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REPORT

From:	Presidency
To:	Delegations
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on credit servicers, credit purchasers and the recovery of collateral - Presidency progress report

1. Introduction

Pursuant to the Council Conclusions to tackle Non-Performing Loans (NPL) in Europe, as adopted by the Council in July 2017, the Commission put forward the Directive on credit servicers, credit purchasers and the recovery of collateral as part of the legislative package in March 2018. Negotiations on the Directive started under the Bulgarian Presidency on 20 April 2018 and were continued under the Austrian Presidency.

Negotiations on the Directive have been split under the Austrian Presidency in the following two work streams: (1) Issues related to credit servicers and credit purchasers (secondary market) and (2) Issues related to the recovery of collateral through the Accelerated Extrajudicial Collateral Enforcement (AECE - Title V).

Under the Austrian Presidency the formation of the Working Party on Financial Services focussing on this Directive dedicated four meetings to the discussion on credit servicers and credit purchasers (on 13 September, 25 October, 19 November, 6 December) as well as three meetings on AECE (on 6 July, 4 September and 9 November), respectively. Whereas discussions on secondary market provisions advanced quickly and the Presidency already put forward two draft proposals reflecting Member States positions, AECE is not so far developed and no changes have been done so far to title V of the Directive.

This Presidency Progress Report has been prepared under the responsibility of the Austrian Presidency having regard to the opinions expressed by delegations to address the progress achieved by the Presidency on the Directive on credit servicers, credit purchasers and the recovery of collateral. It highlights the outcome of discussions on Working Party level and the progress that has been assessed by the Presidency in this regard. Thus, this report may not be relied upon as binding on the delegations but is intended to provide continuity and to outline a possible way forward.

2. Secondary Market part

2.1. General considerations

The part of the Directive focussing on the secondary market and thus on credit servicers and credit purchasers aims at enabling credit institutions to better deal with credit agreements once they become non-performing. To address a large build-up of NPLs or a possible lack of expertise to properly manage and service those kinds of credit contracts, credit institutions are encouraged to employ a credit servicer, especially when an unregulated credit purchaser is involved, or to sell NPLs on the market to a third party. The Directive provides for a harmonized authorisation regime for credit servicers managing non-performing as well as performing credit agreements. In addition, it should foster the development of the secondary market by removing any impediments to the transfer of NPLs by credit institutions to non-credit institutions. The Directive thus aims at establishing a Union-wide framework for both purchasers and servicers of credit agreements issued by credit institutions.

The Austrian Presidency followed up on the work of the Bulgarian Presidency with the aim of progressing to the most possible extent on the parts regarding credit servicers and credit purchasers.

A detailed first reading of the legal text was already conducted by the Bulgarian Presidency. Following this, the Austrian Presidency prepared various Non-Papers to discuss in depth the issues put forward by Member States. Consequently, the Presidency drew up a first compromise legal draft at the end of October, as well as a second revised comprehensive legal text at the beginning of December to incorporate requests made by Member States regarding the Directive.

2.2. Main issues

2.2.1. Scope

In connection with the scope of the Directive concerning credit servicers and credit purchasers the Presidency had thorough discussions with Member States on various issues, from which the following main conclusions have been brought forward:

- A significant number of Member States agreed to restrict the scope of action for non-licensed purchasers to non-performing credit agreements, as it would guarantee a higher level of borrower and consumer protection and safeguard financial stability. Nonetheless, national discretion should allow Member States to go beyond the restricted scope was clarified in the recitals. However, some other Member States argued for a minimal harmonisation through a narrower scope for non-licensed purchasers limited to past-due credit agreements.

- With respect to credit servicers, many Member States agreed to maintain the scope as proposed by the Commission and thus a credit servicer should be able to conduct services for non-performing as well as performing credit agreements. The extent of the scope was also included in the legal drafting. However, some Member States still demand a more restrictive approach by limiting the general scope of the Directive to non-performing credit agreements**.**

- In the Working Party meetings in November and December a compromise proposal by the Portuguese Delegation was discussed, which foresees that a non-licensed purchaser should be obliged to use the services of a professional credit servicer (or a credit institution) after acquiring a non-performing credit agreement. In such cases, this professional credit servicer should be responsible for any interaction with the borrower and the authorities. Building on these discussions some Member States saw the need to include this rule as an addition to the restriction of the scope of action for non-authorised purchasers to guarantee a sufficient level of consumer and borrower protection. Certain Member States were not opposed to include this additional rule as a national discretion, however, others did not see the need for this addition and some even saw it as an obstacle to the functioning of the secondary market.

- Member States agreed to clarify in a recital that the scope of credit servicer's authorisation can be extended on national level to credit agreements issued by non-credit institutions. However, it was agreed that such a service cannot be passported to other Member States.

- Further, regarding the applicability of the Directive on fund managers licensed under Directive 2011/61/EU or 2014/91/EU, as well as public notaries, bailiffs or lawyers several Member States asked for an exclusion of these parties from the overall scope of the Directive. In this regard the Austrian Presidency tried to clarify these exclusions in the drafting. Nevertheless, some Member States asked for further work on the drafting in this respect to specify the exclusions better.

2.2.2. Credit servicer and its authorisation

Discussions in several Working Party meetings were held under the Austrian Presidency in connection to the definition of a credit servicer, as well as its authorisation and the requirements to grant and refuse an authorisation of a credit servicer. The Austrian Presidency tried to address concerns brought forward by Member States during the discussions and the following conclusions could be drawn:

- The definition of a credit servicer was modified and the activities for which an authorisation is required were restricted. The new definition was broadly agreed by Member States. Nevertheless, a few Member States still saw the need to further discuss the activities to be conducted by a credit servicer.

- Regarding the process of granting an authorisation, several Member States asked for amendments in respect to the requirements and the procedure for granting and refusing an authorisation. It was clarified that a credit servicer needs to apply for an authorisation in the Member State where its registered office or principle place of business is established. Further, requirements for adequate knowledge and experience were added and clarified for whom these requirements should apply. To avoid any divergent interpretations of the requirement of adequate knowledge and experience it was added that the European Banking Authority (EBA) should develop guidelines for this purpose. Nevertheless, a few Member States had issues with EBA establishing these guidelines, as the NCA responsible for banking supervision might not be the competent authority for credit servicers in every Member State.

- With regard to the timeline available for competent authorities to asses an application, as well as communicate to an applicant the granting or refusing of an application, most Member States agreed to a simplified process and to the proposed timeline of 30 days for checking the completeness of the application and 90 days, after the receipt of the complete application, for making a decision and communicating it to the applicant. Some Member States asked for a longer timeline and thus argued to include working days instead of regular days in the drafting.

- In order to avoid interference with data protection rules, the Austrian Presidency modified Article 9(3) in a way that only relevant correspondence or instructions need to be kept in line with conditions provided for by the applicable national law. Further, the overall timeframe to keep records should be at least 5 years, but no longer than 10 years. The same rules were also included in Article 10(3) for the requirement to keep certain records in connection to the outsourcing agreement. Most Member States broadly agreed to this process.

In connection to the question if a credit servicer should only be a legal person or could also be a natural person, views were evenly split among Member States. The text currently includes a restriction only to legal person, which resulted from the position formerly expressed by several Member States. However, this would not be in line with some other EU regulations. Thus, several Member States criticised the restrictive application and asked for a revisit of this issue.

Further, discussions in respect to requirements for Anti-Money Laundering (AML) and counter terrorist financing to find a solution that would not require an amendment of Article 2 of (EU) Directive 2015/849 are still ongoing. In this respect, the Austrian Presidency proposed an alternative solution, where competent authorities should check if there are reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted by the credit servicer. Several Member States did not oppose to this alternative solution, however, further assessments and analyses were considered necessary.

2.2.3. Obligations for the purchaser

In the Council Working Party in mid-November a large group of Member States was in favour of aligning Article 15(2) with respective recitals in order to clarify that credit purchasers have to abide by the rules anchored in Union and national law in particular regarding public and contract law as it is applicable to the initial credit agreement, rules for consumer protection and criminal law. The Austrian Presidency tried to align Article 15(2) with recital 17 and 38, nevertheless, several Member States asked for further alignments and a revised wording in this respect.

Member States also did not oppose the clarification in the text that national rules regarding credit registers, especially the power to require information from credit purchasers regarding the credit agreement and its performance, should not be affected.

A notification requirement was added for credit purchasers, where the credit purchaser or its representative has to notify without delay to the competent authority of the home Member State its first purchase on the secondary market of a respective Member State. The information should then be submitted by the competent authority to EBA which will be obliged to publish a regularly updated list on its website regarding credit purchasers being active on the European secondary market. Several Member States were in general supportive of such a notification requirement. Nevertheless, questions were raised about the right moment of such a notification or whether EBA is the appropriate authority. Further, some asked for a better alignment of recital 33 and Article 15(3).

The Irish Delegation presented in the Working Party in December a Non-Paper regarding their well functioning national secondary market and raised the need for an authorisation of the credit purchaser. Some Member States also saw merit in an authorisation of the credit purchaser. However, others were opposed and argued that this would disturb the market and discourage market entry of credit purchasers.

2.2.4. Information requirements

There were several discussions in the Working Party meetings regarding the information requirements for credit institutions and credit purchasers in respect to a transfer of a credit agreement. As many Member States were not satisfied with the extensive requirements in this regard, the Austrian Presidency proposed different approaches to streamline the information requirements and reduce the burden on the market participants.

Most Member States finally agreed on the proposal by the Austrian Presidency to modify the information requirements in a way to oblige the seller of a credit agreement, as a general rule, to submit information to the competent authority. In Article 13 the seller is a credit institution, in Article 19 the seller is a credit purchaser. Articles 13 and 19 clarify that the credit seller should provide information for each transfer of credit agreements about the Legal Entity Identifier (LEI) of the credit purchaser or his representative or alternatively, if the LEI does not exist, the identity of the credit purchaser, its representative or members of the purchaser's management or administrative organ or the persons who hold qualifying holdings in the purchaser as well as the address of the pruchaser or of his representative. Additionally, credit sellers should submit information on aggregate level about the outstanding balance of the credit agreements, the number and size of credit agreements included in the transferred portfolios and whether those credit agreements were concluded with consumers and the type of assets. Some Member States were still concerned about the requirement that the creditor has to submit information to the credit purchaser. More in general, some Member States shared the opinion that credit purchasers shall always avail themselves of credit servicers (or of credit institutions) to manage the credit agreement, and accordingly any information requirement should be imposed on the appointed credit servicer rather than on the credit purchaser.

In order to comply with principles of proportionality, recital 31 encourages competent authorities to avoid the duplication of information requirements and thus taking into account information already available to them by other means.

In Article 16 concerning cases where a credit purchaser or its representative decides to engage a credit servicer or a credit institution to perform credit servicing activities in relation to a transferred credit agreement, the responsibility of the credit purchaser to inform the competent authority of the home Member State was further specified.

2.2.5. Supervision

In the Working Party meeting in mid-November, several Member States were in favour of introducing more powers for competent authorities of the host Member State in relation to the supervision of credit servicers. For this purpose, the Presidency amended the powers of the host competent authority that in a situation of a breach or in an urgent case competent authorities can prohibit further activities of a credit servicer until a decision is taken by the home competent authority.

In order to strengthen the flexibility of the competent authority, some Member States asked for an extension of the indicative list of powers for the home competent authorities and now inter alia it also encompasses the power to remove members of a credit servicer's management/administrative organ or to request further information pertaining to the transfer of a credit agreement. Nevertheless, some Member States raised scrutiny reservation regarding some of these new powers and saw the need for further analyses. Member States broadly agreed that in line with the principle of proportionality and to avoid undue burden for the competent authority the evaluation process should follow a risk-based approach.

2.2.6. Other issues discussed

During the Council Working Party meetings other issues have been discussed as well and the most important ones are listed below:

- In respect to the definition "credit agreement" Member States agreed in the Working Party at the beginning of December that the definition should be in line with the Consumer Credit Directive and the Mortgage Credit Directive. This would entail that the definition initially given by the Commission would be kept and just the wording "creditor's rights", or "creditor's claims" as some Member States would prefer, would be added in the text.
- Most Member States agreed to include the definition "credit servicing agreement" and the modified definition of "home Member State".
- Further discussions will be needed in respect to the new definition of "non-performing credit agreement", as some Member States do not deem this definition used for prudential purposes as appropriate for this Directive and the given context.
- In Article 8 Member States supported the national discretion in keeping a national list or register of all authorised credit servicers to provide services in a given territory.
- A significant number of Member States agreed on the amended outsourcing process in Article 10. When an outsourcing is conducted by a credit servicer, the credit service provider needs to comply with applicable law provisions, including national law transposing the Directive and the relevant Union or national laws applicable to the credit agreement. The obligations of the servicer towards the creditor or borrower and the requirements of authorisation should not be altered or affected by the outsourcing. The credit servicer should inform the competent authority, upon request, about the outsourcing of activities.
- To be consistent with other legislations, Member States agreed to use the wording "administrative penalties" in this Directive.
- Most Member States did not oppose to specify the main topics of the evaluation of the Directive by the Commission in an indicative list.
- Regarding the date of transposition **of the Directive into national law as well as the dates of application**, Member States had different views, as some asked for more time and others for an ambitious transposition date**.**

3. AECE part

3.1. General considerations

The Title V of the Directive introducing the AECE instrument, in particular, seeks to address the problem of existing non-performing loans and to prevent their future accumulation. In doing so, the proposal aims at a minimum harmonisation of pertinent rules, leaving a large degree of flexibility to Member States to adapt the new mechanism to their existing legal traditions. It should increase the efficiency of debt recovery procedures especially by simplifying and speeding up the out-of-court realisation of collateral.

The Austrian Presidency followed up on the work of the Bulgarian Presidency with the aim of progressing to the most possible extent on Title V.

The Presidency had a detailed first reading of the legal text going article by article through Title V of the Directive. Following this first reading the Presidency prepared Non-Papers that allowed for a more detailed discussion of the technical issues raised by Member States.

3.2. Main issues

3.2.1. Scope

The Austrian Presidency presented a Non-Paper for discussion looking closer into the different issues around the scope of the AECE instrument. The discussions on the scope lead to the following conclusions:

- Member States agreed that a creditor should have the choice between AECE and judicial enforcement proceedings, as well as that neither the creditor nor the debtor should be prevented from seeking judicial protection in an AECE proceeding. In this respect Member States agreed on spelling out this right to seek judicial protection **at any stage of the AECE proceeding** more precisely in the Directive as better indicated in the following paragraph 3.2.3.

- According to the Commission proposal AECE shall only apply to enforcing the outstanding debt under a secured credit agreement concluded by a credit institution or another undertaking authorised to issue credit in accordance with the national law of a Member State on the one hand, and by a "business borrower" on the other hand. The restriction to a business borrower in this regard is meant to exclude the application of AECE to credit agreements entered into by a consumer. In this latter regard, Member States agreed on the scope given by the Commission.

- The scope of the Commission proposal foresees the inclusion of movable as well as immovable collateral to secure a loan covered by AECE. Views were split in this regards, as some Member States wanted to restrict AECE to movable collateral only and others argue that excluding immovable assets (real estate) would render AECE ineffective to prevent the accumulation of non-performing loans, as mortgage loans represent a significant portion of commercial credits.

- The scope of application of the Commission proposal foresees an application of AECE on the creditor side limited to a credit institution or another undertaking authorised to issue credit. Some Member States were supportive of the proposed scope, as it would otherwise unfairly favour banks. However, other Member States opposed a scope that would encompass other undertakings authorised to issue credit.

3.2.2. Enforcement

In connection with the enforcement of the AECE instrument (Article 23 to 26) the Presidency had a thorough discussion with Member States on various issues related to that topic, from which the following main conclusions have been brought forward:

- When a loan becomes past due, the decisive factor to initiate AECE is the enforcement event. The Commission proposal outlines that the conditions for the enforcement event need to be agreed upon in the initial credit contract. In order to avoid uncertainty about the creditor's right to trigger AECE, these conditions have to be clear and precise. Several Member States brought forward that the definition of the enforcement event should be up to Member States to be defined in national law. However, other Member States preferred a general definition while others only asked for minimum criteria to be defined in the Directive that parties have to agree upon.

- Several Member States expressed serious concerns about creating a directly enforceable title without the involvement of a judge, solicitor or at least any sort of public official and therefore asked for a clarification in the directive, that obtaining an enforceable title through an AECE agreement does not enable the creditor to seek direct judicial enforcement, but only allows for direct extrajudicial measures. Some Member States made wording proposals to replace the term "directly enforceable title". However, other Member States did not see the need of such a clarification.

- Concerning the involvement of notaries, bailiffs and other public officials in the enforcement procedure many Member States showed themselves positive in this regard. A significant number of Member States claimed that it should be up to national discretion to decide upon the degree of involvement, as well as the activities to be conducted by a notary, bailiff or other public official.

- In the discussion about the means to realise collateral under the AECE instrument Member States agreed in general that these parts in the Directive are not sufficiently clear in the drafting. Views were split in respect of the inclusion of appropriation as a means to realise collateral. Further, a significant amount of Member States supported the Presidency's proposal leaving the choice to Member States to provide only for one means of realisation. Member States expressed different views as to whether all means of realisation should be of equal rank, while some Member States claimed that this question should be up to national discretion to decide.

3.2.3. Right to challenge

Article 28 of the proposal provides for legal protection of the business borrower before a national court. However, the wording of this article limits the scope of the judicial protection to the realisation of the collateral and thus to the ultimate phase of the enforcement procedure.

Most Member States considered this safeguard clause too narrow; they demanded that legal protection has to be available at all stages of the enforcement procedure. However, some others were concerned that the right to challenge at any stage could undermine legal certainty of acquirers when the sale procedure gets cancelled by a court ruling. In this respect, some Member States also expressed the view that challenges should not suspend the enforcement procedure nor result in the annulment of the sale once effected, but rather give rise to compensation rights. Further, a significant number of Member States requested that the right to challenge should not be restricted solely to business borrowers but also be granted to third parties or to the creditor. Most Member States also supported that the means of legal redress should not go beyond the remedies which the national legal orders provide for infringements of property rights. **Nevertheless, some Member States asked to leave this question for the Member States to decide.**

3.2.4. Other issues discussed

During the Council Working Party meetings other issues have been discussed as well and the most important ones are listed below:

- The Presidency as well as the Czech delegation put forward in a Non-Paper the question of applicable law in connection to the collateral enforcement. Following the discussion the majority of Member States did not see the need to regulate and address any rules on conflict of laws in the Directive**.**

- Article 27 deals with competing security rights and it outlines that the priority attached to competing security rights in the same collateral should not be affected by AECE enforcement proceedings. Some Member States asked to restrict AECE to first rank securities. Member States did not see the need to include any detailed provisions regarding competing security rights in the Directive and thus leave it to Member States to define safeguards in their national law in this respect.

- In several discussions held on Working Party level the topic about the definition of the consumer was raised. Finally Member States supported the following definition: “A consumer means a natural person who, in credit agreements covered by this Directive, is acting for purposes which are outside his trade, business or profession.”

- Article 33 requires a comprehensive collection and transmission of data to the Commission to monitor, on an annual basis, the number of secured loans which are enforced through AECE, the timeframes and the recovered values. Member States in general welcomed the objective to collect comparable data, nevertheless, the process was criticised too excessive and burdensome. Therefore, the Presidency proposed a less complex and burdensome process in which competent authorities supervising credit institutions should only collect information from the creditor regarding the number of AECE proceedings initiated, pending or realized. A significant number of Member States supported this leaner procedure.

- The Directive does not cover any rules regarding the acquisition in good faith of collateral connected to a loan covered by AECE. After discussions in the Working Party meeting, Member States came to the conclusion that there should not be any harmonisation of this issue in the Directive and thus should stay as defined in Member States in national law.

- The current proposal does not limit the use of AECE to the original contractor but extends its application also to the purchaser. Being an integral contractual clause, the purchaser acquires the unlimited right to use AECE under the same terms and conditions as the credit institution which initially granted the credit. As the transfer of the credit agreement according to Article 31 is not restricted to credit institutions or other supervised entities, several Member States addressed concerns about adequate debtor protection and requested comprehensive safeguards. While some Member States advocated for a restriction of the use of AECE to banks, institutions which are allowed to issue credits or other supervised entities, others opposed restrictions as AECE would categorically be limited to business borrowers.

- Regarding Article 32 on restructuring and insolvency proceedings the views of Member States were mixed if a reference to the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures is necessary due to the applicability of the "stay of individual enforcement actions" to AECE. Some Member States showed themselves to be indifferent on this point, while others considered an in-depth discussion necessary, and a third group considered a reference in a recital as sufficient.

- The focus of the Directive (e.g. Article 2 (2), Article 23 (1)), is primarily on the relationship between creditors and business borrowers. Nevertheless, several Member States stated, that various situations might arise in which third parties can be affected for example when the collateral is owned by a third party or the collateral is bought by a third party after the agreement on AECE by the creditor and the business borrower. Some Member States demanded to further discuss this issue and possibly also foresee a provision dealing with this matter.

Furthermore, in this context some delegations advocated that the exception in Article 2 (5), according to which AECE would not be applicable to immovable residential property which is the primary residence of a business borrower, should be extended to third parties (i.e. guarantors), as they may have the same need for protection as the debtor.

- In respect to the notification of the borrower of the intention to realise the assets through AECE, the creditor has to notify the borrower of his intention to apply the contractual AECE clause, at the latest within four weeks of the enforcement event. Some Member States found it useful to reconsider the length of the notification period and its starting point. Further, some Member States also suggested changing the given approach and turning the notification period into an alert for the debtor, to be calculated backwards from the (future) moment of enforcement.

4. Possible way forward

In the Working Party meeting at the beginning of December Member States expressed their overall support of the direction taken by the Austrian Presidency on the secondary market part of the Directive. However, they still saw the need for further work on few specific issues as well as on the definite wording of some parts of the legal drafting.

Especially the overall scope in connection with performing and non-performing credit agreements and in particular the possible exclusion of credit agreements qualified as unlikely-to-pay will require further discussions. Additionally, also the role of the credit servicer in respect to transfers of credit agreements to non-authorised entities, as well as the obligations on the credit purchaser needs to be analysed further.

Concerning AECE, the Presidency did not assess sufficient progress to come forward with an appropriate drafting proposal. On the basis of the above mentioned considerations and guidance given by Member States in the course of the Working Party meetings held under Austrian Presidency, a possible way forward could be to outline a landing zone in order to achieve broad consensus among Member States.

In the view of the Austrian Presidency an essential element of this landing zone should be the involvement of a public official in this process as this would address the concerns of Member States regarding the maintenance of the existing level of legal protection. The degree of involvement of the public official could be left to national discretion. Aside from this essential part, the landing zone should consist of various elements, which taken together should result in a balanced solution that caters for national discretion as well as for a certain degree of harmonisation. In any case, there will be the need for further in depth discussion considering the various aspects of AECE to reach an optimal outcome.

The Austrian Presidency would like to highlight once again that the views expressed in this paper constitute an estimation by the incumbent Presidency and are not intended to prejudge in any way the decision by the upcoming Romanian Presidency on the further work on this file.