

The European Union created a uniform regime for credit purchasers and credit servicers of non-performing loans



Introduction

On 8 December 2021, Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers, and amending Directives 2008/48/EC and 2014/17/EU (the **Directive**) was published in the Official Journal of the European Union.

The Directive entered into force on 28 December 2021.

Member States are required to implement the Directive by 29 December 2023 and the provisions implementing it should apply starting on 30 December 2023.

By way of exemption, entities which carry out credit servicing activities on 30 December 2023 in accordance with the applicable national provisions regarding credit servicing activities, will be required to comply with the new rules imposed under the legislation implementing the Directive from 29 June 2024.

The purpose of the Directive is to contribute to the creation of a uniform secondary market, as part of the banking union, as significant discrepancies in the Member States have been observed regarding the rules governing credit servicing activities. Thus, the Directive, together with other actions by the European authorities, will ensure “the appropriate environment for credit institutions to deal with NPLs on their balance sheets and will reduce the risk of future NPL accumulation”¹, in order for such credit institutions to carry on with their primary role in financing the economy².

Area of application

The Directive establishes the applicable framework and the requirements for: (i) **credit servicers**, acting on behalf of a credit purchaser, servicing the creditor’s³ rights under a non-performing agreement or the non-performing credit agreement itself, originated by a credit institution established in the European Union; and (ii) **credit purchasers** acquiring a creditor’s rights under a non-performing agreement or the non-performing credit agreement itself, originated by a credit institution established in the European Union.

The following activities are excluded from the scope of the Directive:

(a) the servicing of a creditor's rights under a credit agreement, or of the credit agreement itself, carried out by an institution which is already subject to supervision by a competent authority, such as: (i) a credit institution established in the EU; (ii) an alternative investment fund manager (AIFM) authorised or registered in accordance with Directive 2011/61/EU, or a management company, or an investment company authorised in accordance with Directive 2009/65/EC, provided that the investment company has not designated a management company under that Directive, on behalf of the fund it manages; (iii) a non-credit institution subject to supervision by a competent authority of a Member State in accordance with Article 20 of Directive 2008/48/EC or Article 35 of Directive 2014/17/EU when performing activities in that Member State.

The Preamble of the Directive explains that in these cases, where all entities are already subject to supervision by the competent authorities, requiring an additional authorisation in line with the Directive would be an unjustifiable doubling of compliance requirements.

(b) the servicing of a creditor's rights under a credit agreement, or of the credit agreement itself, that was not originated by a credit institution established in the EU, except where the creditor's rights under the credit agreement, or the credit agreement itself, is replaced by a credit agreement issued by such credit institution.

By way of interpretation, in Romania credit agreements concluded by a non-banking financial institution (*instituție financiară nebancară*) would not fall under the scope of the law implementing the Directive, unless Romanian legislation opts in, to ensure a uniform regime.

(c) the purchaser is a credit institution established in the EU. This exclusion is based on the same rationale as that in paragraph (a) above;

(d) the transfer of a creditor's rights under a credit agreement, or of the credit agreement itself, transferred before 30 December 2023; or

(e) the servicing of a creditor's rights under a credit agreement, when the creditor is a credit institution, in which case outsourcing rules will apply⁴.

Separately, Member States may exempt from the application of this Directive the servicing of a creditor's rights under a credit agreement, or of the credit agreement itself, carried out by public notaries and bailiffs, as defined by national law or lawyers when conducting credit servicing activities as part of their profession. Given that these entities are subject to specific regulations, we believe that excluding them from the scope of the national law implementing the Directive is justified.

A **credit purchaser** may be any natural or legal person who, in the course of business, acquires a creditor's rights under a non-performing credit agreement or the non-performing credit agreement itself, without any requirement for authorisation. The Directive's Preamble⁵ explains that this is justified because a credit purchaser does not generate new credit, but only acquires non-performing credit at its own risk. Conversely, a **credit servicer** can only be a legal entity that is authorised in its home Member State, in accordance with the national law implementing the Directive, to carry out credit servicing activities⁶.

Nevertheless, if a credit purchaser with his/her/its registered office/central office in the European Union is not authorised as a credit servicer, he/she/it will be required to execute a credit servicing agreement with a credit servicer for credit servicing activities related to a non-performing credit agreement executed with a consumer. If the credit purchaser has his/her/its registered office/central office outside the European Union, the requirement to appoint a credit servicer will also apply to credit agreements executed with small and medium enterprises (SMEs).

The Directive allows each Member State to decide whether a credit servicer will be allowed to receive and hold funds from borrowers to transfer those funds to credit purchasers; if the Member State allows such receiving and holding of funds, it will lay down the rules related to such payments and holding of funds.

Authorisation of credit servicers

The requirements for authorisation as a credit servicer mainly refer to:

- (i) existence as a legal entity with a registered office/head office in the Member State where it files for authorisation;
- (ii) the good reputation of the management body and of the persons owning a qualifying holding in the entity;
- (iii) adequate knowledge and experience for the management board;
- (iv) appropriate governance arrangements, as well as internal policies and procedures, e.g. to ensure protection and fair and diligent treatment of borrowers, for recording and handling complains by borrowers, and on anti-money laundering and counter terrorist financing.

The Directive does not envisage regulating the transfer of non-performing credit agreements and will apply without prejudice to any restrictions imposed by the national laws of the Member States in this area. Nevertheless, it should be noted that the Directive defines non-performing credit agreements by reference to the rules regarding non-performing exposures established under Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions, and amending Regulation (EU) No. 648/2012.

However, Romania has specific provisions imposing registration requirements with the National Authority for Consumer Protection on debt collection entities (acting as credit purchasers) regarding credit agreements concluded with consumers, and both Emergency Government Ordinance No. 50/2010 on credit agreements for consumers (**EGO No. 50/2010**)⁷ and Emergency Government Ordinance No. 52/2016 on credit agreements for consumers relating to immovable property, and on the amendment of Emergency Government Ordinance No. 50/2010 on credit agreements for consumers (**EGO**)⁸, provide that claims under a non-performing credit agreement may be assigned, among others, to debt collection entities.

Considering the regime imposed by the Directive, we expect the Romanian legislator is expected to decide the relationship between these current rules and the provisions under the Directive.

Outsourcing

Credit servicers are allowed to outsource credit servicing activities to credit service providers⁹, under a written outsourcing agreement. Credit service providers are defined as “a third party used by a credit servicer to perform any of the credit servicing activities”¹⁰.

A credit servicer is not allowed to outsource all credit servicing activities at the same time and it cannot outsource to the credit service provider the possibility to receive and/or hold funds from the borrowers (even if the credit servicer may do so under its authorisation).

When envisaging outsourcing, the Directive provides that the credit servicer needs to ensure that:

- (a) the outsourcing will not result in any undue operational risk;
- (b) its undertakings to the credit purchaser are not altered as a result of the outsourcing;
- (c) its authorisation is not affected by the outsourcing;
- (d) the outsourcing to the credit service provider does not impede supervision by the competent authorities;
- (e) it has direct access to all relevant information concerning the outsourced credit servicing activities;
- (f) when the outsourcing agreement is terminated, the credit servicer has the expertise and resources to be able to provide the outsourced credit servicing activities;
- (g) before commencing the outsourcing, it will notify the competent authorities of its home Member State.

Obligations under the Directive

Further, the Directive establishes certain general obligations regarding credit servicing activities to ensure that the across the Member States, they will apply a uniform regime on:

- (a) the information to be provided by a credit institution to a credit purchaser in when contemplating a transfer of its rights under a non-performing credit agreement. To this end, to ensure a uniform regime, the Directive mandates the European Banking Authority (the **EBA**)¹¹ to develop draft data templates for the provision of such information. These templates will be used for credit agreements concluded on or after 1 July 2018 that become non-performing after 28 December 2021. We note that one of the criteria the EBA will consider when preparing these drafts data templates refers to the templates being proportionate to the nature and size of the credit and credit portfolios;
- (b) how the credit purchaser or the credit servicer should communicate with the borrower, including on the notification of a transfer. We note that the notification of a transfer should be made by the credit purchaser or the credit servicer, irrespective of whether the borrower is a consumer or a professional;
- (c) reporting obligations (semi-annually) for credit institutions concerning the transfer of its rights under a non-performing credit agreement or the credit agreement itself;
- (d) archiving requirements for credit purchasers and credit servicers.

Cross-border operations

To ensure that a credit servicer has the possibility to carry out credit servicing activities in other Member States, the Directive sets out the notification procedure to be carried out between the competent authorities of the relevant Member States.

When carrying out cross-border servicing activities, a credit servicer should consider that it can only carry out those activities for which it has been authorised in its home Member State, and will be subject to the same restrictions to which the credit servicers authorised in the host Member State are subject.

Amendments to consumer directives

The Directive amends both 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 (**Directive 2008/48/EC**) and 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 (**Directive 2014/17/EU**). These amendments refer to:

(a) new information obligations for creditors regarding the amendment of a credit agreement, including to provide: (i) a description of the amendments and whether they require the consumer's consent or they are by effect of law, in which case the consumer's consent is not required; (ii) a timeline for the implementation of the amendments; (iii) a procedure for consumer complaints regarding the amendments, including the deadline by which such complaints may be filed and the competent authority.

We note that Romanian legislation already includes similar provisions to those which are envisaged to be introduced in Directive 2008/48/EC and Directive 2014/17/EU. EGO No. 50/2010 provides that the consumer's consent is required for any amendment to the credit agreement, except for those amendments deriving from a change of law, a timeline for the implementation of the amendments, as well as a procedure for complaints. Regarding the last of these, it is provided that the credit provider will handle the relevant complaints. Specifically under EGO No. 52/2016, Article 19 requests the consumer's consent irrespective of the source of amendments. Given the amendments envisaged under the Directive, it is possible that EGO No. 52/2016 will also be amended to cater for this distinction;

(b) new obligations for creditors if consumers run into financial difficulty, including implementing policies and procedures pursuant to which creditors will make efforts, if applicable, to ensure a reasonable forbearance before initiating enforcement proceedings. Such forbearance measures may include: (i) total or partial refinancing; (ii) extending the duration of the credit agreement, postponing payments for a certain period; (iii) amending the interest rate; (iv) offering a grace period; (v) partial payment; (vi) currency conversion; (vii) partial forgiveness and debt consolidation.

Regarding the amendments to Directive 2014/17/EU, EGO No. 52/2016 already includes similar obligations for creditors if a consumer runs into financial difficulty (e.g. Article 48 of EGO No. 52/2016), inspired by the EBA Guidelines on arrears and foreclosure¹²;

(c) strictly regarding Directive 2014/17/EU, a new article is included which states that, in the event of assignment: (i) the consumer may invoke any defences against the assignee he/she may have had against the assignor, including set-off; and (ii) the consumer must be informed of the assignment, except for cases where the assignor continues to service the credit after the assignment. Under Romanian law, EGO No. 52/2016 provides for the consumer's right to invoke any defences against the assignee he/she may have had against the assignor, although it does not expressly refer to set-off. However, by corroborating it with other Romanian law provisions (Law No. 193/2000 on abusive clauses in agreements with consumers, which prohibits a professional from obliging the consumer to waive the right to set-off, and the Civil Code, which allows an assigned debtor to invoke the right to set-off, except in cases where the assigned debtor accepted the assignment in writing) it can be construed that, in the case of assignment, the consumer may invoke set-off including at the time.

Conclusions

The adoption of the Directive opens the way to create a uniform regime for the credit servicers and credit servicing

activities across the EU. It can be seen that, although in certain places the Directive specifically refers to consumers, to ensure sufficient protection for this category there are still significant provisions which generally envisage a borrower, which includes a corporate debtor.

Although for consumer financing the adoption and implementation of the Directive should not trigger significant changes (and we have explained above that some of the amendments envisaged under the Directive already exist in Romanian legislation), for corporate financing (including syndicated financings) it is yet to be seen whether the adoption and implementation of this Directive may impact assignments and transfers in this area, e.g. considering the disclosure requirements imposed on credit institutions, as the Loan Market Association has raised concerns throughout the adoption process of the Directive¹³.

1. Paragraph (4) of the Preamble.

2. Paragraph (11) of the Preamble.

3. Article 3, paragraph (2) of the Directive defines the creditor as either a credit institution or a credit purchaser.

4. Paragraph (23) of the Preamble.

5. Paragraph (40) of the Preamble.

6. Article 3, paragraph 9 of the Directive defines the “credit servicing activities” broadly and generally refers to “one or more of the following activities: (a) collecting or recovering from the borrower, in accordance with national law, any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself;

(b) renegotiating with the borrower, in accordance with national law, any terms and conditions related to a creditor’s rights under a credit agreement, or of the credit agreement itself, in line with the instructions given by the credit purchaser, where the credit servicer is not a credit intermediary as defined in Article 3, point (f), of Directive 2008/48/EC or in Article 4, point (5), of Directive 2014/17/EU;

(c) administering any complaints relating to a creditor’s rights under a credit agreement or to the credit agreement itself;

(d) informing the borrower of any changes in interest rates or charges or of any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself.”

7. Implementing 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.

8. Implementing 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.

9. Article 12 of the Directive.

10. Article 3, paragraph (7) of the Directive.

11. Article 16 of the Directive.

12. EBA/GL/2015/12.

13. Loan Market Association - Press Releases (lma.eu.com) (published on 22 March 2019, last accessed on 20 December 2021).