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2018/0063 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on credit servicers, credit purchasers and the recovery of collateral**

(Text with EEA relevance)

{SWD(2018) 75 final} - {SWD(2018) 76 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

This proposal is an important part of the work to strengthen Europe's Economic and Monetary Union (EMU). A more integrated financial system will enhance the resilience of the EMU to adverse shocks by facilitating private risk-sharing across borders, while at the same time reducing the need for public risk-sharing. In order to achieve these objectives, the EU must now complete the Banking Union and put in place all building blocks for a Capital Markets Union (CMU). The Commission's Communication of 11 October 2017<sup>1</sup> sets out a way forward to complete the Banking Union by promoting risk reduction and risk sharing in parallel, as part of the roadmap to strengthen EMU set out by the Commission on 6 December 2017.<sup>2</sup>

Addressing high stocks of non-performing loans (NPLs)<sup>3</sup> and their possible future accumulation is essential to complete Banking Union. This will further reduce risks and enable banks to focus on lending to businesses and citizens. NPLs are loans where the borrower is unable to make the scheduled payments to cover interest or capital reimbursements. When the payments are more than 90 days past due, or the loan is assessed as unlikely to be repaid by the borrower, it is classified as an NPL. The financial crisis and subsequent recessions led to a more widespread inability of borrowers to pay back their loans, as more companies and citizens faced continued payment difficulties or even bankruptcy. This was particularly so in Member States which faced protracted periods of recessions. As a consequence of this, as well as other factors, many banks saw a build-up of NPLs on their books.

High stocks of NPLs can weigh on bank performance through two main channels. First, NPLs generate less income for a bank than performing loans and thus reduce the bank's profitability, and may cause losses that reduce its capital. In the most severe cases, these effects can put in question the viability of a bank, with potential implications for financial stability. Second, NPLs tie up significant amounts of a bank's resources, both human and financial. This reduces the bank's capacity to lend, including to small and medium-sized enterprises (SMEs).

SMEs are particularly affected by the reduced credit supply, as they rely on bank lending to a much greater extent than larger companies, thereby affecting economic growth and job creation. Bank lending is often overly expensive and bank lending volumes to SMEs have been severely affected by the 2008 financial crisis, which impedes the development and growth of SMEs.

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<sup>1</sup> Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on completing the Banking Union, COM(2017) 592 final, 11.10.2017.

<sup>2</sup> Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank - further steps towards completing Europe's economic and monetary union: a roadmap, COM(2017) 821 final, 06.12.2017.

<sup>3</sup> NPLs denote loans where the borrower is unable to make the scheduled payments to cover interest or capital reimbursements. When the payments are more than 90 days past due, or the loan is assessed as unlikely to be repaid by the borrower, it is classified as an NPL. Commission Implementing Regulation (EU) 2015/227.

Well-developed secondary markets of NPLs are also one of the building blocks for a well-functioning CMU<sup>4</sup>. One of the main objectives of the Commission's priority of establishing the CMU is to provide new sources of financing for EU businesses, SMEs and high-growth innovative companies in particular. While the CMU project is focused on facilitating access to and diversifying non-bank finance for EU businesses, it also acknowledges the important role played by banks in financing the EU economy. Therefore, one of the CMU work streams aims at enhancing banks' capacity to lend to businesses, including through strengthening their ability to recover value from collateral provided to secure loans.

High levels of NPLs must be addressed by a comprehensive approach. While the primary responsibility for tackling high levels of NPLs remains with banks and Member States<sup>5</sup>, there is also a clear EU dimension to reduce current stocks of NPLs, as well as preventing any excessive build-up of NPLs in the future given the interconnectedness of the EU's banking system and in particular that of the euro area. In particular, there are important potential spill-over effects from Member States with high NPL levels to the EU economy as a whole, both in terms of economic growth and financial stability.

Reflecting this EU dimension and building on the shared agreement on the need to continue and extend the actions already initiated by the Commission, the Council adopted in July 2017 an "Action Plan To Tackle Non-Performing Loans in Europe". The Action Plan sets out a comprehensive approach that focus on a mix of complementary policy actions in four areas: (i) bank supervision and regulation (ii) reform of restructuring, insolvency and debt recovery frameworks, (iii) developing secondary markets for distressed assets, and (iv) fostering restructuring of the banking system. Actions in these areas are to be taken at national level and at Union level where appropriate. Some measures will have a stronger impact on banks' risk assessment at loan origination, while others will foster swift recognition and better management of NPLs, and further measures will enhance the market value of such NPLs. These measures mutually reinforce each other and would not be sufficiently effective if implemented in isolation.

This proposal, together with the other measures the Commission is putting forward as a comprehensive package for NPLs, as well as the action taken by the Single Supervisory Mechanism (SSM) and the European Banking Authority (EBA) are key parts of this effort. In combining several complementary measures, the Commission helps create the appropriate environment for banks to deal with NPLs on their balance sheets, and to reduce the risk of future NPL accumulation.

Banks will be required to put aside sufficient resources when new loans become non-performing, creating appropriate incentives to address NPLs at an early stage and avoid too large accumulation of NPLs.

If loans become non-performing, more efficient enforcement mechanisms for secured loans will allow banks to address NPLs, subject to appropriate safeguards for debtors. Should NPL stocks nevertheless become too high – as it is currently the case for some banks and some Member States – banks will be able to sell them in efficient, competitive and transparent secondary markets to other operators. Supervisors will guide them in this, based on their

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<sup>4</sup> Communication by the European Commission to the European Parliament, the European Council, the Council, the European Social and Economic Committee and the Committee of the Regions: Completing the Capital Markets Union by 2019 - Time to accelerate delivery, COM(2018) 114.

<sup>5</sup> The Commission has consistently mentioned this matter, for the Member States concerned, in the context of the European Semester.

existing bank-specific, so-called Pillar 2, powers under the Capital Requirements Regulation (CRR)<sup>6</sup>. Where NPLs have become a significant and broad-based problem, Member States can set up national asset management companies or other measures within the framework of current state aid and banks resolution rules.

This proposal will prevent excessive future build-up of NPLs on banks' balance sheets in two ways.

First, the proposal will help banks to better manage NPLs by **increasing the efficiency of debt recovery procedures through the availability of a distinct common accelerated extrajudicial collateral enforcement procedure (AECE)**. In the majority of cases, banks address their NPLs themselves by recovering value through work-out. A large share of the loans that become NPLs are loans secured by collateral. While banks can enforce collateral under national insolvency and debt recovery frameworks, the process can often be slow and unpredictable. In the meantime, NPLs remain on banks' balance sheets, keeping the bank exposed to prolonged uncertainty and tying up its resources. This prevents the bank from focusing on new lending to viable customers. Therefore, the proposal makes available more efficient methods to banks and other authorised entities to issue secured loans to recover their money from secured loans to business borrowers, out of court. This more efficient extra-judicial procedure would be accessible when agreed upon in advance by both lender and borrower, in the loan agreement. It will not be applicable for consumer credits and is designed so as to not affect preventive restructuring or insolvency proceedings and not to change the hierarchy of creditors in insolvency. Restructuring and insolvency proceedings prevail over the accelerated extrajudicial collateral enforcement procedure set out with this proposal.

Second, the proposal will **encourage the development of secondary markets for NPLs**. Under some circumstances, banks may be unable to manage their NPLs in an effective or efficient manner. Banks will in these cases recover less value from their loans than would otherwise be possible. This situation may occur, for example, when banks face a large build-up of NPLs and lack the staff or expertise to properly service their NPLs. Banks may also struggle to manage a portfolio of NPLs where the nature of the loans falls outside of the bank's core expertise to recover. In these if, the best option may be to either outsource the servicing of these loans to a specialised credit servicer or sell the credit agreement to a purchaser that has the necessary risk appetite and expertise to manage it. For these reasons, this proposal removes undue impediments to credit servicing by third parties and to the transfer of credits in order to further develop secondary markets for NPLs. The current diverse legislative framework for NPLs in the Member States has hindered the emergence of an effective secondary market for NPLs. The proposal creates a common set of rules that third party credit servicers need to abide by in order to operate within the Union. The proposal sets common standards to ensure their proper conduct and supervision across the Union, while allowing greater competition among servicers in harmonising the market access across Member States. This will lower the cost of entry for potential loan purchasers by increasing the accessibility and reducing the costs of credit servicing. More purchasers on the market should, everything else being equal, ease the way for a more competitive market with a larger number of buyers, leading to higher demand and higher transaction prices.

This proposal is complementary to a number of other measures presented today as set out in the Commission Communication "Second Progress report on the reduction in Non-Performing

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<sup>6</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, pp. 1–337.

Loans in Europe"<sup>7</sup>. In order to prevent the risk of under-provisioning of future NPLs, the Commission also issues a separate proposal as regards deductions in relation to insufficient provisioning for non-performing exposures that amends the Capital Requirements Regulation (CRR)<sup>8</sup>. The amendment introduces so-called statutory prudential backstops that amount to minimum levels of provisions and deductions from own funds that banks will be required to make in order to cover incurred and expected losses on newly originated loans that later turn non-performing. As further part of the NPL package, Member States are also provided with non-binding guidance on how they can set up, where appropriate, national asset management companies (AMCs) in full compliance with EU banking and State aid rules. The AMC Blueprint provides practical recommendations for the design and set-up of AMCs at the national level, building on best practices from past experiences in Member States<sup>9</sup>.

These initiatives mutually reinforce each other. The statutory prudential backstops ensure that credit losses on future NPLs are sufficiently covered, making their resolution or sale easier. The AMC blueprint assists Member States that so wish in the restructuring of their banks by means of the establishment of asset management companies dealing with NPLs. These effects are complemented by the push to further develop secondary markets for NPLs as these would make demand for NPLs more competitive and raise their market value. Furthermore, accelerated collateral enforcement as a swift mechanism for recovery of collateral value reduces the costs for resolving NPLs. At the same time, the proposal does not affect the numerous safeguards for borrowers available under EU and national legislation. It introduces a number of additional safeguards, in order to limit potential risks from the sale of consumer loans and performing credits.

- **Consistency with existing policy provisions in the policy area**

This proposal standardises the regulatory regime (definition, authorisation, supervision, conduct rules) for credit servicers and credit purchasers. Currently, differences in national legislation and implementation across Member States have led to a large variety of business models and unequal volume of activity across Member States and thus contributed to a very limited number of NPLs sales in some Member States with high NPL ratios. By consequence, credit institutions wishing to dispose of credit portfolios containing NPLs face an investor base fragmented along national borders, and credit servicers face significant difficulties in servicing credits involving cross-border dimension (in particular cross-border collection) and also have limited scope to realise scale economies from cross-border activity.

This proposal is consistent with Article 169 of the Treaty on the Functioning of the European Union (TFEU), secondary legislation and Union rules aimed at ensuring a high level of consumer protection, in the area of financial services. To this end, the proposal will establish that consumer protection rules would continue to apply in order to ensure the same level of protection, irrespective of who owns or services the credit and irrespective of the legal regime in force in the Member State of the credit purchaser or the credit servicer. The proposal clarifies that consumer protection and in particular the rights granted to consumers under the Mortgage Credit Directive<sup>10</sup> and the Consumer Credit Directive<sup>11</sup> and the Unfair Contractual

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<sup>7</sup> Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank - second progress report on the reduction of non-performing loans in Europe, COM(2018) 133

<sup>8</sup> Regulation (EU) No 575/2013, *ibidem*.

<sup>9</sup> Commission Staff Working Document AMC Blueprint, SWD(2018) 72.

<sup>10</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34)



Terms Directive<sup>12</sup> in relation to a credit granted by a credit institution will continue to apply irrespective of who subsequently purchases or services the credit. In addition, similar to Article 17 of the Consumer Credit Directive, in the event of assignment of the creditor's rights to a third party, the Mortgage Credit Directive will be amended to state that the consumer shall be entitled to plead against the assignee any defence which was available to him against the original creditor.

This proposal is also consistent with the Financial Collateral Directive (FCD)<sup>13</sup>, which introduced a European regime for the provision and enforcement of collateral under the form of securities, cash and credit claims. The accelerated extrajudicial collateral enforcement procedure set out in this proposal would not interfere with the collateral governed by the FCD because it would regulate the enforcement of other types of collateral than the ones within the scope of the Financial Collateral Directive. Concretely, this proposal would make available effective out-of-court procedures for the enforcement of collateral under the form of movable and immovable assets which is provided by companies and entrepreneurs to secure loans, but matters governed by the FCD will not be affected by this proposal.

This initiative would also ensure full consistency with pre-insolvency and insolvency proceedings initiated under Member States' national laws and regulations. Consistency would be ensured through the principle that the extrajudicial enforcement of collateral set out in this proposal would be possible as long as a stay of individual enforcement actions, in accordance with applicable national laws, is not applicable.

Moreover, this proposal would ensure full consistency and complementarity with the Commission proposal on preventive restructuring frameworks<sup>14</sup> (Restructuring Proposal) which proposed measures to enhance the effectiveness of restructuring and insolvency proceedings and to ensure the availability of preventive restructuring procedures so that viable companies in financial difficulties may avoid insolvency. While the Restructuring Proposal<sup>15</sup> aims at establishing a harmonised judicial framework on preventive restructuring and second chance for companies and entrepreneurs, this proposal aims at enhancing the effectiveness of out-of-court enforcement procedures for collateral. In order to ensure full consistency and complementarity with the Restructuring Proposal, the extrajudicial enforcement of collateral as set out in this proposal would be possible as long as a stay of individual enforcement actions, in accordance with the Restructuring Proposal, is not applicable. The Restructuring Proposal foresees that creditors, including secured creditors of a company or entrepreneur that is subject to restructuring proceedings, are subject to the stay of individual enforcement actions in order to enable the debtor to negotiate a restructuring plan with creditors and avoid insolvency.

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<sup>11</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66–92.

<sup>12</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

<sup>13</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (<http://eur-lex.europa.eu/legal-content/en/txt/?uri=celex%3a3200210047>).

<sup>14</sup> Proposal for a Directive European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM/2016/0723 final, 22.11.2016.

<sup>15</sup> Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM/2016/0723 final, 22.11.2016

- **Consistency with other Union policies**

More than five years after the European Heads of State and Governments agreed to create a Banking Union, two pillars of the Banking Union – single supervision and resolution – are in place, resting on the solid foundation of a single rulebook for all EU institutions. While important progress has been made, further steps are needed to complete the Banking Union, including the creation of a single deposit guarantee scheme, as set out in the Commission Communication of 17 October 2017 and in the Roadmap presented on 6 December, as part of the package on deepening Economic and Monetary Union.

In addition to the comprehensive package of reforms proposed by the Commission in November 2016 ("Banking reform package"), the development of a secondary market for loans and the provision of enhanced protection of secured creditors are part of risk reducing measures that are needed to further strengthen resilience of the banking sector and that are parallel to the staged introduction of the European Deposit Insurance Scheme (EDIS). These measures aim at the same time to ensure a continued single rulebook for all EU institutions, whether inside or outside the Banking Union. The overall objectives of this initiative, as described above, are fully consistent and coherent with the EU's fundamental goals of promoting financial stability, reducing the likelihood and the extent of taxpayers' support in case an institution is resolved as well as contributing to a harmonious and sustainable financing of economic activity, which is conducive to a high level of competitiveness and consumer protection.

This initiative has been announced in the Communication on the Mid-term review of the Action Plan on Building a Capital Markets Union<sup>16</sup>. That Communication stressed that capital markets can also help European banks to overcome the challenges of NPLs. It stressed that policies that aim to improve the functioning of secondary markets for NPLs are a key part of any durable solution, and that the management of NPLs would also benefit from more efficient and more predictable loan enforcement frameworks designed to enable swift value recovery by secured creditors.

One of the objectives of this proposal is to enhance the ability of secured creditors to recover value from collateral in a swifter manner through extrajudicial enforcement procedures for collateral. By enabling secured creditors, including banks, to obtain value from collateral in a swifter manner, this proposal would contribute to facilitating more bank lending to the economy, SMEs in particular, and at lower price, in line with the CMU's objective of facilitating access to finance for companies.

The provisions on loan servicers and purchasers would ensure more predictability and transparency in secondary markets for NPLs, which in turn would allow potential purchasers to more accurately price those assets. This would allow banks to sell their NPLs to a larger pool of investors potentially leading to transaction prices that better reflect the underlying value of the assets. This in turn would lead to cleaned-up balance sheets and credit institutions better prepared to provide new credit flow to the economy.

Addressing the remaining risks in the European banking sector is of great importance to its functioning and stability and thereby to the wider economy. In particular, there are important potential spill-over effects from Member States with high levels of NPLs to other EU

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<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan, COM(2017) 292 final, 8.6.2017.

economies and the EU at large, both in terms of economic growth and financial stability. Segmented NPL markets along national boundaries through strong differences in authorisation regimes would not be consistent with the objective of the Capital Markets Union.

This initiative is without prejudice to the safeguards in place for consumer, including in the case the original creditor is replaced by a non-credit institution. EU legislation already includes a number of measures on consumer protection. The proposal provides that both the credit purchasers and credit servicers will have to comply with Union law in respect of consumer protection applicable to the initial credit agreement. In the same way, all the consumer protection rules in force in the Member State of the consumer, either stemming directly from the initial credit contract or from other rules applicable to credits delivered to consumers or related to the general consumer protection rules in force in the Member State of the consumer, will continue to apply.

The above mentioned safeguards also include the measures of mandatory or voluntary character provided for the protection of consumers in the Member State of their habitual residence, in particular the formal or informal debt-recovery procedures put in place by public or private bodies providing debt-advice to over-indebted households, aimed to their debt-recovery. Furthermore, as regards the exercise of credit servicing activities in the cross-border context, this instrument shall be without prejudice to EU harmonised rules which determine the applicable law, applicable jurisdiction and recognition and enforcement of judgments in civil and commercial matters including in insolvency proceedings.

Borrower rights, personal data protection rights and national civil law provisions that govern the assignment of contracts are not within the scope of this proposal. The processing of personal data in the context of this Directive must fully comply with the rules on personal data protection.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **• Legal basis**

Article 114 of the Treaty on the Functioning of the European Union (TFEU) confers the European Parliament and the Council the competence to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Article 114 TFEU allows the EU to take measures not only to eliminate current obstacles to the establishment and functioning of the internal market, but also to address barriers that dissuade economic operators from taking full advantage of the benefits of that market in particular investing in other Member States. Moreover, Article 53 of the Treaty on the Functioning of the European Union (TFEU) confers the European Parliament and the Council the competence to adopt Directives for the coordination of national provisions concerning economic activities.

Currently, credit purchasers and credit servicers cannot reap the benefits of the internal market due to barriers erected by divergent national legislations in the absence of a dedicated and coherent regulatory and supervisory regime.

Non-bank purchasers of credit granted by credit institutions are not regulated in some Member States, while in others they can face various requirements, sometimes amounting to full banking licences. In practice, this has led to a situation where the purchasers can legally



operate in one Member State but face considerable obstacles to purchasing credits in others. This is one reason why purchasers mostly operate in a limited number of Member States, which resulted in an overall limited competition in the internal market as the number of interested purchasers remains quite low, thus reducing the scope for and potential size of an efficient and competitive NPL market. Markets for NPLs in particular, tend to be characterised by comparatively small trade volumes, a strong clustering in four countries of which only one is a smaller Member State (Italy, Ireland, Spain and the UK). These markets also tend to be dominated by large buyers, which can be explained to a certain extent by the high barriers in place which prevent entry and distort competition.

Credit servicers also face barriers to expand cross-border and scale up their activities. Firstly, only some Member States regulate the activity, and, those that do, define very differently the activities covered. This in practice poses a barrier to the development of expansion strategies through secondary establishment or cross-border provision of services in the internal market. Secondly, a considerable number of Member States requires authorisations for some of the activities that these credit servicers engage. These authorisations impose different requirements and do not provide for possibilities of cross-border scaling up. Finally, in some cases, local establishment is required by law, which in itself makes impossible the exercise of the fundamental freedom to provide cross-border services.

Moreover, the barriers preventing the credit servicers from operating cross-border indirectly affect the potential purchasers, who might not be able to enter a national market and purchase credits from credit institutions, if they cannot then outsource the servicing to other entities than the bank from whom they acquired the credit agreement or use the services of credit servicers from other EU Member States.

The large differences in regulatory standards adopted by Member States contribute to market fragmentation, which restricts the free flow of capital and services within the EU, leads to insufficient competition and slows down the development of a functioning secondary market for bank credits. Limited participation of investors and servicers implies weak competitive pressure on both markets (the one for purchasing and the one for credit servicing). It results in high fees credit servicing firms charge to purchasers for their services and low prices banks can realise if they sell NPLs to non-bank investors, which reduces incentives for banks to offload their high stock of NPLs.

Creditors who grant secured loans to companies and entrepreneurs do not benefit in all Member States from expedited and effective procedures to enforce such loans out-of-court in case of business borrower's default. Should such procedures be available, the risk of banks accumulating NPLs would decrease.

In order to recover value from collateral posed by a borrower in a different Member State, the creditor has to follow rules which are different from the rules of the creditor's home Member State, and the efficiency of which is unknown to the creditor. The creditor cannot presently choose to agree with the borrower a procedure common to all Member States. This creates costs with legal advice and can mean longer duration of recovery procedures, and lower recovery rates. The prospect of recovering less, or at worst, nothing, from a secured loan in case of debtor default can deter lenders from lending cross-border in the first place, or it can increase the price of lending for companies. This in turn constitutes a deterrent for borrowers for turning to creditors in different Member States. This obstructs the free movement of capital and has a direct effect on the functioning of the single market. There is untapped

CMU potential in terms of making funding available to companies, SMEs in particular, which are highly reliant on bank lending.

Similarly, investors considering to buy portfolios of non-performing loans will take into consideration potential legal uncertainties in value recovery from the collateral attached to these loans, and if value recovery cross-border is more difficult or comes with legal uncertainties, this will negatively impact the price, and by consequence, the chance of banks to sell portfolios also to investors from a different Member State as close as possible to the price determined by banks' provision for those loans<sup>17</sup>.

The current fragmentation translated in different degrees of funding opportunities for companies, as bank loans are less available to companies, SMEs in particular, in the Member States without efficient procedures for recovering value from secured loans.

Establishing a framework on efficient out-of-court collateral enforcement procedures would ensure that secured creditors in all Member States benefit from the availability of a distinct common expedited tool to recover value from a secured loan in case a business borrower does not repay the loan. This should create incentives for more cross-border lending by reducing uncertainty about the outcomes of enforcement proceeding (e.g. recovery rate and time) in cross-border transactions.

- **Subsidiarity (for non-exclusive competence)**

Under Article 4 TFEU, EU action for completing the internal market must be appraised in the light of the subsidiarity principle set out in Article 5(3) of the Treaty on European Union (TEU). It must be assessed whether the objectives of the proposal could not be achieved by the Member States in the framework of their national legal systems and, by reason of their scale and effects, are better achieved at EU level.

Since the financial crisis of 2008, the until recently rising stock of NPLs has deteriorated market perceptions of the European banking sector as a whole and has represented negative externalities for the whole EU. These factors have become even more relevant in the context of the Banking Union. A few Member States have actively acted to address the high stock of NPLs in recent years, in most cases fostered through an EU/IMF economic adjustment programme.

Even though Member States have recognised the seriousness of the NPL problem, most have failed so far from taking effective measures to address the 'demand' side of the NPL transfers. Those that did regulate the activities of credit purchasing and servicing have done so without providing for cross-border situations. This has led to insufficient market competition. Varying approaches taken by the Member States and their different interpretations in particular of credit servicing activities have been fragmenting these markets. Therefore, the objectives cannot be reached through individual action by the Member States.

The Commission Services have been monitoring the market for a number of years and have recognised increasing divergence and amplification of problems that warrant EU-level intervention. Evidence collected through studies and public consultations has shown that a recovery in economic growth has not been sufficient to reduce NPL stocks as the latter are weighing on banks' soundness, their credit provision and overall economic growth prospects.

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<sup>17</sup> If a bank has provisioned 30% of an NPL and disposes it subsequently at a price lower than 70% of the value, this will result in a further loss for the bank.

There is no coordination effort undertaken so far among Member States on rules for bank credit purchasers and servicers. Action taken by the Member States can only remedy their own national market conditions, which would not be sufficient to reduce the negative impact on the functioning of the Single Market.

Providing an EU-level framework would ensure uniform entry conditions for credit purchasers and servicers and a passport for carrying out their activities throughout the Single Market. This would result in particular for more competition between potential investors in bank loans and would allow banks to sell them at more competitive prices. In turn, this would allow the banks to reduce exposure to loans that have become non-performing and redirect resources towards new lending to the economy. At the same time, the safeguards provided for consumers would ensure that, in the entire Union, the level of consumer protection would be maintained when consumer loans originally granted by credit institutions are sold and serviced.

Similarly, Member States which have already put in place extrajudicial enforcement procedures have established domestic rules on grounds related primarily to domestic considerations. In some cases, the extrajudicial enforcement procedures for collateral have been established for a long time and do not necessarily incentivise cross-border transactions. Given the differences in the efficiency of existing national procedures and the lack of such procedures in some Member States, the objective is to make available effective such systems across the EU, and to ensure that banks or other undertakings authorised to grant credit in all Member States may use such a procedure. Given the inherent links between collateral enforcement and Member States' civil, property, commercial, pre-insolvency, insolvency and public laws, the envisaged rules on this distinct common extrajudicial collateral enforcement mechanism would need to be able to be implemented in a way that is consistent with those Member States' laws. The provisions below therefore establish a supplementary common mechanism which does not require Member States to interfere with their national extrajudicial enforcement systems where those exist for the type of collateral covered in the proposal. AECE is designed as a distinct mechanism to ensure that an extrajudicial enforcement mechanism may be contractually agreed upon between creditor and business borrower for movable and immovable assets posed as collateral.

Reaching these objectives can be better achieved at EU level.

- **Proportionality**

Under the principle of proportionality, the content and form of EU action should not exceed what is necessary to achieve the objectives of the Treaties.

This proposal does not go beyond what is necessary to encourage market entry and cross-border development, as it is without prejudice to national law provisions on the actual transfer of the creditor's rights, or to any applicable rules on preventive restructuring or insolvency proceedings.

The provisions below establish a regulatory system that is proportionate in terms of creating conditions sufficiently binding to be effective in accomplishing the objectives while at the same time allow Member States the maximum flexibility to maintain national provisions that protect borrowers' rights and defences.

Moreover, while not affecting existing consumer protection rules, the proposal takes into account the need for increased safeguards when consumer credits are concerned. Recognising

these legitimate concerns, the proposal introduces a requirement that third-country purchasers of consumer loans use the services of authorised credit servicers, which are subject to the requirements of this directive and which are subject to supervision in the EU by the national competent authorities. Similarly, the envisaged accelerated extrajudicial collateral enforcement mechanism seeks to balance the interests of creditor and business borrower. It is not available for enforcement of loans granted to consumers, and even for business owners, would not be available to enforce collateral which consists in the first residence of the business borrower. Where the business borrower has paid off the major part (85%) of the sum outstanding under the credit agreement already, he would have to be given additional time to effect payment before collateral could be enforced.

The legal instrument chosen, a Directive, is tailored to achieve the objectives of ensuring a level playing field between secured creditors as regards their ability to agree with the borrower on an extrajudicial procedure to recover value from collateral in order to preserve financial stability and increase funding opportunities for companies.

- **Choice of the instrument**

A Directive is chosen to ensure that its provisions can be transposed by Member States consistent with existing private and public laws given the multiple links with civil, commercial, property and insolvency laws. Article 53 TFEU, which is one of the legal basis of this proposal provides only for the adoption of a Directive.

Moreover, seeing the need to ensure administrative cooperation while allowing the diversity of supervisory choices currently existing in the Member States in respect of the activities covered by this proposal, a directive seems to be the appropriate choice of instrument.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

Ex-post-fitness checks do not apply because this area was previously only regulated at national level,

- **Stakeholder consultations**

The Commission services have carried out a dedicated public consultation on Development of secondary markets for non-performing loans and protection of secured creditors from borrowers' default<sup>18</sup>. Responses to that public consultation have provided qualitative evidence to support development of an impact assessment.

The proposal reflects strongly the feedback gathered from the consultation.

The proposal also reflects the feedback received from the expert group consulted by the Commission services as regards Accelerated Extrajudicial Collateral Enforcement. The proposal is a more proportionate approach to achieving the policy objective as compared to a full harmonisation through the creation of a new security right, as originally foreseen in the public consultation.

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<sup>18</sup> [https://ec.europa.eu/info/sites/info/files/2017-non-performing-loans-consultation-document\\_en.pdf](https://ec.europa.eu/info/sites/info/files/2017-non-performing-loans-consultation-document_en.pdf).

The dominant majority of the replies to the public consultation as regards secondary markets for NPLs affirms that the current size, liquidity and structure of the markets in the EU are an obstacle to the management and resolution of NPLs in the EU.

For a clear majority of those respondents that give a view, differences in national rules pertaining to NPL sales are an effective obstacle to the development of NPL markets. As regards the nature of obstacles for cross-border activity, the dominant number of responses refers to the legal framework, insolvency rules and local practices. Some stakeholders call for additional rules to safeguard consumer/debtor protection while other stakeholders think current rules are sufficient and should be maintained. A substantial majority supports an EU framework for loan servicers. Almost all respondents that support an EU framework for loan servicers advocate that it should cover a licensing regime and about half of them propose that it regulates the supervision of loan servicers.

- **Collection and use of expertise**

The proposal draws on an extensive amount of research, external studies, targeted consultations, interviews and other sources.

Different European and international organisations published analytical reports that build on research workshops and consultations with stakeholders (ESRB, EBA, SSM, ECB and IMF). Commission services could in particular build on the report of a dedicated sub-group on Non-Performing Loans of the Council's Financial Services Committee, as well as on research by consultancies, academics and think tanks. An expert group with Member States and EU institutions was set up in mid-2017 to follow up on the Council's Action Plan.

The proposal also draws on targeted requests for information to Member States' ministries of Justice and legal experts, and several meetings with national experts from Member States. Collection of information also included meetings with stakeholders and academic research papers.

- **Impact assessment**

The main economic and social impacts have been examined in two impact assessments which accompany this proposal.

The first impact assessment investigated the situation of credit purchasers and credit servicers. It describes the baseline scenario and compares it with three possible options for the reduction of entry barriers for loan purchasers and loan servicer. The baseline takes into account that specific entry barriers in some Member States would continue to exist and conduct rules that discourage investor entry and the build-up of investor relationship with loan servicers would remain effective. Based on the range of rules applied in the Member States and a discussion of best regulatory practices, three options were designed to facilitate and harmonise market entry, either using non-binding high-level common principles that target the most significant barriers, binding common standards that allow cross-border activity through passports or a binding single rulebook with passports. Following the analysis made in the impact assessment, the latter two options are equally efficient and among them the option of binding common standards was assessed as more proportionate to accomplish the objective, also in light of very different provisions as regards credit transfers and borrower rights in the Member States that may require room for national discretion.



The impact assessment was submitted to the Regulatory Scrutiny Board ("RSB") on 8 December 2017<sup>19</sup>. The RSB gave a negative opinion on the impact assessment and made a number of recommendations for improvements. The document was revised accordingly and resubmitted on 29 January 2018. On 13 February 2018, the RSB provided a positive opinion<sup>20</sup>.

The key changes introduced in the impact assessment to take into consideration the RSB's comments were the following:

A new introduction common to all three legislative initiatives on NPL was introduced. It explains the NPL issue in a wider context and elaborates on the linkages between the various initiatives in the NPL Action Plan in greater detail.

Differences in borrower rights were introduced as problem drivers as well as discussions how they interact with changes in the authorisation regime for NPL investors and loan servicers. This was also taken up in the discussion on the general impact of the initiative.

The concrete provisions were further specified, including a description of the potential range of these provisions and a discussion of best practices and how they could be combined to a consistent regulatory regime. It was clarified that loan sales include both performing and non-performing loans.

Following up on recommendations to the second RSB opinion, the following changes were introduced:

The set of preferred options was narrowed and the link to concrete provisions this entails described in more detail.

The set of monitoring indicators was expanded to cover also conduct of loan servicers and NPL purchasers with respect to borrower rights and supervisors.

The second impact assessment dealt with the accelerated extrajudicial collateral enforcement. It identified and examined four policy options<sup>21</sup>. The first option referred to possible non-regulatory action based on existing international harmonisation initiatives of extrajudicial collateral enforcement procedures whereby the Commission would recommend Member States to put in place such procedures. The second and preferred option explored the possibility and merits of establishing a minimum harmonisation of an extrajudicial collateral enforcement procedure across the EU so that banks in all Member States have at their disposal an efficient procedure for extrajudicial collateral enforcement. The third option looked into the case for creating of a new security together with a fully harmonised extrajudicial enforcement procedure. The fourth option which has been discarded at an early stage considered establishing a Union out-of-court enforcement mechanism through an alternative regime.

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<sup>19</sup> Commission Staff Working Document Impact Assessment The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans and Accelerated Extrajudicial Collateral Enforcement (Part 1 / 2). SWD (2018) 75.

<sup>20</sup> Regulatory Scrutiny Board, Opinion: Impact Assessment / Development of secondary markets for NPLs, Ares(2018)827204 - 13/02/2018.

<sup>21</sup> Commission Staff Working Document Impact Assessment The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans and Accelerated Extrajudicial Collateral Enforcement (Part 2 / 2). SWD (2018) 75

The proposal is supported by a positive opinion issued by the RSB as regards the accelerated extrajudicial collateral enforcement on 12 January 2018<sup>22</sup>.

As proposed by the RSB, the impact assessment was amended by including the description of the impact of the proposal on Member States' national legislation.

- **Regulatory fitness and simplification**

A harmonised authorisation framework reduces administrative costs across the EU and allows credit servicers to scale up their activities in different Member States by using the passport.

- **Fundamental rights**

The proposal respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the freedom to conduct a business, the right to property, the right to a fair trial, the protection of personal data and consumer protection.

#### **4. BUDGETARY IMPLICATIONS**

This legislative proposal implies no budgetary costs for the budget of the European Union.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

An evaluation is envisaged 5 years after the implementation of the measure and according to the Commission's better regulation Guidelines. The objective of the evaluation will be to assess, among other things, how effective and efficient it has been in terms of achieving the policy objectives and to decide whether new measures or amendments are needed. Member States shall provide the Commission with the information necessary for the preparation of that Report.

- **Explanatory documents (for directives)**

Considering the diversity of the national legal and supervisory systems and the need for a consistent implementation of the Directive, the notification of the transposition measures taken by the Member States should be accompanied by one or more documents explaining the relationship between the components of the Directive and the corresponding parts of national transposition instruments.

- **Detailed explanation of the specific provisions of the proposal**

**Title I** comprises of the subject matter, scope and definitions.

This Directive applies to purchasers and servicers of credit originally issued by a credit institution or its subsidiaries, irrespective of the type of borrower concerned. This Directive shall not apply to purchasing and servicing of a credit agreement carried out by a credit institution and its subsidiaries in the EU or to purchasing and servicing of credit agreements issued by other types of creditors than credit institutions and their subsidiaries.

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<sup>22</sup> Regulatory Scrutiny Board, Opinion: Impact Assessment / Accelerated Extrajudicial Collateral Enforcement, Ares(2018)215454 - 12/01/2018.

As regards the accelerated extrajudicial collateral enforcement procedure, this Directive applies to credit agreements concluded between creditors, primarily banks, and borrowers for the purposes of their trade, business or profession which are secured by any movable and immovable assets owned by the borrower and which have been pledged to a creditor in order to secure the repayment of a loan. Restricting the scope to corporate loans should avoid negative impacts on consumers and households. Even for business borrowers, the main residence of a business owner will be excluded from the scope, based on social considerations.

Article 3 sets out the definitions that are used for the purposes of this Directive.

**Title II** establishes a framework for servicers of credit agreements issued by credit institutions.

Chapter I contains the rules for the authorisation of credit servicers.

Article 5 sets the maximum set of requirements that need to be fulfilled by credit servicers to be authorised in their home Member State.

Article 6 sets out the procedures for the authorisation and Article 7 the cases when the authorisation may be withdrawn.

Article 8 introduces an obligation for the set-up of a public register of authorised credit servicers in each Member State.

Article 9 contains a requirement that the relationship between a credit servicer and a creditor is based on a written contract which, among other issues, includes a clear reference to the obligation to observe Union and national law applicable to the credit agreement. Moreover, the credit servicer is required to keep records for a period of 10 years that competent authorities can have access to.

Article 10 provides for rules concerning the outsourcing of activities by credit servicers by ensuring that they remain fully responsible for all obligations under the national provisions transposing this Directive.

Chapter II deals with the provision of credit servicing cross-border.

Article 11 requires Member States to ensure the freedom to provide services in the Union for authorised credit servicers. To this end, specific provisions on procedures and communication between home and host authorities are set in the Directive.

Article 12 provides for specific rules on how such cross-border servicers shall be supervised by sharing the burden of supervision between home and host competent authorities.

**Title III** covers credit purchasers.

Article 13 provides that creditors shall provide all necessary information to a credit purchaser prior to entering into a contract, with due respect to personal data protection rules. When the first transfer of the credit takes place from a credit institution to a non-credit institution purchaser, the supervisor of the credit institution shall be informed thereof.

Article 14 mandates the use by credit institutions of data standards provided by the European Banking Authority.

Article 15 imposed an obligation on the representatives established in the Union of credit purchasers not established in the Union, to use an authorised credit servicer or a Union credit institution in case of credit agreements concluded with consumers.

Article 16 contains the rules by which credit purchasers inform competent authorities about the servicing of the credit purchased.

Article 17 contains a rule whereby, where a transfer of the credit agreement is concluded, the third country purchaser designates a representative established in the Union. This representative will be responsible for the obligations imposed on credit purchasers under the Directive.

Article 18 sets the rules concerning the enforcement of a credit agreement by the credit purchaser directly and the information obligations set on the credit purchasers and the competent authorities.

Article 19 introduces information obligations of the purchaser in case the purchaser transfers the credit agreement.

**Title IV** covers the supervision by competent authorities.

Article 20 sets obligations of on-going compliance with the national provisions transposing this Directive and the designation of competent authorities responsible for carrying out the functions and duties set by the national provisions implementing the Directive.

Article 21 details the supervisory powers of the competent authorities while Article 22 provides for the rules on administrative penalties and remedial measures.

**Title V** establishes a framework on accelerated extrajudicial collateral enforcement, which is an instrument agreed between the secured creditor and business borrower on a voluntary basis and which the secured creditor may exercise once the conditions set out in Article 23 are met.

Article 24 requires Member States to have in place at least one enforcement procedure which may be used for the purpose of the accelerated extrajudicial collateral enforcement mechanism set out in this proposal. Member States may choose among public auction and private sale procedures which are commonly used to realise collateral. Where the national law establishes the appropriation of the asset procedure, that procedure may also be used for the purpose of this accelerated extrajudicial collateral enforcement procedure. Member States have discretion in deciding upon the type of enforcement procedure which should be made available to creditors, given the multiple links of collateral enforcement with private and public laws, and, in particular, depending on the type of security right which is used to secure collateral.

Article 28 gives the borrower the right to challenge the use of this accelerated extrajudicial collateral enforcement procedure before national courts.

In order to protect the borrower, Article 29 requires the creditor to pay the business borrower, in case of excessive amount recovered through this accelerated extrajudicial collateral enforcement procedure as compared to the outstanding debt, any positive difference between the sum outstanding of the secured credit agreement and the proceeds of the sale of the asset (following public auction or private sale). In case of appropriation, it is appropriate that the creditor will be required to pay the borrower any positive difference between the sum outstanding of the secured credit agreement and the valuation of the asset.

Article 32 aims at ensuring full consistency and complementarity of this accelerated extrajudicial collateral enforcement procedure with pre-insolvency or insolvency proceedings initiated in accordance with Member States' laws. Article 32 also aims at ensuring full

consistency and complementarity of this accelerated extrajudicial collateral enforcement procedure with the Restructuring Proposal by stating that creditors, including secured creditors of a company or entrepreneur that is subject to a restructuring proceedings, are subject to the stay of individual enforcement actions.

Article 33 requires Member States and, in case of credit institutions, credit institutions' supervisors to collect, on an annual basis, data on the number of secured loans which are enforced through out-of-court procedures, the timeframes and value of recovery rates, and to transmit this data to the Commission annually.

**Title VI** provides in Article 34 for specific safeguards for consumers in case of modification of the credit agreement and in Article 35 for the handling of complaints both by the credit servicer and by the competent authorities.

Article 36 reaffirms the observance of personal data protection rules.

Article 37 provides for general administrative cooperation obligation between competent authorities.

**Title VII** contains in Article 38 an amendment to the Mortgage Credit Directive to provide that, in case of a transfer of credit to consumer covered by that Directive, the consumer shall be entitled to plead against the credit purchaser any defence which was available to him against the original creditor and an obligation to inform the consumer.

**Title VIII** contains final provisions about the set-up of a Committee to assist the Commission, the review, the transposition deadline, entry into force and addressees



Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on credit servicers, credit purchasers and the recovery of collateral**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53 and Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>23</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The establishment of a comprehensive strategy to address the issue of non-performing loans (NPLs) is a priority for the Union<sup>24</sup>. While addressing NPLs is primarily the responsibility of credit institutions and Member States, there is also a clear Union dimension to reduce current stocks of NPLs, as well as to prevent any excessive build-up of NPLs in the future. Given the interconnectedness of the banking and financial systems across the Union where credit institutions operate in multiple jurisdictions and Member States, there is significant potential for spill-over effects between Member States and the Union at large, both in terms of economic growth and financial stability.
- (2) An integrated financial system will enhance the resilience of the Economic and Monetary Union to adverse shocks by facilitating private cross-border risk-sharing, while at the same time reducing the need for public risk-sharing. In order to achieve these objectives, the Union should complete the Banking Union and further develop a Capital Markets Union (CMU). Addressing high stocks of NPLs and their possible future accumulation is essential to completing the Banking Union as it is essential for ensuring competition in the banking sector, preserving financial stability and encouraging lending so as to create jobs and growth within the Union.
- (3) In July 2017 the Council in its "Action Plan to Tackle Non-Performing Loans in Europe"<sup>25</sup> called upon various institutions to take appropriate measures to further address the high number of NPLs in the Union. The Action Plan sets out a comprehensive approach that focuses on a mix of complementary policy actions in

<sup>23</sup> OJ C , , p. .

<sup>24</sup> See the Reflection Paper on Deepening the Economic and Monetary Union at: [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf), 31.5.2017

<sup>25</sup> 11/07/2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-non-performing-loans/pdf>.

four areas: (i) bank supervision and regulation (ii) reform of restructuring, insolvency and debt recovery frameworks, (iii) developing secondary markets for distressed assets, and (iv) fostering restructuring of the banking system. Actions in these areas are to be taken at national level and at Union level where appropriate. The Commission announced a similar intention in its "Communication on completing the Banking Union" of 11 October 2017<sup>26</sup>, which called for a comprehensive package on tackling NPLs within the Union.

- (4) This Directive, together with other measures which the Commission is putting forward, as well as the action taken by the ECB in the context of banking supervision under the Single Supervisory Mechanism (SSM) and by the European Banking Authority will create the appropriate environment for credit institutions to deal with NPLs on their balance sheets, and will reduce the risk of future NPL accumulation.
- (5) Credit institutions will be required to put aside sufficient resources when new loans become non-performing, which should create appropriate incentives to address NPLs at an early stage and should prevent an excessive accumulation of them. Where loans become non-performing, more efficient enforcement mechanisms for secured loans would allow credit institutions to enforce NPLs, subject to appropriate safeguards for borrowers. Nevertheless, should NPL stocks become too high – as it is currently the case for some credit institutions and some Member States – credit institutions should be able to sell them in efficient, competitive and transparent secondary markets to other operators. Competent authorities of credit institutions will guide them in this, based on their existing bank-specific, so-called Pillar 2, powers under Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>27</sup> (CRR). Where NPLs become a significant and broad-based problem, Member States can set up national asset management companies or other alternative measures within the framework of current state aid and banks resolution rules.
- (6) This Directive should enable credit institutions to better deal with loans once these become non-performing by improving conditions to either enforce the collateral used to secure the credit or to sell the credit to third parties. The introduction of accelerated collateral enforcement as a swift mechanism for the recovery of collateral value would reduce the costs for resolving NPLs and would hence support both credit institutions and purchasers of NPLs in recovering value. Moreover, when credit institutions face a large build-up of NPLs and lack the staff or expertise to properly service them, one viable solution would be to either outsource the servicing of these loans to a specialised credit servicer or to transfer the credit agreement to a credit purchaser that has the necessary risk appetite and expertise to manage it.
- (7) The two solutions for credit institutions to deal with NPLs provided for by this Directive are mutually reinforcing. The shorter time for enforcement and the increased recovery rates, as expected with accelerated extrajudicial collateral enforcement increases the value of an NPL. In turn, this would raise bid prices in NPL transactions. A further effect is that selling NPLs will be less complicated if the loan is collateralised. The reason for this is that price determination is simpler for a collateralised NPL than an unsecured one in a secondary market transaction because

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<sup>26</sup> Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on completing the Banking Union, COM(2017) 592 final, 11.10.2017.

<sup>27</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

the value of the collateral sets a minimum value of a NPL. With a more liquid and better functioning secondary market for NPLs where investors would show greater interest for NPLs incorporating the accelerated enforcement feature, there would be additional incentives for credit institutions to use accelerated extrajudicial collateral enforcement at the time of issue of the new loans. Moreover, the harmonisation achieved by this Directive would foster development of pan-Union NPL investors, thus further improving market liquidity.

- (8) While the terms 'loans' and 'banks' are commonly referred to in the public debate, the more precise legal terms of 'credit' or 'credit agreements' and 'credit institution' are used hereafter. Furthermore, unless otherwise specified, the terms bank and credit institution also cover their subsidiaries.
- (9) This Directive should foster the development of secondary markets for NPLs in the Union by removing impediments to the transfer of NPLs by credit institutions to non-credit institutions, while at the same time safeguarding consumers' rights. Any proposed measure should also simplify and harmonise the authorisation requirements for credit servicers. This Directive should therefore establish a Union-wide framework for both purchasers and servicers of credit agreements issued by credit institutions.
- (10) However, currently, credit purchasers and credit servicers cannot reap the benefits of the internal market due to barriers erected by divergent national legislations in the absence of a dedicated and coherent regulatory and supervisory regime. Member States have very different rules for how non-credit institutions may acquire credit agreements from credit institutions. Non-credit institutions which purchase credit issued by credit institutions are not regulated in some Member States, while in others they are subject to various requirements, sometimes amounting to a requirement to obtain an authorisation of a credit institution. These differences of regulatory requirements have resulted in considerable obstacles to legally purchasing credit cross-border in the Union mainly by increasing the compliance costs faced when seeking to purchase credit portfolios. As a result, credit purchasers operate in a limited number of Member States, which has resulted in little competition in the internal market, as the number of interested credit purchasers remains low. This has led to an inefficient secondary market for NPLs. In addition, the essentially national markets for NPLs tend to remain of a small volume.
- (11) The limited participation of non-credit institutions has resulted in low demand, weak competition and low bid prices for portfolios of credit agreements on secondary markets, which is a disincentive for credit institutions to sell non-performing credit agreements. Therefore, there is a clear Union dimension to the development of markets for credits granted by credit institutions and sold to non-credit institutions. On the one hand, it should be possible for credit institutions to sell non-performing or even performing credit agreements on a Union-wide scale in efficient, competitive and transparent secondary markets. On the other hand, completion of the Banking Union and a Capital Markets Union make it necessary to act in order to prevent the accumulation of non-performing credit agreements on credit institutions' balance sheets so that they can continue to perform their role of financing the economy.
- (12) Creditors should be able to enforce a credit agreement and recover the amounts due themselves or they should be able to entrust such recovery to another person who provides such services on a professional basis, namely credit servicers. Equally, purchasers of credit from credit institutions often use the services of credit servicers in

order to recover amounts due and yet credit servicing activities are not subject to a Union framework.

- (13) Certain Member States regulate credit servicing activities, but to varying degrees. Firstly, only some Member State regulate these activities, and, those that do, define them very differently. The increased regulatory compliance costs operate as a barrier to the development of expansion strategies by means of secondary establishment or cross-border provision of services. Secondly, a considerable number of Member States requires authorisations for some of the activities that these credit servicers engage in. These authorisations impose different requirements and do not provide for possibilities of cross-border scaling up, this again operating as a barrier to the provision of cross-border services. Finally, in some cases, local establishment is required by law, which hinders the exercise of the freedom to provide cross-border services.
- (14) While credit servicers can provide their services to credit institutions and to credit purchasers that are not credit institutions, a competitive and integrated market for credit servicers is linked to the development of a competitive and integrated market for credit purchasers. Since credit purchasers often do not have the capacity to service credit themselves, they may not purchase credit from credit institutions, if they cannot outsource the credit servicing to other entities.
- (15) The lack of competitive pressure on the market for purchasing credit and on the market for credit servicing activities results in credit servicing firms charging credit purchasers high fees for their services and leads to low prices on secondary markets for credit. This reduces incentives for credit institutions to offload their stock of NPLs.
- (16) Therefore, action at Union level is necessary in order to address the position of credit purchasers and credit servicers in relation to credit originally granted by credit institutions. It is not proposed to cover credit originally issued by non-credit institutions or debt collection in general at this stage, as there is no evidence of macroeconomic relevance, misaligned incentives or ill-functioning markets for such an extended scope.
- (17) Although the purpose of this Directive is to strengthen the credit institutions' capacity to deal with credit that has become non-performing or risks becoming non-performing, the secondary market for credit covers both performing and non-performing credit. Actual market sales encompass credit portfolios, consisting of a mix of performing, under-performing and non-performing credit. The portfolios include credit that is both secured and unsecured and that is owed by consumers or businesses. Where rules for the enforcement of credit differed for each type of credit or borrower, there would be additional costs to the packaging of those credit portfolios for sale. The provisions in this Directive that target the development of the secondary market cover performing and non-performing credit in order to avoid a situation that these additional costs would discourage investor participation and fragment this emerging market. Credit institutions will benefit from facing a larger investor base and more efficient credit servicers. Similar benefits will accrue to asset management companies that are instrumental in some Member States in marketing both non-performing and performing credit originated from credit institutions that had been resolved or been restructured or that have otherwise offloaded them from their balance sheets<sup>28</sup>.

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See Commission staff working document SWD(2018 72) on the AMC Blueprint.

- (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<sup>29</sup>, Directive 2008/48/EC of the European Parliament and of the Council<sup>30</sup> and Council Directive 93/13/EEC<sup>31</sup> 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.
- (19) This Directive should not affect acts of Union law concerning judicial cooperation in civil matters, notably the provisions on the law applicable to contractual obligations and on jurisdiction, including the application of those acts and provisions in individual cases under Regulation (EC) No 593/2008 of the European Parliament and of the Council<sup>32</sup> and, Regulation (EU) 1215/2012 of the European Parliament and of the Council<sup>33</sup>. All creditors and any persons representing them are bound to respect those acts of Union law in their dealings with the consumer and national authorities to ensure that consumer rights are protected.
- (20) In order to ensure a high level of consumer protection, Union and national law provide for a number of rights and safeguards related to credit agreements promised or granted to a consumer. Those rights and safeguards apply in particular to the negotiation and conclusion of the credit agreement and to its performance or default thereof. This is notably the case in relation to long-term consumer credit agreements falling within Directive 2014/17/EU, in respect of the right of the consumer to discharge fully or partially his obligations under a credit agreement prior to the expiry of that agreement or to be informed by means of the European Standardised Information Sheet, where applicable, on the possible transfer of the credit agreement to a credit purchaser. Borrower rights should also not be altered if the transfer of the credit agreement between a credit institution and a purchaser takes the form of contract novation.
- (21) In addition, this Directive does not reduce the scope of application of Union consumer protection rules and to the extent credit purchasers qualify as creditors under the provisions of Directive 2014/17/EU and Directive 2008/48/EC, they should be subject to the specific obligations set by Article 35 of the Directive 2014/17/EU or Article 20 of the Directive 2008/48/EC, respectively.
- (22) Union credit institutions and their subsidiaries undertake credit servicing activities as part of their normal business. They have the same obligations with regard to credit they have issued themselves and credit they purchased from another credit institution. Since they are already regulated and supervised, application of this Directive to their

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<sup>29</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

<sup>30</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 60/34, 22.5.2008, p. 66).

<sup>31</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

<sup>32</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

<sup>33</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32.



credit servicing or purchasing activities would mean unnecessary duplication of authorisation and compliance costs and therefore they are not covered by this Directive.

- (23) In order to allow existing credit purchasers and credit servicers to adapt to the requirements of the national provisions implementing this Directive and, in particular, to allow credit servicers to be authorised, this Directive will only apply to transfers of credit agreements that take place six months after the transposition deadline has expired.
- (24) The authorisation of a credit servicer to provide credit servicing activities throughout the Union should be subject to a uniform and harmonised set of conditions that should be applied in a proportionate manner by the competent authorities. To avoid a reduction in debtor or borrower protection and in order to promote trust, the conditions for granting and maintaining an authorisation as a credit servicer should ensure that credit servicers, persons who hold a qualifying holding in the credit servicer or who are part of the management of the service provider have a clean police record in relation to serious criminal offences linked to crimes against property, to crimes related to financial activities or to crimes against the physical integrity and that they are of good repute. Similarly, these persons as well as the credit servicer should not be subject to an insolvency procedure or have not previously been declared bankrupt, unless they have been reinstated in accordance with national law. Finally, to ensure compliance with debtor protection as well as personal data protection rules, it is necessary to require that appropriate governance arrangements and internal control mechanisms and recording and handling of complaints, are established and subject to supervision. Moreover, credit servicers should be obliged to act fairly and with due consideration for the financial situation of the borrowers. Where debt advice services facilitating debt repayment are available at national level, the credit servicers should consider referring borrowers to such services.
- (25) To avoid lengthy procedures and uncertainty, it is necessary to establish requirements regarding the information applicants are required to submit, as well as the reasonable deadlines for the issue of an authorisation and the circumstances for its withdrawal of authorisation. Where authorities withdraw an authorisation of a credit servicer which provides credit servicing activities in other Member States, competent authorities in the host Member State should be informed. Equally, an up-to-date online public register should be established in each Member State to ensure transparency as regards the number and identity of authorised credit servicers.
- (26) It should be established that credit servicers are responsible for making sure that where they outsource their activities to credit service providers, this does not result in undue operational risk or non-compliance by the credit service provider with any national or Union legal requirements or restrict the capacity of a regulatory supervisor to perform its duty and safeguard borrower rights.
- (27) Given that when a creditor entrusts the management and enforcement of a credit agreement, the creditor delegates its rights and duties and also its direct contact with the borrower to the credit servicer while still remaining ultimately responsible, the relationship between creditor and credit servicer should be clearly established in writing and it should be possible for competent authorities to verify how such a relationship is determined.
- (28) To ensure the right of a credit servicer to engage in cross-border activities and to provide for their supervision, this Directive sets up a procedure for the exercise of the

right of an authorised credit servicer to engage in cross-border activity. Communication between authorities in the home and host Member States as well as with a credit servicer should take place within reasonable deadlines.

- (29) In order for an effective and efficient supervision of cross-border credit servicers, a specific framework should be created for the cooperation between home and the host competent authorities. This framework should allow the exchange of information, while preserving its confidentiality, on and off-site inspections, the provision of assistance, the notification of results of checks and inspections and of any measures taken.
- (30) An important prerequisite for the taking up of the role by credit purchasers and credit servicers should be that they can access all relevant information and Member State should ensure that this is possible, while at the same time observing Union and national data protection rules.
- (31) Where a credit institution transfers a credit agreement, they should be required to inform their supervisor and the competent authority for supervising compliance with this Directive about the main characteristics of the transferred credit portfolio and the identity of the purchaser and, where applicable, its representative in the Union. That competent authority should be obliged to transmit that information to the authorities competent to supervise the credit purchaser and the competent authority where the borrower is established. Such transparency requirements allow for a harmonised and effective monitoring of the transfer of credit agreements within the Union.
- (32) As part of the Council's Action Plan, credit institutions' data infrastructure would be strengthened by having uniform and standardised data for non-performing credit agreements. The European Banking Authority has developed data templates that provide information about credit exposures in the banking book and allow potential buyers to evaluate the value of the credit agreements and carry out their due diligence. Applying such templates to credit agreements would reduce information asymmetries between potential buyers and sellers of credit agreements and, thus, contribute to the development of a functioning secondary market in the Union. The EBA should therefore develop the data templates into implementing technical standards and credit institutions should use those standards in order to facilitate the valuation of credit agreements for sale.
- (33) Since the valuation of a portfolio of non-performing credit is complicated and complex, actual buyers on secondary markets are sophisticated investors. Often they are investment funds, financial institutions or credit institutions. As they are not creating new credit, but are buying existing credit at own risk, they do not cause prudential concerns and their potential contribution to systemic risk is negligible. It is therefore not justified to require those types of investors to apply for an authorisation or to set special conditions for them to engage in such activities. It is however important that Union and national consumer protection rules continue to apply and the borrowers' rights continue to be those arising from the initial credit agreement.
- (34) Third-country credit purchasers may make it harder for the Union consumer to rely on their rights under Union law and for the national authorities to supervise the enforcement of the credit agreement. Credit institutions may also be discouraged from transferring such credit agreements to third-country credit purchasers because of the reputational risk involved. Imposing an obligation on the representative of the third-country purchasers of consumer credit to appoint a credit institution or a credit servicer authorised in the Union for servicing a credit agreement ensures that the same

standards of consumers' rights are preserved after the transfer of the credit agreement. The credit servicer is under an obligation to respect the applicable Union and national laws and the national authorities in individual Member States should be given the necessary powers to effectively supervise its activity.

- (35) Credit purchasers that use the services of credit servicers or credit institutions should inform the competent authorities thereof so as to allow them to exercise their supervisory as regards the conduct of the credit servicer vis-à-vis the borrower. Credit purchasers also have an obligation to inform in a timely manner the competent authorities in charge of their supervision if they engage a different credit institution or credit servicer.
- (36) Credit purchasers that enforce the purchased credit agreement directly should do so in compliance with the law applicable to the credit agreement, including consumer protection rules applicable to the borrower. National rules concerning in particular the enforcement of contracts, consumer protection, criminal law, continue to apply and competent authorities should ensure their compliance with them on Member States' territory.
- (37) In order to facilitate the enforcement of the obligations set out in the Directive, where a credit purchaser is not established in the Union national law implementing this Directive should provide that, where a transfer of a credit agreement is concluded, a third country credit purchaser appoints a representative established in the Union, mandated to be addressed by the competent authorities in addition or instead of the credit purchaser. This representative is responsible for the obligations imposed on credit purchasers by this Directive.
- (38) At the moment, different authorities are entrusted with the authorisation and supervision of credit servicers and credit purchasers in Member States, and therefore it is essential that Member States clarify their role and allocate adequate powers, especially as they may need to supervise entities engaged in providing services in other Member States. In order to ensure efficient and proportionate supervision across the Union, Member States should grant the necessary powers for competent authorities to carry out their duties under this Directive, including the power to obtain necessary information, to investigate possible breaches, to handle borrowers' complaints and to impose sanctions and remedial measures, including the withdrawal of the authorisation. Where such sanctions are applied, Member States should ensure that competent authorities apply them in a proportionate manner and give reasons for their decisions and that in addition those decisions should be subject to judicial review also in cases where competent authorities do not act within the timeframes provided.
- (39) In the Council's "Action Plan to Tackle Non-Performing Loans in Europe", a legislative initiative was put forward to enhance the protection of secured creditors by providing them with more efficient methods of value recovery from secured credit through an accelerated extrajudicial collateral enforcement procedure.
- (40) Expedited and efficient out-of-court enforcement mechanisms which enable secured creditors to recover value from collateral in case of borrower's default are not available in some Member States, which means that in those Member States secured creditors are only able to enforce collateral in court, which can be lengthy and costly. Where available, the scope and efficiency of the extrajudicial enforcement procedures vary from one Member State to another. For that reason it is necessary to establish a distinct common mechanism available in all Member States. That mechanism should not,

however, replace existing national enforcement measures including those that do not require the involvement of courts.

- (41) The inefficiency of some Member States' extrajudicial enforcement procedures is an important factor for low recovery rates where business borrowers default on secured credit agreements. The length of some existing procedures entails additional costs for secured creditors and loss of value of the assets provided as collateral. In the Member States which have not established extrajudicial enforcement procedures for various types of collateral, secured creditors face often lengthy judicial enforcement processes.
- (42) Existing enforcement procedures within the Union sometimes result in a lack of level-playing field for credit institutions and companies across the Union with regard to access to credit, particularly for SMEs which depend on bank credit more than larger companies. Uneven recovery rates across Member States lead to differences in the availability of bank credit for SMEs because the credit institutions' lending capacity decreases as NPLs accumulate on their balance sheets, due to prudential requirements and internal resources which need to be dedicated to dealing with NPLs. This contributes to a lack of confidence in the ability to enforce collateral in different Member States and may lead to higher borrowing costs corresponding to place of establishment and irrespective of their real creditworthiness. Therefore, a common new procedure is required for the single market, the Banking Union and the Capital Markets Union and it is necessary to ensure that credit institutions and undertakings which are authorised to issue credit by concluding secured credit agreements in all Member States have the ability to enforce those agreements through effective and expedited extrajudicial enforcement procedures.
- (43) In order to protect consumers, credit agreements provided to consumers should be excluded from the scope of the accelerated extrajudicial enforcement mechanism provided for in this Directive. Equally, in order to protect sole entrepreneurs, this mechanism should not apply to credit agreements secured by collateral in the form of real estate which is the main residence of the sole entrepreneur.
- (44) Since this accelerated extrajudicial collateral enforcement mechanism is a voluntary instrument which is subject to agreement between the secured creditor and the business borrower, it is necessary that the borrower be informed about the consequences and of the conditions under which this accelerated procedure may be used by the creditor. Therefore the conditions should be established in a written agreement, or in a notarised format where national law so provides, between the creditor and the borrower.
- (45) In order to protect business borrowers, it is appropriate to ensure that the necessary measures are in place to ensure that creditors afford borrowers a reasonable period of time for execution of payment to avert this kind of enforcement.
- (46) In order to ensure that this accelerated extrajudicial collateral enforcement mechanism is an expedited and effective instrument to recover value from collateral, the agreement by which the secured creditor and the business borrower agree upon it should comprise a directly enforceable title, which is a clause in the agreement that enables direct execution of the collateral through AECE without the need to obtain an enforceable title from the court.
- (47) In Member States which have already established extrajudicial enforcement procedures, those procedures are interlinked with elements of national civil, commercial, property, insolvency and public laws, and the type of enforcement

procedure that may be used depends on the type of the asset provided as collateral, with procedures for immovable assets often entailing stricter procedural elements and minimum judicial oversight. Therefore Member States should have flexibility in deciding upon the type of enforcement procedure which is made available to secured creditors for the purpose of this accelerated extrajudicial collateral enforcement: public auction or private sale, or, under some national frameworks, the appropriation of the asset.

- (48) In order to ensure that the secured creditor only recovers what it is due by the business borrower under the credit agreement, Member States should ensure that the secured creditor is obliged to pay the business borrower any positive difference between the sum outstanding of the secured credit agreement and the proceeds of the sale of the asset (following public auction or private sale) or, in the case of appropriation between the sum outstanding and the valuation of the asset performed for the purpose of the appropriation. It is appropriate that where Member States provide for the realisation of collateral by means of appropriation, the positive difference to be paid out to the borrower should be the difference between the sum outstanding of the secured credit agreement and the valuation of the asset. Where less than the sum outstanding of the secured credit agreement is recovered through this accelerated enforcement, Member States should not prevent the parties to a secured credit agreement from expressly agreeing that the realisation of collateral by means of AECE is sufficient to repay the credit.
- (49) Member States should ensure that where a secured credit agreement which provides for the accelerated extrajudicial collateral enforcement set out in this Directive is transferred by the creditor to a third party, that third party would acquire the right to avail himself of the accelerated extrajudicial collateral enforcement under the same terms and conditions as the secured creditor.
- (50) In order to ensure consistency with pre-insolvency and insolvency rules, Member States should ensure that where a preventive restructuring proceeding, as provided for in the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring and second chance<sup>34</sup>, is initiated in respect of the business borrower, the realisation of the collateral pursuant to an AECE is subject to a stay of individual enforcement actions in accordance with applicable national laws transposing that Directive. In the case of any insolvency proceedings which are initiated in respect of the business borrower, the realisation of the collateral pursuant to an AECE should also be subject to a stay of individual enforcement actions in accordance with applicable national laws. It should be left to national law whether secured creditors have preferential access to the collateral under this accelerated mechanism even once insolvency proceedings are open.
- (51) Given the limited availability of data on the number of extrajudicial procedures used by credit institutions to recover value from collateral in case of borrower's default, national competent authorities which supervise credit institutions should be required to collect information on the number of secured credit agreements which are enforced through AECE and the timeframes for such enforcement. In order to gain a better understanding of the effectiveness of the exercise of AECE within the Union, Member

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<sup>34</sup> Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM/2016/0723 final, 22.11.2016.



States should provide annual statistical data on these matters to the Commission starting from one year after the date of application of this Directive.

- (52) Without prejudice to pre-contractual obligations under Directive 2014/17/EU, Directive 2008/48/EC and Directive 93/13/EEC, and in order to ensure a high level of consumer protection, the consumer should be presented, in due time and prior to any modifications to the terms and conditions of the credit agreement, with a clear and comprehensive list of any such changes, the timescale for their implementation and the necessary details as well as the name and address of the national authority where he or she may lodge a complaint.
- (53) Since the performance of secondary markets for credit will depend to a large extent on the good reputation of the entities involved, credit servicers should establish an efficient mechanism by which to treat borrower complaints. Member States should ensure that authorities competent for the supervision of credit purchases and credit servicers have effective and accessible procedures to deal with borrowers' complaints.
- (54) Both the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>35</sup> and Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>36</sup> apply to the processing of personal data for the purposes of this Directive. In particular, where personal data is processed for the purposes of this Directive, the precise purpose should be specified, the relevant legal basis referred to, the relevant security requirements laid down in Regulation (EU) 2016/679 complied with, and the principles of necessity, proportionality, purpose limitation and proportionate data retention period respected. Also, personal data protection by design and data protection by default should be embedded in all data processing systems developed and used within the framework of this Directive. Equally, administrative cooperation and mutual assistance between the competent authorities of the Member States should be compatible with the rules on the protection of personal data laid down in Regulation (EU) 2016/679 of the European Parliament and of the Council, and in accordance with national data protection rules implementing Union legislation.
- (55) In order to ensure that the level of protection of the consumer is not affected in the event of an assignment to a third party of the creditor's rights under a mortgage credit agreement or of the agreement itself, an amendment to Directive 2014/17/EU should be introduced to establish that, in cases of a transfer of credit covered by that Directive, the consumer is entitled to plead against the credit purchaser any defence which was available to him against the original creditor and to be informed of the assignment.
- (56) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition

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<sup>35</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>36</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

## **Title I**

### **Subject matter, scope and definitions**

#### *Article 1*

##### **Subject matter**

This Directive lays down a common framework and requirements for:

- (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;
- (b) credit purchasers of a credit agreement issued by a credit institution or by its subsidiaries;
- (c) a supplementary common accelerated extrajudicial collateral enforcement mechanism in respect of secured credit agreements concluded between creditors and business borrowers which are secured by collateral.

#### *Article 2*

##### **Scope**

1. Articles 3 to 22 and Articles 34 to 43 of this Directive shall apply to:
  - (a) a credit servicer of a credit agreement issued by a credit institution established in the Union or by its subsidiaries established in the Union which acts on behalf of a creditor, in accordance with applicable Union or national law.
  - (b) a credit purchaser of a credit agreement issued by a credit institution established in the Union or by its subsidiaries established in the Union, whereby the credit purchaser assumes the creditor's obligations under the credit agreement, in accordance with applicable Union and national law;
2. Articles 3, 23 to 33 and 39 to 43 of this Directive shall apply to secured credit agreements concluded between creditors and business borrowers which are secured by any movable and immovable assets owned by the business borrower and which have been posed as collateral to a creditor in order to secure repayment of claims arising from the secured credit agreement.
3. This Directive does not affect the protection granted to consumers, pursuant to Directive 2014/17/EU, Directive 2008/48/EC, Council Directive 93/13/EEC and the national provisions transposing them, with regard to credit agreements falling within its scope.
4. Articles 3 to 22 and 34 to 43 of this Directive shall not apply to the following:
  - (a) the servicing of a credit agreement carried out by a credit institution established in the Union or its subsidiaries established in the Union;

- (b) the servicing of a credit agreement that was not issued by a credit institution established in the Union or its subsidiaries established in the Union, except where the credit agreement issued is replaced by a credit agreement issued by such an institution or its subsidiaries;
  - (c) the purchase of a credit agreement by a credit institution established in the Union or its subsidiaries established in the Union;
  - (d) the transfer of credit agreements transferred before the date referred to in the second subparagraph of Article 41(2).
5. Articles 3, 23 to 33 and 34 to 43 of this Directive shall not apply to:
- (a) secured credit agreements concluded between creditors and borrowers who are consumers as defined in point (a) of Article 3 of Directive 2008/48/EC;
  - (b) secured credit agreements concluded between creditors and business borrowers who are non-profit making companies;
  - (c) secured credit agreements concluded between creditors and business borrowers which are secured by the following categories of collateral:
    - (i) financial collateral arrangements as defined in Article 2(1)(a) of Directive 2002/47/EC<sup>37</sup>;
    - (ii) immovable residential property which is the primary residence of a business borrower.

### *Article 3*

#### **Definitions**

For the purpose of this Directive, the following definitions shall apply:

- (1) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013<sup>38</sup>;
- (2) 'creditor' means a credit institution or any legal person who has issued a credit in the course of his trade, business or profession, or a credit purchaser;
- (3) 'borrower' means a legal or natural person who has concluded a credit agreement with a creditor;
- (4) 'business borrower' means a legal or natural person, other than a consumer, who has concluded a credit agreement with a creditor;
- (5) 'credit agreement' means an agreement as originally issued, modified or replaced, whereby a creditor grants or promises to grant a credit in the form of a deferred payment, a loan or other similar financial accommodation;
- (6) 'secured credit agreement' means a credit agreement concluded by a credit institution or another undertaking authorised to issue credit, which is secured by either of the following collateral;

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<sup>37</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168 , 27.6.2002, p. 43).

<sup>38</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

- (a) a mortgage, charge, lien or other comparable security right commonly used in a Member State in relation to immovable assets;
- (b) a pledge, charge, lien or other comparable security right commonly used in a Member State in relation to movable assets;
- (7) 'credit purchaser' means any natural or legal person other than a credit institution or a subsidiary of a credit institution which purchases a credit agreement in the course of his trade, business or profession;
- (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:
  - (a) monitors the performance of the credit agreement;
  - (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;
  - (c) informs the borrower of any changes in interest rates, charges or of payments due under the credit agreement;
  - (d) enforces the rights and obligations under the credit agreement on behalf of the creditor, including administering repayments;
  - (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;
  - (f) handles borrowers' complaints.
- (9) 'home Member State' means the Member State in which the credit servicer is domiciled or established.
- (10) 'host Member State' means a Member State, other than the home Member State, in which a credit servicer has established a branch, has appointed an agent or where a credit servicer provides services.
- (11) 'consumer' means a consumer as defined in point (a) of Article 3 of Directive 2008/48/EC.

## **Title II**

### **Credit servicers**

#### **Chapter I**

#### **Authorisation of credit servicers**

##### *Article 4*

##### **General requirements**

1. Member States shall require a credit servicer to obtain an authorisation in a home Member State before commencing its activities within its territory in accordance with the requirements set out in the national provisions transposing this Directive.

2. Member States shall confer the power to grant such authorisations upon the competent authorities designated pursuant to Article 20(3).

#### *Article 5*

##### **Requirements for granting an authorisation**

1. Member States shall lay down the following requirements for the granting of an authorisation as referred to in Article 4(1):
  - (a) the applicant is a citizen of the Union or a legal person as referred to in Article 54 of the Treaty on the Functioning of the European Union;
  - (b) where the applicant is a legal person, the members of its management or administrative organ and the persons who hold qualifying holdings in the applicant, within the meaning of point (36) of Article 4(1) of Regulation (EU) No 575/2013, or where the applicant is a natural person, shall have the following characteristics:
    - (i) are of sufficiently good repute;
    - (ii) have a clean police record or other national equivalent in relation to serious criminal offences relating to property, to financial activities or to physical integrity;
    - (iii) are not currently subject to any insolvency procedure or have previously been declared bankrupt unless reinstated in accordance with national law;
  - (c) the applicant has appropriate governance arrangements and internal control mechanisms in place which ensure respect for borrower rights and compliance with personal data protection rules in accordance with the laws governing the credit agreement,
  - (d) the applicant applies an appropriate policy ensuring the fair and diligent treatment of the borrowers, including by taking into account their financial situation and, where available, the need for such borrowers to be referred to debt advice or social services;
  - (e) the applicant has adequate and specific internal procedures in place which ensure the recording and handling of borrower complaints.
2. The competent authorities of the home Member State shall refuse an authorisation referred to in Article 4(1), where the applicant does not comply with the requirements set out in paragraph 1.

#### *Article 6*

##### **Procedure for granting or refusing an authorisation**

1. Member States shall establish a procedure for the authorisation of credit servicers which enables an applicant to submit an application and provide all the information necessary for the competent authority of the home Member State to verify that the applicant has satisfied all the conditions laid down in the national measures transposing Article 5(1).
2. The application for authorisation, referred to in paragraph 1, shall be accompanied by the following:



- (a) evidence of the applicant's legal status and its instrument of constitution, where appropriate;
  - (b) the address of the applicant's head office or its registered office;
  - (c) the identity of the members of applicant's management or administrative organ who hold qualifying holdings within the meaning of point (36) of Article 4(1) of Regulation (EU) No 575/2013;
  - (d) evidence that the applicant and the persons referred to in point (c) of this Article, comply with the conditions laid down in Article 5(1)(b);
  - (e) evidence of the governance arrangements and internal control mechanisms referred to in Article 5(1)(c);
  - (f) evidence of the policy referred to in Article 5(1)(d);
  - (g) evidence of the internal procedures referred to in Article 5(1)(e);
  - (h) any outsourcing agreement as referred to in Article 10(1).
3. Member States shall ensure that the competent authorities of a home Member State assess, within 20 working days of receipt of the application for authorisation, whether that application is complete. Where the application is considered incomplete, the competent authorities shall set a deadline by which the applicant is to provide any further additional information and they shall notify the applicant when they consider an application to be complete.
  4. Member States shall ensure that competent authorities of the home Member State assess, within 30 working days from the date of receipt of a complete application, whether the applicant complies with the national provisions transposing this Directive. The competent authorities shall, on conclusion of that assessment, adopt a fully reasoned decision either granting or refusing the authorisation which shall be notified to the applicant within five working days.
  5. Member States shall ensure that an applicant has the right of appeal before a tribunal either where the competent authorities of the home Member State decide to refuse an application for authorisation pursuant to Article 5(2) or where no decision is taken by the competent authorities in respect of an application for authorisation, within six months of lodging a complete application.

### *Article 7*

#### **Withdrawal of authorisation**

1. Member States shall ensure that the competent authorities of the home Member State may withdraw the authorisation granted to a credit servicer, where such a credit servicer either:
  - (a) does not make use of the authorisation within 12 months of its grant;
  - (b) expressly renounces the authorisation;
  - (c) has ceased to engage in the activities of a credit servicer for more than six months;
  - (d) has acquired an authorisation through false statements or other irregular means;
  - (e) no longer meets the conditions set out in Article 5(1);

- (f) commits a serious breach of the applicable rules, including the national law provisions transposing this Directive.
2. Where an authorisation is withdrawn in accordance with paragraph 1, Member States shall ensure that the competent authorities of the home Member State shall immediately inform the competent authorities in the host Member States if the credit servicer provides services under Article 11.

#### *Article 8*

#### **Register of authorised credit servicers**

1. Member States shall ensure that competent authorities establish and maintain a national register of all authorised credit servicers authorised to provide services within their territory, including credit servicers providing services under Article 11.
2. The register shall be made publicly accessible online and shall be updated on a regular basis.
3. In case an authorisation has been withdrawn, the competent authorities shall update the register without delay.

#### *Article 9*

#### **Contractual relationship between a credit servicer and a creditor**

1. Member States shall ensure that a credit servicer provides its services in respect of the management and enforcement of a credit agreement on the basis of a written agreement with a creditor.
2. The agreement referred to in the paragraph 1 shall provide for the following:
  - (a) a detailed description of credit servicing activities to be carried out by the credit servicer;
  - (b) the level of remuneration of the credit servicer or how the remuneration is to be calculated;
  - (c) the extent to which the credit servicer can represent the creditor in relation to the borrower;
  - (d) an undertaking by the parties to comply with the Union and national law applicable to the credit agreement, including in respect of consumer protection.
3. Member States shall ensure that the credit servicer keeps and maintains the following records for at least 10 years from the date of the contract referred to in paragraph 1:
  - (a) all correspondence with both the creditor and the borrower;
  - (b) all instructions received from the creditor in respect of each credit agreement that it manages and enforces on behalf of that creditor.
4. Member States shall ensure that the credit servicer makes the records referred to in paragraph 3 available to competent authorities upon request.

## *Article 10*

### **Outsourcing by a credit servicer**

1. Member States shall ensure that where a credit servicer uses a third party to perform activities that would normally be undertaken by that credit servicer ('credit service provider'), the credit servicer remains fully responsible for complying with all obligations under the national provisions transposing this Directive. The outsourcing of those credit servicing activities shall be subject to the following conditions:
  - (a) the conclusion of a written outsourcing agreement between the credit servicer and the credit service provider under which the credit service provider is obliged to comply with relevant Union or national law applicable to the credit agreement;
  - (b) the obligations of credit servicers under this Directive may not be delegated;
  - (c) the contractual relationship and obligations of the credit servicer towards its clients are not altered;
  - (d) the conditions for the authorisation of the credit servicer as set out in Article 5(1) are not affected;
  - (e) the outsourcing to the credit service provider does not prevent the supervision by competent authorities of a credit servicer in accordance with Articles 12 and 20;
  - (f) the credit servicer has direct access to all relevant information concerning the outsourced services to the credit service provider;
  - (g) the credit servicer retains the expertise and resources to be able to provide the outsourced activities, after the outsourcing agreement is terminated.
2. Member States shall ensure that the credit servicer keeps and maintains records of all instructions provided to the credit service provider for at least 10 years from the date of the contract referred to in paragraph 1.
3. Member States shall ensure that the credit servicer and the credit service provider make the information referred to in paragraph 2 available to competent authorities upon request.

## **Chapter II**

### *Cross Border Credit Servicing*

## *Article 11*

### **Freedom to provide credit servicing activities in a host Member State**

1. Member States shall ensure that a credit servicer having obtained an authorisation in accordance with Article 5 in a home Member State has the right to provide in the Union those services that are covered by that authorisation.
2. Member States shall ensure that where the credit servicer authorised in accordance with Article 5 in a home Member State intends to provide services in a host Member State, it shall submit to the competent authority of the home Member State the following information:

- (a) the host Member State in which the credit servicer intends to provide services;
  - (b) where applicable, the address of the branch established in the host Member State;
  - (c) where applicable, identity and address of an agent appointed in a host Member State;
  - (d) the identity of the persons responsible for managing the provision of credit servicing activities in the host Member State;
  - (e) as the case may be, details of the measures taken to adapt the internal procedures, governance arrangements and internal control mechanisms to ensure compliance with the laws applicable to the credit agreement.
3. The competent authorities of the home Member State shall, within 30 working days of the receipt of the information referred to in paragraph 2, communicate that information to the competent authorities of the host Member State which shall acknowledge receipt thereof without delay. The competent authorities of the home Member State shall thereafter inform the credit servicer of such confirmation of receipt.
4. Member States shall ensure that a credit servicer has the right of appeal before a tribunal where the competent authorities of the home Member State fail to communicate the information.
5. Member States shall ensure that once the competent authorities of a home Member State communicate the information referred to in paragraph 2, the credit servicer may start providing services in the host Member State from the earlier of the following:
  - (a) receipt of the communication from the competent authorities in the host Member State acknowledging receipt of the communication referred to in paragraph 3;
  - (b) in the absence of any receipt of a communication referred to in point (a), after the expiry of two months from the date of communication of the information referred to in paragraph 3.
6. Member States shall ensure that a credit servicer shall inform the competent authority of the home Member State of change subsequent to the information communicated in accordance with paragraph 3 by means of the procedure set out in paragraphs 3 to 5.
7. Member States shall ensure that the competent authorities of the host Member State record in the register referred to in Article 8 the credit servicers who are authorised to provide credit servicing activities in their territory and the details of the home Member State.

## *Article 12*

### **Supervision of credit servicers who provide cross-border services**

1. Member States shall ensure that the competent authorities of the home Member State review and evaluate the ongoing compliance by a credit servicer who provides services in a host Member State with the requirements of this Directive.
2. Member States shall ensure that the competent authorities of a home Member State are empowered to supervise, investigate and impose administrative sanctions or

penalties and remedial measures on credit servicers in respect of their activities in a host Member State.

3. Member States shall ensure that the competent authorities of the home Member State will communicate the measures taken in respect of the credit servicer to the competent authorities of the host Member States.
4. Member States shall ensure that where a credit servicer which is domiciled or established in a home Member State, has set up a branch or appointed an agent in a host Member State, the competent authorities of the home Member State and the competent authorities of the host Member State shall cooperate closely in the performance of their functions and duties provided for in this Directive, in particular when carrying out checks, investigations and on-site inspections in that branch or in respect of that agent.
5. Member States shall ensure that the competent authorities of the home Member State in the exercise of their functions and duties provided for in this Directive shall ask the competent authorities of the host Member State for their assistance in carrying out an on-site inspection of a branch set up in or of an agent appointed in a host Member State.
6. Member States shall further ensure that the competent authorities of the host Member State shall be entitled to decide on the most appropriate measures to be taken in each individual case in order to meet the request of assistance by the competent authorities of the home Member State.
7. Where the competent authorities of the host Member State decides to conduct on-site inspections on behalf of the competent authorities of the home Member State, they shall inform the competent authorities of the home Member State of the results thereof without delay.
8. On their own initiative, the competent authorities of the host Member State may conduct checks, inspections and investigations in respect of credit servicing activities provided within their territory by a credit servicer authorised in a home Member State. The competent authorities of the host Member State shall provide the results of these checks, inspections and investigations to the competent authorities of the home Member State without delay.
9. Member States shall ensure that where the competent authorities of the host Member State have evidence that a credit servicer providing services within its territory, in accordance with Article 11, is in breach of the obligations arising from the national provisions transposing this Directive, it shall transmit that evidence to the competent authorities of the home Member State and request that they take appropriate measures.
10. Member States shall ensure that the competent authorities of the home Member State communicate details of any administrative or other procedure initiated in respect of the evidence provided by the host Member State, or about sanctions or penalties and remedial measures taken against the credit servicer or a reasoned decision why no measures were taken, to the competent authorities of the host Member State who referred the evidence no later than two months from the request referred to in paragraph 8. Where a procedure has been initiated, the competent authorities of the home Member State shall regularly inform the competent authorities of the host Member State about its status.



11. Member States shall ensure that where, after having informed the home Member State no adequate measures were taken in a reasonable time or despite measures taken by the competent authorities of the home Member State or in an urgent case, the credit servicer continues to be in breach of the obligations under this Directive, the competent authorities of the host Member State are entitled to take appropriate administrative sanctions or penalties and remedial measures in order to ensure compliance with the provisions of this Directive within its territory after informing without delay the competent authorities of the home Member State.

## **Title III**

### **Credit purchasers**

#### *Article 13*

##### **Right to information regarding the credit agreement**

1. Member States shall ensure that a creditor shall provide all necessary information to a credit purchaser to enable that credit purchaser assess the value of the credit agreement and the likelihood of recovery of the value of that agreement prior to entering into a contract for the transfer of that credit agreement.
2. Member States shall require a credit institution or the subsidiary of a credit institution that transfers a credit agreement to a credit purchaser to inform the competent authorities designated in accordance with Article 20(3) of this Directive and Article 4 of Directive 2013/36/EU<sup>39</sup> of the following:
  - (a) the type of asset securing the credit agreement, including information on whether it is a credit agreement concluded with consumers;
  - (b) the value of the credit agreement;
  - (c) the identity and address of the borrower and of the credit purchaser and, where applicable, of its representative designated in accordance with Article 17.
3. The competent authorities referred to in paragraph 2 shall communicate without delay the information referred to in that paragraph and any other information that they might consider to be necessary for carrying out their task according to this Directive to the competent authorities of the Member State where the credit purchaser or its representative, designated in accordance with Article 17, is established and of the Member State where the borrower is established or resident.
4. The provisions laid down in paragraphs 1,2 and 3 shall be applied in accordance with Regulation (EU) 2016/679 and Regulation (EC) No 45/2001.

#### *Article 14*

##### **Technical standards for NPL data**

1. EBA shall develop draft implementing technical standards that specify the formats to be used by creditors who are credit institutions for the provision of information as set

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<sup>39</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

out in Article 13(1), in order to provide detailed information on their credit exposures in the banking book to credit purchasers for the screening, financial due diligence and valuation of the credit agreement.

2. EBA shall submit those draft implementing technical standards to the Commission by [31 December 2018].
3. Power is conferred on the Commission to adopt the implementing technical standards referred to in the paragraph 1, in accordance with Article 15 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>40</sup>.

#### *Article 15*

##### **Obligations of credit purchasers**

1. Member States shall ensure that the representative of a credit purchaser referred to in Article 17(1) appoints a credit institution established in the Union or its subsidiary established in the Union or an authorised credit servicer to perform credit servicing activities in respect of credit agreements concluded with consumers.
2. Member States shall ensure that a credit purchaser is not subject to any additional requirements for the purchase of credit agreements other than as provided for by the national measures transposing this Directive.

#### *Article 16*

##### **Use of credit servicers, credit institutions or their subsidiaries**

1. Member States shall require the credit purchaser or, where applicable, their representative designated in accordance with Article 17, to inform the competent authorities of the Member State where the credit purchaser or their representative is domiciled or established of the identity and address of the credit institution, its subsidiary or the credit servicer that they have engaged to perform credit servicing activities in relation to the transferred credit agreement.
2. Where the credit purchaser or the representative designated in accordance with Article 17 engages a different credit institution or subsidiary to service the credit or a different credit servicer, it shall notify the competent authorities referred to in paragraph 1 thereof at least two weeks in advance of that change and shall indicate the identity and address of the new credit institution, its subsidiary or credit servicer that they have engaged to perform credit servicing activities in relation to the transferred credit agreement.
3. Member States shall require the competent authorities of the Member State where the credit purchaser or, where applicable, their representative designated, in accordance with Article 17, is domiciled or established to transmit without undue delay to the competent authorities responsible for the supervision of the credit institution, its subsidiary or credit servicer referred to in the paragraphs 1 and 2, the information received in accordance with Article 13(3).

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<sup>40</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

## *Article 17*

### **Representative of credit purchasers not established in the Union**

1. Member States shall provide that where a transfer of the credit agreement is concluded, a credit purchaser that is not domiciled or established in the Union has designated in writing a representative who is domiciled or established in the Union.
2. The representative referred to in paragraph 1 shall be addressed in addition to or instead of the credit purchaser by competent authorities on all issues related to the ongoing compliance with this Directive and be fully responsible for compliance with the obligations imposed on the credit purchaser under the national provisions transposing this Directive.

## *Article 18*

### **Credit purchasers directly enforcing a credit agreement**

1. Member States shall ensure that a credit purchaser or, where applicable, its representative designated in accordance with Article 17, communicates to the competent authorities of the Member State where the credit purchaser or, where applicable its representative is domiciled or established that it intends to directly enforce a credit agreement by providing the following information:
  - (a) the type of asset securing the credit agreement, including information on whether it is a credit agreement concluded with consumers;
  - (b) the value of the credit agreement;
  - (c) the identity and address of the borrower and of the credit purchaser or of its representative designated in accordance with Article 17.
2. Member States shall require the competent authorities referred to in paragraph 1, to transmit without undue delay the information received in accordance with paragraph 1 to the competent authorities of the Member State where the borrower is established.

## *Article 19*

### **Transfer of a credit agreement by a credit purchaser**

1. Member States shall require a credit purchaser or, where applicable, its representative designated in accordance with Article 17, that transfers a credit agreement to another credit purchaser to inform the competent authorities referred to in Article 18(1) of the transfer, the identity and address of the new credit purchaser and, where applicable, its representative designated in accordance with Article 17.
2. Member States shall ensure that the competent authorities referred to in paragraph 1 shall transmit without undue delay the information received in accordance with Article 13(3) to the competent authorities of the Member State where the new credit purchaser and, where applicable, its representative is domiciled or established.

## TITLE IV

### Supervision

#### *Article 20*

##### **Supervision by competent authorities**

1. Member States shall ensure that credit servicers and, where applicable, credit service providers to whom activities have been outsourced in accordance with Article 10, comply with the national provisions transposing this Directive on an on-going basis and shall ensure that those activities are subject to adequate supervision by the competent authorities of the home Member State in order to assess such compliance.
2. The Member State where the credit purchasers or, where applicable, their representative designated in accordance to Article 17, are domiciled or established shall ensure that the competent authorities referred to in paragraph 1 are responsible for the supervision of the obligations set in Articles 15-19 in respect of credit purchasers or, where applicable their representatives designated in accordance to Article 17.
3. Member States shall designate the competent authorities responsible for carrying out the functions and duties under the national provisions transposing this Directive.
4. Where Member States designate more than one competent authority pursuant to paragraph 3, they shall determine their respective tasks.
5. Member States shall ensure that appropriate measures are in place to enable the competent authorities designated pursuant to paragraph 3 to obtain from credit purchasers or their representatives, credit servicers, credit service providers to whom a credit servicer outsources activities under Article 10, borrowers and any other persons or public authority the information necessary to carry out the following:
  - (a) assess the ongoing compliance with the requirements laid down in the national provisions transposing this Directive;
  - (b) investigate possible breaches of those requirements;
  - (c) impose administrative penalties and remedial measures in accordance with the provisions transposing Article 22.
6. Member States shall ensure that the competent authorities designated pursuant to paragraph 3, have the expertise, resources, operational capacity and powers necessary for the exercise of their functions and duties laid down in this Directive.

#### *Article 21*

##### **Supervisory role and powers of competent authorities**

1. Member States shall ensure that competent authorities of the home Member State designated pursuant to Article 20(3), are given all supervisory, investigatory and sanctioning powers necessary for the exercise of their functions and duties laid down in this Directive, including the following:
  - (a) the power to grant or refuse an authorisation pursuant to Article 5;

- (b) the power to withdraw an authorisation pursuant to Article 7;
  - (c) the power to conduct on-site and off-site inspections;
  - (d) the power to impose administrative sanctions or penalties and remedial measures in accordance with the provisions transposing Article 22;
  - (e) the power to review outsourcing agreements entered into by credit servicers with credit service providers in accordance with Article 10(1).
2. Member States shall ensure that the competent authorities of the home Member State evaluate, at least once a year, the implementation by a credit servicer of the requirements set in points (c) (d) and (e) of Article 5(1).
  3. Member States shall determine the extent of the evaluation referred to in paragraph 2, having regard to the size, nature, scale and complexity of the activities of the credit servicer concerned.
  4. The competent authorities of the home Member State shall regularly, and at least once a year, inform the competent authorities of host Member States of the results of the evaluation referred to in paragraph 2, including details of any administrative penalties or remedial measures taken.
  5. Member States shall ensure that when carrying out the evaluation referred to in paragraph 2, the competent authorities of the home and host Member States exchange all information necessary to enable them to carry out their respective tasks laid down in this Directive.
  6. Member States shall ensure that the competent authority of the home Member State is able to require a credit servicer, credit service provider or credit purchaser or its representative appointed in accordance with Article 17 that does not meet the requirements of the national provisions transposing this Directive to take at an early stage, all necessary actions or steps in order to comply with those provisions.

## *Article 22*

### **Administrative penalties and remedial measures**

1. Member States shall lay down rules establishing appropriate administrative penalties and remedial measures applicable in at least the following situations:
  - (a) a credit servicer fails to enter or enters into an outsourcing agreement in breach of the provisions transposing Article 10 or the credit service provider to whom the functions were outsourced commits a serious breach of the applicable legal rules, including the national law transposing this Directive;
  - (b) a credit servicer's governance arrangements and internal control mechanisms fail to ensure respect for borrower rights and compliance with personal data protection rules;
  - (c) a credit servicer's policy is inadequate for the proper treatment of borrowers as set in Article 5(1)(d);
  - (d) a credit servicer's internal procedures fail to provide for the recording and handling of borrower complaints according to the obligations set in the national measures transposing this directive;



- (e) a credit purchaser or, where applicable, its representative designated in accordance with Article 17 fails to communicate the information provided for by national measures transposing Article 16, 18 and 19;
  - (f) a credit purchaser or, where applicable, its representative designated in accordance with Article 17 fails to comply with the requirement of the national measures transposing Article 15;
  - (g) a credit purchaser fails to comply with the requirement of the national measures transposing Article 17.
2. The penalties and measures referred to in paragraph 1 shall be effective, proportionate and dissuasive and shall include at least the following:
- (a) a cancellation of an authorisation to carry out activities as a credit servicer;
  - (b) an order requiring the credit servicer or credit purchaser or, where applicable, its representative designated in accordance with Article 17 to remedy the breach, and to cease the conduct and to desist from a repetition of that conduct;
  - (c) administrative pecuniary penalties.
3. Member States shall also ensure that administrative penalties and remedial measures are effectively implemented.
4. Member States shall ensure that when determining the type of administrative penalties or other remedial measures and the amount of those administrative pecuniary penalties that competent authorities take into account all the following circumstances, where relevant:
- (a) the gravity and the duration of the breach;
  - (b) the degree of responsibility of the credit servicer or credit purchaser or, where applicable, its representative designated in accordance with Article 17, responsible for the breach;
  - (c) the financial strength of the credit servicer or credit purchaser responsible for the breach, including by reference to the total turnover of a legal person or the annual income of a natural person;
  - (d) the importance of profits gained or losses avoided because of the breach by the credit servicer or credit purchaser or, where applicable, its representative designated in accordance with Article 17, responsible for the breach, insofar as they can be determined;
  - (e) the losses caused to third parties by the breach, insofar as those losses can be determined;
  - (f) the level of cooperation by the credit servicer or credit purchaser responsible for the breach with the competent authorities;
  - (g) previous breaches by the credit servicer or credit purchaser or, where applicable, its representative designated in accordance with Article 17, responsible for the breach;
  - (h) any actual or potential systemic consequences of the breach.
5. Where the situations referred to in paragraph 1 apply to legal persons, Member States shall also ensure that competent authorities apply the administrative penalties and remedial measures set out in paragraph 2 to members of the management or

administrative organ, and to other individuals who under national law are responsible for the breach.

6. Member States shall ensure that before taking any decision imposing administrative penalties or remedial measures set out in paragraph 2 of this Article, the competent authorities give the concerned credit servicer, credit purchaser or where applicable, its representative designated in accordance with Article 17, the opportunity to be heard.
7. Member States shall ensure that any decision imposing administrative sanctions or remedial measures as set out in paragraph 2 is properly reasoned and is subject to the right of appeal.

## **TITLE V**

### **Accelerated Extrajudicial Collateral Enforcement**

#### *Article 23*

##### **Conditions for the voluntary use of Accelerated Extrajudicial Collateral Enforcement**

1. Member States shall ensure that this accelerated extrajudicial collateral enforcement mechanism may be exercised by a creditor where all of the following conditions are fulfilled:
  - (a) the mechanism has been agreed in writing, or in a notarised format if so provided by the Member State, by the creditor and business borrower and that agreement specifies the enforcement event and the period of time in which the business borrower may execute payment following that event in order to avert the execution of this accelerated extrajudicial collateral enforcement;
  - (b) the business borrower has been clearly informed about the application and consequences of this accelerated extrajudicial collateral enforcement prior to the conclusion of the agreement referred to in point (a);
  - (c) within 4 weeks of the enforcement event, or such later point in time where so negotiated by the creditor and the business borrower, the creditor has notified the business borrower, in writing, of all of the following:
    - (i) the creditor's intention to realise the assets through this accelerated extrajudicial collateral enforcement mechanism to satisfy the contractual obligations of the secured credit agreement;
    - (ii) the type of enforcement measure to be applied as referred to in Articles 25 and 26;
    - (iii) the time period for the execution of payment before the use of the accelerated extrajudicial collateral enforcement mechanism referred to in point (a);
    - (iv) the default amount of the secured credit agreement due pursuant to the contractual obligations of the secured credit agreement;
  - (d) the business borrower has not executed the full payment as stipulated in the creditor's notification referred to in point (c).

For the purposes of paragraph 1, the agreement referred to in paragraph 1(a) shall include a directly enforceable title.

For the purposes of paragraph 1(a), Member States may establish that in cases where a business borrower has paid at least 85% of the amount of the secured credit agreement, the period referred to therein may be extended by at least six months.

2. Member States shall ensure that the business borrower is not permitted to dispose of the assets pledged as collateral as of receipt of the notification referred to in paragraph 1(c) and is subject to a general duty to cooperate and to furnish all relevant information where this accelerated extrajudicial collateral enforcement mechanism is exercisable in accordance with paragraph 1.
3. Member States shall ensure that the creditor affords the business borrower a reasonable period of time for execution of payment and makes reasonable efforts to avoid the use of this accelerated extrajudicial collateral enforcement mechanism.

#### *Article 24*

#### **Enforcement**

1. Member States shall ensure that collateral may be realised pursuant to this accelerated extrajudicial collateral enforcement mechanism.
2. Member States shall provide for at least one or both of the following means to realise the collateral as referred to in paragraph 1 for each type of security right and collateral:
  - (a) public auction;
  - (b) private sale.

For each of these means, Member States may provide that a notary, bailiff or other public official is appointed where appropriate to ensure an efficient and expedited distribution of sale proceeds and transfer of the collateral to an acquirer, or safeguard the borrower's rights.

3. Where Member States establish the extrajudicial enforcement procedure by means of appropriation, the right of the creditor to retain the asset in or towards satisfaction of business borrower's liability shall be governed by the applicable laws in each Member State. Member States shall ensure that in the case of appropriation the positive difference to be paid out to the business borrower shall be the difference between sum outstanding of the secured credit agreement and the valuation of the asset.
4. For the purposes of the realisation referred to in paragraph 2, Member States shall ensure that the creditor organises a valuation of the assets, in order to determine the reserve price in cases of public auction and private sale, and that the following conditions are met:
  - (a) the creditor and the business borrower agree on the valuer to be appointed;
  - (b) the valuation is conducted by an independent valuer;
  - (c) the valuation is fair and realistic;

- (d) the valuation is conducted specifically for the purposes of the realisation of the collateral after the enforcement event;
  - (e) the business borrower has the right to challenge the valuation before a court in accordance with Article 29.
5. For the purposes of point (a), where the parties cannot agree upon the appointment of a valuer for the purposes of realising the collateral referred to in paragraph 2, a valuer shall be appointed by a decision of a judicial court, in accordance with the national law of the Member State in which the business borrower is established or is domiciled.

#### *Article 25*

#### **Public auction**

1. Member States shall ensure that the realisation of collateral by means of public auction is conducted in accordance with the following elements:
- (a) the creditor has publicly communicated the time and place of the public auction at least 10 days prior to that auction;
  - (b) the creditor has made reasonable efforts to attract the highest number of potential buyers;
  - (c) the creditor has notified the business borrower, and any third party with an interest in or right to the asset, of the public auction, including its time and place, at least 10 days prior to that auction;
  - (d) a valuation of the asset has been conducted prior to the public auction;
  - (e) the reserve price of the asset is at least equal to the valuation amount determined prior to the public auction;
  - (f) the asset may be sold at a reduction of no more than 20% of the valuation amount where both of the following apply:
    - (i) no buyer has made an offer in line with the requirements referred to in points (e) and (f) at the public auction;
    - (ii) there is a threat of imminent deterioration of the asset.
2. Where the asset has not been sold by public auction, Member States may provide for the realisation of the collateral by private sale.
3. Where a Member State provides for a second public auction, points (a) to (e) of paragraph 1 shall apply but the asset may be sold at a further reduction, as determined by Member States.

#### *Article 26*

#### **Private sale**

1. Member States shall ensure that the realisation of collateral by means of private sale is conducted in accordance with the following elements:
- (a) the creditor has made reasonable efforts, including adequate public advertising, to attract potential buyers;

- (b) the creditor has notified the business borrower, and any relevant third party with an interest in or right to the asset, of its intention to sell the asset at least 10 days prior to offering the asset for sale;
  - (c) a valuation of the asset has been conducted prior to the private sale, and or a public auction in accordance with point (c) of Article 25(1);
  - (d) the guide price of the asset is at least equal to the amount established in the valuation referred to in point (c), at the time of offering the asset for private sale;
  - (e) the asset may be sold at a reduction of no more than 20% of value where both of the following apply:
    - (i) no buyer has made an offer in line with the requirements referred to in points (d) and (e) within 30 days;
    - (ii) there is a threat of imminent deterioration of the asset.
2. Where the asset has not been sold by private sale within 30 days of offering the asset for sale, Member States shall ensure that the creditor publicly advertises the sale for an additional period of at least 30 days before concluding any sale.
3. Where a Member State provides for a second attempt at private sale, points (a) to (d) of paragraph 1 shall apply but the asset may be sold at a further reduction, as determined by Member States.

#### *Article 27*

### **Competing security rights**

Member States shall provide that the priority attached to competing security rights in the same collateral is not affected by the enforcement of one of those rights by means of the national provisions transposing this Directive.

#### *Article 28*

### **Right to challenge the enforcement**

Member States shall ensure that the business borrower has the right to challenge the use of this accelerated extrajudicial collateral enforcement mechanism before a national court where the sale of the assets provided as collateral has not been conducted in accordance with the national provisions transposing Articles 24(3), 25 and 26, or the valuation of the assets has not been conducted in accordance with the national provisions transposing Article 24(4).

#### *Article 29*

### **Restitution of the exceeding amount**

Member States shall ensure that the creditor is required to pay the business borrower any positive difference between the sum outstanding of the secured credit agreement and the proceeds of the sale of the asset.



## *Article 30*

### **Settlement of the outstanding amount**

Without prejudice to articles 19 to 23 of the Directive (EU) 20XX/XX of the European Parliament and of the Council<sup>41</sup>, in cases where the amount realised after the use of this accelerated extrajudicial collateral enforcement mechanism is an amount lower than the sum outstanding of the secured credit agreement, Member States may provide for the settlement of all liabilities under that agreement, in accordance with applicable national laws.

## *Article 31*

### **Transfer of secured credit agreements to third parties**

Member States shall ensure that where a secured credit agreement which provides for the right to use accelerated extrajudicial collateral enforcement is transferred by the credit institution or its subsidiary to any third party, that third party shall acquire the right to use this accelerated extrajudicial collateral enforcement mechanism in case of the business borrower's default under the same terms and conditions as the credit institution.

## *Article 32*

### **Restructuring and insolvency proceedings**

1. This Directive shall be without prejudice to the Directive (EU) 20XX/XX of the European Parliament and of the Council<sup>42</sup>.
2. Member States shall ensure that where insolvency proceedings are initiated in respect of a business borrower, the realisation of collateral pursuant to national laws transposing this Directive is subject to a stay of individual enforcement actions in accordance with applicable national laws.

## *Article 33*

### **Data collection**

1. Member States and, in the case of credit institutions competent authorities which supervise credit institutions, shall, on an annual basis, collect information from creditors on the number of secured credit agreements which are enforced through this accelerated extrajudicial collateral enforcement and the timeframes for such enforcement.
2. Member States and, in the case of credit institutions, competent authorities which supervise credit institutions, shall, on an annual basis, collect the following information from creditors:

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<sup>41</sup> Directive (EU) .../... of the European Parliament and of the Council of [...] on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (OJ L [...], [...], p. [...]).

<sup>42</sup> Directive (EU) .../... of the European Parliament and of the Council of [...] on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (OJ L [...], [...], p. [...]).

- (a) the number of proceedings pursuant to the national provisions transposing this Directive initiated, pending and realised, including:
    - (i) the number of proceedings in respect of movable assets,
    - (ii) the number of proceedings in respect of immovable assets.
  - (b) the length of the proceedings from notification to settlement, arranged by means of realisation (public sale, private sale, or appropriation);
  - (c) the average costs of each proceedings, in EUR;
  - (d) the settlement rates.
3. Member States shall aggregate the data referred to in paragraph 2 and compile statistics from that aggregate data for the full calendar year beginning **DATE [OP: Please insert a date of the January 1 following adoption of this act].**
4. The statistics referred to in the first subparagraph shall be communicated to the Commission on annual basis and by 31 March of the calendar year following the year for which data is collected.

## TITLE VI

### Safeguards and duty to cooperate

#### *Article 34*

##### **Modification of the credit agreement**

Without prejudice to the obligations to inform the consumer pursuant to Directive 2014/17/EU, Directive 2008/48/EC and Directive 93/13/EEC, Member States shall ensure that prior to modifying the terms and conditions of a credit agreement either by consent or by operation of law, the creditor communicates the following information to the consumer:

- (a) a clear and comprehensive description of the proposed changes;
- (b) the timescale for the implementation of those changes;
- (c) the grounds of complaint available to the consumer regarding those modifications;
- (d) the time period available for lodging any such complaint;
- (e) the name and address of the competent authority where that complaint may be submitted.

#### *Article 35*

##### **Complaints**

1. Member States shall ensure that a credit servicer communicates, without delay, the following information to the borrower:
  - (a) the identity of the credit servicer;
  - (b) a copy of its authorisation granted pursuant to Article 6;
  - (c) the name, address and contact details of the competent authorities of the Member State where the borrower is domiciled or established and where the borrower may submit a complaint.

2. The communication referred to in paragraph 1 shall be in writing, or by electronic means where permitted under Union or national law.
3. Member States shall ensure that, in all subsequent communications with the borrower as well as in any communication by phone, the credit servicer includes or states the information listed in points (a) and (c) of paragraph 1.
4. Member States shall ensure that credit servicers establish and maintain effective and transparent procedures for the handling of complaints received from borrowers.
5. Member States shall ensure that the treatment by credit servicers of complaints from borrowers is free of charge and that credit servicers record the complaints and measures taken to address them.
6. Member States shall ensure that the competent authorities establish and publish a procedure for the handling of complaints by borrowers concerning credit purchasers, credit servicers and credit service providers and to ensure that they are treated promptly when received.

#### *Article 36*

#### **Personal data protection**

The provision of information to individuals about the processing of personal data and the processing of such personal data and any other processing of personal data for the purposes of this Directive shall be carried out in accordance with Regulation (EU) 2016/679 and with Regulation (EC) No 45/2001.

#### *Article 37*

#### **Cooperation between competent authorities**

1. Member States shall ensure that the competent authorities referred to in Articles 7, 11, 12, 13, 16, 18, 19 and 21 shall cooperate with each other whenever necessary for the purpose of carrying out their duties or of exercising their powers under the national provisions transposing this Directive. Those authorities shall also coordinate their actions in order to avoid possible duplication and overlap when applying supervisory powers and administrative penalties and measures to cross-border cases.
2. Member States shall ensure that competent authorities shall, on request and without undue delay, provide each other with the information required for the purposes of carrying out their functions and duties under the national provisions transposing this Directive.
3. Member States shall ensure that competent authorities receiving confidential information in the exercise of their functions and duties under this Directive shall use that information only in the course of their functions and duties.
4. Member States shall take the necessary administrative and organisational measures to facilitate the cooperation provided for in this Article.
5. The European Banking Authority shall facilitate the exchange of information between competent authorities in the Member States and promote their cooperation.

## **Title VII**

### **Amendment**

#### *Article 38*

#### **Amendment to Directive 2014/17/EU**

The following Article 28a is inserted:

#### "Article 28a

1. In the event of an assignment to a third party of the creditor's rights under a credit agreement or of the agreement itself, the consumer shall be entitled to plead against the assignee any defence which was available to him as against the original creditor, including set-off where the latter is permitted in the Member State concerned.
2. The consumer shall be informed of the assignment referred to in paragraph 1."

## **Title VIII**

### **Final provisions**

#### *Article 39*

#### **Committee**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>43</sup>.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

#### *Article 40*

#### **Evaluation**

1. Five years after the entry into force of this Directive, the Commission shall carry out an evaluation of this Directive and present a Report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
2. Where the evaluation identifies important problems with the functioning of the Directive, the Report should outline how the Commission is intending to address the identified problems, including steps and timings of the potential revision.

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<sup>43</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

## *Article 41*

### **Transposition**

1. Member States shall adopt and publish, by 31 December 2020 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.
2. They shall apply those provisions from 1 January 2021.  
However, Articles 4(1), 7, 9 to 12 shall apply from 1 July 2021.
3. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## *Article 42*

### **Entry into force**

This Directive shall enter into force on the 20<sup>th</sup> day following that of its publication in the *Official Journal of the European Union*.

## *Article 43*

### **Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*