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WORKING PAPER

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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services (NPLs) Financial Services Attachés
Subject:	Preparation of the 3rd political trilogue - Other political topics

Working Party on Financial Services

NPLs Secondary Market Directive

Preparation of the 3rd political trilogue - Other political topics

1. Other political topics

In addition to the political points discussed in the Presidency Non-paper "Main outstanding political topics", the Presidency would like to seek the Member States' views on a set of other matters equally to be decided by co-legislators at the next political trilogue.

I. New items identified during the negotiation:

1. Article 3(8)(a) [line 102] – Possibility of the credit servicer to hold funds from clients
2. Entities allowed to perform credit servicing on behalf of credit purchasers
3. Article 35 – Complaints

II. Open items and proposals on the way forward:

4. Article 2(3b) [line 78b] – Exclusion from the scope the credit servicing under securitisation
5. Article 2(4a) [line 83a] – Discretion for Member States to exclude the credit servicing undertaken by certain professions
6. Article 7(1)(c) [line 145] – Expiry period for the use of a credit servicing licence
7. Article 9(2a) [lines 160b to 160f] – Other requirements of the credit servicing agreement;
8. Article 13(1) [line 206] – Requirement for the creditor to provide the necessary information to the purchaser
9. Article 15(2) and Article 15(2b) [lines 219 and 219b] – Possibility for Member States to impose additional requirements on non-CRR/CRD credit purchasers and inclusion of insolvency rules
10. Recital 9 [line 18]
11. Recital 21a [line 30a]

1.1 New items identified during the negotiation

1. Article 3(8)(a) [line 102] – Possibility of the credit servicer to hold funds from clients

In the previous Working Party meeting, the Presidency explained that it has interpreted the Council General Approach as forbidding credit servicers from holding funds due to the explicit reference to Directive 2015/2366 (PSD II) in the context of the definition of "credit servicer" [point (a) of paragraph 8 of Article 3 (line 102)] - "*collecting or recovering payments due related to the creditor's rights under a credit agreement or to the credit agreement itself from the borrower where it is not a payment service as defined in Annex I of Directive 2015/2366, in accordance with national law*".

For that reason, and taking into account the analysis of the Commission presented in the non-paper "on the conditions for the authorisation of credit servicers" (WK 3063/21), the Presidency proposed to make such prohibition explicit in the text in order to clarify the Directive and also to make clear to the EP that prudential requirements would not be necessary (i.e. if credit servicers do not receive funds, there is no risk for borrowers or credit purchasers). Under this approach, in cases where a credit servicer, according to its business model, needs or wants to hold funds from borrowers (by receiving the funds in the credit servicer's account and subsequently transfer those funds to the credit purchaser's account), the credit servicer would, for instance, apply for a licence as laid down in PSD II or engage a PSD II entity to do that. Such approach was broadly supported by MS and, while few MS questioned the approach, no objections were raised at the time.

The Presidency made this proposal to the European Parliament but the Commission disagreed with such way forward, by arguing that servicers should be able to hold funds and that account segregation requirements would be enough to address the risks involved. Moreover, the EP recalled the requirements on capital and liquidity, aiming borrowers' protection. Therefore, the discussion was postponed, as conveyed in the Presidency Flash Note.

In the Commission's view, the operation where credit servicers receive funds from borrowers in its banking account and subsequently transfer the funds to the creditors' accounts would be possible without a PSD II licence, as it should not be considered a payment service as defined in Annex I of PSD II. Moreover, for the Commission, even if that operation would be considered a payment service, the limited network exemption included in the PSD II (Article 3 (k) (i)) should apply.

Meanwhile, the Presidency realized that **MS' interpretation of the Council General Approach is not the same**. Indeed, while some MS share the Presidency's view on credit servicers' activity, others explained that they have interpreted that the Council text would enable credit servicers to hold funds, also arguing that credit servicers would be covered by the mentioned limited network exclusion foreseen in the PSD II.

Against this background, it is crucial to clarify the text of the Directive to ensure a consistent implementation of the regime across MS. Otherwise, if indeed it would be possible to treat credit servicers under the PSD II limited network exemption, and given that such interpretation is not consensual, the ability of a credit servicer to receive funds would change according to each MS's

view and, therefore, according to the MS where the credit servicer would be providing such service of collecting or receiving funds. Moreover, it is not clear which MS would be relevant for such interpretation: i) the home MS of the credit servicer; ii) the home MS of the credit purchaser; iii) the host MS; iv) all of the previous. There are valid reasons for each of the above options.

In order to overcome this issue, the Presidency presents two possible ways forward.

Option A: To **forbid credit servicers from receiving/holding funds** (as previously proposed by the Presidency), and consequently no capital, liquidity or account segregation requirements as proposed by the EP are needed for credit servicers.

Option B: To provide MS (home and host) with the discretion either to forbid credit servicers from receiving/holding funds from borrowers or to allow credit servicers to do so while imposing both the following requirements in order to tackle the risks involved:

(i) **Account segregation and funds segregation in insolvency** (ensuring that funds in the segregated accounts are not used to reimburse other creditors in the event of bankruptcy of the credit servicer) - this requirement contributes to reduce the risks that borrowers' funds are not received by the credit purchaser in case of insolvency and it is even stricter than the account segregation proposed by the Commission, it further implies that payments made by borrowers would only be channelled through the segregated bank account.

(ii) **Discharge provision** - to introduce in this Directive a provision specifying that the discharge occurs when the borrower pays to the credit servicer, since applicable rules on discharge may vary from MS-to-MS (based on contract law rules) and from case-to-case. Moreover, to impose on the credit servicer the obligation to deliver a letter of discharge to the borrower whenever the credit servicer receives funds from the borrower, in order to acknowledge any amounts received.

Accordingly, when the home MS forbids the holding of funds by credit servicers, the latter cannot perform this activity either in the home MS or in any host MS.

On the contrary, when the home MS opts to allow credit servicers to hold funds from borrowers, the MS has to include in its national law the abovementioned requirements (account segregation, funds segregation, the rule of borrower's discharge when payment is made to credit servicers and the obligation to deliver a letter of discharge), and the credit servicer can perform this activity in any host MS that opts in the same way.

Thus, the credit servicer has to fulfil the account segregation requirement at the moment of authorisation and prior to engaging in cross-border activities (i.e., notification of cross-border). The credit servicer has also to fulfil the requirements above whenever it receives funds from the borrowers. Nevertheless, the credit servicers could retain the discretion to voluntarily restrict themselves to not hold borrower's funds in the performance of their activities, which would thus lead to the waiver of such requirements for those credit servicers.

In the event of MS considering that the abovementioned requirements are not enough to tackle the risks, a **variant of Option B** could be envisaged, whereby **an additional requirement** would

be included, namely: to hire a professional liability insurance providing protection against damages resulting from non-compliance with the account segregation requirement.

The Presidency considers that Option A is simpler than Option B and the most pragmatic way forward, since it does not impose any other requirements to credit servicers. It is worthy to highlight that, even though Option A is less flexible than Option B, it does not preclude that credit servicers opt to follow any other business model, since credit servicers may apply for a PSD II licence or engage a PSD II entity, thereby ensuring borrowers' protection.

In Option B it is worth mentioning that it is dependent on the possibility to reach an agreement with the EP on whether the requirements proposed would be enough in the EP's perspective to tackle the risks. In any case, the Presidency considers that the requirements mitigate significantly the costs incurred by credit servicers (in contrast to capital and liquidity requirements). Nonetheless, it might raise additional challenges for cross-border credit servicing activities, when compared with Option A.

Q1: The Presidency invites MS to:

a) Share their interpretation of the Council General Approach in what concerns the definition of "credit servicer" (point (a) of paragraph 8 of Article 3 - line 102) and whether credit servicers would be able to hold funds (by receiving in their accounts the funds from borrowers and transferring them to credit purchasers);
b) Indicate their preferred way forward - Option A or Option B - and whether they have strong objections against the non-preferable option;
c) Indicate if, in Option B, it would be agreeable to add the liability insurance requirement in case need be.

2. Entities allowed to perform credit servicing on behalf of credit purchasers

During the technical meeting, on Article 15, work on the provisions that do not depend on the political agreement on Article 15 (1) has been conducted.

In a recent meeting, co-legislators preliminarily agreed on Article 15(2d) [line 219s], as circulated for MS' comments to the 4CT. The draft agreement was as follows: "*Member States shall ensure that the appointed credit servicer complies with the notification obligations to the competent authority imposed on the credit purchaser pursuant to Articles 16 and 19 on behalf of the credit purchaser. [In cases where no credit servicer is appointed, the credit purchaser [or its representative] maintains the obligation to comply with those duties.]*"

Since the credit purchaser, under some circumstances (defined under Article 15 (1)), has the obligation to appoint a credit servicer, all the subsequent notifications should be ensured by that entity. It means that the credit purchaser is required to delegate the compliance with the notification requirement to the credit servicer, the latter having then to fulfil the obligations on behalf of the credit purchaser. There is no delegation of responsibility (as in the original EP text), since credit servicers will act on behalf of the credit purchasers.

However, in the process of reviewing the outcome of technical meeting, and while assessing the notification procedures in the Directive (as also described in the Presidency note on the "Main outstanding political topics"), the Presidency realized that the provision in Article 15 (2d) without additional amendment will create a different treatment of credit purchasers according to the entity chosen to perform the servicing of the credit agreements. Indeed, if the credit purchaser chooses an authorised credit servicer, the credit purchaser delegates the compliance with the notification requirements. However, if the credit purchaser engages an entity referred to in Article 2(4)(a)(i) or (iii), it will not be required to delegate the compliance with the notification requirements.

A similar issue arises under the notifications envisaged in Article 8a: as far as the notifications are imposed on the credit purchaser and then on the credit servicer when appointed under this Directive, the applicable rules on the credit purchaser will change according to the entity chosen to perform servicing activities.

The Presidency considers that this creates an unjustified difference of treatment among credit purchasers that should be addressed. In this vein, the requirement on the credit purchaser to delegate to credit servicers the compliance with the notifications to the NCA or to the borrowers should apply to all entities hired by a credit purchaser to service the credit agreement rather than only to credit servicers authorised according to this Directive.

Consequently, in Article 15(2d) the term "credit servicer" should be replaced by "credit servicer or entities referred to in Art 2(4)(a)(i) and (iii)". Moreover, the revised Article 8a, as presented in the Presidency Note on "Main outstanding political topics", should also be adjusted accordingly.

Q2: Do MS have any objection that the compliance with all notification requirements imposed on credit purchasers pursuant the Directive should be delegated to the credit servicer or to the entities referred to in Art 2(4)(a)(i) and (iii)?

3. Article 35 – Complaints

Under technical work, the Presidency identified a gap on the provisions related with borrowers' complaints and the need for articulation/cooperation between Competent Authorities (CA). In particular, it may be the case that the MS where the borrower is domiciled at a given moment might not coincide with the Host MS (or even the Home MS), which are the relevant authorities for purposes of handling complaints. Therefore, the Presidency sees merit in establishing a duty for any CA that receives a compliant relative to which it is not the sole authority responsible, to transmit, without undue delay, said complaint to the appropriate authority.

Against this background, the Presidency proposes to introduce a new paragraph in Article 35.

new Article 35(7) (line 378b) ***Member States shall ensure that when the competent authority where the borrower is domiciled or established receives a complaint from a borrower that complaint is transmitted, without undue delay, to the competent authority of the host Member State and to the competent authority of the home Member State of the credit servicer and also, when relevant, to the competent authority of the home Member State of the credit purchaser.***

Q3: Do MS agree with the proposed adjustment in Article 35?

1.2 Open items and proposals on the way forward

4. Article 2(3b) [line 78b] – Exclusion from the scope the credit servicing under securitisation

The Presidency proposes to maintain the Council text. This is due to the fact that the reference in the Council text "*This Directive shall not affect the requirements*" means that only these requirements remain applicable, without prejudice to the application of other, more stringent, requirements as resulting from the current Directive. This seems to correspond to the EP's aim with this provision as well.

5. Article 2(4a) [line 83a] – Discretion for Member States to exclude the credit servicing undertaken by certain professions

The Presidency proposes to stick to the Council's mandate regarding the text directly related to professions, as the EP drafting "*members of a profession, subject to the supervision of each Member State*" is too broad and may include other professions unrelated with the scope of the current Directive, while accepting the EP's draft on the reference to Directive 98/5/EC.

Article 2 ***4a. Member States may exempt from the application of this Directive the servicing of creditor's rights under a credit agreement or the credit agreement itself carried out by public notaries and bailiffs as defined by national law or lawyers as defined in point (a) of article 1(2)~~(a)~~ of Directive 98/5/EC of the European Parliament and of the ~~Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained~~, when conducting activities referred to in Article 3(7b9) of this Directive as part of their profession;***

1. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36).

6. Article 7(1)(c) [line 145] – Expiry period for the use of a credit servicing licence

Given MS' openness on this matter expressed in their written comments, the Presidency proposes to change the time period from 6 months to 12 months (EP text) under Article 7(1)(c).

7. Article 9(2a) [lines 160b to 160f]– Oher requirements of the credit servicing agreement

In Article 9(2a), the EP proposed to add some additional requirements to the credit servicing agreement in comparison to the Council approach, establishing that: "*Member States shall require, where necessary, that a credit servicing agreement also provide a requirement, according to which: (i) the credit servicer notifies the creditor prior to outsourcing any of its activity as credit servicer; (ii) the borrower is informed of the credit servicing agreement as well as of any further outsourcing of credit servicing activities as defined in Article 3(7b) letters a)-d); (iii)) the costs and remuneration of the credit servicer are not charged to the borrower; (iv) the borrower is entitled to plead against the credit servicer any relevant defence which was available to the borrower in respect of the original creditor.*"

In the Council's approach, only the first requirement was defined, and at the discretion of the Member States (with the word "*may*" instead of "*shall*").

In order to reach a compromise on this topic, the Presidency proposes to move from a discretion to a mandatory requirement regarding the common provision (i.e. item (i)) and replace the term "*creditor*" by "*credit purchaser*" in line with other provisions in the same article. As far as for the remaining requirements in the EP's text, the Presidency proposes to not accept the requirement under item (iv) as it does not seem to relate to credit servicing agreements but to the general protection of borrowers (against credit purchasers). In turn, requirements (ii) and (iii) should also be excluded from this article, as they are addressed under the Presidency proposal for Article 8a (Section 1.3 in the non-paper "Main outstanding political points).

(line 160b EP)***2a. Member States shall require~~, where appropriate,~~ that the credit servicing agreement also provide a requirement according to which:***

(line 160c EP) ***~~(i)~~ the credit purchaser servicer notifies the creditor prior to outsourcing any of its activity as credit servicer.***

8. Article 13(1) [line 206] – Requirement for the creditor to provide the necessary information to the purchaser

In order to avoid ambiguity, the Presidency proposes to remove "*to a reasonable extent*" and to leave the content of the information to be provided to be specified under Article 14.

Additionally, as discussed in the Presidency's note ahead of the 2nd political trilogue (Annex V), the word "*creditor*" should be replaced by "credit institution", in order to be aligned with Article 14 and point (ga) of Article 22(1), which are applicable to credit institutions.

Finally, the Presidency proposes to clarify, in the Directive, that the transmission of this information by credit institutions to credit purchasers is deemed to comply with the requirement foreseen in article 6 (1) (c) of GDPR.

9. Articles 15(2) and 15(2b) [lines 219 and 219b] – Possibility for Member States to impose additional requirements on non-CRR/CRD credit purchasers and inclusion of insolvency rules

The second part of Article 15(2b) under the EP proposal seems to be in contradiction with Article 15(2), according to which a credit purchaser is not subject to any additional administrative requirements than those foreseen in that paragraph. The EP explained in the last political trilogue that the purpose of that provision is to allow MS to impose restrictions on purchasers based on criminal law (similarly to the possible restrictions due to consumer protection and contract law).

On the other hand, a MS raised some concerns related to the need of ensure that insolvency rules are not affected by the transfer of the credit.

Based on these arguments, the Presidency proposes to introduce amendments in the Article 15 (2) in order to make reference to criminal law for the requirements imposed to the purchaser and to ensure the applicability of insolvency rules after the transfer, and to delete the second part of Article 15(2b). The Presidency proposes to clarify that MS can extend the scope of the Directive as in the first part of Article 15(2b) EP, however placed in another part of the Directive.

Article 15 (2) (line 219) Member States shall ensure that a credit purchaser is not subject to any additional ***administrative*** requirements for the purchase of ***a creditor's rights under a non-performing*** credit ~~*agreements*~~***agreement or of the non-performing credit agreement itself,*** other than as provided for by the national measures transposing this Directive***, or by provisions of applicable consumer protection law,*** ~~***or***~~ ***contract law, or criminal law. Member States shall ensure that relevant Union 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 the credit purchaser upon the transfer of the creditor's rights under a credit agreement or of the credit agreement itself to the credit purchaser. The level of protection provided under Union and national law to consumers and other borrowers and insolvency rules shall not be affected by the transfer of***

the creditor's rights under a credit agreement or of the credit agreement itself to the credit purchaser.

~~Article 15 (2b) (line 219b)~~ [*to be placed in a different part of the Directive*] ***This Directive does not affect Member States' laws extending the scope of the Directive.*** ~~*or imposing additional requirements on those credit purchasers that do not hold a licence in accordance with Regulation No 575/2013 and Directive 2013/36/EU.*~~

10. Recital 9 [line 18]

Notwithstanding the other political issue raised by this Recital (i.e. on the scope of the servicers' activities), which was left in square brackets, the Presidency proposes the following drafting regarding the issue "*of removing impediments*" / "*laying down safeguards*" for the transfer of NPLs:

The Presidency considers that it is important to keep the wording "*removing impediments*" as per the Council's General Approach, since this is also an objective of the present Directive.

The reference added by the EP on "*minimum requirements*" could be deleted, given that the Directive does not impose *ex ante* minimum requirements for transfers. On the other hand, the more generic expression "*laying down safeguards*" could be accepted, as it is not directly related with the transfer *per se* and could also convey the idea that certain obligations are imposed (for example, credit institutions and credit purchasers shall report the transfers to NCA in order to allow proper supervision; in some cases, the credit purchasers must designate a credit servicer).

(9) This Directive should foster the development of secondary markets for NPLs in the Union by ***removing impediments and*** ***laying down safeguards*** ~~***and minimum requirements for***~~ the transfer of NPLs by credit institutions to ~~non-credit institutions~~ **credit purchasers**, while at the same time safeguarding ~~*consumers'*~~***borrowers'*** rights. Any proposed measure should ~~*also simplify and*~~ harmonise the authorisation requirements for credit servicers. This Directive should therefore establish a Union-wide framework for both purchasers and servicers of [***non-performing***] credit agreements issued by credit institutions***, whereby credit servicers should obtain authorisation and be subject to the supervision of Member States' competent authorities***.

11. Recital 21a [line 30a]

This Recital does not seem to relate to any specific provision in the text and also seems to be outside of the scope of the current Directive (borrowers' legal guarantees). Several MS expressed concerns with its inclusion in this Directive. Therefore, the Presidency intends not to accept this Recital.

In case the EP insists on maintaining this Recital, the Presidency proposes then to have an alternative drafting recalling Article 47 of the Charter of Fundamental Rights of the EU[1], without further considerations.

Q4: Do MS agree with the proposals presented in this Section 1.2? For the items where MS disagree, which should be the way forward? Please specify any drafting proposal to accommodate your concerns.

Q5: Specifically, on item 9, and taking into account the Commission's proposal for line 219 presented in its non-paper "obligations for Credit Purchasers", do MS agree with the deletion of the term "administrative" and, at the same time, the inclusion of "civil law"? Do MS consider that further elements should be added in order to accept the deletion of the term "administrative"?

[1] Article 47 of the Charter of Fundamental Rights of the EU: "*Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*"