

INITIAL FEEDBACK FOLLOWING THE TRANSPOSITION OF THE NON-PERFORMING LOANS DIRECTIVE ¹

The Non-Performing Loans Directive (NPLD)² was transposed in French law by an Ordinance of 6th December 2023³ and a Decree of December 20, 2023⁴. The resulting provisions **entered into force on December 30, 2023**.

Its main objectives were to encourage the development of a secondary market in non-performing loans, creating the appropriate environment for credit institutions to deal with non-performing loans on their balance sheets, while ensuring borrower protection.

The NPLD constitutes an important change in the regulatory landscape: not only it creates a new type of regulated entity (a credit servicer), it also creates obligations for the purchasers of the non-performing loans themselves (including purchasers located outside the EU).

Given the impact of the NPLD, most actors have already started work to prepare for its impact. For this reason, we have set out below a summary of its main implications, for those still unfamiliar with the NPLD, as well as the initial feedback provided by the French banking authority – the *Autorité de contrôle prudentiel et de résolution* (the “**ACPR**”) with respect to the scope of the directive (1.), the new obligations for the credit servicers, (2.), the new obligations for the credit purchasers (3.) and the supervision by the competent authority (4.).

1. THE SCOPE OF THE DIRECTIVE

The directive applies to the **purchase of non-performing loans and the servicing of the credit**.

Key terms and actors	Description and comments
Non-performing credit agreement	<p>Credit agreement that is classified as a non-performing exposure in accordance with CRR, i.e. an exposure for which a default is considered to have occurred or which is considered to be impaired under the applicable accounting rules.</p> <p>This would be the case, for example, if the credit institution considers that the obligor is unlikely to pay or is more than 90 days past due on material credit obligations⁵.</p> <p>The NPLD applies, however, only to the transfer and management of credit agreements originated by credit institutions or financing companies (<i>sociétés de financement</i>).</p> <p><u>This definition excludes in particular non-performing loans originated by AIFs, by non-EU credit institutions (though the status of non-EU branches of EU credit institutions should be carefully assessed) or by unregulated lenders</u> ⁽⁶⁾.</p>

¹ The authors would like to thank Pierre-Louis Riou for his assistance in the preparation of this newsletter.

² Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers.

³ Ordinance n°2023-1139 of December 6, 2023 on credit servicers and credit purchasers

⁴ Decree n°2023-1211 of December 20, 2023 on credit servicers and credit purchasers

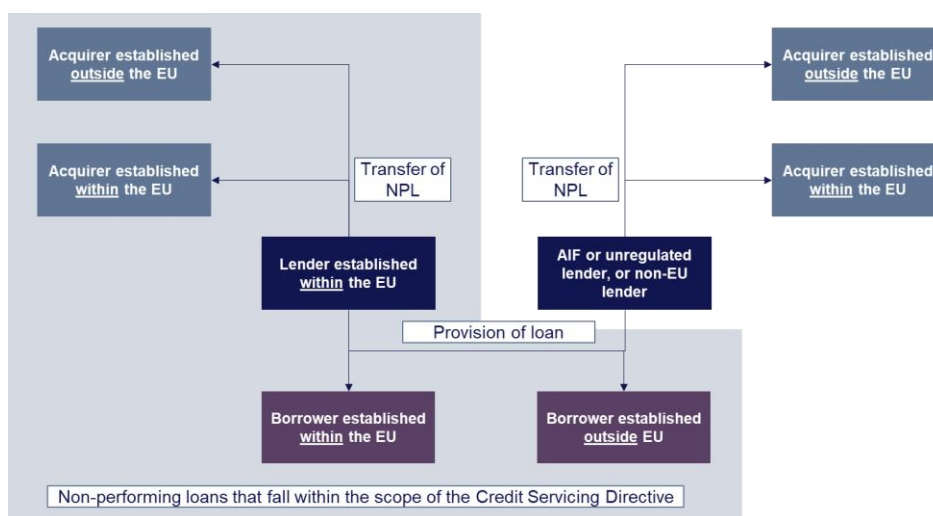
⁵ Articles 47a and 178 of CRR.

⁶ In this respect, we note that while French law regulates the origination of loans (both when they are provided to consumers and to professional lenders), this is not necessarily the case across all Member States.

Key terms and actors	Description and comments
Credit purchaser	A person, other than a credit institution or a securitization SPV (as per the Securitization Regulation) that purchases non-performing loans in the course of its business.
Credit servicer	<p>This refers to currently a person that, in the course of its business and on behalf of a credit purchaser, (i) manages and enforces the rights and obligations related to a non-performing loan, and (ii) carries out at least one or more credit servicing activities (e.g. collection of payments, renegotiation of terms, information of the borrower, etc).</p> <p>In terms of activities, <u>the ACPR has indicated informally that each credit servicer will be licensed to carry out all the services indicated above</u>, and will not need to seek a specific license per service.</p> <p>By way of exception, credit servicing could also be carried out by EU professional lenders (such as an EU credit institution, or an AIFM acting on behalf of investment funds it manages), without them being deemed to be “credit servicers”⁷.</p>

In terms of agreements in scope, the NPLD applies to “sales” of non-performing loans taking place after the 30 December 2023, irrespective of the date on which the relevant receivables sale agreement has been signed. This means that compliance may be required for (i) future flows sale agreements, (ii) the acquisition of NPL receivables even where the sale is based on a receivables sale agreement signed before that date, as well as (iii) the acquisition of NPL receivables occurring after that date on the basis of recourse provisions where the warranty period extends beyond the 30 December 2023. There are however uncertainties and debates as to what extent a credit institution having initiated as sale process prior to this date is effectively bound to comply with its new obligations (in particular regarding disclosure of information to the potential investors).

From an international perspective, the territorial scope of the NPLD is determined by the location of the credit institution or the financing company that has initially originated the loan. Accordingly, we can summarise the above as follows:



⁷ MiFID firms, however, are not exempt. Accordingly, if a MiFID firm intends to carry out credit servicing activities (e.g. acting as a “portfolio manager” with respect to non-performing debt, but with a focus on loans instead of bonds), then it would have to obtain the relevant authorisations as a credit servicer and comply with the NPLD.

Importantly, the NPLD does not address the question whether the sale of the non-performing loan triggers licensing requirements itself.

In this respect, in France for example, the acquisition of a loan that contains unmatured receivables is a regulated activity⁸ triggering licensing requirements when carried out in France. This position has also been confirmed by the EBA more recently⁹.

For this reason, the ACPR expects the NPLD to cover mostly the sale of non-performing loans where all the receivables have matured. For cases where an NPL has a portion of the loan that has matured (and, by definition, is not performing), but still has an unmatured portion as well, the ACPR expects the acquirer to be a credit institution, a financing company, or a securitization vehicle, in which case the NPLD would not apply. However, in practice, we cannot exclude for other situations to occur, especially in cross-border matters.

2. THE NEW OBLIGATIONS FOR CREDIT SERVICERS

In accordance with the NPLD, a credit servicer would be subject to the following:

- (1) **Licensing requirements:** credit servicers will have to be authorized in their home Member State, and will benefit from a European passport.

In France, the authorization will need to be granted by the ACPR. This would imply providing the ACPR with information on the management of the credit servicer, its shareholders, a business plan covering the full next three years, its internal controls systems and its internal procedures.

In terms of governance, the ACPR has indicated that applicants should appoint two senior managers that manage the business on a day-to-day basis, and set up a supervisory body (a board of directors or a supervisory board) – which may present a challenge for smaller actors in particular.

In terms of timing, legally, we note that the ACPR has 45 business days to determine whether the application file is complete and 90 business days from receipt of the complete application file to grant or refuse approval. In practice, under the usual process for other application files, actors are invited to reach out informally to the ACPR and organize a kick-off meeting to discuss the key points of the application file. Following this meeting, there is an initial submission of the application file, which would then need to be assessed by the ACPR. The ACPR would generally raise a number of questions that would need to be addressed and only once this occurs, it would send the authorization file for approval.

The ACPR is expected to publish the application file to be filled out, together with an explanatory instruction in short notice.

Credit servicers already in business have until June 29, 2024 to obtain their approval. In practice, the ACPR has acknowledged that the deadline is quite short and has indicated that while it cannot prolong the deadline, as it is set in law, it would adopt a pragmatic approach with respect to good faith actors.

- (2) **Treatment of borrower funds:** the NPLD left it to Member States to determine whether credit services may receive client funds from borrowers (as part of the reimbursement of the loan). France has chosen to authorize credit servicers to hold client funds, provided that they are segregated in a dedicated

⁸ Cour de cassation, Criminal Chamber, 20 February 1984 : Bull. crim. n° 62. For this reason, the definition of a credit purchaser refers to the relevant exemptions set out under Article L. 511-5 of the MFC.

⁹ EBA, Single Rulebook, Question ID 2021-6257, where the EBA has indicated that: “For the purpose of Article 4(1)(1) of Regulation (EU) No 575/2013, the purchase of credit receivables should be understood as granting credits since the credit risk is transferred to the (natural or legal) person buying those receivables.” (position available here: https://www.eba.europa.eu/single-rule-book-qa/gna/view/publicId/2021_6257).

account opened with a credit institution. A ministerial order is expected to be published shortly to address the regime of this account.

- (3) **Relationship between the credit servicer and the credit purchaser**: the credit servicer would be required to enter into an agreement with the credit purchasers, which must include mandatory provisions. Some of the provisions were already included (e.g. a provision on the remuneration of the credit servicer). However, others would be new: this would be the case, for example, with respect to the duty for the credit servicer to notify the purchaser in case of outsourcing, as well as the duty requiring the fair and diligent treatment of the borrowers.
- (4) **Relationship with the borrowers**: the relationship between the credit servicer and the borrower would need to evolve significantly following the entry into force of the NPLD:
 - a. **First, the borrower must be notified after any transfer of a non-performing loan** before the first debt collection. This notification must be provided by the credit purchaser, the credit servicer or the credit institution (if it is carrying out a credit servicing activity): accordingly, the parties would need to agree contractually as to the entity to carry out this notification.
 - b. **Secondly, whenever requested, the borrower must receive appropriate information regarding the transfer**, the amounts due, the relevant legislation, the credit purchaser, the credit servicer and the regulatory authorities.
 - c. **Third, the credit servicer would be subject to conduct requirements** and would need to (i) act in good faith, fairly and professionally, (ii) provide information that is not misleading, unclear or false, (iii) protect the personal information and privacy of the borrower and (iv) communicate with borrowers in a way that does not constitute harassment, coercion or undue influence. The credit servicer would also need to establish a policy to take into account the financial situation of the borrowers, as well as a complaints procedure to be provided to borrowers;
 - d. **Fourth, the credit servicer would be subject to KYC requirements**: in this respect, the ACPR has confirmed that there will be a business relationship between the credit servicer and the borrower. This may constitute an operational challenge, given that credit servicers are not necessarily in contact with borrowers;
 - e. **Finally, the credit servicer would need to provide a receipt or a letter of discharge to the borrower each time that it receives funds from the borrower**, acknowledging the amounts received.

3. THE NEW OBLIGATIONS FOR THE CREDIT PURCHASERS

Even though the NPLD does not create licensing requirements for credit purchasers, it establishes a set of rights and obligations for credit purchasers and places credit purchasers under the supervision of the supervisory authorities.

In terms of rights, the credit purchaser benefits from a **right to information from the credit institution**, in particular with respect to the creditor's rights and the guarantees. This information must enable the credit buyer to assess the value of the creditor's rights and the likelihood of recovery and must be provided in accordance with a template set out by the European Commission¹⁰.

¹⁰ Commission implementing Regulation (EU) 2023/2083 of 26 September 2023 with regard to the templates to be used by credit institutions for the provision to buyers of information on their credit exposures in the banking book.

In terms of obligations, however, the credit purchaser would need to:

- (1) appoint a representative in the EU (if the credit purchaser is established outside the EU): the representative can be (but is not necessarily) a credit servicer. The representative would receive all communications from third parties intended for the credit purchaser;
- (2) appoint a credit institution or a credit servicer to perform credit servicing activities: until now, this was not a requirement and acquirers could carry out this activity themselves.

In this respect, the French provisions seem to go beyond what is required under the NPLD: the NPLD requires the appointment of a credit servicer only with respect to non-performing loans entered into with consumers (if the purchaser is located in the EU) or with natural persons and micro, small and medium-sized enterprises (if the purchaser is located outside the EU)¹¹.

French law requires the appointment of a credit institution or a credit servicer with respect to (i) any non-performing loan (if the purchaser is established in the EU) or (ii) any loan entered into with natural persons, independent workers, as well as SMEs¹². Further, French law provides that if the credit purchaser, or its representative, “chooses to manage and enforce itself the rights and obligations related to the rights of creditors [under a non-performing loan], it has to seek a license as a credit servicer”¹³.

The credit purchaser must then inform the competent authorities (the ACPR in France) with respect to the appointment of the credit servicer.

4. REGULATORY REPORTING AND SUPERVISION BY THE COMPETENT AUTHORITY

The NPLD will require reporting of the transfer of non-performing loans on a semestrial basis to the competent authorities.

This reporting duty applies both to credit institutions selling such loans, as well as credit purchasers that subsequently transfer them.

The ACPR has also indicated that credit servicers would be subject to other periodic reports, and notably with respect to the borrower funds segregated on an account during a given period, their financial situation of the credit servicer, as well as compliance with LCB-FT requirements.

Likewise, the national competent authorities (in France, the ACPR) will have powers to supervise not only the credit servicers, but also the third-party service providers to which the credit services have outsourced their services, as well as credit purchasers (even if they are unregulated, and even if they are based outside the EU).

In this respect, we note that the NPLD provision gives jurisdiction to competent national authorities to carry out inspections and to impose injunctions or administrative sanctions with respect to credit servicers and credit purchasers¹⁴.

¹¹ Article 17(1) of the NPLD.

¹² Article L. 54-11-27 of the MFC

¹³ Article L. 54-11-28 of the MFC.

¹⁴ Interestingly, the NPLD does not set minimum financial sanctions (contrary to other European directives). In France, the transposition does not include provisions setting out financial penalties in case of a specific breach of the NPLD provisions, implying that the common sanctions regime would apply.

CONTACTS

SAMIR BENSAKER
samir.bensaker@gide.com

GUILLAUME GOFFIN
goffin@gide.com

RUDOLF EFREMOV
rudolf.efremov@gide.com

You can also find this legal update on our website in the News & Insights section: gide.com

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department (privacy@gide.com).