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**NEW EU RULES ON NON-PERFORMING LOANS:  
EBA ISSUES FINAL REPORT ON DISCLOSURE TEMPLATES**

## NEW EU RULES ON NON-PERFORMING LOANS: EBA ISSUES FINAL REPORT ON DISCLOSURE TEMPLATES

The European Banking Authority (EBA) has issued its final report on the new disclosure templates to be used by EU banks selling non-performing loans (NPLs) under the EU Directive on credit servicers and credit purchasers. The EBA's final report makes significant changes to its consultation draft of the templates but the templates will still impose extensive disclosure obligations on EU banks selling NPLs and EU banks may need to make significant changes to their systems to comply with the new requirements.

The EU **Directive** on credit servicers and credit purchasers was adopted in 2021 and Member States are required to bring their implementing rules into effect on 30 December 2023. For more information on the Directive and the EBA's earlier consultation, see our December 2021 briefing: *Implementing the new EU rules on non-performing loans*, available [here](#), and our June 2022 briefing: *New EU rules on non-performing loans: EBA consults on disclosure templates*, available [here](#).

Among other things, the Directive will require EU banks selling NPLs to non-bank "credit purchasers" to disclose to prospective buyers the "necessary information regarding a creditor's rights under [an NPL], and, if applicable, the collateral, so as to enable the prospective credit purchaser to conduct its own assessment of the value of the creditor's rights ... and the likelihood of recovery of the value of [the NPL]". EU banks will have to use prescribed data disclosure templates for this purpose and will also have to use the same templates if they transfer NPLs to other banks (cutting across the market practice under which the parties agree on the scope of the information to be provided by the seller as well as any applicable principles of *caveat emptor*).

The EBA has now published its **final report** setting out its final draft implementing technical standards (ITS) under the Directive including the templates to be used by banks selling NPLs. The EBA will submit its finalised proposals to the European Commission following which the Commission will adopt the ITS (with or without amendments). This briefing assumes that the ITS are adopted in the form set out in the EBA's final report.

The objective of the draft ITS is to provide a common standard for NPL transactions across the EU to enable cross-country comparison and thus reduce information asymmetries between sellers and buyers of NPLs. EU banks will have to provide granular loan-by-loan information to enable prospective buyers to conduct their analysis, financial due diligence and valuation of NPLs. The EBA has reflected many industry comments in its final report. However, the ITS may still make it more difficult for EU banks to sell NPLs and thus may impede the process of moving NPLs off EU bank balance sheets.

### Key issues

- EBA has issued its final draft disclosure templates to be used by EU banks selling NPLs
- The European Commission will now adopt the templates (with or without further amendments)
- The new rules will apply from 30 December 2023 with relief for sales of some existing NPLs
- EU banks will have to disclose extensive information to buyers using templates
- EBA proposes a wider range of exemptions and derogations for some types of transactions, including securitisations and sales of syndicated loans
- EU banks will need new systems to manage data and disclosures
- EU banks that cannot comply with the new rules may not be able to sell NPLs
- EU banks that disclose inaccurate or incomplete information may be subject to fines and damages claims

### What is an NPL?

In summary, the Directive regulates the sale and purchase and servicing of NPLs, that is to say:

- credit agreements and rights under credit agreements;
- originated by credit institutions established in the EU (EU banks); and
- classified as non-performing in accordance with article 47a of the EU capital requirements regulation (CRR).

The definition of a credit agreement covers any syndicated or bilateral agreement under which an EU bank grants a credit in the form of a deferred payment, a loan or other similar financial accommodation to a borrower, including both commercial and consumer borrowers.

### Are there any exemptions?

The final draft ITS state that they apply to sales or transfers of portfolios of NPLs held in the banking book of EU banks, indicating that they would not apply to sales or transfers of single loans.

The final draft ITS also significantly expand the range of exemptions available to EU banks selling portfolios of NPLs compared to the consultation draft. EU banks will not be required to complete the templates for:

- sales or transfers of NPLs held in the selling bank's trading book (i.e., EU banks are only required to use the templates where they hold the NPLs being sold or transferred on their banking book);
- sales or transfers of loans that are not classified as non-performing exposures in accordance with Article 47a of CRR by the selling bank at the time that the selling bank enters into a contract for the sale of the loan;
- sales of NPLs as part of sales of branches, sales of business lines or sales of clients' portfolios which are not limited to non-performing loans and transfers of non-performing loans as part of an ongoing restructuring operation of the selling bank within insolvency, resolution or liquidation proceedings;
- sales or transfers of NPLs through securitisation where the EU securitisation regulation applies and the provision of the related information is governed by the delegated and implementing regulations under that regulation;
- sales or transfers of NPLs pursuant to credit default swap, total return swap and other derivative contracts, contracts of insurance and sub-participation contracts; and
- sales or transfers of NPLs pursuant to a financial collateral arrangement or repurchase or lending transactions on loans.

In addition, the final draft ITS state that:

- only banks incorporated in the EU and subject to CRR are required to use the templates (so that the requirements do not apply to non-EU banks even if they have a branch in the EU, although Member States may extend the Directive obligations to local branches of non-EU banks when they adopt their national implementing rules);
- the ITS do not apply where banks sell or transfer bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets;
- the ITS only apply where the transaction in relation to the NPL is a sale or transfer involving a change in the lender of record under the relevant credit agreement and the ITS do not apply when a bank enters into derivative, insurance or sub-participation contracts in relation to NPLs or transfers NPLs pursuant to such contracts; and
- the ITS do not apply to sales or transfers of NPLs by way of collateral or repurchase or lending agreements.

The final report states that the scope of application of the ITS should be the same as the scope of application of the Directive. Nevertheless, it remains unclear whether some transactions exempted from the scope of the ITS remain in scope of the Directive for the purposes of other obligations, such as selling banks' general obligation to provide "necessary information" to credit purchasers and to report sales or transfers of NPLs to the competent authorities and the obligations of credit purchasers and credit servicers with respect to the NPLs.

There is no blanket exemption from the requirements to use the templates for sales of NPLs under syndicated loan facilities or of NPLs to non-EU borrowers (but see below).

## **What information must be provided to prospective buyers?**

The final draft ITS create six templates to be completed by the selling bank on a loan-by-loan basis. Some templates or fields may need to be completed more than once, e.g., where there are multiple borrowers or guarantors or multiple types of collateral for a loan.

The final draft templates specify 129 data fields (including five identifiers) of which 69 fields are mandatory (counting identifiers only once). The consultation draft of the ITS had specified 157 fields including identifiers (and had also specified 135 fields as mandatory for larger loans) and the EBA's May 2021 discussion paper had specified 230 fields (although that had only specified 30 to 70 fields as "critical").

The final draft ITS provide that data fields are either mandatory or non-mandatory. The final draft ITS state that EU banks must provide information for all mandatory fields (unless the instructions allow otherwise) and state that EU banks must use reasonable efforts to provide information for the fields that are not marked as mandatory in the data glossary.

The final draft ITS allow a selling bank to treat the mandatory data fields as non-mandatory for sales or transfers of:

- a single NPL (even though the final draft ITS state that they only apply to sales of portfolios of NPLs);
- several NPLs to a single borrower;
- NPLs under syndicated loan facilities;
- NPLs to non-EU borrowers;
- NPLs where an EU bank is selling the NPLs to a member of its own group;
- NPLs that have been acquired by the selling bank from an entity other than an EU bank subject to CRR (at least recognising that, in these cases, selling banks may not have access to the required information); and
- NPLs to a natural person outside the scope of the EU Consumer Credit Directive.

However, in these cases, EU banks must still use reasonable efforts to provide the information for both the non-mandatory fields and the mandatory fields treated as non-mandatory, even if it would not be customary to provide that information to a prospective buyer (at least where the sale or transfer is of a portfolio of NPLs).

In summary, the templates require the following information:

- The **counterparty template** requires the bank to provide information identifying the counterparties to the exposure (“borrower” and “protection provider”). For corporate borrowers, the data fields include the legal name, address, name of corporate group, data from the counterparty’s latest available financial statements, date of last contact and details of insolvency and restructuring proceedings.
- The **relationship template** requires the bank to specify the identifiers for each counterparty, loan, mortgage agreement and protection which are then used to establish the relationship between the other completed templates.
- The **loan template** requires disclosure of information on the loan agreement and the loan, including the inception date, governing law, currency, maturity and interest terms, outstanding nominal amount and status of any legal proceedings or forbearance measures.
- The **collateral, guarantee and enforcement template** requires disclosure of information on the type of collateral provided for the loan, including the location, date of completion of construction, area, energy performance and occupancy of real estate, the seniority of the security and the amount secured by any prior ranking collateral, internal and external valuations of the collateral and details of the enforcement processes underway.



- The **mortgage guarantee template** requires disclosure of specific information on mortgage guarantees including the maximum amount the selling bank is entitled to receive on foreclosure.
- The **historical collection and repayment template** requires the bank to provide details of historical collections over the last three years (aggregated by month) before the cut-off date. The collections are aggregated per month.

Despite the revisions designed to improve the proportionality of the final draft ITS, many of the proposed requirements would still present significant challenges for EU banks. For example, the collateral template provides for disclosure of the selling bank's latest internal and external valuations of collateral as mandatory fields (even though this will raise concerns about the selling bank's liability and its ability to disclose external valuations).

The templates are accompanied by a data glossary and instructions for filling in the templates, including links to corresponding definitions in the ESMA templates used for non-performing loan securitisations, the ECB's ANACREDIT framework, the FINREP supervisory reporting requirements, CRR and IFRS/IAS. Generally, the final draft ITS require information to be disclosed as of a reference date (the cut-off date) selected by the bank.

The final draft ITS remove the different treatment for NPLs with a carrying amount below a materiality threshold of €25,000 euros and the requirement to use specific "no data" codes where specified information is not available.

## Do the templates apply when selling existing loans?

EU banks will have to use the data templates for transfers of NPLs held in their banking book taking place on or after 30 December 2023 where the loans were originated on or after 1 July 2018 and became non-performing after 28 December 2021. However, for NPLs originated between 1 July 2018 and the entry into force of the ITS, EU banks need only complete the data templates with the information already available to them. The final draft ITS now state that the date of conclusion of the relevant loan agreement is treated as the origination date for these purposes.

The final report accepts that the templates do not apply to EU banks selling other existing NPLs. However, the EBA encourages EU banks to have regard to the templates and the requirements of the draft ITS and fill in the templates on a "best-efforts" basis even where the templates do not apply. National law implementing the Directive may impose additional obligations.

EU banks originating loans after – or purchasing loans originated after – the ITS enter into force may need to ensure that their systems can generate the required information if they wish to sell the loans after they become non-performing. They may also need to review their systems to check that they can establish what information on earlier loans is available to them should they subsequently wish to sell those loans.

The ITS will probably enter into force in early 2023 but EU banks may not have much notice of the exact date of entry into force – the draft specifies that the ITS will enter into force 20 days after publication in the Official Journal. The EBA rejected comments calling for a delayed entry into force to allow banks time to implement the new requirements.

NPL originated	Loan became non-performing	Information required to be provided
After entry into force of ITS	After entry into force of ITS	Information specified in templates
On or after 1 July 2018 but before entry into force of ITS	On or after 28 December 2021	Information specified in templates already available to seller
On or after 1 July 2018 but before entry into force of ITS	Before 28 December 2021	Templates do not apply.
Before 1 July 2018	At any time before sale	

## What other requirements would apply?

The draft ITS provide that EU banks selling NPLs must:

- ensure that all required data provided to prospective buyers is complete and accurate;
- provide the required information to prospective buyers before entering into a contract for the sale of the NPLs (the recitals state that the information should be provided before the prospective buyer commits to the price) and, unless otherwise agreed by the buyer, in an electronic and machine-readable form;
- comply with the EU general data protection regulation in relation to any personal data disclosed and identify and ensure adequate protection of any disclosed information that is subject to bank secrecy or other confidentiality requirements, including by entering into appropriate confidentiality agreements with prospective buyers;
- use secure channels complying with applicable industry standards to provide required information to prospective buyers (e.g., virtual data rooms).

The European Commission *Guidelines for a best execution process for sales of non-performing loans* (October 2022, available [here](#)) indicate that selling banks can choose a single or two phase process for selling NPLs, where the latter is split between a non-binding offer and a binding offer phase. The EBA states that selling banks can choose only to provide the template information at the start of the second phase to those buyers that have signed non-disclosure agreements.

The final draft ITS remove the additional specific requirements for selling banks to ensure that the information provided to prospective buyers is subject to appropriate internal governance arrangements (although the recitals still mention this and the EBA states that the Commission guidelines may be used a reference for these). They also remove the specific obligation on selling banks to provide updated information to

prospective buyers if the selling bank discovers errors in any information that has been provided.

### **Will buyers request additional information from banks selling loans?**

Credit purchasers may request additional information from banks selling loans so that the credit purchasers can comply with their own obligations under the Directive (such as their obligations to appoint a credit servicer or, for non-EU credit purchasers, an EU representative). For example, credit purchasers may need to know whether the loans being sold fall within the definition of an NPL so as to trigger the credit purchaser's own obligations under the Directive, whether any NPLs being sold have been accelerated and whether the borrowers of any NPLs include individuals who are "consumers" or (for non-EU credit purchasers) other natural persons or micro, small and medium-sized enterprises (resulting in an obligation to appoint a credit servicer). They may request additional information from banks selling NPLs depending on how Member States exercise the national option to extend the obligations of credit purchasers under the Directive.

Similarly, buyers that are EU banks may request additional information from EU banks selling loans so that the buying bank can comply with its own obligations under the Directive, at least if the buying bank will hold the loan on its banking book (and thus might be required to complete the templates on any resale if the loan becomes non-performing). For example, banks buying loans that are not already classified as NPLs may wish to know whether the loan being purchased was originated by an EU bank (and the date of origination) and to receive sufficient information to be able to complete the disclosure templates if they subsequently sell the loan after it has become non-performing.

Buyers may also continue to request additional information, such as copies of the credit documentation, which is not required to be disclosed by the ITS. The EBA encourages banks providing additional information to refer to the data fields and related definitions referred to in version 1.1 of the 2018 EBA NPL transaction data templates (available [here](#)).

### **What are the consequences of providing incorrect information?**

The EBA's feedback states that the draft ITS do not envisage any specific supervisory measures or sanctions for non-compliance "as their application relies on ... market discipline". However, the Directive requires Member States to adopt national rules for effective, proportionate and dissuasive administrative penalties and remedial measures where EU banks fail to comply with their disclosure obligations to credit purchasers under the Directive (and they may impose criminal penalties for non-compliance instead). The EBA also indicates that competent authorities may assess EU banks' availability of information and use of the templates as part of their supervisory activities related to NPL or credit risk management.



In addition, EU law may require Member States' courts to provide buyers of NPLs with a right to compensation if the bank fails to comply with the requirements of the ITS, if they are considered to be designed to protect the interests of buyers. It would be for national law to define the rules providing for compensation, whether a buyer also has rescission or other remedies and whether the bank and buyer are free to agree to exclude or limit the bank's liability by contract. However, the final report does state that the selling bank's liability "is out of the scope of this draft ITS as it is contractually defined with the prospective buyer in line with the industry best observed practices as set out in the EU Commission Guidelines for a best execution process for sales of NPL on secondary markets".

### **What will be the impact on secondary market trading documentation?**

EU banks subject to the disclosure obligations will need to consider the impact on documentation they use when selling NPLs, in particular whether their existing confidentiality agreements, and any limitations or exclusions of liability, are adequate in the context of the new requirements.

EU banks subject to the disclosure obligation will also need to consider whether the courts would give effect to any exclusions or limitations agreed with the buyer on any liabilities of the seller to the buyer in respect of the information provided. The effectiveness of exclusions or limitations of liability will depend on the Member State or third-country law chosen as the governing law of the agreement between the seller and the buyer and the courts specified in the agreement to resolve any disputes between the parties. EU banks may also consider transferring the credit risk on NPLs using sub-participations or other transactions that fall outside the scope of the ITS.

EU banks will also need to put in place new systems to comply with the associated Directive requirements to file reports with regulators on their sales of NPLs to credit purchasers (which will in practice mean ensuring that banks obtain the LEI of any credit purchaser).

### **What about the other open issues under the Directive?**

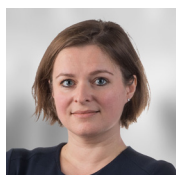
The EBA's final report does not address any of the open issues relating to the other obligations of selling banks, credit purchasers or credit servicers under the Directive, e.g., the application of the obligations of credit purchasers to non-EU banks that buy NPLs, the application of the obligations of credit purchasers and credit servicers in relation to loans acquired by credit purchasers before 30 December 2023 and the treatment of facility agents and security trustees under the Directive. However, the proposed derogation in the final draft ITS suggests that the EBA considers that the Directive does apply to sales and purchases of loans to non-EU borrowers and the servicing of such loans (which could have an impact on EU banks that originate loans to non-EU borrowers cross-border or through non-EU branches and EU and non-EU purchasers and servicers of those loans). These open issues may be addressed by guidance from the Commission, the EBA or national regulators, common industry approaches or national implementing rules.

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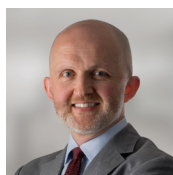
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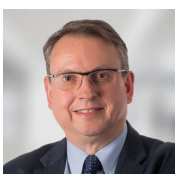
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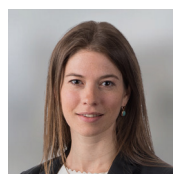
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