

Transposition of the Credit Servicing Directive

On 24 January 2023, the Department of Finance published its **Consultation Paper**¹ on the transposition of the EU **Credit Servicing Directive**² (the "**Directive**") published in the Official Journal of the EU on 8 December 2021.

The Directive contains a number of discretions which Member States may exercise when transposing the provisions into national law. The Consultation Paper aims to generate industry feedback on these discretions. Submissions are due by 8 March 2023 and will be considered as part of the transposition process.

The deadline for the transposition of the Directive into Irish law is 29 December 2023.

The Consultation Paper

The Consultation Paper invites responses on ten questions relating to Member State discretions, including whether:

- credit servicers should be allowed to receive and hold funds from borrowers
- EU-based credit purchasers must appoint credit servicers in respect of credit arrangements other than non-performing loans ("**NPLs**") concluded with customers
- to allow natural persons to service credit agreements which fall within the scope of the Directive.

The Department of Finance has offered no indication as to whether any of the discretions will be exercised.

Effect on the existing domestic credit servicing regime

The scope of the Directive is limited to NPLs originated by EU credit institutions transferred or sold after 29 December 2023. As such, the Directive will not apply to:

- performing loans originated by EU credit institutions
- NPLs originated by EU credit institutions transferred or sold before 30 December 2023
- NPLs transferred by an EU credit institution to another EU credit institution; or
- performing loans or NPLs originated by non-credit institutions.

Due to the Directive's limited application, the Consultation Paper proposes to retain the existing domestic credit servicing regulatory framework in respect of Irish NPLs that fall outside the scope of the Directive. We have previously written on developments in the Irish credit servicing regime over the last two years [here](#)³, [here](#)⁴ and [here](#)⁵; in practice, adoption of the Directive will result in the operation of two distinct regulatory regimes. The most striking difference between the two is that the current

¹ "Minister McGrath announces consultation process on Credit Servicers' Directive" (www.gov.ie, 24 January 2023).

² Directive (EU) 2021/2167.

³ "New Regime for Consumer Hire Purchase, PCP Finance and Point of Sale Lending", 15 July 2021.

⁴ "Bringing New Retail Credit Providers in Scope", 6 April 2022.

⁵ "Widening the Net of Regulation of Retail Credit Firms in Ireland", 15 June 2022.

regime regulates both legal title holding and maintaining key control over portfolio decision making, whereas these are not regulated by the Directive. Given that the Irish NPL market has adapted to the credit servicers' assuming such duties, it will be interesting to see whether they continue to do so in respect of portfolios in scope of the Directive in due course.

Greater clarity is expected with respect to the treatment of mixed portfolios after the consultation period concludes.

The tenth and final question posed by the Consultation Paper relates to the automatic authorisation under the Directive's framework of credit servicing firms subject to the existing Irish authorisation and regulatory framework. Interestingly, the prologue to this question notes that the existing regime is "*considered broadly equivalent*" to that set out in the Directive. As such, automatic recognition of credit servicing firms from the date of transposition is likely. If, however, this discretion is not exercised, entities currently providing credit servicing activities under Irish law will be permitted to continue to operate for a period of 6 months after the transposition deadline of the Directive before requiring authorisation under the transposing law.

The Directive

The launch of the Consultation Paper provides a timely opportunity to review the key measures introduced by the Directive and its general purpose.

The Directive is intended to regulate the secondary market for NPLs originated by EU credit institutions and, in particular, to provide a regulatory framework for purchasers and servicers of credit agreements while enhancing safeguards for borrowers.

In addition, the Directive provides for the establishment of a new authorisation and supervision framework for 'credit servicers' which, in respect of Ireland, is to be overseen

by the Central Bank of Ireland (the "**Central Bank**"). Authorised credit servicers will be able to passport services across the EU once authorised in their home Member State.

The framework introduced by the Directive intends to harmonise regulatory requirements across Member States, thereby reducing the obstacles to purchasing, selling and servicing cross-border credit in the EU and increasing market competition and integration. It is intended that the increased regulatory alignment across the EU will contribute towards the prevention of the accumulation of NPLs on credit institutions' balance sheets, so that they can effectively perform their role of financing the economy.

The Directive also makes certain amendments to the EU Consumer Credit Directive (2008) and the EU Mortgage Credit Directive (2014) which amendments will, inter alia, oblige creditors to have adequate policies in place so that they adopt reasonable forbearance procedures before initiating default enforcement proceedings.

Key Measures introduced by the Directive

The Directive places certain obligations on 'credit institutions', 'credit servicers' and 'credit purchasers', the details of which are summarised below.

Credit institutions

Credit institutions will be required to provide a prospective credit purchaser with information regarding a creditor's rights under a NPL or with the NPL itself (and, if applicable, the collateral) in order to enable the purchaser to conduct a thorough assessment of the value of the NPL before entering into a contract for transfer. This information is to be communicated using reporting templates to be developed by the European Banking Authority (EBA).

On a biannual basis, credit institutions which transfer NPLs to credit purchasers will be

required to provide the Central Bank with the following information:

- the Legal Entity Identifier (LEI) of the credit purchaser, or where the LEI does not exist, the address of the credit purchaser and details of any person considered a qualifying holder of the credit purchaser;
- the aggregate outstanding balance of the creditor's rights under the NPL or of the NPL transferred;
- the number and size of the creditor's rights under the NPL or of the NPL transferred; and
- whether the contract for transfer includes the creditor's rights under the NPL, or the NPL themselves concluded with consumers and the types of assets securing the NPL, where applicable.

Credit purchasers

Where a credit purchaser domiciled in the EU does not itself perform credit servicing activities, an authorised credit servicer must be appointed in respect of the enforcement of the creditor's rights under the NPL concluded with customers.

A credit purchaser not domiciled in the EU will be required to designate in writing an EU representative which shall be fully responsible for compliance with the obligations imposed on the credit purchaser under the Directive.

Member States are required to ensure that credit purchasers and credit servicers act in accordance with prescribed standards when engaging with borrowers. These standards include acting in good faith and communicating with borrowers in a manner which does not constitute harassment, coercion or undue influence. Entities may need to update their policies and procedures to comply with this requirement. It is not clear how the Central Bank will monitor adherence under this article and this is certainly an item to be noted once the transposing legislation is published.

In advance of the commencement of the agreement to provide credit servicing activities, the credit purchaser will be required to inform the Central Bank of the identity of the appointed credit servicer and of any subsequent changes to this arrangement.

Credit servicers

Credit servicers operating within the scope of the Directive will be required to obtain authorisation from the Central Bank before providing such services. The Directive sets out the procedure for authorisation and it is expected that the Central Bank will provide further details in this regard in due course. As detailed above, credit servicing firms authorised under the domestic regime may be automatically registered under the EU framework, subject to the Irish Legislature exercising their discretion under the Directive. Credit servicers, having obtained an authorisation in a home Member State, have the right to passport credit servicing activities across the EU, subject to certain conditions.

The details of any outsourcing arrangements between credit servicers and third parties to perform any credit servicing activities must be communicated to the Central Bank prior to the commencement of any such arrangements. Credit servicers must establish and maintain effective and transparent procedures for the handling of complaints from borrowers. These procedures must be free of charge to the borrower. Details of the complaint and the measures taken to address the issue should be recorded by the credit servicer.

The Directive also mandates that a credit servicing agreement shall, amongst other requirements, provide for the following:

- an undertaking by the parties to comply with applicable EU and Irish law (particularly with respect to consumer and data protection);
- a clause requiring fair and diligent treatment of the borrowers; and

- a clause requiring the credit servicer to provide notification to the credit purchaser before outsourcing any of its credit servicing activities to a third party.

The Directive also prescribes the information that a credit purchaser or its credit servicer must provide to a borrower following the transfer of a NPL.

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