LMA Loan Market Association

12 January 2023

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

cc:

John Berrigan
Director General
Directorate-General for Financial Stability, Financial Services and Capital Markets Union

José Manuel Campa
Chairperson
European Banking Authority

Dear Commissioner McGuinness,

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

The Loan Market Association (LMA) welcomes the final report published by the European Banking Authority (EBA) on draft implementing technical standards (ITS) under the Directive on credit servicers and credit purchasers (EBA/ITS/2022/05, 16 December 2022). The final draft ITS set out in the EBA's final report include provisions addressing many of the LMA's comments submitted in response to the EBA's consultation on the draft ITS in relation to sales or transfers of non-performing loans (NPLs) under syndicated loan facilities.

However, the LMA considers that the European Commission should amend the final draft ITS to address some significant remaining concerns of particular importance to the syndicated loan market. We set out our proposals in this letter. Annex I to this letter sets out a consolidated text of our proposed amendments to the final draft ITS.

The LMA also considers that it is essential that the Commission or the EBA provide guidance on additional issues relating to the Directive that fall outside the scope of the ITS. Participants in the syndicated loan market are not able fully to prepare to implement the new requirements under the Directive unless and until the Commission or the EBA provides clarity on these issues. Our requests for guidance on the Directive are set out in Annex II to this letter.

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 letter focuses on the potential impact of the Directive and the final draft ITS on the syndicated loan market.

In this letter, 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".

1. Executive summary

In summary:

- **Application of the ITS to portfolio sales:** The LMA welcomes the provisions of the final draft ITS making clear that the ITS only apply to sales or transfers of portfolios of NPLs. However, the Commission should amend the final draft ITS to make clear that the sale or transfer of a single non-performing loan, non-performing loans towards a single borrower or several loans under a single credit agreement (whether to a single borrower or more than one borrower) is not regarded as the sale or transfer of a portfolio of NPLs falling within the scope of the ITS. See the discussion in section 3 below.

- **Application of the ITS to sales of syndicated loans and intragroup transactions:** The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to these transactions. However, the proposed limited derogation in the final draft ITS would not adequately ensure that the ITS are proportionate as selling banks would still be under an obligation to use reasonable efforts to provide the information specified in all fields covered by the proposed templates. The Commission should amend the final draft ITS to make clear that there is no obligation on selling banks to provide information for non-mandatory data fields, including mandatory data fields that are treated as non-mandatory in relation to sales or transfers of NPLs under syndicated loan facilities or NPLs between members of the same group. Alternatively, the Commission should amend the final draft ITS so that banks selling or transferring NPLs under syndicated loans or between members of the same group are only required to provide information for a very limited number of data fields and are under no obligation to provide information for other data fields. The amendments should also treat sales or transfers of NPLs under large corporate bilateral loan facilities in the same way as sales or transfers of NPLs under syndicated loan facilities. See the discussion in section 4 below.

- **Application of the ITS to loans to non-EU borrowers:** The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to sales or transfers of NPLs representing exposures to non-EU borrowers. However, the Directive was only intended to apply in relation to loans to EU borrowers and, in any event, the proposed limited derogation in the final draft ITS would not ensure that the ITS are proportionate as selling banks would still be under an obligation to use reasonable efforts to provide the information specified in all fields covered by the proposed templates. The Commission should amend the final draft ITS to exclude all NPLs linked to non-EU borrowers from the scope of the ITS. Alternatively, if the Commission concludes that sales or transfers of NPLs linked to non-EU borrowers are within the scope of the Directive, the Commission should amend the final draft ITS so that banks selling or transferring those NPLs are (at most) only required to provide

information for a very limited number of data fields and are under no obligation to provide information for other data fields (and to align the wording of the ITS with the wording of the Directive). See the discussion in section 5 below.

- **Application of the ITS to loans acquired from third parties:** The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to sales or transfers of NPLs acquired by the selling bank otherwise from other EU banks. However, the Directive was only intended to apply where the selling bank itself originated the NPLs being sold and, in any event, the proposed limited derogation in the final draft ITS would not ensure that the ITS are proportionate as selling banks would still be under an obligation to use reasonable efforts to provide the information specified in all fields covered by the proposed templates. The Commission should amend the final draft ITS to exclude all NPLs acquired from third parties from the scope of the ITS. Alternatively, if the Commission concludes that sales or transfers of NPLs acquired from third parties are within the scope of the Directive, the Commission should amend the final draft ITS so that banks selling or transferring those NPLs are (at most) only required to provide information for a very limited number of data fields and are under no obligation to provide information for other data fields. See the discussion in section 6 below.

- **Application of the ITS to complex transactions:** The Commission should amend the provisions of the final draft ITS on complex transactions to align them with the wording of the Directive and the other provisions of the ITS. See the discussion in section 7 below.

- **Contents of the templates:** The Commission should amend the final draft ITS to delete the requirements to disclose information on the valuation of the loan and related collateral; on leases; and on the lien position. The Commission should also amend the final draft ITS to make clear that the lenders under a syndicated loan facility can include lenders other than credit institutions. See the discussion in section 8 below.

- **Sanctions and liability:** The Commission should amend the final draft ITS to make clear that a selling bank is not required to provide information for mandatory fields where that information is not available to the selling bank or would only be available at unreasonable expense and that a selling bank is only required to make reasonable efforts to ensure that information provided is complete and accurate. The Commission should also amend the final draft ITS to make clear that seller's liability to a buyer or transferee for the information provided or a failure to comply with the ITS is contractually defined with the prospective buyer. See the discussion in section 9 below.

- **Timing of entry into force:** The Commission should amend the date of entry into force of the ITS to give market participants more time to prepare to comply with the requirements of the ITS. See the discussion in section 10 below.

- **Other changes to the consultation draft of the ITS:** The LMA welcomes many of the other changes in the final draft ITS. See the discussion in section 11 below.

2. Background on the syndicated loan market in the EU

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.

There is also a significant risk that many banks will decide not to make the investment in new systems required to comply with obligations under the ITS 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.

3. Application of the ITS to portfolio sales

The LMA welcomes the provisions of the final draft ITS making clear that the ITS only apply to sales or transfers of portfolios of NPLs (see Article 2(1) of the final draft ITS and the definition of a portfolio of NPLs in Article 3(7) of the final draft ITS). We consider that restricting the scope of the ITS to portfolio sales is in line with the provisions of the Directive (see, e.g., Article 16(3) and recitals (10), (11), (37), (38), (43) and (47) to the Directive).

The final draft ITS define a portfolio of NPLs as "a group of non-performing loans" (Article 3(7) of the final draft ITS). However, a single NPL or NPLs towards a single borrower should not be regarded as a portfolio of NPLs. In addition, many syndicated (and other) facility agreements include more than one credit facility or allow more than one borrower to draw on those facilities. Creditors under those agreements may sell or transfer those loans to a purchaser in a single transaction and would not regard such a sale or a transfer as a sale or transfer of a "portfolio" of loans. Sales or transfers of a single NPL, NPLs towards a single borrower NPLs under or forming part of a single credit agreement lack heterogeneity in the documentation or

credit risks for the loans sold or transferred and should not be regarded as a portfolio of NPLs for these purposes.

The Commission should amend the final draft ITS to make clear that the sale or transfer of a single non-performing loan, non-performing loans towards a single borrower or several loans under a single credit agreement (whether to a single borrower or more than one borrower) is not regarded as the sale or transfer of a portfolio of NPLs falling within the scope of the ITS.

Accordingly, the Commission should amend Article 2(2) of the final draft ITS to include the following additional exclusion:

> "*Article 2*
> *Scope of application*
>
> ...
>
> (2) This Regulation shall not apply to the following:
>
> …
>
> ( ) sales or transfers of a single non-performing loan, non-performing loans towards a single borrower or non-performing loans under or forming part of a single credit agreement;"

The Commission should also amend Article 5(4) of the final draft ITS as follows:

> "*Article 5*
> *Information granularity, completeness and accuracy*
>
> ...
>
> (4) By way of derogation from the requirements of paragraph 2 of this Article, the requirement to provide data fields marked as mandatory in the data glossary set out in Annex II of this Regulation shall not apply to transactions involving the following:
>
> ~~(a) sales or transfers of a single non-performing loan or non-performing loans towards a single borrower;~~"

Article 5(4)(a) is inconsistent with the provisions of the final draft ITS which limit the scope of the ITS to sales or transfers of portfolios of NPLs. The transactions covered by point (a) should not require the limited derogation as they should not be regarded as sales or transfers of a portfolio of NPLs.

4. Application of the ITS to sales of syndicated loans and intragroup transactions

The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to sales or transfers of NPLs under syndicated loan facilities or of NPLs between members of the same group (see paras 22, 50 and 69 of the EBA's final report). However, the EBA concludes that the ITS cannot wholly exclude such sales or transfers from their scope as the scope of ITS should be the same as the scope of the Directive and the final draft ITS only include a limited derogation allowing selling banks to treat the mandatory fields

as "non-mandatory" in relation to sales of those loans (see recital (8) to and Article 5(4)(a) and (b) of the final draft ITS).

The LMA considers that this limited derogation would not adequately ensure that the ITS are proportionate. Article 5(3) of the final draft ITS would still require selling banks to use "reasonable efforts" to provide information for "non-mandatory" data fields. Failure to comply with that requirement would expose selling banks to the risk of significant fines or other regulatory sanctions as well as potential liability to buyers.

Therefore, EU banks selling or transferring NPLs under syndicated loan facilities or selling or transferring NPLs to members of their group would still be required to take steps to identify whether the specified "non-mandatory" information 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 of information which is inconsistent with market practice (and of no value to the purchaser or transferee, especially in the case of intragroup transfers).

The Commission should amend the final draft ITS to make clear that there is no obligation on selling banks to provide information for non-mandatory data fields, including mandatory data fields that are treated as non-mandatory in relation to sales or transfers of NPLs under syndicated loan facilities or NPLs between members of the same group.

Article 5(3) goes beyond the powers conferred by the Directive. Article 16(2) of the Directive requires the draft ITS to specify the data fields "including which data fields are mandatory". This indicates that the data fields specified by the draft ITS should include both mandatory and non-mandatory data fields. However, Article 5(3) means that all the data fields are mandatory as a failure to comply with Article 5(3) in relation to "non-mandatory" data fields still exposes selling banks to the risk of significant fines or other regulatory sanctions under Article 23(1)(j) of the Directive (as a failure to communicate the information set out in the national measures in implementing Article 15, which will require selling banks to comply with the ITS).

The Directive only confers powers to draft ITS specifying the templates to be used by selling banks and the mandatory or non-mandatory data fields in those templates (and the data treatment for confidential information). The Directive does not confer powers to impose additional obligations on selling banks in relation to the information specified in those fields.

Alternatively, the Commission should amend the final draft ITS so that banks selling or transferring NPLs under syndicated loans or between members of the same group are only required to provide information for a very limited number of data fields and are under no obligation to provide information for other data fields. The ITS should specify that only the following fields are applicable to these transactions, i.e.:

Field 1.02 – Counterparty – Counterparty Identifier (borrower only)

Field 1.03 – Counterparty – Name of Counterparty (borrower only)

Field 3.01 – Loan – Loan Identifier

Field 3.02 – Loan – Inception date

The amendments should also treat sales or transfers of NPLs under large corporate bilateral loan facilities in the same way as sales or transfers of NPLs under syndicated loan facilities.

Accordingly, the Commission should amend Article 5 of the final draft ITS as follows:

" *Article 5*
Information granularity, completeness and accuracy

...

(3) Credit institutions shall not be required to provide information for the data fields that are not marked as mandatory in the data glossary set out in Annex II of this Regulation.

(4) By way of derogation from the requirements of paragraph 2 of this Article, the requirement to provide data fields marked as mandatory in the data glossary set out in Annex II of this Regulation shall not apply to transactions involving the following:

…

(b) sales or transfers of non-performing loans under or forming a part of syndicated loan facilities;

(b1) sales or transfers of non-performing loans under or forming part of a credit agreement where the aggregate of the original commitments to grant credit under the credit agreement exceeds EUR 20 million;

…

(d) 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, the Commission should amend Article 5 of and Annex III to the final draft ITS as follows:

"*Article 5*
Information granularity, completeness and accuracy

...

(3) Credit institutions shall make reasonable efforts to provide information for the data fields that are not marked as mandatory in the data glossary set out in Annex II of this Regulation.

(4) By way of derogation from the requirements of paragraphs 2 and 3 of this Article, credit institutions shall only be required to provide the information specified in section 5 of Part I of Annex III in relation to transactions involving the following:

…

(b) sales or transfers of non-performing loans under or forming a part of syndicated loan facilities;

(b1) sales or transfers of non-performing loans where the aggregate of the original commitments of the party granting credit under the relevant credit agreement exceeds EUR 20 million;

…

(d) 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;

…

ANNEX III
Instructions for filling loan data tape

…

PART 1
GENERAL INSTRUCTIONS

…

5. DEROGATION

16. By way of derogation from the other provisions of this Annex, in relation to the transactions referred to in Article 5(4), credit institutions shall only be required to provide information for the following fields:

Template 1

Field 1.02 – Counterparty – Counterparty Identifier (borrower only)

Field 1.03 – Counterparty – Name of Counterparty (borrower only)

Template 3

Field 3.01 – Loan – Loan Identifier

Field 3.02 – Loan – Inception date

5. Application of the ITS to loans to non-EU borrowers

The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to sales or transfers of NPLs representing exposures to borrowers outside of the European Union (see paras 22, 50 and 71 of the EBA's final report). The final draft ITS assumes that sales or transfers of those NPLs fall within the scope of the Directive but includes a limited derogation allowing selling banks to treat the mandatory fields as "non-mandatory" in relation to those sales or transfers (see recital (8) to and Article 5(4)€ of the final draft ITS).

However, the Directive was only intended to apply where 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.

Furthermore, the limited derogation in Article 5(4) of the final draft ITS is inadequate to ensure that the ITS are proportionate in relation to sales or transfers of NPLs linked to non-EU borrowers. As discussed in section 4 above, selling banks would still be required to use "reasonable efforts" to provide information for all the fields in the template (even though they are "non mandatory") and again would be required to take responsibility for ensuring the accuracy and completeness of the information that it is able to provide.

As a result, the application of the Directive and the ITS 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).

The Commission should amend the final draft ITS to exclude all NPLs linked to non-EU borrowers from the scope of the ITS.

Accordingly, the Commission should amend Article 2(2) of the final draft ITS to include the following additional exclusion:

"*Article 2*
Scope of application

...

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

…

( ) sales or transfers of non-performing loans where the borrower is not domiciled in the Union, does not have its registered office in the Union or, if under its national law it has no registered office in the Union, does not have its head office in the Union;

…"

The Commission should also amend Article 5(4) of the final draft ITS as follows:

"*Article 5*

Information granularity, completeness and accuracy

...

(4) By way of derogation from the requirements of paragraph 2 of this Article, the requirement to provide data fields marked as mandatory in the data glossary set out in Annex II of this Regulation shall not apply to transactions involving the following:

…

~~(c) sales or transfers of non-performing loans where the borrower is not domiciled or, if under its national law, it has no registered office in the Union;~~

Alternatively, if the Commission concludes that sales or transfers of NPLs linked to non-EU borrowers are within the scope of the Directive, the Commission should amend the final draft ITS so that banks selling or transferring those NPLs are (at most) only required to provide information for a very limited number of data fields and are under no obligation to provide information for other data fields (and to align the wording of the ITS with the wording of the Directive).

Accordingly, in that event, the Commission should make the alternative changes to the introductory wording of Article 5(4) discussed in section 4 above. It should also amend Article 5(4)(c) as follows to align the text more closely with the definition of host Member State in the Directive:

"*Article 5*
Information granularity, completeness and accuracy

…

(c) sales or transfers of non-performing loans where the borrower is not domiciled <u>in the Union, does not have its registered office in the Union</u> or, if under its national law~~,~~ it has no registered office in the Union<u>, does not have its head office in the Union</u>;

6. Application of the ITS to loans acquired from third parties

The LMA welcomes the EBA's conclusion that it would be disproportionate to apply the requirements of the ITS to sales or transfers of NPLs acquired by the selling bank otherwise from other EU banks, as in such situations many of the required data fields may not be available to the selling bank (see paras 22 and 71 of the EBA's final report). The final draft ITS assumes that the sales or transfers of those NPLs fall within the scope of the Directive but includes a limited derogation allowing selling banks to treat the mandatory fields as "non-mandatory" in relation to those sales or transfers (see recital (8) to and Article 5(4)(d) of the final draft ITS).

However, 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. This issue arises whether or not the market participant that sold the rights to the selling bank is itself an EU bank.

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 (as part of a sale of a portfolio of NPLs);

- 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 and even if it acquired the rights from another EU bank).

Even if the selling bank acquired rights under a credit agreement in the secondary market from a market participant that is also an EU bank (and can identify whether the loan was originated by an EU bank), the selling bank may still 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 held the loan on its trading book at the time of the sale to the selling bank (and thus the sale was outside the proposed scope of the ITS);

- that market participant held 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 and thus the sale was outside the scope of the ITS);

- that market participant sold the loan to the selling bank otherwise than as part of a portfolio of NPLs (and thus outside the proposed scope of the ITS);

- that market participant itself acquired the loan from a seller that was not an EU bank (and therefore benefitted from the proposed limited derogation under the final draft ITS and so was not required to provide all the information specified in mandatory fields to 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 addition, 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 accuracy and completeness 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 accuracy and completeness 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.

In any event, the limited derogation in Article 5(4) is inadequate to ensure that the ITS are proportionate even in relation to these transactions where the selling bank has acquired the loan from a third party other than another EU bank. As discussed in section 4 above, selling banks would still be required to use "reasonable efforts" to provide information for all the fields in the template (even though they are "non mandatory") and again would be required to take responsibility for ensuring the accuracy and completeness of the information that it is able to provide.

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 and accuracy of the information provided to the bank by third parties.

The Commission should amend the final draft ITS to exclude all NPLs acquired from third parties from the scope of the ITS.

Accordingly, the Commission should amend Article 2(2) of the final draft ITS to include the following additional exclusion:

> "*Article 2*
> *Scope of application*
>
> ...
>
> (2) This Regulation shall not apply to the following:
>
> …
>
> ( ) sales or transfers of non-performing loans that have been acquired by the credit institution from another person;
>
> …"

The Commission should also amend Article 5(4) of the final draft ITS as follows:

> "*Article 5*
> *Information granularity, completeness and accuracy*
>
> *...*
>
> (4) By way of derogation from the requirements of paragraph 2 of this Article, the requirement to provide data fields marked as mandatory in the data glossary set out in Annex II of this Regulation shall not apply to transactions involving the following:
>
> …
>
> ~~(e) sales or transfers of non-performing loans that have been acquired by the credit institution from an entity other than a credit institution established in the Union and subject to the requirements of Regulation (EU) No 575/2013;~~"

Alternatively, if the Commission concludes that sales or transfers of NPLs acquired from third parties are within the scope of the Directive, the Commission should amend the final draft ITS so that banks selling or transferring those NPLs are (at most) only required to provide information for a very limited number of data fields and are under no obligation to provide information for other data fields.

Accordingly, in that event, the Commission should make the alternative changes to the introductory wording of Article 5(4) discussed in section 4 above and should amend Article 5(4)(e) as follows:

> "*Article 5*
> *Information granularity, completeness and accuracy*
>
> …
>
> (e) sales or transfers of non-performing loans that have been acquired by the credit institution from <u>another person</u> ~~an entity other than a credit institution established in the Union and subject to the requirements of Regulation (EU) No 575/2013~~;"

7. Application of the ITS to complex transactions

The Commission should amend the provisions of the final draft ITS on complex transactions to align them with the wording of the Directive and the other provisions of the ITS.

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

> "… <u>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</u> 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]."

The Commission should amend the ITS as follows:

- Article 2(2):

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

  …

  (b) transactions where sales or transfers of non-performing loans are included as part of the transaction, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of exposures to clients which are not limited to non-performing loans and 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;"

- Recital (5):

  "(5) This Regulation should apply to transactions which only involve the sale or transfer of non-performing loans and should not apply to transactions where sales or transfers of non-performing loans are included as part of the transaction, including sales or transfers of non-performing loans as part of sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of exposures to clients which are not limited to non-performing loans and 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;"

The amendments align the provisions with the wording of the Directive which makes clear that the exemption is not restricted to the listed examples of complex transactions. They also clarify the reference to "clients' portfolios" by aligning the wording with the scope of application of the Directive and the ITS (which only apply where an EU bank sells or transfers its own exposures to clients to a credit purchaser or another credit institution).

8. Content of the templates

Valuations

Templates 3 and 4 require banks to disclose information on valuations of the loan and related collateral. 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.

Even where the relevant fields are non-mandatory, the final draft ITS would still require the selling bank to use "reasonable efforts" to provide the information.

The Commission should amend the final draft ITS to delete the requirements to disclose information on the valuation of the loan and related collateral.

Accordingly, the Commission should amend the final draft templates to delete the following fields:

- Field 3.42 – Loan – Debt Forgiveness (requires disclosure of carrying amount in some cases).

- Fields 4.19 to 4.26 – Collateral Guarantee and Enforcement (require provision of information on internal and external valuations of collateral).

Leases

The LMA welcomes the EBA's conclusions that the ITS do not apply to leases (see para 8 of the final report and recital (4) to the final draft ITS) and the deletion of the counterparty type "tenant" (see page 57 of the final report). However, the templates in the final draft ITS still assume that a lease could form part of a credit agreement and require information about a lease.

In any event, it would also be disproportionate to 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. 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.

The Commission should amend the final draft ITS to delete the requirements to disclose information on leases.

Accordingly, the Commission should amend the final draft Loan template to delete Fields 3.33 to 3.37 (which require information on "leases forming part of the credit agreement").

Lien position

The final draft ITS require the selling bank to disclose information on the lien position and amount secured by higher ranking liens. These would require the selling bank to provide an opinion on matters of law which may not be straightforward and may expose the selling bank to liability.

The Commission should amend the final draft ITS to delete the requirements to disclose information on lien position.

Accordingly, the Commission should amend:

- the final Collateral guarantee and enforcement template to delete Fields 4.09 (Lien position) and 4.10 (Higher Ranking Loan); and

- the Mortgage guarantee template to delete Fields 4.45 (Lien position) and 4.46 (Higher ranking loan).

Syndicated loans

The description of the field on syndicated loans assumes that the only lenders under a syndicated loan facilities will be credit institutions.

The Commission should amend the final draft ITS to make clear that the lenders under a syndicated loan facility can include lenders other than credit institutions.

Accordingly, the Commission should amend the description of Field 3.30 – Loan – Syndicated Loan by adding the words "or other lenders" after the words "credit institutions".

9. Sanctions and liability

Regulatory sanctions

The final draft ITS require selling banks to provide information strictly in accordance with the Annexes and to ensure that information provided is complete and accurate (Article 4 and 5(1) and (2) of the final draft ITS). In addition, they must use "reasonable efforts" to provide information for all the "non-mandatory" fields (Article 5(3) of the final draft ITS). Failure to comply with these requirements would expose selling banks to the risk of significant fines or other regulatory sanctions (see Article 23(1)(j) of the Directive).

The Commission should amend the ITS to make clear that a selling bank is not required to provide information for mandatory fields where that information is not available to the selling bank or would only be available at unreasonable expense and that a selling bank is only required to make reasonable efforts to ensure that information provided is complete and accurate.

Accordingly, the Commission should amend the final draft ITS as follows:

> *Article 5*
> *Information granularity, completeness and accuracy*
>
> (1) Credit institutions shall make reasonable efforts to ensure that the information ~~Information~~ provided ~~by the credit institutions~~ to prospective buyers in accordance with Article 4 of this Regulation ~~shall be~~ is complete and accurate.
>
> (2) Credit institutions shall provide information for all data fields marked as mandatory in the data glossary set out in Annex II of this Regulation, except where these data fields are not applicable in accordance with the criteria specified in the instructions set out in Annex III of this Regulation. Credit institutions shall not be required to provide information for data fields marked as mandatory in the data glossary set out in Annex II of this Regulation where that information is not available to them or is only available to them at unreasonable expense.

Liability

It will be for national law to define the extent to which selling banks are liable to buyers or transferees in respect of the information provided under the ITS or a failure to comply with the

ITS and the extent to which selling banks can agree the extent of, and limits on, their liability to a prospective buyer in respect of any information provided.

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. Uncertainty as to the extent of the liability of selling banks and their ability to agree on limits to that liability will discourage sellers from selling NPLs or require them to demand a higher price to compensate for the additional risks.

Accordingly, the LMA welcomes the EBA's statements in its feedback statement that the seller's liability is contractually defined with the prospective buyer (see pages 53, 60, 66 and 84 of the final draft report). However, this may not be enough to provide selling banks with sufficient legal certainty.

The Commission should amend the final draft ITS to make clear that seller's liability to a buyer or transferee for the information provided or a failure to comply with the ITS is contractually defined with the prospective buyer.

Accordingly, the Commission should amend the final draft ITS to include the following additional recital:

> (15a) Any liability of a credit institution to a prospective buyer or transferee for the information provided to the prospective or a failure to comply with this Regulation should be contractually defined with the prospective buyer;

10. Timing of entry into force

Article 9 of the final 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 final 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 until the Commission has decided to adopt the ITS (with or without amendments). 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).

The Commission should amend the date of entry into force of ITS to give market participants more time to prepare to comply with the requirements of the ITS.

Accordingly, the Commission should amend Article 9 of the final draft ITS 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.

11. Other changes to the consultation draft of the ITS

The LMA welcomes the changes in the final draft ITS making clear that:

- the ITS do not apply where EU banks sell or transfer bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets (see recital (4) of the final draft ITS);

- EU banks are only required to use the templates where they hold the NPLs being sold or transferred on their banking book (see Article 2(1) and (2)(a) of the final draft ITS);

- only banks incorporated in the EU and subject to CRR are required to use the templates (see Article 2(1)) of the final draft ITS);

- an EU 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 (see Article 2(2)(f) of and recital (5) to the final draft ITS);

- selling 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 (see Article 2(1) of and recital (6) to the final draft ITS);

- 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 (see recital (6) to the final draft ITS);

- 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 (see Article 2(2)(d) of and recital (3) to the final draft ITS);

- the ITS do not apply to sales or transfers of NPLs by way of collateral or repurchase or lending agreements (see Article 2(2)(e) of the final draft ITS).

These changes are important in providing clarity on the scope of the ITS.

The LMA also welcomes the comment in the EBA's final report stating that "EBA notes that the scope of application of the draft ITS shall be the same as the Directive" (para 69) suggesting that the provisions referred to above also indicate EBA's views on the scope of application of the Directive. We consider that the provisions referred to above should also be relevant when considering the scope of application of the other obligations of selling banks under the Directive and the scope of application of the obligations of credit purchasers and credit servicers under the Directive (see sections 2 and 3 of Annex II to this letter).

In addition, the LMA welcomes the changes:

- recognising that many counterparties do not have LEIs and that shares or other securities of private companies will not have ISINs;

- allowing selling banks generally to provide required information by reference to the position as of the selected 'cut-off date';

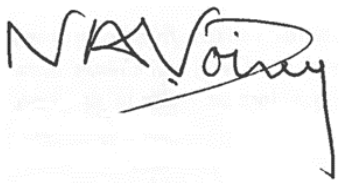
- deleting the provisions in the consultation draft of the ITS specifying operational procedures for the provision of information and data governance arrangements (as these provisions went beyond the powers conferred by the Directive).

These changes are all significant in relation to sales or transfers of NPLs under syndicated loan facilities to the extent that they fall within the scope of the ITS.

12. Conclusion

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,



Nicholas Voisey
Managing Director

ANNEX I

Consolidated amendments to the final draft ITS

The following sets out a consolidated version of the amendments to the final draft ITS proposed in this letter. In some cases, alternative amendments are proposed. The preferred option is highlighted in yellow and the alternative in blue. Additional changes to the recitals would also be needed to reflect the amendments to the operative provisions of the final draft ITS

Recitals

(5) This Regulation should apply to transactions which only involve the sale or transfer of non-performing loans and should not apply to transactions where sales or transfers of non-performing loans are included as part of the transaction, including sales or transfers of non-performing loans as part of sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of exposures to clients which are not limited to non-performing loans and 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;

(15a) Any liability of a credit institution to a prospective buyer or transferee for the information provided to the prospective or a failure to comply with this Regulation should be contractually defined with the prospective buyer;

Article 2
Scope of application

…

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

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

(a1) sales or transfers of a single non-performing loan, non-performing loans towards a single borrower or non-performing loans under or forming part of a single credit agreement;

(a2) sales or transfers of non-performing loans where the borrower is not domiciled in the Union, does not have its registered office in the Union or, if under its national law it has no registered office in the Union, does not have its head office in the Union;

(a3) sales or transfers of non-performing loans that have been acquired by the credit institution from another person;

(b) transactions where sales or transfers of non-performing loans are included as part of the transaction, including sales or transfers of branches, sales or transfers of business lines or sales or transfers of ~~clients'~~ portfolios of exposures to clients which are not limited to non-performing loans and 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;

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

(d) 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;

(e) 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(28) 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;

(f) sales or transfers of 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 of the loan.

Article 5
Information granularity, completeness and accuracy

(1) Credit institutions shall make reasonable efforts to ensure that the information provided by the credit institutions to prospective buyers in accordance with Article 4 of this Regulation ~~shall be~~ is complete and accurate.

(2) Credit institutions shall provide information for all data fields marked as mandatory in the data glossary set out in Annex II of this Regulation, except where these data fields are not applicable in accordance with the criteria specified in the instructions set out in Annex III of this Regulation. Credit institutions shall not be required to provide information for data fields marked as mandatory in the data glossary set out in Annex II of this Regulation where that information is not available to them or is only available to them at unreasonable expense.

(3) Credit institutions shall ~~make reasonable efforts~~ not be required to provide information for the data fields that are not marked as mandatory in the data glossary set out in Annex II of this Regulation.

(3) Credit institutions shall make reasonable efforts to provide information for the data fields that are not marked as mandatory in the data glossary set out in Annex II of this Regulation.

(4) By way of derogation from the requirements of paragraph 2 of this Article, the requirement to provide data fields marked as mandatory in the data glossary set out in Annex II of this Regulation shall not apply to transactions involving the following:

(4) By way of derogation from the requirements of paragraphs 2 and 3 of this Article, credit institutions shall only be required to provide the information specified in section 5 of Part I of Annex III in relation to transactions involving the following:

~~(a) sales or transfers of a single non-performing loan or non-performing loans towards a single borrower;~~

(b) sales or transfers of non-performing loans under or forming a part of syndicated loan facilities;

(b1) sales or transfers of non-performing loans under or forming part of a credit agreement where the aggregate of the original commitments to grant credit under the credit agreement exceeds EUR 20 million;

~~(c) sales or transfers of non-performing loans where the borrower is not domiciled or, if under its national law, it has no registered office in the Union;~~ *[Note: see Article 2(2)(a2)]*

(c) sales or transfers of non-performing loans where the borrower is not domiciled in the Union, does not have its registered office in the Union or, if under its national law~~,~~ it has no registered office in the Union, does not have its head office in the Union;

(d) 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;

~~(e) sales or transfers of non-performing loans that have been acquired by the credit institution from an entity other than a credit institution established in the Union and subject to the requirements of Regulation (EU) No 575/2013;~~ *[Note: see Article 2(2)(a3)]*

(e) sales or transfers of non-performing loans that have been acquired by the credit institution from another person ~~an entity other than a credit institution established in the Union and subject to the requirements of Regulation (EU) No 575/2013~~;

(f) sales or transfers of unsecured non-performing loans granted to a natural person where they do not meet the criteria to be considered in the scope of Directive 2008/48/EC.

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.

ANNEX III
Instructions for filling loan data tape

…

PART 1
GENERAL INSTRUCTIONS

…

5. DEROGATION

16. By way of derogation from the other provisions of this Annex, in relation to the transactions referred to in Article 5(4), credit institutions shall only be required to provide information for the following fields:

Template 1

Field 1.02 – Counterparty – Counterparty Identifier (borrower only)

Field 1.03 – Counterparty – Name of Counterparty (borrower only)

Template 3

Field 3.01 – Loan – Loan Identifier

Field 3.02 – Loan – Inception date

Data templates

Loan template

Delete:

- Field 3.42 – Loan – Debt Forgiveness (information on carrying amount);
- Fields 3.33 to 3.37 (information on leases).

Amend the description of Field 3.30 (Syndicated Loan) by adding the words "or other lenders" after the words "credit institutions".

Collateral Guarantee and Enforcement template

Delete:

- Fields 4.09 (Lien position) and 4.10 (Higher Ranking Loan);
- Fields 4.19 to 4.26 (require provision of information on internal and external valuations of collateral).

Mortgage Guarantee template

Delete Fields 4.45 (Lien position) and 4.46 (Higher ranking loan).

ANNEX II

Request for guidance on the Directive

This Annex sets out our request to the Commission or the EBA to provide guidance on additional issues arising under the Directive that fall outside the scope of the ITS and that are particularly relevant to the syndicated loan market.

Syndicated loan facilities commonly involve syndicates of EU banks and, where permitted by applicable law, non-bank entities and syndicate members often actively trade their commitments and the drawn loans under those facilities. Therefore, there are many non-bank entities that already own loans under syndicated loan facilities and some of those loans may be NPLs within the scope of the Directive. In addition, the Directive's relaxation of the restrictions under Member State law on non-bank entities purchasing NPLs could mean that non-bank entities are a more significant source of liquidity for NPLs under syndicated loan facilities in the future. Therefore, it is important for the syndicated loan market that the Commission or the EBA provides clarity as to when and how obligations under the Directive apply to credit purchasers and credit servicers in relation to NPLs under syndicated loan facilities, as well as when and how obligations under the Directive apply to selling banks.

Participants in the syndicated loan market are not able fully to prepare to implement the new requirements under the Directive unless and until the Commission or the EBA provides clarity on the issues set out in this Annex.

1. Executive summary of request for guidance

The Commission or the EBA should make it clear that:

- the disclosure obligation under Article 15(1) and the obligation to report sales to regulators under Article 15(2) do not apply to sales of non-performing loans (NPLs) to which the ITS do not apply (See the discussion in section 2 below);

- 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

  (See the discussion in section 3 below);

- where non-bank entities have purchased loans before 30 December 2023:

    - the buyers are not 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 subject to the obligations of credit servicers under the Directive in relation to those loans

(See the discussion in section 4 below);

- facility agents and security agents under syndicated loan facilities:

    - are not "credit servicers" subject to the obligations that apply to credit servicers under the Directive; and

    - that are EU banks within Article 2(5)(i)(a) or non-bank entities within Article 2(5)(a)(iii) are not subject to obligations under Articles 10(2) and (3) and 17(5) when they perform credit servicing activities for credit purchasers in relation to NPLs unless, absent the exemption in Article 2(5)(i) or (iii), they would be "credit servicers" within Article 3(8)

  (See the discussion in section 5 below);

- non-EU credit institutions that buy NPLs are not "credit purchasers" subject to the obligations that apply to credit purchasers under the Directive (See the discussion in section 6 below); and

- where non-bank entities have bought NPLs from EU banks that subsequently cease to be non-performing:

    - the buyers are no longer "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 in relation to those loans are no longer "credit servicers" subject to the obligations that apply to credit servicers under the Directive in relation to those loans (although credit servicers authorised under the Directive may continue to carry out their activities, including in other Member States, based on their authorisation)

  (See the discussion in section 7 below).

Unless the context otherwise requires, references in this Annex to recitals and Articles are to recitals to and Articles of the Directive.

2. Application of the disclosure obligation and reporting requirement when the ITS do not apply

Article 15(1) requires Member States to ensure that credit institutions provide prospective credit purchasers with necessary information regarding NPLs, and, if applicable, the collateral, to enable the prospective credit purchaser to conduct its own assessment of the value of NPLs and the likelihood of recovery before entering into a contract for the transfer of the NPLs. The ITS under Article 16(1) specify the templates to be used by credit institutions for the provision of the information referred to in Article 15(1). Article 15(2) then requires credit institutions that transfer NPLs to a credit purchaser to report the transfers to the competent authorities of the host Member State and its home Member State.

The final draft ITS make clear that the ITS do not apply to sales or purchases of NPLs in some cases on the basis that the scope of application of the ITS is the same as the Directive (para 69 of the final report). Our letter asks the Commission to amend the final draft ITS to make clear

that selling banks are not required to use the disclosure templates specified under Article 16(1) in some other cases where the Directive also does not apply.

The Commission or the EBA should make clear that:

- ***the disclosure obligation under Article 15(1); and***
- ***the obligation to report sales of NPLs to regulators under Article 15(2)***

do not apply in circumstances where the ITS do not apply.

In particular, those obligations should not apply where selling banks sell or transfer:

- NPLs otherwise than as part of a portfolio of NPLs (Article 2(1) of the final draft ITS);
- bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets (recital (4) of the final draft ITS);
- loans held on their trading book (Article 2(1) and (2)(a) of the final draft ITS);
- loans where the bank itself has not classified the credit agreement as a non-performing exposure in accordance with Article 47a of the Capital Requirement Regulation (CRR) at the time of the contract for the sale or transfer (Article 2(2)(f) of and recital (5) to the final draft ITS);
- loans that do not meet the time criteria set out in Article 16(7) of the Directive (Article 2(1) of and recital (6) to the final draft ITS);
- NPLs as a part of a complex transaction which does not only relate to NPLs (Article (2)(b) of the final draft ITS);
- NPLs where the Securitisation Regulation and the RTS and ITS under that regulation apply (Article 2(2)(c) of the final draft ITS); or
- NPLs by way of collateral or repurchase or lending agreements (Article 2(2)(e) of the final draft ITS).

Those obligations should also not apply where:

- the bank selling or transferring the loans is not an EU bank (Article 2(1) of the final draft ITS); or
- the transaction in relation to the NPL is not a sale or transfer involving a change in the lender of record under the relevant credit agreement, including credit derivative, credit insurance or sub-participation contracts in relation to NPLs (or transfers of NPLs pursuant to such contracts) (Article 2(2)(d) of and recital (3) to the final draft ITS);

In addition, those obligations should also not apply where selling banks sell or transfer:

- loans which the selling bank acquired from a third party; or
- loans representing exposures to non-EU borrowers.

See sections 5 and 6 of our letter.

3. Application of obligations of credit purchasers and credit servicers when ITS do not apply

The Directive also imposes obligations on non-bank entities where they purchase NPLs from a selling bank and on entities that perform credit servicing activities on behalf of non-bank entities that are credit purchasers in relation to those NPLs.

The Commission or the EBA should make clear that, where non-bank entities buy or take a transfer of loans in circumstances in which the ITS do not apply to the selling bank (as set out under 1 above):

- ***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.***

The Directive aims to remove impediments to, and to lay down safeguards for, the transfer of NPLs by credit institutions to credit purchasers and to introduce harmonised authorisation requirements for credit servicers. The Directive seeks to achieve these objectives by creating an integrated set of obligations on sellers, buyers and servicers of loans that arise where selling banks sell NPLs to non-bank entities.

Therefore, non-bank entities should only be subject to the obligations of credit purchasers under the Directive where they buy or take a transfer of loans from selling banks that are subject to disclosure obligations in relation to the sale or transfer under Articles 15(1) and 16(1). Similarly, entities performing credit servicing activities on behalf of non-bank entities that buy or take transfers of loans should only be subject to the obligations of credit servicers where the non-bank entities are subject to the obligations of credit purchasers under the Directive in relation to those loans.

4. Application of obligations of credit purchasers and credit servicers to existing loans

Article 2(5)(d) states that the Directive does not apply to the transfer of NPLs transferred before 30 December 2023. However, Article 32(2), first subparagraph provides that Member States must apply their national implementing measures from 30 December 2023, but entities already carrying out, in accordance with national law, credit servicing activities on 30 December 2023 are allowed to continue carrying out those credit servicing activities in their home Member State until 29 June 2024 or until the date on which they obtain an authorisation in accordance with the Directive, whichever is the earlier.

The Commission or the EBA should make clear that, where non-bank entities have purchased loans before 30 December 2023:

- ***the buyers are not 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 subject to the obligations of credit servicers under the Directive in relation to those loans.***

Non-bank entities that have purchased loans before 30 December 2023 and entities performing servicing activities in relation to those loans may be unable to determine whether those loans qualify as NPLs which are within the scope of the Directive. For example, they may be unable to determine whether the loans were originated by an EU bank or were held on the selling bank's banking book and were classified by the selling bank as non-performing in accordance with Article 47a CRR at the time of sale, especially where the loans have been traded multiple times since their origination.

Even if non-bank entities that have purchased loans before 30 December 2023 or entities performing credit servicing activities in relation to those loans can determine that existing loans are NPLs under the Directive, the buyers or the entities performing credit servicing activities may not be able to comply with the obligations that would apply under the Directive in relation to those loans. For example:

- the buyers may not have sufficient information about the borrowers to determine whether they must appoint a credit servicer under Article 17(1) in relation to those loans (e.g., because they do not have information on whether any of the borrowers under a loan qualify as micro, small or medium sized enterprises for the purposes of Article 17(1)(b)(ii) or meet any additional criteria under national law specified under Article 17(1), second subparagraph);

- the buyers or entities performing credit servicing activities in relation to those loans may be party to existing agreements governing the performance of credit servicing activities in relation to those loans or the outsourcing of those activities to third parties that are not consistent with the requirements of Articles 11 and 12 but that they cannot amend because this requires the agreement of third parties that do not agree to those amendments (e.g., where those agreements form part of a structured finance transaction where changing the terms of agreements requires the consent of all lenders or investors); and

- entities already performing credit servicing activities in relation to those loans may be non-EU entities that cannot be authorised under the Directive and do not benefit from the transitional derogation under Article 32(2), second subparagraph (e.g., where the entity that bought the loan is a non-EU alternative investment fund which has a non-EU alternative investment fund manager that meets the definition of a credit servicer but that does not benefit from the exemption in Article 2(5)(a)(ii) because it is not authorised or registered under the Directive on alternative investment fund managers).

5. Application of the Directive to facility agents and security agents

Syndicated loan facility agreements usually provide for the appointment of:

- a facility agent: the facility agent would typically be responsible on drawdown for receiving funds from lenders and passing these on to the borrower and receiving payments of principal and interest from the borrower and passing these on to the lenders, as well as performing other administrative tasks under the agreement generally in accordance with the instructions of lenders (but normally would not have powers to

take proceedings against the borrower to enforce the borrower's obligations under the facility agreement); and

- a security agent (secured loans): the security agent holds the security on trust for the lenders with power to take enforcement and other actions with respect to the security generally in accordance with the instructions of lenders (other similar arrangements may be put in place where applicable law does not allow the security to be held on trust).

The Commission or the EBA should make clear that facility agents and security agents under syndicated loan facilities are not "credit servicers" for the purposes of the Directive.

The definition of a credit servicer limits the definition of that term to entities that both "manage and enforce" the rights and obligations related to a creditor's rights under NPLs (Article 3(8)). As already noted, facility agents do not generally have powers to "enforce" the rights of lenders under the facility agreement. A security agent's powers will include enforcement powers under the collateral agreements but may not include enforcement powers with respect to all the borrower's rights and obligations related to the NPLs. In addition, those powers are generally limited to acting on the instructions of the lenders and the strict limits on the discretions of the security agent mean that they should not be regarded as empowered to "manage" the rights and obligations related to a creditor's rights under NPLs.

Facility agents and security agents may not know whether lenders under a syndicated loan facility to whom they provide services are "credit purchasers" or whether loans transferred to a new lender qualify as NPLs within the scope of the Directive. There is no mechanism in syndicated loan facilities enabling facility agents or security agents to identify whether loans transferred to a non-bank entity were originated by an EU bank, were held on a selling bank's banking book or trading book at the time of sale or were classified by a selling bank as non-performing in accordance with Article 47a CRR at the time of sale, especially where the loans have been traded multiple times since their origination. Therefore, facility agents and security agents would not know when they are required to comply with the obligations that apply to credit servicers under the Directive.

In addition, facility agents and security trustees are unlikely to be able to comply with the obligations that apply to credit servicers under the Directive without significant changes to current syndicated loan documentation (which may require the agreement of lenders that are not credit purchasers). Facility agents and security agents currently may not be able to control whether lenders under a syndicated loan facility to whom they provide services are "credit purchasers" or whether loans transferred to a new lender qualify as NPLs within the scope of the Directive. Lenders are usually able to transfer their rights under the facility agreement to qualifying entities, which may include entities that are not EU banks.

In any event, the provisions of Articles 11 and 12 are inconsistent with the limited role of facility agents and security agents under current documentation and complying with those provisions would require facility agents and security agents to consider whether they are willing to continue to perform their roles on the basis of current fee arrangements or at all. For example, Article 17(2) requires Member States to ensure that relevant EU and national law concerning, in particular, the enforcement of contracts, consumer protection, borrowers' rights, credit origination, bank secrecy rules and criminal law continues to apply to credit purchasers upon the transfer to them of NPLs and Article 17(5) requires Member States to ensure that

credit servicers comply with those obligations on behalf of the credit purchasers for whom they perform credit servicing activities. These obligations go far beyond the obligations assumed by facility agents and security agents under current documentation and facility agents and security agents would generally not be able to identify all the additional obligations that would fall on them under these new requirements.

In addition, the Commission or the EBA should make clear that facility agents and security trustees under syndicated loan facilities that are EU banks within Article 2(5)(i)(a) or non-bank entities within Article 2(5)(a)(iii) are not subject to obligations under Articles 10(2) and (3) and 17(5) when they perform credit servicing activities for credit purchasers in relation to NPLs unless, absent the exemption in Article 2(5)(i) or (iii), they would be "credit servicers" within Article 3(8).

Many facility agents and security agents under syndicated loan facilities are EU banks. Article 2(5)(a)(i) and (iii) state that the Directive does not apply to the servicing of NPLs carried out by credit institutions established in the EU and non-credit institutions subject to supervision by a competent authority of a Member State in accordance with Article 20 of the Consumer Credit Directive or Article 35 of the Mortgage Credit Directive when performing activities in that Member State. However, Articles 10(2) and (3) and 17(5) require entities falling within Article 2(5)(a)(i) or (iii) to comply with some of the obligations that apply to credit servicers when those entities perform credit servicing activities for credit purchasers in relation to NPLs.

EU banks falling within Article 2(5)(a)(i) and non-bank entities falling within Article 2(5)(a)(iii) should not be regarded as being subject to the obligations under Articles 10(2) and (3) and 17(5) when they perform credit servicing activities for credit purchasers in relation to NPLs unless, absent the exemption in Article 2(5)(a)(i) or (iii), they would have been subject to the obligations that apply to credit servicers because they also "manage and enforce" the rights and obligations related to a creditor's rights under NPLs within Article 3(8) (as to which see above). Otherwise, the Directive would create an unlevel playing field for EU banks and non-bank entities falling within Article 2(5)(a)(i) or (iii) that do not "manage and enforce" the rights and obligations related to a creditor's rights under NPLs because they would be subject to obligations under the Directive that would not apply to other entities performing similar activities, but which also do not "manage and enforce" such rights and obligations.

6. Application of obligations of credit purchasers to non-EU banks

Non-EU banks may buy NPLs under syndicated loan facilities, either through an EU branch (e.g., where the borrower is located in the Member State in which the branch is established) or through its head office or a branch outside the EU (where this is permitted under applicable law).

The Commission or the EBA should make clear that non-EU credit institutions that buy NPLs are not "credit purchasers" subject to the obligations that apply to credit purchasers under the Directive.

The Directive defines "credit purchaser" to mean any natural or legal person, "other than a credit institution", that purchases NPLs in the course of its trade, business or profession, in accordance with applicable EU and national law. It also defines a "credit institution" by reference to the definition of a credit institution in Article 4(1)(1) CRR which covers, among other things, any undertaking the business of which consists of taking deposits or other

repayable funds from the public and granting credits for its own account. This definition is not limited to EU banks. Non-EU banks that purchase NPLs may be subject to similar obligations as EU banks, especially where they operate through a branch in the EU. Therefore, non-EU banks should not be subject to the same obligations under the Directive as entities that are not credit institutions and should not be treated as credit purchasers for the purposes of the Directive.

As non-EU banks should not be treated as credit purchasers, entities performing credit servicing activities for non-EU banks should not be regarded as subject to the obligations of credit servicers under the Directive and EU banks selling NPLs to non-EU banks should be regarded as subject to Article 16(8) and not Articles 15(1) and (2).

7. Application of the Directive to NPLs that subsequently cease to be non-performing

Non-bank entities may buy NPLs from EU banks that subsequently cease to be non-performing.

The Commission or the EBA should make clear that, where non-bank entities have bought NPLs from EU banks that subsequently cease to be non-performing:

- ***the buyers are no longer "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 in relation to those loans are no longer "credit servicers" subject to the obligations that apply to credit servicers under the Directive in relation to those loans (although credit servicers authorised under the Directive may continue to carry out their activities, including in other Member States, based on their authorisation).***

Recital (12) provides that, where NPLs become performing in the process of servicing the credit, credit servicers should be able to continue carrying out their activities, based on their authorisation as credit servicers in accordance with the Directive. This indicates that, where non-bank entities have purchased loans originated by an EU bank from selling banks that classified those loans as non-performing exposures in accordance with Article 47a CRR at the time of the sale, those loans cease to be treated as NPLs for the purposes of the Directive if they subsequently cease to be non-performing in accordance with the criteria set out in Article 47a CRR.

Under the Directive, this means that entities performing credit servicing activities in relation to those loans are no longer treated as credit servicers under the Directive (although recital (12) indicates that a former credit servicer can, if it is authorised under the Directive, continue its activities in relation to those loans). However, it also means that non-bank entities that bought those loans are no longer treated as credit purchasers in relation to those loans and, therefore, should no longer be subject to the obligations of credit purchasers under the Directive in relation to those loans.