credit contract, before any debt collection can take place;<br><br>(b) undertake mandatory notification of the status of a debt to the borrower by a formal notice before any debt collection can take place. This formal notice must contain all relevant information on the debt and be presented in a transparent, understandable way;<br><br>(c) ensure debt notification is sent to the borrower by registered post with an acknowledgment of receipt in a plain envelope and in a regulated format;<br><br>(d) provide debt notification including at least the following information:<br><br>(i) the identity of the creditor including their phone number/contact details;<br><br>(ii) the identity of the credit servicer, or their mandate; |

(iii) a notified, legally verifiable and documented proof of the existence of a debt, the detailed amounts requested, and the type of debt in question (capital, interest, penalties, procedural costs, or other);

(iv) a clear, understandable description of all relevant borrowers' rights, including their right to protection against harassment and misleading practices;

(v) contact details of where the borrower can receive information and advice.

3. Member States should adopt a list of the actions that credit servicers are prohibited from employing when dealing with the borrowers and connected to the debt collection process. These practices constitute harassment and should associated with dissuasive fines and criminal charges, depending on the practice. This list should include at least:

(a) misleading the borrower, including through improper legal threats or providing other misleading information;

(b) sending excessive numbers of dunning letters, phone or other reminders; including automatic messages and messages generated by any technology operated without human intervention;

(c) omitting to deduct previous payments from the requested amount;

(d) sending stigmatising or intimidating communications;

(e) contacting persons other than the borrower including the borrowers' relatives, friends, neighbours, colleagues;

(f) contacting borrowers at inappropriate times or places, including during working hours and at the workplace.

4. Member States shall ensure that the costs and remuneration of the credit servicer are never charged to the borrower.

5. Member States shall ensure that the borrower is entitled to use any defence against the credit servicer that was available to them in dealings with the original creditor and to be informed of the assignment.

6. Business to borrower credit servicers shall systematically use the EU standardised debt notification document before any debt collection can take place. EBA shall develop draft regulatory standards setting out the criteria for debt notification including for the mandatory debt notification document.

**Article 6a Requirements for credit servicers, creditors and credit service providers on conduct of business and debt collection**

1. Member States shall ensure that creditors, credit servicers and other credit service providers send the borrower before any debt collection a mandatory notification that provides without any ambivalence evidence of the debt, relied on a credit agreement. The debt notification must be exclusively made by a letter to the borrower in a white envelope without any specific writing and with acknowledgment of receipt. The notification shall not exceed 3 pages and include in clear and understandable for the general public language at least the following:

(a) the evidence of the debt, relied on a credit contract

(b) the identification of the creditor including its contact details;

(c) where relevant, the identification of the credit servicer and its rights;

(d) the legal base of the debts, the detailed amounts requested, and their source (capital, interest, penalties, procedural costs);

(e) a key selection of borrowers' rights description, including necessarily the protection against harassment and misleading behaviours; (f) a contact reference where to receive information and advice for borrowers under payment difficulties.

2. Member states shall ensure that no behaviour or practice causes damage to borrowers' privacy. 3. Member states shall ensure that creditors or credit servicer refrain from:

(a) omitting to deduct previous payments from the requested amount;

(b) sending stigmatising, intimidating or misleading communications, including improper legal threats or information that may be misleading for the borrower;

(c) contacting other persons than the borrower including borrowers' relatives

4. EBA shall develop regulatory technical standards to specify the provisions of paragraphs 2 and 3. EBA shall submit those draft regulatory technical standards to the Commission by ... [12 months after the date of entry into force of this Directive]. Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

5. EBA shall develop draft implementing technical standards that specify the mandatory format of the notification under paragraph 1. EBA shall submit those draft implementing technical standards to the Commission by [12 months from the entry into force of this Directive].

**Article 6a Debt buy-back**

1. When a credit institution intends to transfer a credit agreement to a credit purchaser at a specified price, before the transfer the credit institution shall allow the debtors concerned who are consumers to buy back their debt at the same price or with a small mark-up, which would be specified by the relevant competent authorities. For that purpose, credit institutions shall be required to disclose to the relevant competent authorities the necessary details of expected deals with credit purchasers.

2. Member States shall ensure that the buy-back option can be exercised in instalments.

The EBA is again mandated with establishing and maintaining a register of all transactions of non-performing loans in secondary markets in the Union. The new Article 8a introduced by the Amendments Report focuses specifically on the borrower's protection, while the four proposed versions of the new Article 11(1a) generally state that with regard to credit agreements concluded between creditors and consumers, a credit servicer will be required to obtain an authorization and establish a branch or a subsidiary in the member state where it intends to operate, the justification for that being that the supervisory authority of the firm's home country is competent to oversee its activities, while the host authority has limited power to do that. It also mentions that EU passporting is not an appropriate tool when it comes to consumer non-performing loans. As such, passporting on a services/consumers basis does not seem to be permitted and will not cause the market to take off. The same passporting justification also applies to one of the four proposed versions of Article 12 (1a), which, on the other hand, deals with the forbearance measures and foreclosure, already mentioned in the new Recitals and does not add substantially more information than the Recital, another indicator that the new amendments do not use the Recitals as originally foreseen. With regards to inspection rights, it remains to be seen if the ECB will look to apply any inspection powers if a servicer is connected to a bank it supervises.

| Original text | Proposed amended text |
| --- | --- |
| **[None]** | 1a. Credit servicers shall not be allowed to provide cross-border services in respect of credit agreements concluded between creditors and consumers, as well as credit agreements concluded between creditors and business borrowers secured by the immovable residential property which is the primary residence of a business borrower. In that case, credit servicers shall be authorised and supervised by the competent authorities of the Member State where they effectively operate. |
| **[None]** | 1a. Member States shall ensure that the competent authorities of the host Member State may review and evaluate the ongoing compliance by a credit servicer who provides services in that Member State with the requirements arising from this Directive as well as from other Union and national rules applicable to the credit agreement and to its debtor. |
| **[None]** | 1a. Credit servicers shall not be allowed to provide cross-border services in respect of credit agreements concluded between creditors and consumers. In that case, credit servicers shall be authorised and supervised by the competent authorities of the Member State where they effectively operate. |
| **[None]** | 1a. Credit servicers shall not be allowed to provide cross-border services in respect of credit agreements concluded between creditors and consumers. In that case, credit servicers shall be authorised and supervised by the competent authorities of the Member State where they effectively operate. |


# Outlook and next steps

In general, similar to the journey the Securitization Regulation took, the final product here is shaping up to be rather different from the initial version. This is mostly due to the political influence exerted by various members of the ECON committee. It should be remembered that this is not the final version of the document and as such all these amendments may be approved or rejected before the final version of the document is published in the Official Journal, and indeed, as we suggested in April 2019, it is still possible that a lot of items that are in dispute or causing confusion are split out for further fleshing out in the form of a Commission Delegated Regulation and other further materials. It is certainly interesting to observe the functioning of the EU legislative apparatus and how it is being swayed in one direction or another, especially when it concerns a matter as central to preventing the resurgence of NPLs and protection of consumers as this one.

**If you would like to discuss any of the items mentioned above, in particular how to forward-plan any impacts on operationalizing compliance across documentation and non-documentation workstreams or how these priorities may affect your business or your clients more generally, please contact our Eurozone Hub key contacts.**

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CSBRAND-24172_Client_Alert_brochure_02 — 06/03/2020