SUBMITTED VIA

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Re: Response to EBA consultation paper on ITS on NPL transaction data templates

1. Do the respondents agree that these draft ITS fits for the purpose of the underlying directive?

The Loan Market Association (LMA) welcomes this opportunity to respond to the EBA's consultation paper and its draft implementing technical standards (ITS) under the directive on credit servicers and credit purchasers. We also attach a supplemental paper asking the EBA to provide guidance on additional issues that fall outside the scope of the ITS.

We would welcome an opportunity to discuss our response to the consultation and our supplemental comments with the EBA. Please contact Nicholas Voisey at the LMA (nicholas.voisey@lma.eu.com) if you would like to arrange a meeting or call.

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 800 organisations across EMEA, including the European Commission, and consists of banks, non-bank investors, borrowers, law firms, rating agencies and service providers. This response focuses on the potential impact of the draft ITS on the syndicated loan market.

Summary of our response to the consultation

In summary, we consider that the draft ITS are not fit for the purpose of the underlying directive in so far as the ITS apply to sales or transfers of non-performing loans (NPLs) under syndicated loan facilities. In particular, the LMA considers that it is critical that the ITS:

- exempt syndicated loans and intragroup transactions from most, if not all, the template disclosure requirements; and

- make clear that the template disclosure requirements do not apply to loans held by a bank on its trading book.

The proposed ITS would impose inappropriate and disproportionate requirements on sales or transfers of NPLs under syndicated loan facilities that will have a significant adverse impact on the secondary market for loans under syndicated loan facilities, contrary to the intention of the directive to "foster the development of secondary markets for NPLs in the Union" (recital (9) to the directive). EU banks selling NPLs that cannot fully and accurately complete the templates in accordance with the ITS will face the risk of significant fines and other regulatory

sanctions as well as potential liability to buyers, and thus will effectively be unable to sell their NPLs.

In addition, there are significant uncertainties as to the scope of the obligations to use the proposed templates under the ITS. While the ITS address some of these uncertainties, they should further clarify the scope of those obligations in line with the intended scope of the directive.

Our response to question 1 covers the following issues:

- The ITS should exempt the following from the requirement to use the proposed templates or should specify that only a minimal number of fields are applicable to these transactions:
    - sales or transfers of NPLs under large, syndicated loan facilities (exceeding EUR 20 million); and
    - sales or transfers of NPLs to a member of the selling bank's own group.
- The ITS should make clear that:
    - they do not apply where banks sell or transfer bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets;
    - banks are only required to use the templates where they hold the NPLs being sold or transferred on their banking book;
    - only banks incorporated in the EU and subject to CRR are required to use the templates;
    - a bank is only required to use the templates where the bank itself has classified the credit agreement as a non-performing exposure in accordance with Article 47a CRR at the time of the contract for the sale or transfer;
    - a bank is only required to use the templates where the bank itself originated the non-performing loan;
    - banks are only required to use the templates where they sell or transfer rights representing exposures to EU borrowers;
    - banks are not required to use the templates for sales or transfers of NPLs that do not meet the time criteria set out in Article 16(7) of the directive;
    - the date of conclusion of the credit agreement is the relevant date for the purposes of applying the time criteria referred to in Article 2(1) of the ITS and Article 16(7) of the directive;
    - the ITS do not apply to any transaction where both NPLs and other assets or liabilities are being sold or transferred to a buyer;
    - the ITS only apply where the transaction in relation to the NPL is a sale or transfer involving a change in the lender of record under the relevant credit agreement and

that the ITS do not apply when a bank enters into derivative, insurance or sub-participation contracts in relation to NPLs or transfers NPLs pursuant to such contracts; and

- the ITS do not apply to sales or transfers of NPLs by way of collateral or repurchase or lending agreements;

- The ITS should enter into force on a date that gives banks adequate time to implement the requirements of the ITS; and

- The definition of 'loan' in the ITS should also refer to rights under credit agreements as well as the credit agreement itself.

We discuss these points further below.

We have additional comments on the templates themselves and the operational procedures, confidentiality and data governance requirements set out in the draft ITS. These are set out in our responses to the other questions. In summary:

- The ITS should not require sellers of NPLs under syndicated loans to comply with the full requirements of the ITS, to complete mandatory fields if they do not have or reasonably have access to the information required to complete them, to include or accept responsibility for information that they have from third parties or to complete fields which would require the exercise of judgement or a legal analysis or to provide internal or external valuations.

- The ITS should specify that selling banks are not required to provide information on non-EU counterparties and, in any event, are not required to complete any mandatory fields with information that is not available because the counterparty or collateral is located outside the EU.

- The ITS should recognise that many counterparties do not have LEIs and that shares of or other securities of private companies will not have ISINs.

- The templates should allow selling banks to provide all (or more of) the required information by reference to the position as of the selected 'cut-off date'.

- The ITS should be amended to delete Article 6 (Operational procedures for the provision of information) and Article 8 (Credit institutions' data governance arrangements) as these go beyond the powers conferred by the directive.

- The obligation to make corrections should only apply where the information previously provided was incorrect in a material respect on the date it was provided (or, if applicable, on the cut-off date) and up to the time when the bank enters into the contract for the sale or transfer of the loan.

- The ITS should make clear that selling banks are not liable for penalties or other regulatory sanctions if the information is not accurate, so long as the selling bank has put in place an adequate process designed to ensure the accuracy of the information.

- The ITS should make clear that selling banks continue to be free to agree with prospective buyers on the extent of, and limits on, the liability of the selling bank for information provided via the templates.

For the purposes of our responses to the consultation, we refer to banks established in the EU and subject to the Capital Requirements Regulation (CRR) as "EU banks" and to EU banks that are selling or transferring NPLs as "selling banks".

We have proposed amendments to the recitals to the ITS where these are necessary to conform the recitals to proposed amendments to the operative provisions of the ITS or to clarify operative provisions of the ITS. However, we have not, at this stage, proposed new recitals to explain the objectives of all the proposed amendments to the operative provisions.

For ease of reference, we set out at the end of our response to question 1 a consolidated version of the amendments to the operative provisions of, and the recitals to, the ITS proposed in our response to this question.

(a) The ITS should exempt sales or transfers of NPLs under large, syndicated loan facilities from the requirement to use the proposed templates or should specify that only a minimal number of fields are applicable to those transactions.

EU syndicated loan facilities:

- range from around EUR 20 million to as much as EUR 75 billion;

- can involve large numbers of lenders (both EU banks and, where permitted by applicable law, other lenders) that often actively trade their commitments and the drawn loans under the facility;

- finance many different types of private and public sector borrowers, including for general or public sector corporate purposes, financing M&A and commercial real estate transactions and project and asset finance;

- often include multiple different kinds of facility (sometimes in multiple currencies), including revolving credit, term loan and letter of credit, performance bond and other trade finance facilities (on a senior, mezzanine or subordinated basis, which may involve intercreditor agreements between the lenders and other creditors);

- often include multiple borrowers, co-borrowers and guarantors within a group of companies where the entities may be incorporated within or outside the EU (and the identity of the borrowers and guarantors may change over the life of the facility);

- often involve complex security packages covering a wide range of different assets, including real estate, shares in public and private companies, cash accounts, portfolios of equity or debt investments, intellectual property, aircraft, trains, ships or other financed assets, receivables and general or floating charges or security, where the assets may be located within or outside the EU (and, in many cases, the assets charged will not be static but may change during the life of the facility as the borrower may be allowed or required to substitute or add additional assets as collateral); and

- have facility agents, security agents or trustee and complex governance arrangements to take account of the interests of the different participants in the facility;

- when they become, or threaten to become, non-performing, are often subject to complex judicial and non-judicial restructuring or enforcement processes in multiple jurisdictions.

The total size of the annual syndicated loan market to EU borrowers is approximately EUR 840 billion (2021).

Article 16 of the directive requires the EBA to ensure that the templates are proportionate to the size of credits and to take into account existing market practices in data sharing between buyers and sellers and the importance of minimising processing costs for credit institutions and credit purchasers.

Requiring banks selling NPLs under syndicated loan facilities to provide prospective buyers with the information specified in the proposed templates:

- would be disproportionate, having regard to the size of these loans;

- would not in any way be reflective of current market practices on data sharing for these loans; and

- would impose significant and unnecessary processing costs on EU banks.

The complex and heterogeneous nature of syndicated loans means that, when banks sell NPLs under syndicated loan facilities, the transactions are generally negotiated individually with buyers and sellers agreeing on the nature of the information to be disclosed by the seller, rather than using the existing EBA or other disclosure templates. Syndicated loan facility agreements typically allow a selling bank to share information received as a lender with a potential buyer (subject to an appropriate confidentiality agreement). Therefore, sellers can already provide buyers with information if the seller or the buyer requires this. Buyers of loans under syndicated facilities are sophisticated investors that know what information they need to make investment and pricing decisions and typically only require copies of the facility documentation and recent financial statements. In some cases, sellers have very limited (or even no) documentation or detailed information to provide to buyers, particularly if the seller is reselling a loan that it is buying under another transaction that has not yet settled. In addition, where the borrowers or guarantors under a syndicated loan facility have listed securities, prospective buyers of positions under the facility often do not wish to receive non-public information on the borrowers that might amount to inside information as this may prevent them from dealing in those securities. Requiring selling banks to use the templates in relation to sales of NPLs under syndicate loan facilities would impose additional burdens and liability risks on selling banks without significant benefit to buyers.

It would also be costly and time-consuming for banks to build the systems that would be required to comply with the requirements of the ITS for this asset class. These costs will be exacerbated by the fact that only 81 of the 157 fields reflect existing provisions of the ESMA templates, AnaCredit, FinRep, CRR or IFRS (and, even where the templates reflect existing data, systems may need to be changed to make use of that data). Banks that cannot fully and accurately complete the templates in accordance with the ITS will face the risk of significant fines and other regulatory sanctions as well as potential liability to buyers and therefore will

effectively be unable to sell or transfer their loans after they have been classified as non-performing.

It would be disproportionate (and would not reflect existing market practice) effectively to require banks to make this investment in systems and to use the templates for sales of NPLs under syndicated loan facilities when the contents (and the format) of the templates will, in many cases, be wholly inappropriate for the syndicated loan and of little assistance to (or not wanted by) prospective buyers.

There is also a significant risk that many banks will decide not to make the investment in new systems and instead would choose to forego being able to sell their loans under syndicated loan facilities should they become non-performing while still held by the bank. This would have a significant adverse impact on the secondary market for loans under syndicated loan facilities and would be contrary to the intention of the directive to foster the development of the EU secondary market in NPLs.

In addition, lending syndicates may include both EU banks and other lenders (where this is permitted by applicable law). If EU banks selling their positions under a syndicated facility are required to use the proposed templates when other lenders are not, this will put EU banks at a competitive disadvantage in relation to such sales because of the costs and operational complexity of complying with the ITS. This will also have an impact on their competitive position in relation to participation in lending syndicates at the outset as they may have to consider the possibility that the ITS will effectively prevent them from selling their loans if they become non-performing.

We consider that similar issues would arise with respect to large bilateral loans that become non-performing.

Article 2(2) of the ITS should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
>
> (a1) sales or transfers of non-performing loans where the aggregate of the original commitments of all the parties granting credit under the relevant credit agreement exceeds EUR 20 million;

Alternatively, if it is not possible for the EBA to exempt this class of transactions entirely from the ITS, the ITS should specify that only a minimal number of fields are applicable to these transactions (e.g., those fields identifying the borrower(s) and the credit agreement). See our response to questions 2 and 3 for our proposals.

The individual NPL being sold by a bank may be smaller than the specified threshold amount depending on the size of the bank's commitment under the credit agreement and whether it has already sold part of its commitment or acquired a position under the credit agreement from other participants. Therefore, it would not be appropriate to set the threshold by reference to the carrying amount or gross book value of the NPL being sold by the selling bank.

(b) The ITS should exempt sales or transfers of NPLs to a member of the bank's own group from the requirement to use the proposed templates or should specify that only a minimal number of fields are applicable to those transactions.

Where the seller and buyer are part of the same group, it should be presumed that they will both have access to the same information. Requiring EU banks to use the templates when conducting intragroup transactions:

- would be disproportionate;
- would not in any way be reflective of current market practices on data sharing for these transactions; and
- would impose significant and unnecessary processing costs on EU banks.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
>
> …
>
> (a2) sales or transfers of non-performing loans by a credit institution to an undertaking which is a member of the same group as defined in point (138) of Article 4(1) of Regulation (EU) No 575/2013;

Alternatively, if it is not possible for the EBA to exempt this class of transactions entirely from the ITS, the ITS should specify that only a minimal number of fields are applicable to these transactions (e.g., those fields identifying the borrower(s) and the credit agreement). See our response to questions 2 and 3 for our proposals.

(c) The ITS should make clear that they do not apply where banks sell or transfer bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets.

The directive applies to agreements whereby an EU credit institution grants a credit in the form of a deferred payment, a loan or other similar financial accommodation (Article 3(4)). It should be made clear that this does not cover sales or transfers of other instruments or transactions. This is consistent with the co-legislators' intention as articulated in the recitals to the directive (e.g., recitals 7 and 8) which clearly focus on the treatment of loans rather than other types of instruments or transactions. The directive and the draft ITS do not address the range of additional issues that would need to be addressed if the directive had been intended to cover instruments or transactions other than loans.

The recitals to the ITS should be amended by adding the following new recital:

> (1a) This regulation applies to sales or transfers of 'non-performing loans' and covers a sale or transfer of both a creditor's rights under a non-performing credit agreement and the non-performing credit agreement itself. However, it does not cover sales or transfers of transferable debt securities, derivatives or other financial instruments within the meaning of Directive 2014/65/EU [MiFID], securities financing transactions, other than margin lending transactions, within the meaning of Regulation (EU) 2015/2365 [SFTR] or financial or other leases of moveable or immovable property that are not covered by Directive 2008/48/EC [Consumer Credit Directive] or sales or transfers of rights under such instruments, transactions or leases.

(d) The ITS should make clear that banks are only required to use the templates where they hold the NPLs being sold or transferred on their banking book.

Under Article 3(13) of the directive, a credit agreement is only regarded as a non-performing credit agreement if it is classified as non-performing in accordance with Article 47a CRR, which only applies to exposures held in the banking book. In addition, the directive only provides for the EBA to draft ITS specifying templates to be used by selling banks in order to provide detailed information on "their credit exposures in the banking book" to credit purchasers and other banks (Article 16(1) of the directive). The title to the draft ITS reflects this requirement but this is not reflected in the operative provisions of the ITS.

Article 2(1) of the draft ITS should be amended as follows:

> (1) This Regulation shall apply to the sales or transfers of non-performing loans held on the ~~balance sheet~~ banking book of credit institutions, that meet the time criteria set out in Article 16 (7) of Directive (EU) 2021/2167.

Article 2(2) of the draft ITS should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
>
> (a1) sales or transfers of non-performing loans held on the trading book of credit institutions;

Article 3 of the draft ITS should be amended as follows:

> For the purposes of this Regulation the following definitions apply:
>
> (a1) 'Trading book' means the trading book as defined in point (86) of Article 4(1) of Regulation (EU) No 575/2013;
>
> (a2) 'Banking book' means all exposures and positions not held in the trading book;

(e) The ITS should make clear that only banks incorporated in the EU and subject to CRR are required to use the templates.

The directive only applies to non-performing credit agreements originated by credit institutions established in the EU (Article 1 of the directive). In addition, a credit agreement is only a non-performing credit agreement for the purposes of the directive where it is classified as non-performing in accordance with Article 47a CRR (Article 3(13) of the directive). Article 47a CRR only applies to credit institutions that are subject to CRR because they are supervised under the Capital Requirements Directive (CRD) (Article 1(1) CRR). Only banks incorporated in the EU and not falling within the exemptions under Article 2(5) CRD are supervised under CRD and are thus subject to CRR.

The ITS should make clear that the templates do not apply to:

- EU-incorporated entities that meet the definition of a credit institution in CRR but are not subject to CRR because they fall within the exemptions in Article 2(5) CRD (e.g., central banks, KfW, etc.); and

- banks incorporated outside the EU, even if they operate through a branch established in the EU or are subsidiaries of EU banks (as those branches and subsidiaries are not subject to CRR).

In addition to the amendments to Article 2(1) of the ITS proposed above, Article 2(1) should be amended as follows:

(1) This Regulation shall apply to the sales or transfers of non-performing loans held on the ~~balance sheet~~ banking book of credit institutions established in the EU and subject to the requirements of Regulation (EU) No 575/2013/EU, that meet the time criteria set out in Article 16 (7) of Directive (EU) 2021/216714.

(f) The ITS should make clear that a bank is only required to use the templates where the bank itself classifies the credit agreement as a non-performing exposure in accordance with Article 47a CRR at the time of the contract for the sale or transfer.

There may be cases where more than one EU bank has rights under a syndicated credit agreement, but those banks make different decisions as to whether or when to classify the credit agreement as a non-performing exposure in accordance with Article 47a CRR. A selling bank would not normally know how other EU banks holding positions under the relevant credit agreement have classified their exposures. A selling bank should not be required to provide information under the ITS unless that bank has itself classified the loan as a non-performing exposure in accordance with Article 47a CRR.

The ITS should also make clear that the ITS do not apply where the selling bank does not classify the exposure as non-performing at the time that the bank enters into a contract for the sale or transfer of the loan. For example, the selling bank may have previously classified the loan as a non-performing exposure but, before the date of the contract, may have reclassified the loan as performing in accordance with Article 47a CRR. In addition, there may be circumstances where the selling bank enters into a contract for the sale or transfer of a loan at a time when it classifies the loan as a performing exposure but then classifies the loan as a non-performing exposure after the date of the contract (but before the date on which the loan is transferred to the buyer).

This will be particularly important where banks enter into contracts that might require the transfer of a loan at a future date. For example, under market standard contracts:

- where banks acquire credit protection under physically-settled credit default swaps, total return swaps or other credit derivative contracts, they may be required to transfer loans to the counterparty on the occurrence of a credit event in relation to the borrower or at maturity of the contract;

- where banks acquire credit risk insurance under credit risk insurance policies they may be required to transfer defaulted loans to the insurer by way of subrogation and assignment after the insurer has paid the bank's claim under the policy; and

- where banks enter into sub-participation contracts in relation to loans under which they grant a sub-participation in respect of the loan to a participant, the bank may be required upon the request of the participant (or the bank) to elevate the participant's position in respect of the loan by transferring the loan to the participant.

This proposal is consistent with the provisions of Article 15(1) of the directive and Article 6(1) of the draft ITS which provide that the bank must provide the required information prior to entering into a contract for the sell or transfer of NPLs.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
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> …
>
> (c) sales or transfers by a credit institution of ~~exposures~~ loans that are not classified as non-performing exposures in accordance with Article 47a of Regulation (EU) No 575/2013 by the credit institution at the time that the credit institution enters into a contract for the sale or transfer of the loan;

See below for the corresponding amendments to recital (2) to the ITS and amendments to the definition of a 'loan' in the ITS.

(g) **The ITS should make clear that a bank is only required to use the templates where the bank itself originated the non-performing loan.**

We consider that the directive was only intended to apply where the selling bank itself originated the NPLs being sold and has itself classified the loan as a non-performing exposure before selling or transferring the loan to a credit purchaser or another bank.

A bank selling a non-performing loan may have acquired its rights under the relevant credit agreement from other market participants and those market participants may themselves have acquired those rights in the secondary market. If the original lenders under the credit agreement included lenders that were not EU banks, it may be impossible for the selling bank to ascertain whether the rights it has acquired were originated by an EU bank, especially where the rights under the credit agreement have been actively traded before the selling bank acquired them. Rights under a facility granted under credit agreement would usually be fungible with other rights under the same facility and the selling bank will not have access to the full history of the transactions in the position that it has acquired.

For example, assume that:

- the selling bank is selling a non-performing €10m position under a fully drawn €100m term loan facility whose original lenders included lenders that were not EU banks;
- the selling bank acquired that position (before the exposures became non-performing) from another market participant; and
- that other market participant itself had previously acquired its position in the secondary market, by buying a €15m position from an original lender under the facility that was an EU bank and a €10m position from another original lender under the facility that was not an EU bank.

In such a case, the selling bank would be unable to identify whether the rights it has acquired were originated by an EU bank (even if it had access to the full history of transactions in positions under the credit agreement, which it will not).

Furthermore, in many cases, a selling bank that has acquired rights under a credit agreement in the secondary market will not have access to all the information required by the templates because that information was only available to the originator of the loan and the selling bank acquired those rights from a market participant that either did not itself have the information or, even if it did, was not required to provide the information to the selling bank under Article 16(8) of the directive because:

- that market participant was not an EU bank (the directive does not require credit purchasers selling NPLs or other loans to provide information to prospective buyers);

- that market participant was an EU bank but held the loan on its trading book and so was not required to provide information to prospective buyers (see above); or

- that market participant was an EU bank holding the loan on its banking book but did not classify the credit agreement as a non-performing exposure at the time of the sale to the selling bank (i.e., the loan became non-performing after its acquisition by the selling bank).

Market participants are unlikely to be willing to take steps to ensure that the information specified in the templates "travels" with a loan from originator to buyer to buyer (or to commit to give a future buyer access to that information), especially when sales of the loan take place at a time when the prospect of default seems remote and when it is unclear whether any future buyer of the loan will be an EU bank that needs the information in order to resell the loan after it has become non-performing.

In any event, even if a selling bank acquiring loans in the secondary market is provided with relevant information by the market participant that sold the loans to the selling bank, the selling bank will be reluctant to take responsibility for ensuring the completeness, consistency and accuracy of that information when it sells the loans to a credit purchaser or another EU bank. The ITS make the selling bank responsible for the completeness, consistency and accuracy of all information provided on the templates. The selling bank will be at risk of significant fines or other regulatory sanctions and civil liability to buyers of the loans if the information it provides to prospective buyers does not meet these requirements. See our comments on question 13 below on this issue.

If the ITS were to require selling banks to provide information to prospective buyers on loans not originated by the selling bank, this would create a significant obstacle to EU banks acquiring loans in the secondary market to hold on their banking book. An EU bank may be unable to resell those loans if they are or become non-performing because it does not have all the information needed to comply with the disclosure obligations of Article 15(1) or 16(8) or because it is unable or unwilling to take responsibility for the completeness, consistency and accuracy of the information provided to the bank by third parties.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

2) ~~The~~This Regulation shall not apply to the following:

…

(d) sales or transfers by a credit institution of loans that were not originated by the credit institution;

It should also be made clear that a selling bank is not regarded as having originated an NPL for these purposes when it acquired the rights under the credit agreement by novation, assignment or other means by adding a new recital (3a) to the ITS:

(3a) A credit institution should not be regarded as having originated a loan for the purposes of this Regulation where it acquired the loan under the relevant credit agreement by novation, assignment or other means.

Corresponding amendments should be made to recital (2) to the ITS to reflect the above amendments:

… Finally, this Regulation should not apply to sales or transfers by a credit institution of ~~exposures~~ loans that are not classified as non-performing exposures by the credit institution in accordance with Article 47a of Regulation (EU) No 575/201311 at the time of the contract for the sale or transfer of the loan or that were not originated by the credit institution.

See below for amendments to the definition of a 'loan' in the ITS.

(h) The ITS should make clear that banks are only required to use the templates where they sell or transfer rights representing exposures to EU borrowers.

The directive clearly assumes that the borrowers of NPLs are domiciled or have their registered office in a Member State or, if under their national law they do not have a registered office, have their head office in a Member State (EU borrowers). See the definition of 'host Member State' in Article 3(11) of the directive.

Articles 8(1)(f) and (2), 12(2), 13, 14, 15(2), 17(1), 18(3), 20(3), 21(4), 22(2), (5) and (6) and 30(1)(a) of the directive all assume that there is a 'host Member State' for every NPL because the borrower is an EU borrower. For example:

- Article 15(2) requires an EU bank selling NPLs to credit purchasers to make biannual reports to the competent authorities of the 'host Member States'. An EU bank would not be able to fulfil this obligation where the borrower is a non-EU borrower.

- Article 17(1) allows the 'host Member State' to extend the obligation on credit purchasers to appoint a servicer to additional classes of NPLs. There would be no relevant competent authority to perform this role in relation to NPLs to non-EU borrowers.

In addition, the intent of the directive is "to foster the development of secondary markets for NPLs in the Union" (recital (9) to the directive, emphasis added) and to enable "credit purchasers and credit servicers … [to] reap the benefits of the internal market" (recital (10) to the directive, emphasis added). The directive is not intended to regulate the secondary market for NPLs in third countries.

The directive would also have addressed significant additional issues if it had been intended that it should apply extraterritorially to loans to non-EU borrowers, in particular:

- Where EU banks make loans to non-EU borrowers, either cross-border or from a non-EU branch, the most likely buyers of those loans, when they become non-performing, will be banks or non-bank entities in the relevant third country.

- However, if those loans to non-EU borrowers were within the scope of the directive, those non-EU buyers would become 'credit purchasers' subject to extraterritorial requirements under the directive from the time that the new rules come into force, including obligations:

    - to appoint an EU-incorporated entity as the credit servicer if the loans meet the criteria of Article 17(1) of the directive;

    - at least for purchases after the date of application of the new rules (30 December 2023), to appoint a representative in the EU (under Article 19(1) of the directive);

    - to notify its 'home Member State' competent authority of the appointment of a person to service NPLs on its behalf (under Article 18(1) and (2) of the directive);

    - to report sales of the loans to other credit purchasers to its 'home Member State' competent authority biannually or, if required by the authority, quarterly (Article 20 of the directive); and

    - to comply with obligations as to the fair treatment of the non-EU borrowers of NPLs, the information to be given to the non-EU borrowers about their purchase of the NPLs and the terms of any appointment of a credit servicer in relation to the loan (Article 10 of the directive).

- In addition, from 30 December 2023, any person performing the role of a 'credit servicer' in relation to those loans to non-EU borrowers would have to be an EU-incorporated entity authorised under the directive or an EU entity falling within the exemptions in Article 2(5)(a) of the directive. A non-EU entity would not be able to rely on those exemptions or the transitional provisions in the second sub-paragraph of Article 32(2) of the directive and thus would immediately have to cease performing that role when the new rules enter into application.

As a result, the application of the directive to loans to non-EU borrowers would be likely to have an immediate, significant adverse impact on the ability of EU banks to carry on business outside the EU, either cross-border or through non-EU branches, because they may be unable to sell their non-performing loans generated through such business (as well as having an immediate, significant adverse impact on non-EU entities that have already purchased NPLs to non-EU borrowers originated by EU banks).

Even if they could find a buyer, some of the mandatory fields in the proposed templates assume that the borrower is an EU borrower (e.g., field 1.27, which assumes that the borrower is subject to IAS) or that the collateral is located in the EU (e.g., field 4.25, which assumes that there will be an energy performance certificate for real estate collateral).

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

2) ~~The~~ This Regulation shall not apply to the following:

…

(e) sales or transfers of a loan unless the borrower is domiciled in the Union or has its registered office or, if under its national law it has no registered office, its head office in the Union;

See below for amendments to the definition of a 'loan' in the ITS.

(i) The ITS should make clear that banks are not required to use the templates for sales or transfers of NPLs that do not meet the time criteria set out in Article 16(7) of the directive.

Article 16(7) of the directive states that:

> 7. The data templates shall be used for transactions relating to credits issued on or after 1 July 2018 that become non-performing after 28 December 2021. For credits that originate between 1 July 2018 and the date of entry into force of the implementing technical standards referred to in paragraph 1, credit institutions shall complete the data template with the information already available to them.

Article 2(1) of the draft ITS correctly states that the ITS only apply to NPLs that meet the time criteria set out in Article 16(7). However, recital (3) to the draft ITS states that:

> The templates specified in this Regulation should be used and information be provided in relation to the loans that are originated on or after 1 July 2018 and that became non-performing after 28 December 2021. For loans originated before 1 July 2018 or between 1 July 2018 and the date of entry into force of this Regulation, credit institutions should have regard to the requirements of this Regulation concerning the templates used when selling these non-performing loans and complete them with available information on a best-efforts basis.

The last sentence incorrectly suggests that EU banks have a legal obligation to use the templates and complete them with available information (albeit only on a best-efforts basis) even where the loans fall outside the time criteria of Article 16(7), i.e.:

- Loans originated before 1 July 2018; and
- Loans originated on or after 1 July 2018 that become non-performing on or before 28 December 2021.

In addition, it suggests that, for credits that originate between 1 July 2018 and the date of entry into force of the ITS and that become non-performing on or before 28 December 2021, the bank is under an obligation to use 'best efforts' to provide available information.

There is no legal basis for the ITS to purport to extend the obligations of EU banks in this way. In addition, the requirement to use 'best efforts' is inconsistent with the ITS, which only require a selling bank to use 'reasonable efforts' to complete non-mandatory fields (see Article 5(4) of the ITS).

Recital (3) of the ITS should be amended as follows:

The templates specified in this Regulation should be used and information be provided in relation to ~~the~~ loans that are originated on or after 1 July 2018 and that became non-performing after 28 December 2021. For loans originated ~~before~~ between 1 July 2018 ~~or between 1 July 2018~~and the date of entry into force of this Regulation, credit institutions should ~~have regard to the requirements of this Regulation concerning the templates used when selling these non-performing loans and~~ complete them with ~~available~~ information already available to them ~~on a best-efforts basis~~.

See below for amendments to the definition of a 'loan' in the ITS.

(j) The ITS should make clear that the date of conclusion of the credit agreement is the relevant date for the purposes of applying the time criteria referred to in Article 2(1) of the ITS and Article 16(7) of the directive.

The directive does not identify what is the relevant date for determining the application of the time criteria for the use of the templates. We consider that using the date of conclusion of the relevant credit agreement would provide legal certainty to banks, would be in accordance with the intention of the directive (given that the scope of the directive focuses on the creditors' rights under a credit agreement which will arise at the date of conclusion of the credit agreement) and would be consistent with proposed field 3.03 – Loan – Inception date.

Other possible dates (such as the date of drawdown of individual advances under a credit) will be difficult to track (especially in the case of revolving credits) and may result in the creditors' rights in respect of different advances under the same credit agreement being treated differently for the purposes of the templates.

In addition to the amendments to recital (3) to the ITS proposed above, recital (3) should be amended by adding the following sentence at the end:

> The date of conclusion of the relevant credit agreement should be regarded as the date of origination of a loan for these purposes.

See below for amendments to the definition of a 'loan' in the ITS.

(k) The ITS should make clear that they do not apply to any transaction where both NPLs and other assets or liabilities are being sold or transferred to a buyer.

Recital (38) to the directive states that the obligation to use the templates:

> "… should apply to transfers of non-performing credit agreements only, and does not encompass complex transactions where non-performing credit agreements are included as a part of such a transaction, including sales of branches, sales of business lines or sales of clients' portfolios not limited to non-performing credit agreements and transfers as part of an ongoing restructuring operation of the selling credit institution within insolvency, resolution or liquidation proceedings [emphasis added]."

This makes clear that the obligation to use the templates does not apply to any transaction which involves assets or liabilities other than NPLs (or other rights or obligations) not only those transactions of the type described in the wording following the word "including" in the recital.

In contrast, Article 2(2) of the draft ITS sets out a closed list of transactions to which the ITS do not apply. Article 2(2) also refers to "sales of clients' portfolios which are not limited to non-performing loans (emphasis added)". Banks do not hold portfolios of assets belonging to clients on their banking book and Articles 15(1) and 16(8) would not apply in any event when a bank sells or transfers such a portfolio on behalf of a client.

Article 2(2) is also inconsistent with Article 1 of the ITS, which states that the ITS apply to both "sales and transfers" of NPLs.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

> (2) ~~The~~ This Regulation shall not apply to the following:
>
> (a) sales or transfers of non-performing loans as part of transactions which also involve the sale or transfer of other assets or liabilities or other rights or obligations, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of loans to clients which are not limited to non-performing loans, ~~and~~ or sales or transfers of non-performing loans as part of an ongoing restructuring operation of the selling credit institution within insolvency, resolution or liquidation proceedings;

Corresponding amendments should be made to recital (2) to the ITS:

> … Furthermore, this Regulation should not apply to sales or transfers of non-performing loans as part of transactions which also involve the sale or transfer of other assets or liabilities or other rights or obligations, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of loans to clients which are not limited to non-performing loans, ~~and~~ or sales or transfers of non-performing loans as part of an ongoing restructuring operation of the selling credit institution within insolvency, resolution or liquidation proceedings. **…**

(l) The ITS should make clear that they only apply where the transaction relating to the NPL is a sale or transfer involving a change in the lender of record under the relevant credit agreement and that the ITS do not apply when a bank enters into derivative, insurance or sub-participation contracts in relation to NPLs or transfers NPLs pursuant to such contracts.

Banks may reduce their risks in respect of their loan books by means other than an outright sale or transfer of the loan. For example, they may enter into credit default swaps, total return swaps or other credit derivative contracts, credit insurance contracts or sub-participation contracts which do not involve any change in the lender of record under the relevant credit agreement, including when the loan is already impaired and classified by the bank as a non-performing exposure in accordance with Article 47a CRR. We consider that the directive was not intended to cover such transactions.

In particular, the obligations that apply to credit purchasers and credit servicers would not make sense where a person acquires an exposure to a loan via a credit derivative contract, insurance contract or sub-participation contract. For example:

- Article 10 of the directive assumes that a credit purchaser and a credit servicer have a relationship with the borrower whereas the counterparties to a credit derivative contract, insurance contract or sub-participation agreement only have rights and obligations between themselves; and

- Articles 1, 15, 16 and 18 and the definition of credit purchaser assume that a credit institution sells or transfers rights to the credit purchaser, rather than creating new rights and obligations between the credit institution and the counterparty to the credit derivative contract, insurance contract or sub-participation agreement.

In addition, such contracts may require the bank subsequently to transfer the loan to the counterparty. For example, as discussed under point (f) above, physically-settled credit default swaps, total return swaps or other credit derivatives, credit insurance contracts and sub-participation contracts may require the bank to transfer defaulted loans to the counterparty to the contract at a future time. However, they cannot at that time comply with the provisions of Article 15(1) of the directive and Article 6(1) of the draft ITS which provide that the bank must provide the required information prior to entering into a contract for the sell or transfer of NPLs.

In addition to the amendments to recital (2) to the draft ITS proposed above, recital (2) should be amended by adding the following sentence at the end:

> … In addition, this Regulation should only apply to sales or transfers of non-performing loans involving a change to the lender of record under the relevant credit agreement and should not apply to other types of contracts, such as credit default swap, total return swap and other derivative contracts, insurance contracts and sub-participation contracts in relation to non-performing loans, or to transfers of non-performing loans pursuant to such contracts.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
>
> …
>
> (f) sales or transfers of non-performing loans pursuant to credit default swap, total return swap and other derivative contracts, contracts of insurance and sub-participation contracts;

(m) The ITS should make clear that they do not apply to sales or transfers of NPLs by way of collateral or repurchase or lending agreements.

Banks may transfer loans as part of financing transactions, e.g., collateral arrangements involving the creation of a security interest over the loans or title transfer financial collateral arrangements governed by the Financial Collateral Directive or repurchase or reverse repurchase agreements, lending or borrowing agreements or buy-sell back agreements. The counterparties to these transactions may be other banks, central banks or non-bank entities. The accounting treatment of these transactions is generally that the loans remain on the bank's balance sheet since it retains the economic risks and rewards of ownership.

The recitals to the directive make clear that it is intended to facilitate the sale of NPLs "to prevent the accumulation of non-performing credit agreements on credit institutions' balance sheets" (recital (11) to the directive). It is not intended to cover transactions that do not amount to outright sales of NPLs.

In addition to the amendments to Article 2(2) of the ITS proposed above, Article 2(2) should be amended as follows:

> 2) ~~The~~ This Regulation shall not apply to the following:
>
> …
>
> (g) sales or transfers of non-performing loans pursuant to a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC or a transaction that would be a securities financing transaction as defined in point (139) of Article 4(1) of Regulation (EU) 575/2013 if that definition also applied to repurchase transactions, lending and borrowing transactions and margin lending transactions relating to loans.

(n) The ITS should enter into force on a date that gives banks adequate time to implement the requirements of the ITS.

Article 9 of the draft ITS provides that the technical standards enter into force 20 days after the publication of the ITS in the Official Journal.

Under Article 16(7) of the directive and the draft ITS, banks that wish to sell NPLs on or after 30 December 2023 will have to be able accurately to complete all mandatory fields in the templates and to use the correct no-data code for non-mandatory fields for all loans originated after the ITS enter into force. Banks will need to put in place significant systems changes to be able to do this and, if they cannot, they will not be able to sell loans without the risk of significant regulatory penalties or other regulatory sanctions and liability to buyers.

However, banks will not be able to finalise their systems changes even after the EBA sends its final draft ITS to the Commission. The Commission may amend the ITS with only six weeks' prior notice to the EBA and is under no obligation to consult publicly on any changes. The ITS will also only be available in all the languages of the EU when they are published in the Official Journal. Banks will need significant time after the publication of the ITS in the Official Journal to prepare for implementation of the ITS.

In addition, banks may need to take account of the national rules implementing the directive when designing their systems to implement the ITS (e.g., as to data fields required for the reporting of sales of NPLs required under Article 15(2) of the directive). National rules may not be final until 29 December 2023, i.e., the day before Member States are required to bring those rules into application (Article 32(1) of the directive).

Article 9 of the ITS should be amended as follows:

> This Regulation shall enter into force on ~~the twentieth day following that of its publication in the Official Journal of the European Union~~ 30 December 2023.

(o) The definition of 'loan' in the ITS should also refer to rights under credit agreements as well as the credit agreement itself.

The ITS refer to a 'loan' in a number of places in the instructions and in Article 5(3) and define a 'loan' to mean a credit agreement as defined in the directive (Article 3(6)).

However, the relevant credit agreement may provide for multiple separate facilities (e.g., where the selling bank is selling its position under one of the facilities under a credit agreement but retaining its position under another facility under the same agreement) or the selling bank may be only selling part of its position under a single facility. EU banks participating in a syndicated loan facility will only hold rights under the credit agreement, rather than the entire credit agreement itself. The templates should only require information about the rights being sold or transferred by the selling bank.

In addition, the definition of a 'loan' should be aligned with the definition of a 'non-performing loan' in Article 3(4) of the ITS and Articles 1 and 2(1) of the directive, which also refer to the rights under a credit agreement as well as the credit agreement itself.

Article 2(6) of the ITS should be amended as follows:

> (6) 'Loan' means rights under a credit agreement or a credit agreement in accordance with Article 3, point (4) of Directive (EU) 2021/2167.

The amendments proposed above also refer to a 'loan' and are intended to include both the rights under a credit agreement and the credit agreement itself, as appropriate, in line with the amended definition.

Consolidated amendments

For ease of reference, we set out below a consolidated version of the amendments to the operative provisions of, and the recitals to, the ITS proposed in our response to question 1.

Article 2
Scope of application

(1) This Regulation shall apply to the sales or transfers of non-performing loans held on the ~~balance sheet~~ banking book of credit institutions established in the EU and subject to the requirements of Regulation (EU) No 575/2013/EU, that meet the time criteria set out in Article 16 (7) of Directive (EU) 2021/216714.

(2) ~~The~~ This Regulation shall not apply to the following:

(a1) sales or transfers of non-performing loans held on the trading book of credit institutions;

(a2) sales or transfers of non-performing loans where the aggregate of the original commitments of all the parties granting credit under the relevant credit agreement exceeds EUR 20 million;

(a2) sales or transfers by a credit institution of non-performing loans to an undertaking which is a member of the same group as defined in point (138) of Article 4(1) of Regulation (EU) No 575/2013;

(a) sales or transfers of non-performing loans as part of transactions which also involve the sale or transfer of other assets or liabilities or other rights or obligations, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of loans to clients which are not limited to non-performing loans, ~~and~~ or sales or transfers of non-performing loans as part of an ongoing restructuring operation of the selling credit institution within insolvency, resolution or liquidation proceedings;

(b) sales or transfers of non-performing loans through securitisation, where Regulation (EU) 2017/2402 applies and provision of the related information is governed by Commission Delegated Regulation (EU) 2020/1224 and Commission Implementing Regulation (EU) 2020/1225;

(c) sales or transfers by a credit institution of ~~exposures~~ loans that are not classified as non-performing exposures in accordance with Article 47a of Regulation (EU) No 575/2013 by the credit institution at the time that the credit institution enters into a contract for the sale or transfer of the loan;

(d) sales or transfers by a credit institution of loans that were not originated by the credit institution;

(e) sales or transfers of a loan unless the borrower is domiciled in the Union or has its registered office or, if under its national law it has no registered office, its head office in the Union;

(f) sales or transfers of non-performing loans pursuant to credit default swap, total return swap and other derivative contracts, contracts of insurance and sub-participation contracts;

(g) sales or transfers of non-performing loans pursuant to a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC or a transaction that would be a securities financing transaction as defined in point (139) of Article 4(1) of Regulation (EU) 575/2013 if that definition also applied to repurchase transactions, lending and borrowing transactions and margin lending transactions relating to loans.

Article 3
Definitions

For the purposes of this Regulation the following definitions apply:

(a1) 'Trading book' means the trading book as defined in point (86) of Article 4(1) of Regulation (EU) No 575/2013;

(a2) 'Banking book' means all exposures and positions not held in the trading book;

…

(6) 'Loan' means rights under a credit agreement or a credit agreement in accordance with Article 3, point (4) of Directive (EU) 2021/2167.

Article 9
Entry into force

This Regulation shall enter into force on ~~the twentieth day following that of its publication in the Official Journal of the European Union~~ 30 December 2023.

Recitals:

(1a) This regulation applies to sales or transfers of 'non-performing loans' and covers a sale or transfer of both a creditor's rights under a non-performing credit agreement and the non-performing credit agreement itself. However, it does not cover sales or transfers of transferable debt securities, derivatives or other financial instruments within the meaning of Directive 2014/65/EU, securities financing transactions, other than margin lending transactions, within the meaning of Regulation (EU) 2015/2365 or financial or other leases of moveable or immovable property that are not covered by Directive 2008/48/EC or sales or transfers of rights under such instruments, transactions or leases.

(2) Credit institutions have different possibilities for disposal of non-performing loans from their balance sheet, with most common being sales or transfers of such loans to other investors or credit institutions, or though securitisation. This Regulation should apply in relation to direct sales or transfers of non-performing loans between two or more parties, while the disposals of non-performing loans through securitisation, where Regulation (EU) 2017/24028 applies and the provision of the related information is governed by the Commission Delegated Regulation (EU) 2020/12249 and Commission Implementing Regulation (EU) 2020/122510, should not be in scope of this Regulation. Furthermore, this Regulation should not apply to sales or transfers of non-performing loans as part of transactions which also involve the sale or transfer of other assets or liabilities or other rights or obligations, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of clients' portfolios of loans to clients which are not limited to non-performing loans, ~~and~~ or sales or transfers of non-performing loans as part of an ongoing restructuring operation of the selling credit institution within insolvency, resolution or liquidation proceedings. Finally, this Regulation should not apply to sales or transfers by a credit institution of ~~exposures~~ loans that are not classified as non-performing exposures by the credit institution in accordance with Article 47a of Regulation (EU) No 575/201311 at the time of the contract for the sale or transfer or that were not originated by the credit institution. In addition, this Regulation should only apply to sales or transfers of non-performing loans involving a change to the lender of record under the relevant credit agreement and should not apply to other types of contracts, such as credit default swap, total return swap and other derivative contracts, insurance contracts and sub-participation contracts in relation to non-performing loans, or to transfers of non-performing loans pursuant to such contracts.

(3) The templates specified in this Regulation should be used and information be provided in relation to the loans that are originated on or after 1 July 2018 and that became non-performing after 28 December 2021. For loans originated ~~before 1 July 2018 or~~ between 1 July 2018 and the date of entry into force of this Regulation, credit institutions should have regard to the requirements of this Regulation concerning the templates used when selling these non-performing loans and complete them with ~~available~~ information already available to them ~~on a best-efforts basis~~. The date of conclusion of the relevant credit agreement should be regarded as the date of origination of a loan for these purposes.

(3a) A credit institution should not be regarded as having originated a loan for the purposes of this Regulation where it acquired the loan under the relevant credit agreement by novation, assignment or other means.

2. What are the respondents' views on the content of Template 1? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.

As noted in our response to question 1, we consider that the proposed templates are inappropriate and disproportionate for sales or transfers of NPLs under syndicated loan facilities. Therefore, we have not commented in detail on every field in the draft templates. However, our responses to this question and the following questions include some general remarks on the draft templates and on some individual fields.

Requirements for syndicated loans and intragroup transfers

Our response to question 1 proposes amendments to the ITS to exempt sales or transfers of NPLs under large, syndicated loans and sales or transfers of NPLs to another member of the same group from the requirements of the ITS. Alternatively, if it is not possible for the EBA to exempt these classes of transactions entirely from the ITS, our response proposes that the ITS should specify that only a minimal number of fields be applicable to these transactions, i.e., the following fields:

1.03 – Counterparty – Counterparty Identifier (only for the borrower)
[Drafting note: this is a bank's internal identifier, not the LEI]
1.04 – Counterparty – Name of Counterparty (only for the borrower)
3.01 – Loan – Contract Identifier
3.03 – Loan – Inception date

In any event, to the extent that the templates do require information on syndicated loans, the ITS should make clear that selling banks are not required to:

- to complete mandatory fields if they do not have or reasonably have access to the information required to complete them;
- to include or accept responsibility for information that they have from third parties, such as facility agents as they cannot be expected to take responsibility for information provided by third parties;
- to complete fields which would require the exercise of judgement or a legal analysis (e.g., the lien position, 4.05) as to do so would be to require sellers effectively to provide a legal opinion to prospective buyers on these matters; or
- to provide details for every security interest as would impose very significant burdens in the case of complex security packages.

As noted in our response to question 1, imposing the full requirements of the ITS on sales of NPLs under syndicated loans would impose additional burdens and liability risks on selling banks without significant benefit to buyers and will have a significant adverse impact on the secondary market for loans under syndicated loan facilities.

LEIs and type of counterparty

Field 1.14 – Counterparty – Legal Entity Identifier (LEI) is mandatory for larger loans. Many counterparties will not have LEIs and banks are currently not required to record this data if the LEI is not available. Section 12.4.2 of the AnaCredit reporting manual provides that:

> If no eligible LEI exists for a given counterparty, the data attribute "legal entity identifier (LEI)" is reported as "non-applicable", while the reporting of a national identifier and of the identifier type becomes mandatory for that counterparty.

Field 1.05 – Counterparty – Legal Type of Counterparty (mandatory) also assumes that all counterparties can be categorised as Private Individuals, Listed Corporates or Unlisted Corporates and Partnerships (without defining any of those terms, e.g., whether listed status is limited to listings of equity securities and is determined by the listed status of the entity or its parent). Syndicated loan facilities (and other bank facilities) are granted to a wide range of different kinds of counterparty, including public sector bodies and partnerships (and other bank facilities may involve sole traders).

Non-EU counterparties and collateral

The templates assume that the counterparty is incorporated in the EU and that collateral is located in the EU. For example:

> 1.28 – Counterparty – Annual Turnover (mandatory for larger loans): This field assumes that a counterparty's financial statements disclose turnover in accordance with Commission Recommendation 2003/361/EC.
>
> 4.07 – Collateral guarantee and enforcement – Register of Deeds Number (mandatory): A lien over third-country assets may not be required to be registered in the third country and, even if it is, the registry may not assign a deeds number. Similar issues may arise in relation to liens over EU assets, e.g., there is no registration requirement for collateral covered by the Financial Collateral Directive.
>
> 4.25 – Collateral guarantee and enforcement – Value of Energy Performance Certificate (mandatory for larger loans): Third countries may not require real estate to have energy performance certificates or they may not be comparable with EU certificates.

The instructions should state that selling banks are not required to provide information on non-EU counterparties (in line with the proposals regarding the scope of the ITS set out above). In any event, the instructions should state that the selling banks are not required to complete any mandatory fields with information that is not available because the counterparty or collateral is located outside the EU.

Cut-off date

The draft templates should allow selling banks to provide <u>all</u> (or more of) the required information by reference to the position as of the selected 'cut-off date'. For example:

- The loan documentation may allow the addition or substitution of additional co-borrowers or protection providers after the cut-off date (e.g., where the loan documentation requires additional entities becoming members of the borrower's group of companies to guarantee the loan).

- There may be changes to a counterparty's group after the cut-off date as a result of mergers or acquisitions resulting in changes to the identifier or other information for the counterparty's group.

- The borrower may publish new financial statements after the cut-off date requiring an update to financial data included in the templates.

- The loan documentation may allow or require the addition or substitution of collateral after the cut-off date (e.g., where security is granted over a fluctuating portfolio of securities, where a borrower is required to provide additional collateral because of a fall in value of the collateral or where a borrower is allowed to remove collateral or substitute collateral so long as the collateral pool maintains a minimum value).

It would be disproportionate to require selling banks continuously to update the information up to the time at which the information is provided to the prospective buyer. See also our response to question 13 below regarding corrections of errors in information provided.

Tenants

Template 1 requires information to be provided in relation to each 'counterparty', which is defined to include a 'tenant' (Article 3(2) of the ITS). The discussion of Template 2 (relationship) on page 8 of the consultation paper and paragraph 16 of Annex III suggests that it was intended that Template 1 require the provision of information on the tenant or lessee of real estate or other assets where the lenders take security over those assets or a lease of those assets. However, the selling bank may not have the required information in all cases on the tenant or lessee of real estate or other collateral, especially where the owner of the collateral is permitted to grant leases or approve transfers of, or amendments to, leases without the lender's consent. All fields relating to 'tenants' should be non-mandatory (and should be limited to information as of the cut-off date).

3. What are the respondents' views on the content of Template 3? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.

See our responses to question 2, some of which also relate to Template 3.

Syndicated loans

Template 3 has two fields specifically relating to syndicated loans:

3.33 – Loan – Syndicated Loan (mandatory)
3.34 – Loan – Syndicated Portion (non-mandatory)

The description of field 3.33 incorrectly assumes that the only lenders under a syndicated credit facility will be other (EU) credit institutions. In addition, both fields fail to take account of the possibility that there may be multiple separate facilities under a single syndicated credit facility agreement and that the selling bank may be only selling or transferring only part of its participation in these facilities. It would also be inappropriate to require a selling bank to disclose the size of its retained portion of any loan.

Valuations

Templates 3 and 4 require banks to disclose information on valuations of the loan and related collateral. See the following mandatory fields:

3.13 – Loan – Total Balance (the carrying amount of the loan)
3.16 – Loan – Percentage of the loan that is collateralised
4.17 – Collateral guarantee and enforcement – Latest Internal Valuation Amount
4.19 – Collateral guarantee and enforcement – Latest External Valuation Amount

It would be disproportionate and inappropriate to require selling banks to disclose this information:

- The purpose of the required disclosures is to enable a prospective buyer "to conduct its own assessment of the value [of the NPL]" (Article 15(1) of the directive). These fields require the selling bank to disclose the selling bank's own assessment of that value.
- Disclosure of the selling bank's own assessment of the carrying value and the valuation of collateral unfairly distorts the sale process as it reveals the selling bank's likely willingness to accept a particular price.
- Selling banks are likely to be unwilling to disclose this information as they may have civil liability to the buyer if the selling bank's internal assessment of the appropriate level of provisions or the value of the collateral proves incorrect.
- External valuers may not consent to the selling bank providing their valuations to prospective buyers because of their own concerns about potential liability to a buyer.

Reference rates

Field 3.24 – Loan – Reference Rate does not reflect the shift away from LIBOR (and similar rates) to the new risk-free rates which are now widely used in the syndicated loan market.

4. What are the respondents' views on the content of Template 4? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.

See our responses to question 2 and 3, some of which also relate to Template 3.

ISINs

Field 4.29 – Collateral guarantee and enforcement – ISIN (mandatory) requires disclosure of the ISIN of equity and debt securities. However, ISINs will not be available for debt or equity securities of many private and some listed companies. Syndicated loans are often secured by charges over shares of unlisted subsidiaries within the borrower's group of companies.

5. What are the respondents' views on the content of Template 5? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.?

See our response to question 2 in relation to the cut-off date for information.

6. Do the respondents agree on the structure of Template 2 to represent the relationship across the templates? If not, do you have any other suggestion of structure?

See our response to question 2 in relation to the cut-off date for information.

7. Do the respondents agree on the structure and the content of the data glossary? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.

Having regard to our comments above, we make no comment on the data glossary, but see our response to question 1 above in relation to the definition of a 'loan'.

8. What are the respondents' views on the content of instructions?

Having regard to our comments above, we make no comment on the instructions, but see our response to question 1 above in relation to the definition of a 'loan' and our response to question 2 above.

9. Do the respondents agree on the use of the 'No data options' as set out in the instructions?

Having regard to our comments above, we make no comment on these options.

10. What are respondents' views on whether the proposed set of templates, data glossary and instructions are enough to achieve the data standardisation in the NPL transactions on secondary markets, or there may be a need for some further technical specifications or tools to support digital processing or efficient processing or use of technology (e.g., by means of the EBA Data Point Model or XBRL taxonomy)?

Article 16(1) and (2) of the directive empowers the EBA to draft ITS to "specify the templates to be used by credit institutions for the provision of information referred to in Article 15(1)", which specify "the data fields, including which data fields are mandatory, and the data treatment for confidential information as set out in Article 15(1)". The directive does not empower the EBA to include additional obligations for banks in the ITS.

11. What are the respondents' views on the approach to the proportionality, including differentiating mandatory data fields around the threshold? Please provide any specific comment you may have on the data fields in the dedicated columns of the data glossary (Annex II to the draft ITS) added for your feedback.

As noted in our response to question 1, we consider that it would be disproportionate to require banks to use the templates for sales or transfers of NPLs under syndicated loan facilities or intragroup transactions. See our response to questions 1 and 2 above for our proposal for an exemption (or, at the very least, highly reduced disclosure requirements) for sales or transfers of NPLs where the aggregate of the original commitments of all the parties granting credit under the relevant credit agreement exceeds EUR 20 million and for intragroup transactions.

12. Do the respondents agree with the proposed calibration of 25 000 euros threshold in line with AnaCredit Regulation? If not, what alternative threshold should be introduced, and why?

The EUR 25,000 threshold is not relevant to the syndicated loan market. See our response to questions 1 and 2 above for our proposal for an exemption (or, at the very least, highly reduced disclosure requirements) for sales or transfers of NPLs where the aggregate of the original commitments of all the parties granting credit under the relevant credit agreement exceeds EUR 20 million.

However, see also our comments above relating to the disclosure of internal valuations of loans. Using a threshold set by reference to the carrying value of the loan may indirectly disclose to a prospective buyer that the bank's carrying value is below that threshold, e.g., because the prospective buyer will be able to see where the selling bank has used no-data values only available for loans below that threshold.

13. What are the respondents' views on the operational procedures, confidentiality and data governance requirements set out in the draft ITS?

General

Article 16(1) and (2) of the directive empower the adoption of ITS to "specify the templates to be used by credit institutions for the provision of information referred to in Article 15(1)", which specify "the data fields, including which data fields are mandatory, and the data treatment for confidential information as set out in Article 15(1)". The directive does not empower the ITS to impose additional obligations on banks.

The ITS should be amended to delete Article 6 (Operational procedures for the provision of information) and Article 8 (Credit institutions' data governance arrangements) as these go beyond the powers conferred by the directive (with a consequential amendment to Article 5(1) of the ITS to remove the cross-reference to Article 8).

Correction of errors

Article 5(6) requires that, where a selling bank identifies errors in any information already provided to the prospective buyers, it must provide, without undue delay, a corrected set of information and inform prospective buyers accordingly.

It should be made clear that:

- Article 5(6) does not require the selling bank to notify a correction where information was correct on the date it was provided to the prospective buyer (or, if applicable, on

the cut-off date) but there are subsequent changes that mean that the information is no longer accurate (see also our response to question 2 above in relation to the use of a cut-off date in relation to information that is to be provided to prospective buyers);

- the obligation to make corrections only applies where the information previously provided was incorrect in a material respect on the date it was provided (or, if applicable, on the cut-off date);

- there is no obligation to provide a person with corrected information where that person is no longer a prospective buyer (e.g., because it has withdrawn from the sale process); and

- there is no obligation to provide corrected information after the selling bank enters into a contract for the sale or transfer of the loan.

Liability for penalties or other regulatory sanctions

Article 5(1) provides that:

> Information provided by the credit institutions to prospective buyers in accordance with Article 4 of this Regulation shall be complete, consistent and follow the data governance process set out in Article 8 of this Regulation.

As already noted, Article 8 goes beyond the empowerment conferred by the directive. However, Article 5(1) should make clear that selling banks are not liable for penalties or other regulatory sanctions if the information is not accurate, so long as the selling bank has put in place an adequate process designed to ensure the accuracy of the information. This is particularly important for selling banks where they provide information obtained from a third party, such as a borrower, guarantor, facility agent or security trustee, or where the information is forward-looking (e.g., the expected dates for enforcement action or future repayment schedules) or involves matters of opinion (e.g., valuations).

Civil liability

EU law may require national courts to provide a prospective buyer with a remedy in damages (or other remedies) if they suffer loss because information provided by the templates is incorrect or misleading or fails to comply with the ITS (e.g., because it is not in accordance with the instructions and data glossary). Currently, banks selling NPLs can agree the extent of, and limits on, their liability to a prospective buyer in respect of any information provided. This is particularly important for selling banks where they provide information obtained from a third party, such as a borrower, guarantor, facility agent or security trustee, or where the information is forward-looking (e.g., the expected dates for enforcement action or future repayment schedules) or involves matters of opinion (e.g., valuations). Selling banks are unlikely to be willing to accept liability for that information not least because such liability could have prudential consequences for the selling bank.

The LMA market standard terms set out clear market conventions regarding the seller's potential liability to the buyer and the limited representations and warranties the seller makes. Requiring the seller to accept liability for the information set out in the templates is a complete reversal of the current market approach. It will discourage sellers from selling NPLs or require them to demand a higher price to compensate for the additional risks.

The ITS should make clear that selling banks continue to be free to agree with prospective buyers on the extent of, and limits on, the liability of the selling bank for information provided via the templates.

Confidentiality agreements

Article 7(1)(c) of the ITS provides that:

> As part of ensuring the protection of confidential information, before providing such information to prospective buyers, credit institutions shall sign confidentiality arrangements such as non-disclosure agreements drafted in conformity with applicable legislation and market practices [emphasis added].

This might imply that the selling bank and the prospective buyer must 'sign' a confidentiality agreement when there are other ways in which such agreements become binding on the parties (e.g., by exchange of emails). The ITS should make clear that the selling bank is only required to ensure that the prospective buyer is subject to confidentiality arrangements (such as non-disclosure agreements drafted in conformity with applicable legislation and market practices).