

EU Directive 2021/2167 of 24 November 2021, on credit servicers and credit purchasers, provides for a new EU-wide law for purchasers, sellers and servicers of non-performing loans. Pursuant to Article 32 thereof, EU member states need to implement those rules into domestic law no later than by 29 December 2023 and must apply those rules as of 30 December 2023.

In essence, such new rules oblige loan servicers to go through a licensing process, and oblige purchasers, whether situated within the EU or, under certain circumstances, in the UK, the US or otherwise outside the EU, to purchase non-performing loans only if they employ a licensed loan servicer.

Passporting of licensed servicers within the EU will be possible.

The German government had provided a draft of the German implementation act in October 2023 (Credit Markets Promotion Act – *Kreditzeitmarktförderungsgesetz*). That act has been adopted, was published on 29 December 2023 and came into force on 30 December 2023. The act has the form of an omnibus act which, inter alia, includes the Secondary Credit Markets Act (*Kreditzeitmarktgesetz*).

The Secondary Credit Markets Act regulates the laws on “credit services” provided by “credit service institutions” and the obligations of “credit purchasers” of “non-performing loan agreements” and claims thereunder, as well as the selling “lenders”.

The following aspects are of importance for the market participants:

- According to Section 1 (2) No. 4, the law does not apply if the first acquisition or assignment took place before 30 December 2023. Further, according to Section 1 (2) No. 1, the law does not apply to credit services if the credit agreement was not granted by a credit institution established in a member state of the EU.
- According to Section 2 (3), “credit services” are the following services for a “credit purchaser” with regard to “non-performing loan agreements,” or claims arising therefrom – (i) the collection and enforcement of due payment claims, (ii) the renegotiation of rights, obligations or other material conditions arising from the loan agreement, (iii) the handling of complaints in connection with the agreement and (iv) the notification of the borrower of changes in interest rates, charges or payments due in connection with the agreement.

- Notably, pursuant to Section 43, it is a criminal offence (punishable by imprisonment of up to five years or a fine) to provide a credit service without a permit pursuant to Section 10 (1) Sentence 1.
- Pursuant to Section 46 (1), companies in the legal form of a legal entity or commercial partnership that already provided credit services prior to the entry into force of the act may continue to provide such services after the entry into force of the Secondary Credit Markets Act without a licence, pursuant to Section 10 (1), until the first of the following dates – (i) receipt of the licence, (ii) decision by the Federal Financial Supervisory Authority (BaFin) that no licence will be granted or (iii) the expiry of six months after the entry into force of the act.
- Any such company that intends to provide credit services for longer than six months after the act has come into force must notify BaFin of this intention in writing or electronically, in accordance with Section 46 (2), no later than seven weeks after the act came into force; BaFin has calculated the end of this seven week period to be 16 February 2024.
- The company must also submit the information and documents in accordance with Section 10(3) to BaFin no later than seven weeks after the act came into force; BaFin has, in a circular of 23 January 2024, extended the timeline for submission of the relevant documents until 5 April 2024, even though such time extension was not contemplated in the Secondary Credit Markets Act.

In addition, the following defined terms need to be taken into account:

- “Non-performing loan agreements” are loan agreements that are classified as non-performing exposures within the meaning of Article 47a of Regulation (EU) No. 575/2013, i.e. in particular those pursuant to Article 47a (3) (a) and Article 178 (1) (b) of Regulation (EU) No. 575/2013 that are more than 90 days overdue.
- “Credit agreements” are agreements under which a credit institution has granted a loan in the form of a deferral of payment, a loan or other similar financial assistance. It is not clear and an open issue whether bonds and notes will also fall under the definition of “Credit Agreement”; since bonds and notes, even though not formally being a “loan” from the German perspective, are nevertheless a form of financial assistance.
- “Credit institution” means credit institutions within the meaning of Section 1 (1) Sentence 1 of the German Banking Act, including branches deemed to be credit institutions within the meaning of Section 53 (1) of that act. This means that loans granted by social insurance institutions, or private or public insurers, are probably not covered by the Secondary Credit Markets Act.

- Credit service providers are credit service institutions as well as credit institutions and other persons referred to in Section 2 (4).

One important new rule is that Section 7 provides for the obligation of credit purchaser (whether situated within the EU or in the UK, the US or otherwise outside the EU) to appoint a licensed “credit service provider” if (i) the purchaser is not itself a “credit service provider” and (ii) credit agreements with consumers or small and medium-sized enterprises (SMEs) are affected. It is interesting to note that only Section 7 restricts the purchaser’s obligations to consumer loans and loans to SMEs, and that otherwise, the Secondary Credit Markets Act does not appear to restrict the scope of application to such loans. This would mean that the licensing requirement for the provision of credit services also applies to non-performing loans to large companies.

Ultimately, credit service institutions need to have a licence in accordance with Section 10 of the Secondary Credit Markets Act. When applying to BaFin for a licence, a “viable business plan” and a “proper business organisation” must be submitted and proven in accordance with Section 10 (3) No. 7 – in addition to many other documents to be provided. These terms are based on banking supervisory terminology for banking transactions and financial services transactions. BaFin has issued a number of circulars defining these terms, applying banking supervisory terminology.

What are we doing to assist our clients in this area?

The new requirements under the law are significant, and we can assist clients in fulfilling these, in particular in respect of applying for licences in Germany as Credit Services Provider.

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