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the authoritative voice
of the EMEA market

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8 June 2018

Jan Ceyssens
Cabinet of Vice-President Valdis Dombrovskis
Directorate-General for Financial Stability, Financial Services and Capital Markets Union
European Commission
1049 Bruxelles/Brussel
Belgium

Dear Mr Ceyssens

Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (the "Proposed Directive")

The Loan Market Association[1] ("**LMA**") welcomes the opportunity to provide feedback on the Proposed Directive and would like to thank you and your colleagues for taking the time to meet with us on 4 May to discuss the potential impact of the Proposed Directive on the syndicated loan market. In preparing this response, we have consulted widely with bank and non-bank LMA members that are active across the primary and secondary syndicated loan markets and this letter reflects their feedback.

The LMA recognises the positive legislative intention of the Proposed Directive to encourage development of secondary markets for non-performing loans ("**NPLs**") and welcomes the proposed requirement at Article 15(2) of the Proposed Directive for Member States to lift any existing restrictions in national law, such as licensing requirements, which may currently prevent loan transfers being made to non-bank institutions.

However, as discussed with you on 4 May, we are concerned that the Proposed Directive contains a number of measures that would, if adopted in their current form, cause significant uncertainty and disruption to primary and secondary syndicated loan markets. For example:

- the mandatory disclosure duty at Article 13(1) would introduce significant changes to well-established, existing market practices based around the "*buyer beware*" principle;

[1] The LMA is the trade body for the European, Middle Eastern and African syndicated loan markets. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 680 organisations across EMEA, including the European Commission, and consists of banks, non-bank investors, borrowers, law firms, rating agencies and service providers.

- the proposed reporting requirements in relation to non-bank transferees at Articles 13(2) and 19(1) and the requirement for non-EU non-bank transferees to appoint an EU representative at Article 17 would discourage lenders other than EU banks and their subsidiaries from entering into secondary syndicated loan transactions, thus making it more difficult for EU banks to transfer syndicated NPLs from their balance sheets and decreasing liquidity in secondary syndicated loan markets;

- the proposed requirement for non-bank transferees to inform competent authorities before enforcing a loan at Article 18 would make enforcement slower and hamper lender recovery efforts for syndicated lending transactions generally, where there may typically be a mixture of bank and non-bank lenders. Occasionally, and in particular in the case of margin loan facilities, the decision to enforce is taken on a real time basis and rapid enforcement is imperative to protect the position of the lender(s); and

- there may be real practical difficulties with ascertaining whether a participation in a syndicated loan held by a lender other than an EU bank was originated by an EU bank and accordingly whether it would fall within the scope of Title III of the Proposed Directive.

We are therefore grateful for the confirmation provided at the meeting on 4 May that it is not the Commission's intention to disrupt or damage the syndicated loan markets. As discussed, we have therefore provided some suggested drafting amendments to carve out syndicated and other wholesale loans from the scope of the Proposed Directive and to apply the requirements of the Proposed Directive in what we hope is a more targeted, effective and proportionate manner.

We have also provided some comments on other aspects of the Proposed Directive, including in relation to the Accelerated Extrajudicial Collateral Enforcement ("**AECE**") mechanism, which are set out in the Appendix to this letter. We hope that these comments and drafting amendments will be useful in shaping the debate as the Proposed Directive makes its way through the EU legislative process.

1. Limiting the scope of the Proposed Directive: drafting amendments

We request that syndicated and other wholesale loans are excluded from the scope of the requirements of Titles II to IV and VI of the Proposed Directive (i.e. requirements relating to credit servicers and credit purchasers and consumer protection safeguards) altogether, except for Article 15(2), which should apply to all types of loans. This could be achieved as follows:

- Article 2(6): "*Articles 4 to 15(1), 16 to 22 and 34 to 37 of this Directive shall not apply to:*

  (a) syndicated credit agreements;

  (b) wholesale credit agreements."

- Article 3(6a): "*'syndicated credit agreement' means a credit agreement that provides for, or contemplates, two or more creditors;*"

- Article 3(6b): "*'wholesale credit agreement' means a credit agreement concluded between a creditor and a business borrower, other than a business borrower who is a micro, small or medium-sized enterprise within the meaning of Article 2 of the Annex to the Commission Recommendation 2003/361/EC of 6 May 2003*;"

We consider that limiting application of these requirements to consumer and SME loans, similar to the scope of the new credit servicing regime in Ireland, would be consistent with the objective of the Proposed Directive and the broader Capital Markets Union ("**CMU**") project to facilitate SME lending.

In light of the particular practical challenges that would arise under the Proposed Directive in the context of a syndicated lending arrangement, we have also proposed including a separate carve-out for syndicated loans. Whilst the syndicated loan market is wholesale in nature and so syndicated loans would generally also fall within the broader carve out for wholesale loans, this dual carve out is intended to ensure that syndicated loans would not inadvertently fall within scope of the Proposed Directive (for example if the borrower is an SPV that may technically qualify as an SME due to the corporate structure used for that transaction). We consider this to be the simplest solution, and one which would minimise any potential disruption to existing syndicated loan markets, which currently operate on an efficient basis both in the context of performing and non-performing loans.

If syndicated and other wholesale loans are not carved out of scope of the Proposed Directive altogether as envisaged above, we foresee a number of issues which would need to be addressed. These issues are summarised in section 2 below and are considered in further detail in the Appendix to this letter.

2. Summary of issues to be addressed

(a) *Application to a mixed syndicate*

The Proposed Directive is not currently drafted from the perspective of a syndicated lending arrangement and so it is unclear how various measures would apply in this context. Unless syndicated loans are excluded from scope altogether, we therefore request clarification that the presence of a single EU established credit institution in the original lending syndicate would not bring the whole facility agreement within scope but that the requirements would instead apply only to that single bank's participation (although even this would not be without difficulty, for example in determining if a loan participation held by a non-EU bank derives from a participation originated by an EU bank).

(b) *Proposed requirements relating to non-bank transferees*

We are concerned that the proposed requirements relating to credit purchasers may act as a disincentive for existing lenders to make loan transfers to non-banks and create an additional barrier to the development of secondary NPL markets. Particularly when viewed as a whole, these new requirements would impose a significant additional administrative burden on both existing lenders and non-bank transferees. This may discourage non-bank lenders from acquiring distressed loans, making it more difficult for banks to remove these exposures from their balance sheets and potentially

reducing banks' recoveries as a result. In turn, this would limit the ability of banks to extend further credit to consumers and SMEs, potentially undermining one of the key objectives of the Proposed Directive and the broader CMU project.

As set out above, we consider that the most effective solution would be to exclude syndicated and other wholesale loans from the scope of these requirements altogether. However notwithstanding this, and particularly in the absence of such a carve-out being agreed, there are various conceptual and practical issues that still need to be addressed. These are discussed in further detail in the Appendix to this letter, but in summary, we request:

- amendments to the mandatory disclosure requirements under Article 13(1) to clarify that:
  - information should be required to be provided only if requested by the non-bank transferee (as some non-bank lenders do not want to receive information that could be "inside information" for market abuse purposes);
  - an existing lender should be required only to provide information that it actually holds and knows, and should not be liable to the extent this information turns out to be inaccurate or incomplete; and
  - the disclosure requirement should not extend to sensitive, proprietary information such as credit papers and internal risk ratings, or information that is held behind an information barrier or is subject to pre-existing confidentiality obligations;
- confirmation that the information reported to competent authorities under Articles 13(2), 18(1) or 19(1) will not be made public;
- clarification as to how the requirement for non-EU, non-bank lenders to appoint an EU representative under Article 17 would apply in practice, including:
  - how this would be enforced against non-EU entities;
  - whether it is the domicile of a fund, or the domicile or other EU presence of the fund's manager, that is relevant in determining whether a transferee is an EU or non-EU credit purchaser;
  - further guidance on what the EU representative would be required or expected to do to in practice; and
- deletion or limitation of the requirement for non-bank transferees to inform competent authorities before enforcing a loan under Article 18 to the new AECE mechanism.

(c) ***Credit servicer regime***

We are concerned that the definition of "credit servicer" is drafted too broadly and that it could be read as also capturing, for example, facility or security agents, as well

as entities within credit fund structures that manage loan participations on behalf of their credit funds, such as a fund manager, investment adviser or fund administrator. Absent a carve-out for all syndicated loans, this would prevent non-EU entities from taking on these agency roles for syndicated loans and, in addition, would create a significant administrative burden for non-bank facility agents and trustees (who in recent years have become far more active in the syndicated loan market given the reluctance of some banks to assume these roles).

Therefore, we request that the definition of "credit servicer" be narrowed so as to clearly exclude facility agents, security agents and entities within fund structures that manage or administer loans held by their funds. We note that a more limited carve out (for example covering only transfers of performing syndicated or wholesale loans) would not address this issue, as in practice these entities would need to be authorised in case the loan turned non-performing.

We would be happy to discuss any aspect of this response with you in more detail and to meet with you again as required to make the necessary amendments so as not to damage the syndicated loan market. If we can be of any further assistance, please do not hesitate to contact either myself or Owen Lysak via email at nicholas.voisey@lma.eu.com / owen.lysak@cliffordchance.com or by telephone on +44 (0) 207 006 5364 / +44 (0) 207 006 2904.

Yours sincerely

Nicholas Voisey
Managing Director
Loan Market Association

Appendix

We have set out below a more detailed discussion of the key issues raised in the main body of the letter, as well as some more technical comments and requests for clarification on other aspects of the Proposed Directive, including the AECE mechanism.

1. Requirements relating to non-bank transferees

We are concerned that the proposed requirements relating to credit purchasers may act as a disincentive for existing lenders to make loan transfers to non-banks and may reduce recoveries by existing lenders from loan transfers, potentially undermining one of the key objectives of the Proposed Directive. As set out above, we consider the most effective solution would be to exclude syndicated and other wholesale loans from scope of these requirements altogether. However notwithstanding this, and particularly in the absence of such a carve-out being agreed, the following conceptual and practical issues still need to be addressed.

(a) *Mandatory disclosure of information relating to the credit agreement (Article 13(1))*

The requirement for mandatory disclosure in Article 13(1) of the Proposed Directive would introduce significant changes to well-established, existing market practices based around the "*buyer beware*" principle. We understand that the aim of this requirement is to increase transparency and promote greater symmetry of information between the transferor and transferee of a loan, rather than to change the current allocation of risk and responsibility between the buyer and seller of a loan. We believe, though, that the mandatory disclosure duty does not fully take into account the sophisticated nature of the parties in secondary loan trading transactions and the many avenues of access that these parties may have to the information that they need or wish to review before entering into secondary loan transactions.

Therefore, our members consider that as long as an existing lender provides a new non-bank lender with the relevant information that it actually holds or knows, the existing lender should not be liable to the extent that this information turns out to be inaccurate or incomplete. This should be expressly provided for in the Proposed Directive, as it would otherwise be doubtful whether liability could be successfully excluded in a contract in respect of information required to be provided pursuant to a statutory requirement.

Article 13(1) is also drafted in broad terms and so the exact scope of information to be provided is unclear. This should be clarified, in particular to confirm that lenders should not be required to share sensitive, proprietary materials such as internal credit analyses, credit monitoring reports and internal risk ratings, due to the significant liability and reputational risks that this could entail. An existing lender should also only be required to disclose information that it has obtained in its capacity as lender (and not, for example, by virtue of the existing lender also being a shareholder of the borrower).

Finally, existing lenders should be required to provide information about a loan or the borrower / obligor only if requested to do so by the new non-bank lender and should not be required to provide information that is held behind an information barrier (and so is not within the actual knowledge of individuals in the relevant part of the firm's

business) or which is subject to a pre-existing confidentiality obligation. Otherwise, these disclosure requirements risk undermining firms' existing processes for complying with market abuse requirements. For example, larger firms may have established information barriers to ensure other business lines are able to operate effectively. Conversely, many non-banks active in secondary loan markets lack infrastructure to establish information barriers and operate on the basis of limited "public" information only, meaning that they would typically request not to receive non-public information about a loan.

(b) ***Reporting to national competent authorities (Articles 13(2) and 19(1))***

We understand that the requirements at Article 13(2) and 19(1) of the Proposed Directive for lenders to provide information to national competent authorities ("**NCAs**") about loan transfers to non-bank credit purchasers, are intended to address concerns that there is no official data for the volume of secondary trading in NPLs. However, as drafted, these requirements would not achieve the aim of providing national regulators with accurate data about NPL secondary markets, as they would also apply to transfers of performing loans and would capture only information about transfers to non-bank lenders (and not transfers to credit institutions, many of whom are active secondary loan market participants).

Nevertheless, we consider that these reporting requirements would place a significant administrative and compliance burden on EU credit institutions and their subsidiaries, as well as on non-bank transferors, particularly when viewed in the context of the other new requirements applicable to existing lenders under the Proposed Directive. It is also unclear what competent authorities would do with this information and we should be grateful for confirmation that there is no intention for this information (as well as the information reported under Article 18(1)) to be made public, which could again discourage non-bank lenders from acquiring distressed loans, thus making it more difficult for banks to transfer these exposures from their balance sheets.

Therefore, we consider that the most effective way of mitigating these issues would be to exclude all transfers of syndicated and other wholesale loans from scope of these reporting requirements. Careful consideration should also be given to any loans that remain in scope, to ensure that the information provided to NCAs is proportionate and useful and does not result in unintended consequences for the loan market more generally.

(c) ***Representative in the EU for non-EU, non-bank lenders (Article 17)***

The LMA very much welcomes the proposal to require Member States to lift any existing restrictions in national law, such as licensing requirements, which may currently prevent loan transfers being made to non-bank institutions (Article 15(2) of the Proposed Directive). However, our members are concerned that the requirement under Article 17 for credit purchasers that are not domiciled or established in the EU to appoint an EU domiciled or established representative may be extremely burdensome in practice.

Non-EU entities currently participate in the existing secondary loan market as well as in primary syndication. As drafted, Article 17 would apply to any non-bank to which a loan transfer is made (whether in primary syndication or as part of a secondary

trade) and which is not domiciled or established in the EU, which could make their continued participation in EU loan markets much more difficult and costly.

Chief amongst the difficulties would be the challenge of persuading a third party to act as their representative and to be responsible for their obligations under the Proposed Directive. The cost of appointing and maintaining such an EU representative is also likely to negatively impact rates of return and reduce the willingness of non-EU entities to purchase EU loans. Ultimately, this will impact borrowers of such loans, either by reducing access to a broad group of lenders, or by increasing borrowing costs associated with a transaction.

Therefore, as set out above, our proposed solution is to provide a carve out for all syndicated and other wholesale loans. We note that a more limited carve out for transfers of performing syndicated and other wholesale loans would not solve this issue as it may still have the adverse consequence of discouraging non-EU entities from purchasing NPLs from EU credit institutions, thus making it more difficult for EU banks to transfer NPLs from their balance sheets, potentially reducing EU banks' recoveries from their NPL exposures and decreasing liquidity in secondary markets.

However notwithstanding this, and in the absence of a carve out for all syndicated and other wholesale loans being agreed, we should be grateful for further clarification as to how this requirement would apply in practice. In particular:

- The meaning of 'domiciled or established' is unclear. In the case of a credit fund purchaser of a loan, it is not clear whether the domicile of the fund vehicle itself or the domicile or other EU presence of the fund's manager should be considered when determining whether it is an EU or non-EU credit purchaser (although our members consider that a fund manager operating in the EU should count as an EU credit purchaser).

- It is unclear how the requirement to appoint a representative in the EU will be enforced against entities not domiciled or established in the EU.

- It is not clear what the EU representative would be required or expected to do in practice (particularly bearing in mind that it may be an otherwise unregulated entity). Absent further clarification, we consider there is a risk of an unlevel playing field if Member States were to impose their own regulatory or supervisory expectations on EU representatives, for example in relation to the level of practical oversight expected in respect of the non-EU lender's business or activities.

(d) ***Pre-enforcement notification by non-bank transferees (Article 18)***

Members are concerned that the proposed requirement for non-bank transferees to inform competent authorities before enforcing a loan will generally make enforcement slower and hamper lender recovery efforts. Such a requirement is at odds with longstanding lending practices both within and outside the EU.

In particular, the proposed requirement is not appropriate for syndicated lending transactions, where there may typically be a mixture of bank and non-bank lenders in the syndicate at any time, meaning that some but not all syndicate members would be

subject to this requirement. In the context of a syndicated loan, the security agent would usually co-ordinate any enforcement action and take relevant practical steps to enforce the loan. However, if each non-bank lender or its EU representative (or possibly the security agent, acting on their behalf) is required to notify their relevant competent authority before enforcement action can take place, this is likely to hamper a lending syndicate's ability to enforce quickly when the circumstances demand.

Such a delay could cause a significant deterioration of value to the business or assets in question, leading to a further reduction in ultimate recoveries for lenders. There is also a "first mover" advantage relative to other creditors in a distressed scenario which appears to be degraded by this proposed requirement for prior notification to competent authorities. Therefore, the practical effect of this requirement may be to cause those non-bank institutions which are already active participants in the primary and secondary loan markets to reassess the attractiveness of this asset class, as the perception of regulatory hurdles to enforcement may act as a red flag.

It is also unclear whether this obligation only applies to enforcement using the new AECE mechanism or whether the obligation applies in respect of any form of enforcement under the relevant loan. On its face, the wording suggests the obligation applies to any type of enforcement (i.e. it does not expressly say it is limited to the AECE mechanism). However, the reference to "directly enforce" in Article 18 of the Proposed Directive implies the provision is focused on out-of-court enforcement which suggests it is intended to be limited to the AECE mechanism. Therefore, absent full deletion of this requirement or a carve out for all syndicated and other wholesale loans, we would recommend that it is expressly limited to the new AECE mechanism.

Finally, we would recommend that any notice requirement be structured so that notice can be sent contemporaneously with the commencement of an enforcement action, so that a lender is not prevented from acting expeditiously when necessary or appropriate to preserve value or prevent loss. Lenders should not be frustrated in their enforcement actions by any requirement to provide notice prior to acting.

2. Credit servicer regime

We understand that the new regulatory framework for credit servicers is intended to capture loan servicers and debt administrators that specialise in the servicing and administration of NPLs. However, members are concerned that the definition of "credit servicer" is drafted too broadly and that it could be read as also capturing facility or security agents, as well as credit fund managers.

Whilst credit institutions (whether or not established in the EU) will be exempt from the new "credit servicer" regime, a recent trend in the loan markets has been the use of specialist non-bank service providers in the facility agent and security agent role. Absent a broad carve-out for all syndicated loans, these entities would fall within the regime and become subject to authorisation and other regulatory requirements, which seem out of place in this context.

Any such non-bank agent that is not incorporated in the EU will be in a particularly difficult position. They will need to be authorised under the Proposed Directive but will be unable to obtain this authorisation since they are not incorporated in the EU. The effect will be to prevent them from acting as facility agents or security agents in respect of loans originally

made by an EU established bank. This seems counterproductive, particularly since filling agency roles for syndicated loans can already be difficult in some cases.

As drafted, the definition of "credit servicer" also seems likely to include entities within credit fund structures that manage loan participations on behalf of their credit funds, such as fund managers and investment advisers. It could also potentially capture investment managers, fund administrators, corporate service providers and valuers, fund entities, single investors who hold loans in a managed or advised portfolio as well as other holding vehicles in a fund structure. However, again, these entities would become subject to regulatory requirements which seem equally out of place and could create barriers for non-EU credit funds seeking to purchase loans originated by an EU credit institution (as they may need to appoint or establish an EU entity to manage these loan participations, adding significantly to their costs of doing business and reducing their rates of expected return).

A more limited carve-out for transfers of performing syndicated and other wholesale loans would not address this issue, as in practice facility or security agents would need to be authorised in case the loan turned non-performing. Therefore, absent a carve-out for all syndicated and other wholesale loans, the definition of "credit servicer" should be narrowed so as to clearly exclude facility agents and security agents, as well as entities in a fund structure that manage loan participations on behalf of the relevant fund.

3. Accelerated extrajudicial collateral enforcement mechanism

The LMA welcomes the broad approach taken by the Commission in relation to the AECE mechanism under Title V of the Proposed Directive. In particular, we are pleased to see that these proposals take the form of an enforcement mechanism (rather than new type of security interest) and that use of the AECE is subject to upfront agreement between the borrower and lender(s) that this enforcement mechanism will be available.

Nevertheless, there are some aspects of the proposed AECE mechanism that would, in our view, benefit from further clarification or adjustment. These are summarised below.

(a) *Relationship with the Financial Collateral Directive*

The relationship between the proposed AECE mechanism and the remedy of appropriation under the Financial Collateral Directive ("**FCD**") is unclear (although the intention from page 5 of the Explanatory Memorandum seems to be that the AECE does not interfere with appropriation).

For example, Article 2(5)(c)(i) of the Proposed Directive states the AECE provisions do not apply where the credit agreement is secured by a financial collateral arrangement. However, it is not clear whether this would mean that if only part of the security package is a financial collateral arrangement, the AECE mechanism could not be used to enforce the remaining security. In our view, this would be overly restrictive and therefore we should be grateful for a clarification that Article 2(5)(c)(i) applies only in respect of the part of a security package that is a financial collateral arrangement.

(b) ***Member State discretions and applicable jurisdiction***

The proposal to allow Member States discretion to implement the AECE mechanism in different ways may cause confusion and undermine the efficiencies in enforcement that the Proposed Directive seeks to achieve. In particular, the Proposed Directive allows Member States to decide whether to allow the AECE mechanism to operate by way of private sale, public auction or both. Similarly, the more detailed provisions of these private sale and public auction processes allow Member States options to provide for a second auction if the first auction is not successful or for a private sale to take place after a failed auction process.

Instead, we consider that it would be more efficient for Member States to provide for both methods of sale (i.e. public auction and private sale) as each method may be more appropriate for particular asset classes or in particular situations. It would also ensure the same sale mechanism could be used if, for example, security is taken over a pool of assets located in various jurisdictions.

In addition, it is not currently clear which Member State's implementation of Article 24(2) of the Proposed Directive will be relevant in a given situation, as the Proposed Directive is silent as to the applicable law. If the Member States of the governing law of the credit agreement, the governing law of the security agreement and the *lex situs* of the asset are all different, which Member State's implementation of the AECE mechanism is relevant? We note that if the *lex situs* were identified as the applicable law, it would be crucial that Member States are not granted discretion to implement the AECE in inconsistent ways. Otherwise, this could lead to practical difficulties and loss of efficiency in enforcement of security taken over a pool of assets located in various Member States, as noted above.

(c) ***Notice period for use of AECE***

Under Article 23(1)(c) of the Proposed Directive, the lender must notify the borrower in writing of its intention to use AECE (and certain other matters) within four weeks of the enforcement event. This period is too short (and is inconsistent with Article 23(3)), as lenders often need longer than this to determine whether to enforce their security. As currently drafted, lenders may be forced unnecessarily and prematurely to give such a notification.

(d) ***Other comments and clarifications***

Article 23(1)(b) of the Proposed Directive provides that the borrower must be "*clearly informed*" about the application and consequences of the AECE. To limit the scope for challenge around this, it may be preferable for Article 23(1)(b) to provide for the application and consequences of the AECE to be set out in the credit agreement or security agreement as envisaged in recital (44) of the Proposed Directive.

Article 23(3) of the Proposed Directive provides that the creditor makes "*reasonable efforts*" to avoid using the AECE. To avoid any challenges around what this entails, it may be preferable to instead rely on the other protections in the Proposed Directive such as the reasonable period of time to pay and, if applicable, the extension of the time period where at least 85% of the secured obligations are paid.

It is unclear at what point in time a lender and borrower need to agree on the AECE valuer under Article 24(4) of the Proposed Directive. Members consider that it should be sufficient for the borrower and lender(s) to agree on the valuer or the manner in which the lender(s) may select the valuer upfront in the credit agreement or security agreement. Otherwise, it may be difficult to get a defaulting borrower to cooperate and agree on the valuer to be appointed. We should be grateful for express confirmation of this point. It should also be made clear that the valuation is obtained at the borrower's cost and that if the lender(s) meet(s) that cost, it is included in the secured liabilities which benefit from the underlying security.

Article 24(4)(c) of the Proposed Directive provides that the valuation must be "*fair and realistic*". Such a standard is susceptible to challenge and is arguably redundant in view of the requirement for the borrower and creditor to agree on the valuer and the rationale for having an independent valuer. We therefore consider that it should be deleted.

It is unclear from Article 24 of the Proposed Directive whether the valuation should be a non-distressed / going concern valuation or whether it should be prepared on a distressed basis. Setting the reserve or guide price at the level of the valuation (with a maximum possible reduction of 20% in certain circumstances) seems too high, particularly if a non-distressed valuation is used, and introduces a degree of rigidity into the enforcement process that seems inconsistent with the underlying aims of the AECE mechanism.

Similarly, we should be grateful for clarification that a public auction may include a competitive M&A sales process, for example in the case of sale of shares in a private company. The description of the auction process in Article 25(1) (e.g. reference to "time and place" of the auction) suggests a real time bidding scenario which may not be appropriate for the assets in question.

Certain other aspects of the private sale and public auction procedure are unclear. For example, Articles 25(1)(f) and 26(1)(e) of the Proposed Directive provide that the lender can sell at a 20% discount to the valuation if (amongst other things) there is a "*threat of imminent deterioration of the asset*". However, it is unclear what this means, who determines this and how material the deterioration would need to be. Therefore, we should be grateful for further guidance on the meaning of this phrase, for example by mandating the European Banking Authority to produce guidelines on this point.

The definition of "*secured credit agreement*" at Article 3(6) of the Proposed Directive refers to the agreement being concluded by a credit institution or "*another undertaking authorised to issue credit*". However, in some Member States, entities do not generally need to be authorised in order to issue credit. Therefore, where an unauthorised entity issues credit supported by collateral, this would appear to fall outside the definition of "*secured credit agreement*" and so Title V of the Proposed Directive would not apply. In our view, this would create an unlevel playing field between types of credit issuers and so the word "authorised" should be deleted from the definition of secured credit agreement.

4. Clarification of territorial scope and key concepts

Finally, we should be grateful for clarification of the territorial scope of the Proposed Directive and the meaning of certain key concepts referred to in the Proposed Directive, as set out below.

(a) *Territorial scope and meaning of "credit institution"*

In our view, the territorial scope of the Proposed Directive, and in particular whether references to "credit institutions" are intended to capture non-EU entities, is unclear and should be expressly clarified.

We understand that the definition of "credit institution" at Article 3(1) of the Proposed Directive is intended to capture any undertaking (wherever established or located) "*the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account*"[2] and that it is not intended to be limited to entities that are *authorised* as credit institutions under CRD IV.[3] This interpretation is supported by the fact that Article 2 of the Proposed Directive expressly refers to "*a credit institution established in the Union*" when defining the scope of the Proposed Directive. The words "*established in the Union*" would not be necessary if the definition of credit institution at Article 3(1) were already limited to credit institutions established in the EU.

Therefore, we understand that other references to "*credit institution*", for example in the definition of "*credit purchaser*" and "*credit servicer*" are intended to refer to both EU and non-EU entities that take deposits and grant credits in accordance with the definition at Article 4(1)(1) CRR. We therefore understand that a non-EU bank could act as a "*credit servicer*" without requiring authorisation and an EU bank could transfer a loan to a non-EU bank without triggering the mandatory disclosure and other requirements applicable to loan transfers to "*credit purchasers*".

On the other hand, it seems that certain other references to "*credit institution*" (for example at Articles 13(2) and 14 of the Proposed Directive) are intended to apply only to EU-authorised credit institutions. This is on the assumption that the Commission does not intend to impose an obligation on non-EU banks to report to EU competent authorities. Indeed, there is no indication of which Member State's competent authorities a non-EU bank should report to in these circumstances. Therefore, we would recommend that the wording of Articles 13(2) and 14 is amended to expressly confirm that these obligations apply only in respect of credit institutions established in the Union and their subsidiaries. We should also be grateful for confirmation of whether these reports should be submitted to home or host state competent authorities.

We request express confirmation that our understanding is correct, as if this were not the case, it would have a significant adverse impact on EU loan markets. For example, it would likely act as a major disincentive for non-EU banks from purchasing loans

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[2] Article 4(1)(1) 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 ("**CRR**")

[3] Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ("**CRD IV**")

originated by EU banks and reduce the size and liquidity of EU secondary loan markets. Subject to our other comments, it could also prevent non-EU banks from acting as facility or security agents on syndicated deals, under the proposed credit servicer regime.

(b) ***Application to a mixed syndicate***

The Proposed Directive is not currently drafted from the perspective of a syndicated lending arrangement and so it is unclear how various measures would apply in this context. In particular, it is not clear whether the presence of a single EU established credit institution in the original lending syndicate would bring the whole facility agreement within scope or whether the requirements would apply only to that single bank's participation.

In our view (as we assume must be the intention), the requirements should be understood as applying only to that single bank's participation and only to the extent that it is within the power of that bank to comply with the relevant requirements. This is because it will not generally be within an EU bank's power to impose requirements on other syndicate members, particularly where there is a minority of EU banks in the syndicate. If EU banks were expected to agree terms with other syndicate members that would effectively require those other syndicate members to comply with provisions of the Proposed Directive, this would likely put EU banks at a competitive disadvantage and risk effectively shutting EU lenders out of predominantly non-EU syndicates.

Even if the application of the Proposed Directive were understood in this way, there may be real practical difficulties with ascertaining whether a participation in a syndicated loan held by a lender other than an EU bank was originated by an EU bank. Therefore, as noted above, our proposed solution would be to exclude syndicated and other wholesale loans from the scope of the Proposed Directive.

(c) ***Application to a mixed portfolio***

It is also unclear how the Proposed Directive would apply in practice to sales of portfolios of loans where some but not all loans in the portfolio fall within scope of the Proposed Directive. For example, would the transferor be required to provide information to a credit purchaser under Article 13(1) only in respect of the sub-set of loans within the portfolio that are subject to the requirements of the Proposed Directive or would it need to provide this information in respect of the portfolio sale as a whole?

We expect that the approach taken to these sorts of practical questions may differ depending on the particular fact pattern and so consider that firms should have sufficient flexibility to comply in a practical and pragmatic manner. However, we would suggest that firms should only be required to provide information under Article 13(1) in respect of the sub-set of loans within the portfolio that are in scope, even if they instead choose to provide this information in respect of the portfolio as a whole.

(d) ***Meaning of "transfer"***

The Proposed Directive does not provide a definition or other guidance as to what precisely is meant by a "transfer" of a loan. Therefore, it is not clear whether the Proposed Directive would apply only to a full transfer of the lender's rights and obligations, or whether it would also apply in respect of other arrangements, including use of a synthetic arrangement such as a sub-participation.

Whilst a sub-participation may have a similar economic effect to a full transfer, (i.e. removal of the loan from the original lender's balance sheet), the legal effect is not the same. In a sub-participation arrangement, the original lender's legal rights and obligations towards the borrower are unaffected and the borrower would therefore typically have no direct contractual relationship with (or even knowledge of the existence of) a sub-participant. Therefore, the original lender will remain in the picture at least to some extent and so they are distinct from a full transfer, where a new lender effectively steps into a previous lender's shoes. Therefore, we would propose clarifying that the Proposed Directive is intended to apply only to transfers that result in a change to the lender of record.

Similarly, the Proposed Directive currently appears to capture transfers that are made on primary syndication of a loan. Primary syndications of loans should be distinguished from secondary trading of loans for a number of reasons, including the borrower's more active role and the greater availability of loan underwriting information in a primary syndication. Therefore, in the absence of a carve-out for syndicated loans, we do not consider it appropriate to apply the requirements of the Proposed Directive to primary syndications, which should be entirely excluded from scope.

(e) ***Meaning of "issued" and "replaced" in the context of credit agreements***

Article 2 of the Proposed Directive refers to a credit agreement "issued" by a credit institution in the EU (or its EU subsidiaries) and a credit agreement that is "replaced" by a credit agreement issued by a credit institution in the EU (or its EU subsidiaries). This terminology has the potential to cause confusion when used in relation to syndicated loans. In particular, it would be helpful to clarify that "issuing" means participating as lender of record and therefore would not catch, for example, credit institutions and subsidiaries that act only as arrangers.

Additionally, a replacement (i.e. new) credit agreement will either be in scope or not, and therefore there could be confusion as to whether the reference to "replace" at Article 2 is intended to cover something other than a replacement credit agreement. Therefore, again, we would propose that this point is clarified.