**Loan Market Association**

**Response to EBA consultation paper on ITS on NPL transaction data templates**

**Supplemental comments**

The Loan Market Association (LMA) welcomes this opportunity to provide comments supplementing our response to the EBA's consultation paper and its draft implementing technical standards (ITS) under the EU directive on credit servicers and credit purchasers. This paper asks 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.

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

The LMA is the trade body for the European, Middle Eastern and African syndicated loan markets. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 800 organisations across EMEA, including the European Commission, and consists of banks, non-bank investors, borrowers, law firms, rating agencies and service providers.

**Summary**

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;
* 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;
* 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;
* 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);
* non-EU credit institutions that buy NPLs are not 'credit purchasers' subject to the obligations that apply to credit purchasers under the directive; 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).

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 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 EBA provides clarity on these issues.

For the purposes of these supplemental comments, we refer to banks established in the EU and subject to the Capital Requirements Regulation (CRR) as "EU banks", to EU banks that are selling or transferring NPLs as "selling banks" and to undertakings that are not EU banks as "non-bank entities". Unless the context otherwise requires, references to recitals and Articles are to recitals to and Articles of the directive.

1. **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.

Our consultation response asks the EBA to amend the draft ITS to make clear that selling banks are not required to use the disclosure templates specified under Article 16(1) in several cases.

***The EBA should also 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:

* bonds, derivatives and other financial instruments, securities financing transactions and leases of real estate or other assets;
* loans held on their trading book;
* 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;
* loans where the bank itself did not originate the non-performing loan;
* loans representing exposures to non-EU borrowers;
* loans that do not meet the time criteria set out in Article 16(7) of the directive;
* a portfolio comprising NPLs and other assets or liabilities;
* NPLs where the Securitisation Regulation and the RTS and ITS under that regulation apply; or
* NPLs by way of collateral or repurchase or lending agreements.

Those obligations should also not apply:

* where the bank selling or transferring the loans is not an EU bank; or
* where 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).

1. **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 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.

1. **Application of obligations of credit purchasers and credit servicers to existing loans**

Article 32(2), first subparagraph provides that Member States must apply their national implementing measures from 30 December 2023, but that 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. However, Article 2(5)(d) states that the directive does not apply to the transfer of NPLs transferred before 30 December 2023.

***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).

1. **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 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 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.

1. **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 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).

1. **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 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.