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## Development of the Non-Performing Loans Servicing Directive: Directive (EU) 2021/2167 and the EBA Guidelines published in December 2023

### 1. Background

By 29 December 2023, Member States should have adopted and published the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on Credit Servicers and Credit Purchasers (the “**Directive**”)<sup>1</sup>.

In accordance with the Directive, the European Banking Authority (EBA) published “*Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of a credit servicer as a whole, under the Non-Performing Loans Directive*” (the “**Guidelines**”), harmonising the criteria for one of the Directive’s requirements concerning the adequate knowledge and experience of the management bodies of Credit Servicers suitable to carry out credit servicing activities in a competent and responsible manner.

The highlights of the Directive and the Guidelines are summarised below.

### 2. Scope of application of the Directive

The scope of the Directive is limited to:

- i) **servicers**<sup>2</sup> acting on behalf of a purchaser of non-performing loans (**NPLs**)<sup>3</sup> resulting from credit agreements issued by credit institutions established in the European Union (“**EU**”); and
- ii) credit purchasers<sup>4</sup> of NPLs resulting from credit agreements issued by credit institutions established in the EU<sup>5</sup>.

The Directive does not apply to:

- i) The servicing of NPLs resulting from credit agreements issued by entities other than EU credit institutions; and
- ii) Servicing carried out by: (a) credit institutions established in the EU (also excluded as purchasers); (b) alternative investment fund managers or management or investment companies on behalf of the funds they manage; (c) non-credit institutions subject to supervision under consumer credit or mortgage lending regulations, and (d) certain professionals (e.g. notaries or lawyers).

<sup>1</sup> As of the date of this note, the Directive has not yet been implemented in Spain.

<sup>2</sup> A legal person which, in the course of its business, manages and performs the rights and obligations relating to the creditor’s rights under a credit claim agreement, or the credit claim agreement itself, on behalf of a purchaser of credit claims and which carries out at least one or more credit administration activities (“**Servicers**”).

<sup>3</sup> Either through the purchase of the non-performing credit agreement itself (defined in the Directive as a credit agreement that is classified as a non-performing exposure) or of creditor’s rights under a non-performing credit agreement.

<sup>4</sup> Any natural or legal person, other than a credit institution, that purchases rights from a creditor arising from a non-performing credit agreement, or the non-performing credit agreement itself, in the course of their trade, business or profession, in accordance with applicable Union and national law (“**Credit Purchasers**”).

<sup>5</sup> Without prejudice to the fact that, at the time of transposition, the Spanish legislature may extend the provisions of the Directive to other cases of debt recovery (i.e., performing loans and/or credits derived from non-financial entities).

Thus, the Directive regulates the activity of Servicers and Credit Purchasers, including the obligation for Servicers to obtain authorisation from the relevant competent authority<sup>6</sup> to carry out the credit servicing activity on behalf of purchasers and the requirements for obtaining such authorisation, as well as a supervisory regime by regulatory bodies.

### 3. Regulation of Servicers under the Directive

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#### 3.1. Authorisation and Registration

Member States must: (a) require Servicers to obtain an authorisation from the designated competent authority in their home Member State before commencing their activities within their territory, and (b) establish a register of authorised Servicers.

#### 3.2. Requirements for granting (and maintaining) authorisation

In order to obtain authorisation to operate as a Servicer under the Directive, evidence of the following is required: (a) that the applicant is a legal person and has its registered office (or head office) in the Member State in which the applicant is seeking authorisation; (b) that the members of the applicant's management body and the persons holding qualifying holdings are of sufficiently good repute<sup>7</sup>; (c) that the applicant's management body has adequate knowledge and experience to conduct the business in a competent and responsible manner<sup>8</sup>; (d) that the applicant has in place robust governance arrangements and adequate internal control mechanisms and an appropriate policy to ensure compliance with rules for the protection, and the fair and diligent treatment, of borrowers; (f) that the applicant has in place adequate and specific internal procedures that ensure the recording and handling of complaints from borrowers; (g) that the applicant has in place adequate anti-money laundering and counter-terrorist financing procedures, and (h) that the applicant is subject to reporting and public disclosure requirements.

#### 3.3. Procedure for authorisation and withdrawal of the authorisation

The application must be submitted to the competent national authority and must provide evidence of the applicant's legal status, the applicant's head office or its registered office, the identity of the members of the management body and persons holding qualifying holdings, and compliance with the requirements detailed above.

The competent national authority must: (a) verify that the application is complete within 45 days of receipt, and (b) notify the applicant of whether the authorisation has been granted or refused (stating reasons for its refusal) within 90 days. There is a right of appeal against a refusal or failure to decide within the time limit set out above.

The authority may withdraw the authorisation in the event of the non-use of the authorisation within twelve months of its granting, its express renunciation, cessation of the Servicer's activities for more than twelve months, the acquisition of an authorisation through false statements or other irregular means, failure to comply with any requirement for the granting of the authorisation, or a serious infringement of applicable regulations, including consumer protection rules.

#### 3.4. Relationship with the borrower

Credit Purchasers and Servicers, in their relationships with borrowers, among others, must: (a) act in good faith, fairly and professionally; (b) provide information to borrowers that is not misleading, unclear

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<sup>6</sup> In Spain, possibly the *Bank of Spain*.

<sup>7</sup> Including a clean police record, transparency and cooperation in previous professional relationships and no ongoing insolvency proceedings.

<sup>8</sup> This is the requirement established by the Guidelines.

or false; (c) respect and protect the personal information and privacy of borrowers, and (d) communicate with borrowers in a way that does not constitute harassment, coercion or undue influence.

### **3.5. Servicing Agreement**

Servicing activities by the Servicer on behalf of purchasers shall be set out in an agreement which provides the following: (a) a detailed description of the credit servicing activities to be carried out by the Servicer; (b) the level of remuneration; (c) the extent of representation; (d) an undertaking to comply with applicable consumer and data protection legislation; (e) an undertaking to treat service borrowers fairly and diligently; and, (f) where applicable, provisions on the requirement to notify the Credit Purchaser before outsourcing any servicing activity.

Servicers are obliged to keep records and make the following documents available to the competent authorities, for at least five years following the termination of the servicing agreement and for a maximum period of 10 years: (a) correspondence with purchasers and borrowers; (b) instructions received from the purchaser, and (c) the servicing agreement.

### **3.6. Ability to receive and hold funds from borrowers**

Member States shall determine whether Servicers are entitled to receive and hold funds from borrowers for onward transfer to Credit Purchasers. In such a case, it will be necessary to: (a) have separate accounts in a credit institution; (b) ensure that the funds are protected in the interest of the purchasers<sup>9</sup>; (c) require that payments from the borrower to the Servicer are deemed to be credited to the purchaser, and (d) require the Servicer to deliver a receipt or a letter of discharge to the borrower.

### **3.7. Outsourcing of activities**

The Servicer may outsource certain activities (except for the receipt and maintenance of funds) subject to certain conditions<sup>10</sup>, provided that the quality of the Servicer's internal control mechanisms and the soundness or continuity of its activities are not compromised and subject to prior communication to the competent authority and the Credit Purchasers.

### **3.8. Cross-border credit servicing activities and supervision**

Servicers authorised to provide their services in one Member State may provide their services in another Member State. Accordingly, the Servicer shall inform the competent authorities of the home Member State, which, in turn, shall communicate to the competent authorities of the host Member State. The supervision of the Servicer is carried out by the competent authority of the home Member State (with the assistance of the host Member State and, where appropriate, of the Member State where the credit was granted).

### **3.9. Information Obligations**

The Directive establishes a number of reporting obligations for credit institutions selling NPLs vis-à-vis purchasers and the competent authority<sup>11</sup>. Purchasers, in turn, are required to provide certain information on the purchased NPLs that they subsequently sell.

Thus, credit institutions and purchasers selling purchased NPLs shall report the sales they make to the competent authority on a biannual basis, identifying the purchaser, the aggregate outstanding balance,

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<sup>9</sup> Against claims by third parties, in particular, in the event of insolvency.

<sup>10</sup> These conditions include the following requirements: (a) the conclusion of a written outsourcing agreement; (b) the prohibition on outsourcing concerns all credit servicing activities at the same time; (c) that the servicing agreement is not altered; (d) that compliance with the Servicer's requirements is not affected by the outsourcing; (e) that the outsourcing does not prevent supervision by the competent authorities; (f) direct access to all relevant information concerning the credit servicing activities outsourced by the Servicer; (g) the Servicer's expertise and resources to provide the outsourced credit servicing activities.

<sup>11</sup> Based on templates developed by the EBA for banks to transmit information on the portfolios of NPLs they wish to sell to purchasers.

the number of NPLs transferred, details of the NPLs transferred that correspond to consumer agreements and the guarantees, if any, securing these NPLs.

### **3.10. Supervision**

In addition to the management of authorisations, the competent authorities may prohibit certain activities, issue injunctions, carry out inspections and impose penalties.

## **4. Regulation of purchasers**

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### **4.1. The right of purchasers to obtain information on NPLs from credit institutions**

Credit institutions must provide Credit Purchasers with the necessary information on the NPLs that are sold (and collateral, if any)<sup>12</sup>, using reporting templates developed by the EBA<sup>13</sup>.

### **4.2. Obligation to engage an NPL Servicer and appoint a representative**

In the case of credit agreements concluded with consumers, purchasers that are not Servicers shall appoint a credit institution, a non-credit institution subject to supervision under consumer credit or mortgage credit legislation, or a Servicer to perform credit servicing activities in respect of NPLs and inform the competent authority of the home Member State of the identity and address of the entity or Servicer. If the purchaser is not domiciled in the EU, this obligation shall be extended to NPLs of natural persons, SMEs and micro-SMEs.

## **5. Borrowers' safeguards**

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The Directive establishes rules to protect assigned borrowers, especially if they are consumers. Servicers and purchasers must communicate the assignment of the NPL and its contents to borrowers, after any assignment or at the request of the borrower.

Member States should ensure that EU and national rules on the enforcement of agreements, consumer protection, borrowers' rights, the granting of credit, banking secrecy and criminal law continue to apply to the purchaser.

Servicers and competent authorities should establish procedures for handling borrowers' complaints.

The Directive on Credit Agreements for consumers has been amended by regulating the creditor's obligation to communicate certain information to the consumer before the modification of the credit agreement and the creditor's obligation to have appropriate policies and procedures in place to show reasonable forbearance before enforcement proceedings are initiated.

The Mortgage Credit Directive introduces, in favour of the consumer in the event of the assignment of the credit, the right to be informed of the assignment and to have any defences he had against the original creditor respected<sup>14</sup>.

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<sup>12</sup> This obligation also applies to sales to other credit institutions.

<sup>13</sup> This relates to the Servicer's information obligations detailed above.

<sup>14</sup> This should not represent a significant change from normal practice.

## 6. The EBA Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of Servicers

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The assessment of the initial and ongoing individual and collective adequate knowledge and experience of the management or administrative organ of the Servicer and the requirement for the good repute of their members is the responsibility of the Servicer.

This self-assessment must be carried out initially, prior to the application for authorisation, as well as on an ongoing basis, in particular when there are significant changes to the composition of the management or administrative organ, the business model, the applicable regulations, or applied technology.

For the purposes of the self-assessment, Servicers shall apply the principle of proportionality (i.e., taking into account their size, their internal organisation and the nature, scale, and complexity of their activities when assessing the adequate knowledge and experience of their management and administrative organs, as a whole, and when developing and implementing related policies and processes that ensure that the requirements are met).

### 6.1. Individual members' adequate knowledge and experience criteria

Individual members of the management or administrative organ should have: (a) an up-to-date understanding of the Servicer's business and its risks, at a level proportionate to their responsibilities; (b) a clear understanding of the Servicer's governance arrangements, their respective roles and responsibilities, and, where applicable, the group structure and any possible conflicts of interest that may arise. In addition, they should be able to contribute to the implementation of an appropriate corporate and risk culture, corporate values, and behaviour.

The assessment of the adequate knowledge and experience of individual members should consider: (a) the role and duties of the position; (b) the knowledge attained through education, training, and practice; (c) their practical and professional experience; (c) current directorships, and (d) the knowledge and experience acquired and demonstrated by the professional conduct of the member.

In determining the level and profile of individual education and training of each individual member, particular attention shall be paid to financial literacy, including education in finance and banking, economics, law, accounting, auditing, management, IT and financial regulation, and quantitative methods.

When assessing the adequate knowledge and experience of a member, a thorough analysis of the member's practical experience should be carried out, taking into consideration their theoretical and practical experience of: (a) legal and regulatory regime, insolvency, consumer protection, data protection, anti-money laundering and anti-terrorist financing obligations, and (b) the day-to-day management of the business (including corporate governance, banking and finance, contract law, accounting, auditing, and management skills).

### 6.2. Collective adequate knowledge and experience criteria

In parallel to the evaluation of individual members, the Servicer should carry out a collective evaluation of the management or administrative body as a whole, assessing what the absence of any member means for the knowledge and experience of the body as a whole. In this regard, the EBA advises that there should be several members with sufficient knowledge in each area to discuss decisions.

The management or administrative organ, as a whole, should have adequate knowledge and experience regarding the matters listed for individual members and in addition regarding: (a) all business activities of the Servicer and the main related risks; (b) the legal and regulatory environment; (c) financial accounting and reporting; (d) risk management, compliance and internal audit; (e) ICT security risks; (f) local and cross-border markets, where applicable; (g) managerial skills and experience, and (h) strategic planning.

### 6.3. Servicers' corrective measures

If a Servicer's assessment or reassessment concludes that the management or administrative organ, as a whole, does not collectively possess adequate knowledge and experience, the Servicer should take appropriate corrective measures in a timely manner<sup>15</sup>. These measures include adjusting responsibilities between members, and replacing, recruiting and/or training members to ensure the adequate collective knowledge and experience of the management or administrative organ.

### 6.4. Assessment by competent authorities

Competent authorities should specify the supervisory procedures applicable to the assessment of adequate and up-to-date knowledge and experience of the management or administrative organs, as a whole, of Servicers and the good repute of their members. These procedures shall be made public and shall provide for the use of information provided as part of the authorisation process.

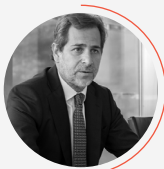
The competent authority may require the list of members of the management or administrative organ and their collective assessment, which shall be accompanied, at a minimum, by the curriculum vitae of each member. In addition, for the assessment of the good repute of members, the competent authority should require information concerning: (a) police records; (b) investigations, enforcement proceedings, or sanctions;

(c) the refusal of a registration, authorisation, membership or a licence to carry out a trade, business or profession; (d) dismissal from employment or a position of trust, fiduciary relationship, or similar, and (e) an assessment of the good repute conducted by another competent authority.

A positive decision may be deemed to have been made through administrative silence when the maximum period for the assessment has been completed and the competent authority has not issued a negative decision.

<sup>15</sup> i.e., before the authorisation is requested or (if detected after the authorisation has been granted) as soon as the shortcomings have been identified. In any case, competent authorities should be informed without delay of: (a) any material shortcomings identified; and (b) the measures taken or envisaged to remedy those shortcomings and the timeline for their implementation.

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