

Questions and Answers regarding the law of 15 July 2024 relating to the transfer of non-performing loans

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Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
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Disclaimer:

The purpose of the present Questions and Answers is to provide ABBL members with clarifications concerning the implementation of the law of 15 July 2024 relating to the transfer of non-performing loans and the respective obligations resulting from its application.

Although the ABBL has taken reasonable precautions to ensure that the information contained herein is complete and correct, these Questions and Answers do not constitute legal advice and the ABBL cannot be held responsible for any errors or omissions. In case of doubt, members are invited to seek the advice of a competent professional.

Table of contents

| | | |
|-----|--|----|
| 1 | Scope of application | 5 |
| 1.1 | What are the loans within the scope of the Law? | 5 |
| 1.2 | What is a non-performing credit agreement? | 5 |
| 1.3 | Are there any exemptions to the scope of application of the Law? | 5 |
| 2 | Credit Seller | 7 |
| 2.1 | What is the main obligation of a credit institution selling non-performing credit agreements? | 7 |
| 2.2 | Will there be a breach of professional secrecy duty when information pertaining to non-performing credit agreements will be shared with credit purchasers? | 7 |
| 2.3 | Is there a specific sharing information format to be used when providing information about non-performing credit agreements portfolios? | 7 |
| 2.4 | Shall the credit institution inform its supervisory authority when it plans to sell non-performing credit agreements? | 7 |
| 2.5 | Are there any additional obligations to be complied with in case of sale of non-performing credit agreements to a third country credit purchaser? | 8 |
| 3 | Credit Purchaser | 9 |
| 3.1 | Can a credit purchaser handle himself the servicing of non-performing credit agreements portfolios or does he need to appoint a specific agent for that purpose? | 9 |
| 3.2 | Are there any additional obligations applicable to third country credit purchasers? | 9 |
| 3.3 | Does a credit servicing agreement need to be put in place between the credit purchaser and the credit servicer? | 9 |
| 3.4 | Is the Law specifying the content of the credit servicing agreement? | 10 |
| 3.5 | What happens when a credit purchaser wants to sell a non-performing credit agreements portfolio to another credit purchaser? | 10 |
| 4 | Debtor | 11 |
| 4.1 | Shall the debtor be informed of the transfer of the non-performing credit agreement? | 11 |
| 4.2 | Are there any specificities to be taken into consideration if the debtor is a consumer? | 11 |
| 5 | Credit Servicer | 12 |
| 5.1 | What is a credit servicer? | 12 |
| 5.2 | Is an authorization necessary to act as credit servicer? | 12 |
| 5.3 | What are the credit servicing activities that can be provided by a credit servicer? | 12 |

| | | |
|-----|---|----|
| 5.4 | Does the relation between the credit purchaser and the credit servicer need to be documented? | 12 |
| 5.5 | Is a credit servicer able to hold funds in the debt collection process? | 13 |
| 5.6 | Can a credit servicer outsource some of its activities? | 13 |
| 6 | Entry into force and Sanctions..... | 14 |
| 6.1 | When will the Law enter into force? | 14 |
| 6.2 | Are there any sanctions for non-compliance with the Law provisions? | 14 |
| | Glossary | 15 |
| | About the ABBL..... | 16 |

1 Scope of application

1.1 What are the loans within the scope of the Law?

As a preliminary remark, the term loan is not defined within the law of 15 July 2024 relating to the transfer of non-performing loans¹ (the “Law”) so the adequate term to be used is credit agreement (term used in the NPL Directive transposed by the Law). Therefore, credit agreement means an agreement whereby a credit institution established in a Member State of the European Union grants a credit in the form of a deferred payment, a loan or other similar financial accommodation, irrespective of the quality of the borrower², and such credit agreement must be non-performing to fall within the scope of application of the Law.

1.2 What is a non-performing credit agreement?

A non-performing credit agreement means a credit agreement that is classified as a non-performing exposure in accordance with Article 47a of the CRR³. To summarize, a non-performing credit agreement will be characterized in one of the following instances:

- Defaulting loan;
- Impaired loan;
- Loan under probation;
- Loan that will be repaid only if the collateral is realized.

1.3 Are there any exemptions to the scope of application of the Law?

The Law will not apply to⁴:

- a) the servicing of a creditor’s rights under a credit agreement, or of the credit agreement itself, carried out by:
 - i. a credit institution established in the European Union;
 - ii. an alternative investment fund manager (AIFM) authorised or registered in accordance with Directive 2011/61/EU, or a management company, or an investment company authorised in accordance with Directive 2009/65/EC provided that the investment company has not designated a management company under that Directive, on behalf of the fund it manages;
 - iii. a non-credit institution subject to supervision by a competent authority of a Member State;

¹ <https://legilux.public.lu/eli/etat/leg/loi/2024/07/15/a292/jo>

² Art. 1 6° of the Law

³ Art. 1 7° of the Law

⁴ Art. 2 (4) 1° of the Law

- b) the servicing of a creditor’s rights under a credit agreement, or of the credit agreement itself, that was not issued by a credit institution established in the European Union⁵;
- c) the purchase of a creditor’s rights under a non-performing credit agreement, or of the non-performing credit agreement itself, by a credit institution established in the European Union.

In a nutshell, servicing or purchase of creditor’s rights under a credit agreement carried out by a European Union regulated entity are not in the scope of application of the Law.

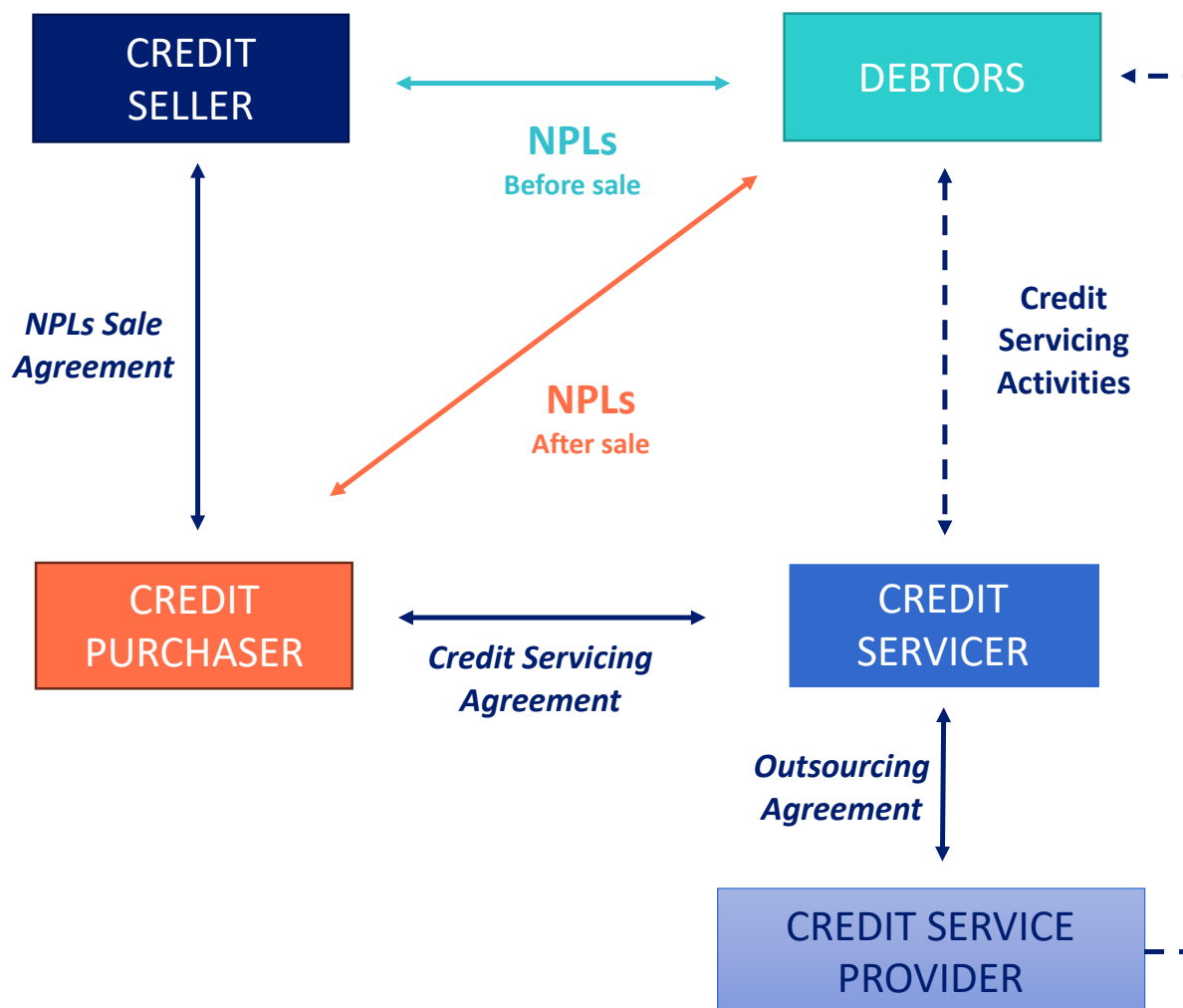


Fig. 1 Illustrative chart

⁵ except where the creditor’s rights under the credit agreement, or the credit agreement itself, is replaced by a credit agreement issued by such credit institution.

2 Credit Seller

2.1 What is the main obligation of a credit institution selling non-performing credit agreements?

A credit institution selling non-performing credit agreements shall provide a prospective credit purchaser with necessary information regarding the non-performing credit agreement itself, and, if applicable, the collateral, so as to enable the prospective credit purchaser to conduct its own assessment of the value of the non-performing credit agreement and the likelihood of recovery of that value prior to entering into a contract for the transfer of the non-performing credit agreement.

2.2 Will there be a breach of professional secrecy duty when information pertaining to non-performing credit agreements will be shared with credit purchasers?

No, as the Law contains a specific provision⁶ whereby credit institution selling non-performing credit agreements have to provide necessary information to a prospective credit purchaser, there will be no breach of professional secrecy duty resulting from that transfer of information.

In addition, the prospective credit purchaser must protect the information made available by the credit seller.

2.3 Is there a specific sharing information format to be used when providing information about non-performing credit agreements portfolios?

Yes, the European Banking Authority (EBA) has published [Implementing Technical Standards \(ITS\)](#) specifying the requirements for the information that credit institutions selling non-performing credit agreements shall provide to prospective purchasers.

2.4 Shall the credit institution inform its supervisory authority when it plans to sell non-performing credit agreements?

Yes, the credit institution selling non-performing credit agreements shall inform, on a bi-annual basis, the competent supervisory authorities⁷ of at least the following:

⁶ Art. 3 of the Law

⁷ Art. 10 of the Law

- a) the identity of the credit purchaser or, where applicable, of its representative;
- b) the aggregate outstanding balance of the non-performing credit agreements transferred;
- c) the number and size of the non-performing credit agreements transferred;
- d) whether the transfer includes the non-performing credit agreements concluded with consumers and the types of assets securing the non-performing credit agreements, when applicable.

2.5 Are there any additional obligations to be complied with in case of sale of non-performing credit agreements to a third country credit purchaser?

Yes, in such instance the credit institution selling non-performing credit agreements shall ensure that a representative of the credit purchaser has been duly appointed (see question 3.2 below). The Law specifies that in case of failure to appoint such representative the transfer of the non-performing credit agreements cannot occur.

3 Credit Purchaser

3.1 Can a credit purchaser handle himself the servicing of non-performing credit agreements portfolios or does he need to appoint a specific agent for that purpose?

A credit purchaser domiciled or registered in the European Union, shall appoint a credit servicer⁸, to perform credit servicing activities in respect of a non-performing credit agreement concluded with consumers⁹.

In respect of non-performing credit agreements concluded with borrowers which are not consumers, a credit purchaser domiciled or registered in the European Union can either appoint a credit servicer to perform credit servicing activities or take care himself of the servicing of such non-performing credit agreements.

3.2 Are there any additional obligations applicable to third country credit purchasers?

Yes, a third country credit purchaser must designate in writing a representative that is domiciled or have its registered office in the European Union¹⁰, which will be fully responsible for compliance with the obligations imposed on the credit purchaser under the Law.

That representative will then need to appoint a credit servicer¹¹ to perform credit servicing activities in respect of a non-performing credit agreement concluded with consumers or with micro, small and medium-sized enterprises (SMEs).

3.3 Does a credit servicing agreement need to be put in place between the credit purchaser and the credit servicer?

Yes, when a credit purchaser does not itself perform credit servicing activities, the appointed credit servicer shall provide services regarding the management and enforcement of the non-performing credit agreement on the basis of a credit servicing agreement concluded with the credit purchaser¹².

⁸ or a credit institution, an AIFM, a regulated management company or a non-credit institution subject to supervision by a competent authority of a Member State.

⁹ Art. 4 of the Law

¹⁰ Art. 5 of the Law

¹¹ or a credit institution, an AIFM, a regulated management company or a non-credit institution subject to supervision by a competent authority of a Member State; except if the representative is such a regulated entity or a credit servicer.

¹² Art. 7 (1) of the Law

3.4 Is the Law specifying the content of the credit servicing agreement?

Yes, the credit servicing agreement shall contain¹³:

- a) a detailed description of credit servicing activities to be carried out by the credit servicer;
- b) the level of remuneration of the credit servicer or how the remuneration is to be calculated;
- c) the extent to which the credit servicer can represent the credit purchaser in relation to the borrower;
- d) an undertaking by the parties to comply with the Union and national law applicable to a creditor's rights under a credit agreement, or to the credit agreement itself, including in respect of consumer and data protection;
- e) a clause requiring the fair and diligent treatment of the borrowers.

Moreover, it also needs to include a requirement pursuant to which the credit servicer notifies the credit purchaser prior to outsourcing any of its credit servicing activities

3.5 What happens when a credit purchaser wants to sell a non-performing credit agreements portfolio to another credit purchaser?

The obligations applicable to a credit seller (further detailed under section 2 hereabove) will need to be complied with (notably regarding the information to the competent supervisory authorities).

¹³ Art. 7 (2) of the Law

4 Debtor

4.1 Shall the debtor be informed of the transfer of the non-performing credit agreement?

Yes, the Law specifies¹⁴ that the debtor shall be informed of the transfer of the non-performing credit agreement to a credit purchaser after the said transfer, and always in advance of the first debt collection, by the credit purchaser, or the credit servicer, or, when appointed to perform credit servicing activities, the credit institution or the non-credit institution subject to supervision.

The information that needs to be specified in that communication is further detailed in the Law.

4.2 Are there any specificities to be taken into consideration if the debtor is a consumer?

Yes, in case of modification the terms and conditions¹⁵ of the credit agreement, the creditor shall communicate the following information to the consumer:

- a) a clear description of the proposed changes and, where applicable, of the need for consumer consent or of the changes introduced by operation of law;
- b) the timescale for the implementation of the changes referred to in point (a);
- c) the means for complaint available to the consumer regarding the changes referred to in point (a);
- d) the time period available for lodging any such complaint;
- e) the name and address of the competent authority to which the consumer can submit that complaint.

Also, the Law specifies¹⁶ that creditors must have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before enforcement proceedings are initiated against a consumer. Such forbearance measures shall take into account, among other elements, the consumer's circumstances and may consist of, among other possibilities a total or partial refinancing of a credit agreement and/or a modification of the existing terms and conditions of a credit agreement.

¹⁴ Art. 9 (2) of the Law

¹⁵ Art. 19 of the Law

¹⁶ Art. 20 of the Law

5 Credit Servicer

5.1 What is a credit servicer?

A credit servicer is a legal person that manages and enforces the rights and obligations related to a non-performing credit agreement and carries out at least one or more credit servicing activities.

5.2 Is an authorization necessary to act as credit servicer?

Yes, a credit servicer needs to obtain an authorization from the CSSF before starting its activities and specific conditions have to be fulfilled¹⁷.

5.3 What are the credit servicing activities that can be provided by a credit servicer?

The credit servicing activities that can be provided by a credit servicer are one or more of the following activities:

- collecting or recovering from the borrower, in accordance with national law, any payments due related to a creditor's rights under a credit agreement or to the credit agreement itself;
- renegotiating with the borrower, in accordance with national law, any terms and conditions related to a creditor's rights under a credit agreement, or of the credit agreement itself, in line with the instructions given by the credit purchaser, where the credit servicer is not a credit intermediary;
- administering any complaints relating to a creditor's rights under a credit agreement or to the credit agreement itself;
- informing the borrower of any changes in interest rates or charges or of any payments due related to a creditor's rights under a credit agreement or to the credit agreement itself.

5.4 Does the relation between the credit purchaser and the credit servicer need to be documented?

Yes, see questions 3.3 and 3.4 hereabove.

¹⁷ Art. 30 of the Law

5.5 Is a credit servicer able to hold funds in the debt collection process?

Yes, the Law allows credit servicers, when performing credit servicing, to receive and hold funds from borrowers in order to transfer those funds to credit purchasers¹⁸.

In that case additional requirements are applicable notably that (i) the credit servicer has a separate account in a credit institution into which all funds received from borrowers are to be credited and kept until their channelling to the respective credit purchaser, under the conditions agreed with the credit purchaser, (ii) that those funds are protected in accordance with national law in the interest of the credit purchasers against the claims of the other creditors of the credit servicers, in particular in the event of insolvency and (iii) when a borrower makes a payment to a credit servicer in order to, partially or totally, reimburse the amounts due related to the non-performing credit agreement, that payment is treated as having been paid to the credit purchaser.

5.6 Can a credit servicer outsource some of its activities?

Yes, a credit servicer can use a credit service provider to perform any of the credit servicing activities, but the credit servicer remains fully responsible for complying with all obligations under the Law. Such outsourcing is however subject to conditions, notably the outsourcing of all credit servicing activities at the same time is forbidden.

¹⁸ Art. 30 of the Law

6 Entry into force and Sanctions

6.1 When will the Law enter into force?

The Law has entered into force on 22 July 2024.

6.2 Are there any sanctions for non-compliance with the Law provisions?

Yes, the CSSF can issue penalties and remedial measures¹⁹ in case of non-compliance with the Law provisions such as:

- a) the withdrawal of the authorisation to carry out activities as a credit servicer;
- b) an order requiring the credit servicer or credit purchaser or, where applicable, its designated representative to remedy the infringement, and to cease the conduct and to desist from a repetition of that conduct;
- c) an administrative fine of a maximum amount of 5,000,000 euros, or up to 10 percent of the total annual turnover of the entity infringing the Law's provisions;
- d) an administrative fine of a maximum amount of twice the benefit derived from the infringement, if it can be determined (even if that amount is above the amount specified under (c)).

¹⁹ Art. 14 of the Law

Glossary

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|-----------------------------------|---|
| borrower | a legal or natural person who has concluded a credit agreement with a credit institution, including its legal successor or assignee |
| consumer | a natural person who, in credit agreements, is acting for purposes which are outside his trade, business or profession |
| credit purchaser | any natural or legal person, other than a credit institution, that purchases a creditor's rights under a non-performing credit agreement, or the non-performing credit agreement itself, in the course of its trade, business or profession, in accordance with applicable Union and national law |
| credit service provider | a third party used by a credit servicer to perform any of the credit servicing activities |
| credit servicer | a legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor's rights under a non-performing credit agreement, or to the non-performing credit agreement itself, on behalf of a credit purchaser, and carries out at least one or more credit servicing activities |
| credit servicing agreement | a written contract concluded between a credit purchaser and a credit servicer concerning the services to be provided by the credit servicer on behalf of the credit purchaser |
| creditor | a credit institution that has issued a credit, or a credit purchaser |
| CRR | Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 |
| NPL Directive | Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU |

About the ABBL

The ABBL is the largest professional association in the financial sector, representing the majority of financial institutions as well as regulated financial intermediaries and other professionals in Luxembourg, including law firms, consultancies, auditors, market infrastructures, e-money and payment institutions. This makes us truly representative of the diversity of the Luxembourg financial centre, placing us in a unique position, able to give the entire sector a voice at both national and international level.

We provide our members with the intelligence, resources and services they need to operate in a dynamic financial market and in an increasingly complex regulatory environment. We facilitate an open platform to discuss key industry issues and to define common positions for the entire sector.

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