

## THE NEW EU RULES ON NON-PERFORMING LOANS ARE TRANSPOSED INTO FRENCH LAW

The EU directive<sup>1</sup> on credit servicers and credit purchasers which regulates the sale, purchase and servicing of non-performing loans<sup>2</sup> ("NPLs") originated by EU credit institutions (the "Directive") has been transposed into French law, with effect from 30 December 2023.

The Directive was published in the EU Official Journal on 8 December 2021 and entered into force on 28 December 2021. The [French Ordonnance](#)<sup>3</sup> transposing the necessary changes into the French Monetary and Financial Code and the related [Decree](#)<sup>4</sup> were published on 6 December 2023 and 20 December 2023 respectively, just in time for the deadline for transposition of 29 December 2023. Entities currently engaged in in-scope credit servicing activities will have until 29 June 2024 to comply with the new rules. In terms of future developments, the *Autorité de contrôle prudentiel et de résolution* (the "ACPR") will establish and publish the procedure relating to complaints from borrowers concerning credit purchasers, credit servicers and credit servicing service providers in due course<sup>5</sup>.

### What is the overarching objective of the Directive?

The Directive aims to reduce the accumulation of non-performing loans on the balance sheets of European credit institutions by improving the secondary market for NPLs through the creation of a common legislative framework in the European Union for the sale, purchase and servicing of non-performing loans originated by EU banks. It is part of a wider effort to tackle the risk of high levels of NPLs<sup>6</sup>, seen by the European Commission as a threat to both economic growth and financial stability in Europe. If European credit institutions are burdened by illiquid NPLs on their balance sheets<sup>7</sup>, they will be less able to free up funds for the creation of jobs and growth within the European Union. This has been an issue in the past in Eastern and Southern Europe, as recognised by the French authorities<sup>8</sup>. From a policy perspective, the creation of an efficient, competitive and transparent cross-border secondary market for NPLs is also seen as necessary for the completion of the banking and capital markets unions in Europe.

### How faithful to the Directive has the transposition into French law been?

The Directive was deliberately drafted to leave little room for arbitrage between individual EU member states. In relation to where the French legislator was accorded discretion, it decided:

- to authorise credit servicers in France to receive and hold funds from borrowers whilst performing credit servicing activities<sup>9</sup>, in keeping with current French market practice;

<sup>1</sup> Directive (EU) 2021/2118 of 24 November 2021.

<sup>2</sup> Loans that are originated by EU credit institutions and classified as a non-performing exposure in accordance with the EU capital requirements legislation (i.e. Article 47a of Regulation (EU) no. 575/2013) at the time of the transfer.

<sup>3</sup> Ordinance no. 2023-1139 of 6 December 2023 on credit purchasers and credit servicers.

<sup>4</sup> Decree no. 2023-1211 of 20 December 2023 on credit purchasers and credit servicers.

<sup>5</sup> Article L. 54-11-33 of the Monetary and Financial Code.

<sup>6</sup> See the European Commission's [Action Plan](#).

<sup>7</sup> The European Commission sees this as a risk due to the lack of incentives for credit institutions to offload their stock of NPLs, caused by a lack of competition among credit servicers enabling them to charge credit purchasers high costs, which in turn leads to low prices in the secondary markets for NPLs.

<sup>8</sup> Report to the *Président* on Ordinance no. 2023-1139 of 6 December 2023 on credit purchasers and credit servicers.

<sup>9</sup> Article L. 54-11-6 of the French Monetary and Financial Code.

- to apply the rules already applicable to service providers supervised by the ACPR in France with regards to supervision and the application of sanctions legislation, in particular in relation to anti-money laundering and the financing of terrorism<sup>10</sup>;
- not to apply the provisions of the Directive to justice commissioners (*commissaires de justice*), public notaries and lawyers engaged in credit servicing activities (subject to other rules specifically applicable to them)<sup>11</sup>; and
- while the Directive is only expressed to apply in relation to credit agreements "issued by"<sup>12</sup> a credit institution established in the European Union, to extend the regime to credit agreements issued by French *sociétés de financement*<sup>13</sup>.

### **What are the key points to note for sellers, purchasers and servicers in France in relation to the Directive, as transposed into French law?**

New obligations will be imposed upon (i) EU credit institutions or *sociétés de financement* financing companies selling such NPLs, (ii) purchasers of such NPLs, which are not EU credit institutions ("**credit purchasers**") and (iii) entities servicing NPLs on behalf of credit purchasers ("**credit servicers**"). Credit servicers are entities that:

- manage and enforce the rights and obligations of creditors under NPLs on behalf of a credit purchaser; and
- carry out one or more of the following activities:
  - collecting and recovering payments due;
  - renegotiating with the borrower the terms of an NPL;
  - administering complaints in relation to a creditor's rights; and/or
  - informing the borrower of changes to interest rates or any payments terms relevant to a creditor<sup>14</sup>.

#### *EU credit institutions and French sociétés de financement selling NPLs*

##### **• Pre-sale disclosure requirements:**

As a general rule, EU credit institutions or French *sociétés de financement* selling NPLs (other than NPLs held on their trading book) must disclose to prospective credit purchasers "the necessary information regarding the creditor's rights and any collateral to enable the prospective purchaser to assess the value of those rights and the likelihood of recovery"<sup>15</sup>.

Prescribed data disclosure templates have been published by the European Banking Authority in recently adopted [implementing technical standards](#), in order to ensure that this objective standard is met and there is the necessary standardisation to bring about efficiencies in the secondary market. There are various exclusions to the use of the data disclosure templates, such as:

- sales of NPLs in the context of securitisations and sub-participations;
- sales of syndicated loans;
- intra-group transfers;
- sales of a single NPL; or

<sup>10</sup> Article L. 561-2 20° of the Monetary and Financial Code.

<sup>11</sup> Article L. 54-11-3 of the Monetary and Financial Code.

<sup>12</sup> But we note in this respect that the Final Report on Draft ITS on NPL Transaction Data Templates seems to consider that the regime should apply to the sale, by a CRR credit institution, of an exposure booked by such credit institution as an NPL, but that was not initially originated by a CRR credit institution.

<sup>13</sup> *Sociétés de financement* are regulated legal entities, other than credit institutions, which carry out credit transactions on their own behalf and in the normal course of business, subject to the conditions and limits defined in their authorisation (Article L. 511-1 of the Monetary and Financial Code).

<sup>14</sup> Article L. 54-11-1 6° of the Monetary and Financial Code.

<sup>15</sup> Article L. 54-11-25 of the Monetary and Financial Code.

- sales of NPLs to a single purchaser<sup>16</sup>.

In addition, not all of the fields in the disclosure templates are mandatory (only 78 out of 135 data fields are mandatory<sup>17</sup>), although reasonable efforts must be used to complete "non-mandatory" fields<sup>18</sup>.

- **Post-sale reporting:**

EU credit institutions must report details of their sales of NPLs to credit purchasers to authorities in their own EU Member State and the relevant 'host' Member State of the relevant credit purchaser (if different) on a biannual basis<sup>19</sup>, although the ACPR reserves the right to increase the frequency of such reporting up to a quarterly basis in specific circumstances<sup>20</sup>. The minimum information to be reported includes (i) the legal entity identifier of the credit purchaser, (ii) the aggregate outstanding balance of the seller's rights under the NPLs, (iii) the number and size of seller's rights sold to a credit purchaser and (iv) whether the transfer includes NPLs with consumers and the type of collateral, if applicable<sup>21</sup>.

#### *Credit purchasers*

Credit purchasers having their statutory headquarters in France must appoint an authorised credit servicer or an EU credit institution to service purchased NPLs<sup>22</sup>. Non-EU credit purchasers are only required to appoint a credit servicer for NPLs where the borrower is a natural person, including consumers and independent workers, or micro, small or medium-sized enterprises<sup>23</sup>. Any such appointment should be notified to the relevant competent authority (the ACPR in France).

The regime introduced by the Ordinance is without prejudice to the French banking monopoly rules<sup>24</sup>, meaning that credit purchasers will need to ensure that they have the relevant banking license(s) or authorisation(s) to purchase NPLs in France (or can rely on exemptions).

The regime does not apply to the servicing of creditors' rights under a credit agreement, or the servicing of a credit agreement itself, by (i) an alternative investment fund manager (AIFM) authorised or registered under the AIFM Directive, (ii) an authorised UCITS management company, (iii) an investment company authorised under the UCITS Directive (without a management company) or (iv) an EU credit institution.

In the case of a securitisation of NPLs, the French transposition provides an exemption for alternative investment funds managed by a licensed<sup>25</sup> portfolio management company from the requirement to appoint an authorised credit servicer or an EU credit institution to service purchased NPL. This exemption should protect securitisation funds and securitisation companies constituted or incorporated in France (which are alternative investment funds under French law) but not necessarily securitisation special purpose entities incorporated outside of France, which would not typically qualify as alternative investment funds under the laws of their jurisdiction of incorporation. Credit purchasers that are securitisation special purpose entities incorporated outside of France will therefore need to assess on a case-by-case basis whether the regime applies to them.

The French transposition does not apply to loans transferred before 30 December 2023. This means that non-bank entities that hold previously acquired loans on 30 December 2023 are not subject to the ongoing obligations of credit purchasers in relation to such loans even if those loans meet the definition of an NPL<sup>26</sup>.

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<sup>16</sup> See "Application of the requirements of the NPL transaction data templates" in the Final Report on Draft ITS on NPL Transaction Data Templates dated 16 December 2022.

<sup>17</sup> Data Glossary, pages 46-85 of the Final Report on Draft ITS on NPL Transaction Data Templates dated 16 December 2022.

<sup>18</sup> Paragraph 27 of the Final Report on Draft ITS on NPL Transaction Data Templates dated 16 December 2022.

<sup>19</sup> Article R. 54-11-5 of the Monetary and Financial Code.

<sup>20</sup> Article R. 54-11-6 of the Monetary and Financial Code.

<sup>21</sup> Article L. 54-11-26 of the Monetary and Financial Code.

<sup>22</sup> Article L. 54-11-27 of the Monetary and Financial Code.

<sup>23</sup> Article L. 54-11-27 of the Monetary and Financial Code.

<sup>24</sup> Article L. 54-11-1-3° of the Monetary and Financial Code, cross-referencing article L. 511-5 of the same code.

<sup>25</sup> This assumes that the reference to "agr  e" in article 54-11-3, I, (b) is an error and should actually be read "agr  e" so that it relates to the management company rather than the fund. It should be noted that, under this interpretation, the French transposition deviates from the Directive as this provision would not apply to "registered" management companies under the AIFM Directive.

<sup>26</sup> Article L. 54-11-3, II, c, of the Monetary and Financial Code.

*Credit servicers*

- **Authorisation from the ACPR:**

Unless they are EU credit institutions or EU management companies acting on behalf of funds they manage, credit servicers having their headquarters or central administration in France will need to obtain an authorisation from and be subject to supervision by the ACPR in order to carry out credit servicing activities in France, with the procedure and eligibility conditions for the obtention of such authorisation set out in the Monetary and Financial Code<sup>27</sup>. For example, the credit servicer must be profit making and either have its registered office or central administration in France. In addition, it must be solvent, its officers must have a clean criminal record and it must have proper corporate governance through an appropriate governing body<sup>28</sup>. The ACPR has 45 working days to review an authorisation request and 90 calendar days to inform the applicant of the granting or refusal of any such request.

Conditions for maintaining an authorisation are also set out in the Monetary and Financial Code. For example, an authorisation can be withdrawn if a credit servicer ceases to carry out credit servicing activities for a period of longer than 12 months or in the case of a significant breach of applicable rules<sup>29</sup>.

The ACPR authorisation also permits a credit servicer to passport its authorisation in order to carry out its activities in other European member states, provided that the rules and procedures relating to the supervision of any cross-border activity, also set out in the French Monetary and Financial Code, are respected. Likewise, in accordance with the Directive, a credit servicer having obtained an authorisation in its home EU member state has the right to provide in France those services that are covered by that authorisation<sup>30</sup>.

- **Other additional obligations:**

Credit servicers have to ensure the fair treatment of borrowers, which includes a requirement to maintain effective and transparent processes for managing borrower complaints. Credit servicers are also responsible for informing borrowers about any change in the ownership of their NPLs. Effective record-keeping practices are also imperative, as is the proper handling of client funds. Additionally, if credit servicers opt to outsource certain functions to third parties, these arrangements must be managed in a manner that upholds the integrity and compliance of the service.

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<sup>27</sup> For example, honorability of its directors, compliance and appropriate internal policies (Article L. 54-11-4, III and Article R. 54-11-2 of the Monetary and Financial Code).

<sup>28</sup> Article L. 54-11-5 of the Monetary and Financial Code.

<sup>29</sup> Article L. 54-11-5 of the Monetary and Financial Code.

<sup>30</sup> Articles L. 54-11-17 and L. 54-11-19 of the Monetary and Financial Code.

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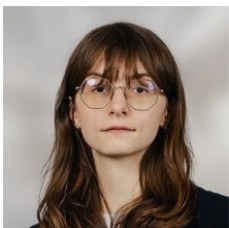
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