

14 June 2023

John Berrigan
Director General
Directorate-General for Financial Stability, Financial Services and
Capital Markets Union
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels Belgium

cc:

Commissioner Mairead McGuinness
Directorate-General for Financial Stability, Financial Services and
Capital Markets Union

José Manuel Campa
Chairperson
European Banking Authority

Dear Mr Berrigan

**Directive on credit servicers and credit purchasers:
EBA final report on draft ITS on NPL transaction data templates**

Thank you for your letter of 15 May 2023 responding to our letter of 12 January 2023 commenting on the December 2022 final report of the European Banking Authority (EBA) on draft ITS on data templates for transactions in non-performing loans (NPLs) and seeking guidance from the Commission and the EBA on additional issues relating to the Directive on credit servicers and credit purchasers that fall outside the scope of the ITS. I attach a copy of our previous letter for your ease of reference.

1. Alignment between the scope of the ITS and the Directive

We welcome the confirmation in your letter that the scope of the ITS must be aligned with the scope of the Directive.

However, sections 2 and 3 of Annex II to our previous letter requested guidance on additional issues relating to the Directive including confirmation that:

- the disclosure obligation under Article 15(1) and the obligation to report sales to regulators under Article 15(2) of the Directive do not apply to sales of NPLs to which the ITS do not apply;
- where non-bank entities buy or take a transfer of loans in circumstances in which the ITS do not apply to the selling bank:

- the non-bank entities are not "credit purchasers" subject to the obligations that apply to credit purchasers under the Directive in relation to those loans; and
- entities performing credit servicing activities for the buyers are not "credit servicers" subject to the obligations that apply to credit servicers under the Directive in relation to those loans.

It appears from your letter that the Commission may agree with these conclusions on the basis that the scope of the ITS and the Directive are aligned. However, we consider that it would be helpful if the Commission or the EBA make clear that the disclosure and reporting obligations referred to above will not apply in relation to sales of loans where the ITS do not apply and that the obligations of credit purchasers and servicers under the Directive do not apply in relation to entities that are purchasers of such loans or that perform credit servicing activities in relation to such loans.

2. Treatment of syndicated loans, large corporate loans, loans acquired from third parties and loans to third country borrowers

Your letter states that the key argument in our previous letter is that certain categories of loans, i.e., syndicated loans and large corporate loans, loans acquired from non-bank third parties, and loans to third country borrowers should be excluded from the scope of the ITS and also from the scope of the Directive. Your letter also refers to the proportionality model introduced in the final draft ITS, allowing all data fields to be treated as "non-mandatory" when selling or transferring NPLs related to syndicated and large corporate single-name transactions and NPLs acquired from non-banks and states that this "effectively makes the use of the templates non-mandatory."

(a) Scope of the Directive

Our previous letter did not argue that syndicated loans and large corporate loans are excluded from the scope of the Directive and thus should be excluded from the scope of the ITS (see section 4 of our previous letter).

Our previous letter did argue that a better interpretation of the Directive is that the selling bank obligations under the Directive do not apply to sales of loans to third country borrowers or loans acquired from third parties, whether the third party is a bank or non-bank entity (for the reasons set out in sections 5 and 6 of our previous letter). We understand from your letter that the Commission does not interpret the Directive in this way but that these issues may be addressed as part of the review of the Directive in three years' time (which of course would be too late to be of any assistance to our members when implementing the obligations under the Directive from the end of this year).

(b) Proportionality

We understand that the final draft ITS sought to introduce an element of proportionality by providing limited derogations from the requirements of the ITS in relation to sales of syndicated loans (but not large non-syndicated corporate loans as such), loans to third country borrowers, intragroup transactions and loans acquired from non-bank third parties (but not loans acquired from banks) (Article 5(4)(b) to (e) of the final draft ITS). These limited derogations allow the selling bank to treat all the data fields as "non-mandatory" in such cases.

However, as we discussed in section 4 of our previous letter, there appears to be a risk that the final draft ITS still impose disproportionate obligations on selling banks, even where the limited derogations in Article 5(4) apply. Article 5(3) of the final draft ITS requires a selling bank to "make reasonable efforts to provide information" for the data fields that are not mandatory. Therefore, it appears that EU banks selling NPLs in circumstances covered by the limited derogations in Article 5(4) may still be required to take steps to identify whether the information by all the fields in the templates is available to them and whether it can be provided to the purchaser or transferee without unreasonable effort. This may still require investment in new systems to manage this obligation and may potentially require the disclosure to purchasers of syndicated loans or other loans covered by the limited derogations of information which is inconsistent with market practice (and of no value to the purchaser or transferee, especially in the case of intragroup transactions). EU banks may be concerned that a failure to comply with this obligation to make reasonable efforts could expose them to the risk of administrative penalties for failing to provide the information required by the ITS in accordance with the Directive.

As we proposed in sections 4 to 6 of our previous letter, the final ITS should address these concerns by making it clear that the use of the templates is indeed non-mandatory where the derogations apply (preferably) by making clear there is no obligation on selling banks to provide (or to use reasonable or other efforts to provide) information for non-mandatory data fields, including data fields that are treated as non-mandatory in relation to sales or transfers of NPLs by virtue of the derogations in Article 5(4) of the final draft ITS.

3. Treatment of portfolio sales

Your letter also suggests that the limited derogations in Article 5(4) of the final draft ITS apply to sales or transfers of NPLs related to "large corporate single-name transactions". We assume that this is a reference to Article 5(4)(a) of the final draft ITS which extends the limited derogations to sales or transfers of a single NPL and NPLs towards a single borrower (regardless of the size of the transaction). However, as we discuss in section 3 of our previous letter, this provision is inconsistent with Article 2(1) of the final draft ITS which states that the ITS only apply to sales of portfolios of NPLs (which would appear to mean that Article 5(4)(a) is redundant).

We consider that the final draft ITS should make clear that the ITS do not apply to sales of single NPLs, NPLs to a single borrower or NPLs under a single credit agreement on the basis that the Directive only applies to sales of portfolios of NPLs and these transactions cannot be considered to involve the sale of a portfolio. For example, the sale of an NPL or NPLs to multiple borrowers under a single credit agreement would usually be considered to be the sale of a single credit not a portfolio. In many cases, the borrowers would be jointly and severally liable or co-guarantors for one another, especially where they are members of a single group of companies.

4. Other issues

Our previous letter raised other issues about the final draft ITS that we still consider should be addressed in the final ITS. These include issues relating to the application of the ITS to complex transactions, the content of the templates, sanctions and liability and the timing of entry into force of the ITS (see sections 7 to 10 of our previous letter).

Our previous letter also asked the Commission or the EBA to provide guidance on additional issues relating to the Directive falling outside the scope of the ITS. We still consider that the Commission or the EBA should give guidance regarding the application of obligations of credit purchasers and credit servicers to existing loans, the application of the obligations of servicers to facility agents and security agents, the application of the obligations of credit purchasers to non-EU banks and the application of the Directive to NPLs that subsequently cease to be non-performing (see sections 4 to 7 of Annex II to our previous letter).

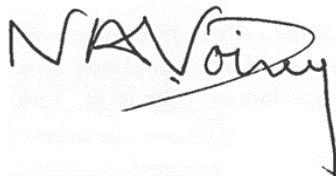
5. Conclusion

The Directive requires Member States to apply their implementing national measures to market participants from 30 December 2023. This deadline is now less than seven months away. Our members face significant challenges in preparing for the implementation of the Directive given the uncertainty as to the final form of the ITS and the lack of legal certainty as to how the Directive should be applied.

The early adoption of final ITS and the provision of guidance addressing the concerns raised in our previous letter would help our members overcome these challenges and successfully prepare for the implementation deadline.

We would welcome an opportunity to discuss the proposals in this letter. Please contact Nicholas Voisey at the LMA (nicholas.voisey@lma.eu.com) if you or your colleagues would like to arrange a meeting or call.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N Voisey', with a long horizontal stroke extending to the right and a vertical line ending in a small hook.

Nicholas Voisey
Managing Director