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**NEW EU RULES ON NON-PERFORMING LOANS:  
COMMISSION ADOPTS IMPLEMENTING  
TECHNICAL STANDARDS**

## NEW EU RULES ON NON-PERFORMING LOANS: COMMISSION ADOPTS IMPLEMENTING TECHNICAL STANDARDS

The European Commission has now adopted the implementing technical standards (ITS) setting out the new disclosure templates to be used by EU banks selling non-performing loans (NPLs) under the EU Directive on credit servicers and credit purchasers. The adopted ITS make some changes to the final draft ITS proposed by the European Banking Authority (EBA), including a change reducing the scope of the obligations to provide information to prospective buyers.

The EU **Directive** on credit servicers and credit purchasers was adopted in 2021 and Member States are required to bring their implementing rules into effect on 30 December 2023.

Among other things, the Directive will require credit institutions established in the EU (EU banks) selling NPLs to non-bank “credit purchasers” to disclose to prospective buyers the “necessary information regarding a creditor’s rights under [the NPL], and, if applicable, the collateral, so as to enable the prospective credit purchaser to conduct its own assessment of the value of the creditor’s rights ... and the likelihood of recovery of the value of [the NPL]”. EU banks will have to use prescribed data disclosure templates for this purpose and will also have to use the same templates if they transfer NPLs to other banks.

Following on from the EBA’s **final report** published in December 2022, the **ITS** adopted by the Commission now specify the templates to be used by banks selling NPLs under the Directive. The ITS aim to provide a common standard for NPL transactions across the EU to reduce information asymmetries between sellers and buyers of NPLs, to reduce entry barriers for small credit institutions and smaller investors wishing to purchase NPLs and to contribute to the development of a functioning secondary market in the EU. EU banks will have to provide granular loan-by-loan information to enable prospective buyers to conduct their analysis, financial due diligence and valuation of NPLs. However, the adopted ITS, unlike the final draft ITS in the EBA’s report, include provisions fully exempting EU banks from the obligation to disclose information using the templates in relation to some sales or transfers of NPLs to which the ITS apply, including sales or transfers of NPLs under syndicated credit agreement facilities.

### Key issues

- European Commission has now adopted the ITS specifying the disclosure templates to be used by EU banks selling NPLs
- Some transactions will fall outside the scope of the ITS, eg, securitisations and sub-participations.
- Banks will not be required to disclose information using the templates for some transactions, eg sales of syndicated loans (although other Directive rules may apply)
- EU banks that disclose inaccurate or incomplete information may be subject to fines and damages claims
- Directive requires the new rules to apply from 30 December 2023 with relief for sales of some existing NPLs

### What is an NPL?

In summary, the Directive regulates the sale and purchase and servicing of NPLs, that is to say:

- credit agreements and rights under credit agreements;
- originated by EU banks; and
- classified as non-performing in accordance with article 47a CRR.

The definition of a credit agreement covers any syndicated or bilateral agreement under which an EU bank grants a credit in the form of a deferred payment, a loan or other similar financial accommodation to a borrower, including both commercial and consumer borrowers.

### When do the ITS apply?

The adopted ITS state that they apply to the sales and transfers by EU banks of credit agreements that are classified as non-performing exposures in accordance with Article 47a of the EU Capital Requirements Regulation (CRR), that those EU banks hold in their banking book, rather than in their trading book as defined in CRR, and that meet the time criteria set out in the Directive (as to which see below). In addition, the recitals to the adopted ITS state that banks should use the templates in sales or transfers of NPLs involving a change to the lender of record under the credit agreement concerned. However, unlike the EBA's final draft ITS, the adopted ITS do not limit their scope to sales of 'portfolios' of NPLs.

The adopted ITS state that they do not apply to:

- sales of NPLs as part of sales of branches, sales of business lines or sales of clients' portfolios which are not limited to NPLs and transfers of non-performing loans as part of an ongoing restructuring operation of the selling bank within insolvency, resolution or liquidation proceedings;
- sales or transfers of NPLs through securitisation where the EU Securitisation Regulation applies and the provision of the related information is governed by the delegated and implementing regulations under that regulation;
- sales or transfers of NPLs pursuant to credit default swap, total return swap and other derivative contracts, contracts of insurance and sub-participation contracts; and
- sales or transfers of NPLs pursuant to a financial collateral arrangement or a transaction that would be a repurchase or securities lending transactions as defined in CRR.

The recitals also state that banks should not use the templates for sales or transfers of:

- transferable securities, derivatives, or other financial instruments that fall under the scope of the EU Markets in Financial Instruments Directive;
- securities financing transactions, other than margin lending transactions, as defined in the EU Securities Financing Transaction Regulation;
- financial or other leases of movable or immovable property that are not covered by EU Consumer Credit Directive; or

sales or transfers of rights under such instruments, transactions or leases.

The EBA's final report had stated that the scope of application of the ITS should be the same as the scope of application of the Directive. However, the adopted ITS do not give any guidance as to whether transactions that fall outside the scope of the ITS remain in scope of the Directive for the purposes of other obligations, such as selling banks' general obligation to provide "necessary information" to credit purchasers and to report sales or transfers of NPLs to the competent authorities or the obligations of credit purchasers and credit servicers with respect to the NPLs.

### **When must banks provide information to prospective buyers using the templates?**

The adopted ITS create templates to be completed by the selling bank on a loan-by-loan basis for transactions where the ITS apply. The ITS provide that data fields in the templates are either mandatory or non-mandatory. EU banks must provide information for all mandatory fields (unless the instructions allow otherwise) and EU banks must make reasonable efforts to provide information for the fields that are not marked as mandatory.

However, the adopted ITS state that EU banks are not required to provide information for the mandatory data fields in relation to sales or transfers of:

- a single NPL or several NPLs to a single borrower;
- NPLs under syndicated credit agreement facilities;
- NPLs to non-EU borrowers;
- NPLs where an EU bank is selling the NPLs to a member of its own group;
- NPLs that have been acquired by the selling bank from an entity other than an EU bank subject to CRR (at least recognising that, in these cases, selling banks may not have access to the required information); and
- unsecured NPLs to a natural person outside the scope of the EU Consumer Credit Directive.

Furthermore, unlike the EBA's final draft ITS, the adopted ITS make clear that the obligation to make reasonable efforts to provide information for non-mandatory data fields does not apply to the transactions excluded from the obligation to complete the mandatory fields. However, selling banks and credit purchasers and credit servicers may be subject to other obligations under the Directive in relation to these transactions.

### What are the main changes from the EBA's final draft ITS?

Unlike the EBA's final draft ITS, the adopted ITS:

- Do not state that they only apply to sales of 'portfolios' of NPLs;
- Do provide that EU banks are not subject to the obligation to provide information for both mandatory and non-mandatory data fields in relation to sales or transfers of NPLs under syndicated credit agreement facilities, intragroup transfers and other specified transactions;
- Do not contain an express provision that they only apply to EU banks subject to the requirements of CRR;
- Do not provide that the ITS only apply where the EU bank selling the NPLs classifies the loans as non-performing at the time of the contract for the sale and transfer;
- Do not contain a recital that the date of the credit agreement is the relevant date for the purpose of applying the time criteria in the Directive;
- Do not contain an express provision requiring the information provided to be complete and accurate;
- Do not include a provision requiring EU banks to agree with prospective buyers, where appropriate, not to share personal data at the early stages of the transaction process and to provide such data to the buyers only after entering into a contract for the transfer of the NPLs.

### What information is covered by the templates?

In summary, the templates require the following information:

- The **counterparty template** requires the bank to provide information identifying the counterparties to the exposure ("borrower" and "protection provider"). For corporate borrowers, the data fields include the legal name, address, name of corporate group, data from the counterparty's latest available financial statements, date of last contact and details of insolvency and restructuring proceedings.
- The **relationship templates** require the bank to specify the identifiers for each counterparty, loan, mortgage agreement and protection which are then used to establish the relationship between the other completed templates.

- The **loan template** requires disclosure of information on the loan agreement and the loan, including the inception date, governing law, currency, maturity and interest terms, outstanding nominal amount and status of any legal proceedings or forbearance measures.
- The **collateral, guarantee and enforcement template** requires disclosure of information on the type of collateral provided for the loan, including the location, date of completion of construction, area, energy performance and occupancy of real estate, the seniority of the security and the amount secured by any prior ranking collateral, internal and external valuations of the collateral and details of the enforcement processes underway.
- The **mortgage guarantee template** requires disclosure of specific information on mortgage guarantees including the maximum amount the selling bank is entitled to receive on foreclosure.
- The **historical collection and repayment template** requires the bank to provide details of historical collections over the last three years (aggregated by month) before the cut-off date. The collections are aggregated per month.

The templates specify 135 data fields (including four identifiers) of which 78 fields are mandatory (counting identifiers only once). Some templates or fields may need to be completed more than once, e.g., where there are multiple borrowers or guarantors or multiple types of collateral for a loan.

The templates are accompanied by a data glossary and instructions for filling in the templates, including links to corresponding definitions in the ESMA templates used for non-performing loan securitisations, the ECB's ANACREDIT framework, the FINREP supervisory reporting requirements, CRR and IFRS/IAS. Generally, the adopted ITS require information to be disclosed as of a reference date (the cut-off date) selected by the bank.

Many of the requirements would present significant challenges for EU banks. For example, the collateral template provides for disclosure of the selling bank's latest internal and external valuations of collateral as mandatory fields (even though this will raise concerns about the selling bank's liability and its ability to disclose external valuations).

### **Do the templates apply when selling existing loans?**

Under the Directive, EU banks will have to use the data templates for transfers of NPLs held in their banking book taking place on or after 30 December 2023 where the loans were originated on or after 1 July 2018 and became non-performing after 28 December 2021. However, the Directive provides that, for NPLs originated between 1 July 2018 and the entry into force of the ITS (19 October 2023), EU banks need only complete the data templates with the information already available to them. The recitals to the EBA's final draft ITS stated that the date of the credit agreement is the relevant date for the purpose of applying these time criteria, but this statement is not included in the recitals to the adopted ITS.

The EBA's final report accepted that the templates do not apply to EU banks selling other existing NPLs. However, the EBA encouraged EU banks to have regard to the templates and the requirements of the draft ITS and fill in the templates on a "best-efforts" basis even where the templates do not apply. National law implementing the Directive may impose additional obligations.

EU banks originating loans after – or purchasing loans originated after – the ITS enter into force may need to ensure that their systems can generate the required information if they wish to sell the loans after they become non-performing. They may also need to review their systems to check that they can establish what information on earlier loans is available to them if they subsequently wish to sell those loans.

NPL originated	Loan became non-performing	Information required to be provided
On or after 19 October 2023	On or after 19 October 2023	Information specified in templates
On or after 1 July 2018 but before 19 October 2023	On or after 28 December 2021	Information specified in templates already available to seller
On or after 1 July 2018 but before 19 October 2023	Before 28 December 2021	Templates do not apply.
Before 1 July 2018	At any time before sale	

### What other requirements apply?

The adopted ITS provide that EU banks selling NPLs must:

- provide the required information to prospective buyers before entering into a contract for the sale of the NPLs and, unless otherwise agreed by the prospective buyer, in an electronic and machine-readable form;
- when providing the required information to prospective buyers, identify any disclosed information that is subject to bank secrecy or other confidentiality requirements;
- before providing the required information to a prospective buyer, enter into confidentiality agreements with the prospective buyer and only share personal data insofar as necessary before entering into a contract for the transfer or sale of NPLs;
- use secure channels, including virtual data rooms or similar electronic means, to provide the required information to prospective buyers.

The recitals to the adopted ITS state that selling banks should provide the necessary information to prospective buyers early enough in the sale process, but that the information should only be provided to those prospective buyers that are seriously interested. The European Commission *Guidelines for a best execution process for sales of non-performing loans* (October 2022, available [here](#)) indicate that selling banks can choose a single or two phase process for selling NPLs, where the latter is split between a non-binding offer and a binding offer phase. The EBA's final report stated that selling

banks can choose only to provide the template information at the start of the second phase to those buyers that have signed non-disclosure agreements.

The recitals to the adopted ITS also state that the EU General Data Protection Regulation will apply to the processing of personal data in the context of the ITS and that selling banks should be allowed to provide personal data only where it is necessary to identify individuals whose credit agreements are non-performing.

### **Will buyers request additional information from banks selling loans?**

Credit purchasers may request additional information from banks selling loans so that the credit purchasers can comply with their own obligations under the Directive (such as their obligations to appoint a credit servicer or, for non-EU credit purchasers, an EU representative). These obligations may apply even if the selling bank is not required to provide information on the NPLs using the templates. For example, credit purchasers may need to know whether the loans being sold fall within the definition of an NPL so as to trigger the credit purchaser's own obligations under the Directive, whether any NPLs being sold have been accelerated and whether the borrowers of any NPLs include individuals who are "consumers" or (for non-EU credit purchasers) other natural persons or micro, small and medium-sized enterprises (resulting in an obligation to appoint a credit servicer). They may request additional information from banks selling NPLs depending on how Member States exercise the national option to extend the obligations of credit purchasers under the Directive.

Similarly, buyers that are EU banks may request additional information from EU banks selling loans so that the buying bank can comply with its own obligations under the Directive, at least if the buying bank will hold the loan on its banking book (and thus might be required to complete the templates on a resale if the loan becomes non-performing). For example, banks buying loans that are not already classified as NPLs may wish to know whether the loan being purchased was originated by an EU bank (and the date of origination) and to receive sufficient information to be able to complete the disclosure templates if they subsequently sell the loan after it has become non-performing.

Buyers may also continue to request additional information, such as copies of the credit documentation, which is not required to be disclosed by the ITS. The ITS state that where banks agree to provide additional information by using the template format they must add rows to the templates with their own index reference. The ITS also state that banks may use the 2018 version 1.1 EBA NPL transaction data templates (available [here](#)) as a reference for this purpose and that any such additional information should as a rule not contain additional personal data.

### **What are the consequences of providing incorrect information?**

The Directive requires Member States to adopt national rules for effective, proportionate and dissuasive administrative penalties and remedial measures where EU banks fail to comply with their disclosure obligations to credit purchasers under the Directive (and they may impose criminal penalties for non-compliance instead). The EBA's final report



also indicated that competent authorities may assess EU banks' availability of information and use of the templates as part of their supervisory activities related to NPL or credit risk management.

In addition, EU law may require Member States' courts to provide buyers of NPLs with a right to compensation if the bank fails to comply with the requirements of the ITS, if they are considered to be designed to protect the interests of buyers. National law may define the rules providing for compensation, whether a buyer also has rescission or other remedies and whether the bank and buyer are free to agree to exclude or limit the bank's liability by contract.

### **What will be the impact on transaction documentation?**

EU banks selling NPLs in transactions triggering the requirement to disclose information using the templates will need to consider the impact on their transaction documentation, in particular whether their existing confidentiality agreements, and any limitations or exclusions of liability, are adequate in the context of the new requirements.

EU banks subject to the requirement to disclose information using the templates will also need to consider whether the courts would give effect to any exclusions or limitations agreed with the buyer on any liabilities of the seller to the buyer in respect of the information provided. The effectiveness of exclusions or limitations of liability will depend on the Member State or third-country law chosen as the governing law of the agreement between the seller and the buyer and the courts specified in the agreement to resolve any disputes between the parties. EU banks may also consider transferring the credit risk on NPLs using sub-participations or other transactions that fall outside the scope of the ITS.

EU banks will also need to put in place new systems to comply with the associated Directive requirements to file reports with regulators on their sales of NPLs to credit purchasers (which will in practice mean ensuring that banks obtain the LEI of any credit purchaser).

### **What about the other open issues under the Directive?**

The adopted ITS do not address any of the open issues relating to the other obligations of selling banks, credit purchasers or credit servicers under the Directive, eg, the application of the obligations of credit purchasers to non-EU banks that buy NPLs, the application of the obligations of credit purchasers and credit servicers in relation to loans acquired by credit purchasers before 30 December 2023 and the treatment of facility agents and security trustees under the Directive. However, the derogation in the ITS that applies to sales or transfers of NPLs to non-EU borrowers suggests that the Commission considers that the Directive does apply to sales and purchases of those NPLs and the servicing of those NPLs (which could have an impact on EU banks that originate loans to non-EU borrowers cross-border or through non-EU branches and EU and non-EU purchasers and servicers of those loans). These open issues may be addressed by guidance from the Commission, the EBA or national regulators, common industry approaches or national implementing rules.

## What happens next?

The Directive requires Member States to adopt and publish, by 29 December 2023, the laws, regulations and administrative provisions necessary to comply with the Directive and to apply those provisions from 30 December 2023. However, it seems likely that many Member States will be late in adopting their implementing measures. This will likely complicate firms' preparations for compliance with the new requirements.

For more information on the Directive and the EBA's earlier consultation and final report, see our briefings:

- *Implementing the new EU rules on non-performing loans* (December 2021, available [here](#));
- *New EU rules on non-performing loans: EBA consults on disclosure templates* (June 2022, available [here](#));
- *New EU rules on non-performing loans: EBA issues final report on disclosure templates* (December 2022, available [here](#)).

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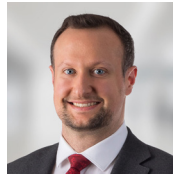
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