German Secondary Credit Markets Act (Kreditzweitmarktgesetz) Implementing New EU Legislation for NPL and Distressed Debt Transactions

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Abstract

Until 29 December 2023 new rules on non-performing loans (NPLs) and distressed debt trades had to be introduced into the local laws of all Member States of the EU. Such new rules establish new procedures for the servicing and collection of NPLs and distressed debt acquired after 29 December 2023 as well as new obligations for sellers and purchasers of NPLs and distressed debt, irrespective of whether the purchasers are resident in the EU, the UK, the US or elsewhere in the world. Purchasers of NPLs and distressed debt now need to appoint a licensed credit servicing institution for the acquired portfolios. Such new EU rules have been implemented in Germany through the German Secondary Credit Markets Act (Kreditzweitmarktgesetz) which came into force on 30 December 2023.

Introduction

EU Legislation

EU Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers[1] (the EU Directive) provides for a new EU-wide law for purchasers, sellers and servicers of non-performing loans and distressed debt. Pursuant to art.32 thereof, EU Member States need to implement those rules into domestic law by no later than 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, the UK, the US or otherwise outside the EU, to purchase non-performing loans only if they employ a licensed credit service institution as loan servicer.

Passporting of the services of a licensed credit service institution as loan servicer from one Member State of the EU into another Member State of the EU is possible.

German legislation

The German government had provided a draft of the German implementation Act in November 2023 (Credit Markets Promotion Act—Kreditzweitmarktförderunggesetz).[2] That Act has been adopted by Parliament on 22 December 2023, 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 (Kreditzweitmarktgesetz, the Act), but also many other modifications to other German laws.

The Act implements the EU Directive into German law and exercises discretion where the EU Directive has granted discretion to the Member States, in particular in respect of the scope of the obligation of a purchaser of claims and rights under a non-performing credit agreements to appoint a licensed credit service provider.

Pursuant to s.43 para.1 no.1 of the Act, 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 s.10(1) sentence 1.

Pursuant to s.44 para.1 nos 1 and 2 of the Act it is an administrative offence (punishable with a fine of up to €100,000) not to duly provide information or notices as seller of rights and claims under a non-performing credit agreement.

Pursuant to s.44 para.1 no.3 of the Act it is an administrative offence (punishable with a fine of up to €100,000) if a purchaser of rights and claims under a non-performing credit agreement does not to duly appoint a licensed credit service provider.

Pursuant to s.44 para.1 no.4 of the Act it is an administrative offence (punishable with a fine of up to €100,000) if a purchaser of rights and claims under a non-performing credit agreement who is not resident in the EU does not duly appoint a representative in the EU when entering into an agreement for the acquisition of rights and claims under a non-performing credit agreement and does not notify such appointment to the German Federal Banking Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)) and the German Federal Bank (Bundesbank).

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[1] Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48 and 2014/17 [2021] OJ L438/1: *https://eur-lex.europa.eu/eli/dir/2021/2167/oj*.

[2] Gesetzentwurf der Bundesregierung eines Gesetzes zur Förderung geordneter Kreditzweitmärkte und zur Umsetzung der Richtlinie (EU) 2021/2167 über Kreditdienstleister und Kreditkäufer sowie zur Änderung weiterer finanzmarktrechtlicher Bestimmungen (Kreditzweitmarktförderungsgesetz), BT-Drucksache 20/9093 of 6 November 2023.

Application and grandfathering

The Act regulates the rules applicable to "credit services" provided by "credit service institutions" and "credit service providers" and the obligations of "credit purchasers" of "non-performing credit agreements"[3] and claims thereunder, as well as the selling "lenders".

There are a number of issues relating to the meaning of such terms and the application of the Act to credit agreements and credit claims sold prior to 30 December 2023.

Grandfathering

According to s.1(2) no.4 of the Act, the Act does not apply if the first acquisition or assignment ("*erstmaliger Erwerb*") took place prior to 30 December 2023.

There is no clarity what that means: on the one hand it could mean that the Act does not apply to any loan receivable which has been sold and assigned for the first time prior to 30 December 2023, including a sale or assignment in the course of a syndication or other transfer or securitisation which closed prior to 30 December 2023. Such a meaning of the wording of s.1(2) no.4 of the Act would result into the non-applicability of the Act for a huge number of loan receivables for a long time. On the other hand, it could mean that the Act only does not apply to loan receivables which have become non-performing loans prior to 30 December 2023 and have as such been sold and assigned prior to 30 December 2023.

Such issue cannot be resolved through looking to the mere wording of the underlying EU Directive as a means of interpreting the German implementing Act,[4] because the different language versions of the EU Directive are inconsistent. Whereas the English[5] and French[6] wording of the relevant provision in art.2, para.5 lit. d) of the EU Directive could be understood to support the above-mentioned first understanding of the grandfathering provision, the German[7] and the Italian[8] wording would support the above-mentioned second understanding.[9] Accordingly, the purpose of the EU Directive and the Act need to be taken into account. Since it is the purpose of the EU Directive and the Act to establish a comprehensive strategy to address the issue of non-performing loans (NPLs) in the EU and to prevent the excessive build-up of NPLs,[10] the Act and the EU Directive need to apply as quickly as possible and thus the grandfathering provisions of s.1(2) no.4 of the Act and of art.2, para.5 lit. d) of the EU Directive should not be interpreted to be extensive. Accordingly, it is the better view that the Act only does not apply to loan receivables which have become NPLs prior to 30 December 2023 and have as such been sold and assigned prior to 30 December 2023. However, it seems that in contrast to the foregoing interpretation of the text of the Act in conjunction with the EU Directive, BaFin takes a more lenient approach to the interpretation of the Act and seems to exempt syndicated and securitised loans from the scope of the Act if in the context of a syndication or securitisation an assignment has already taken place prior to 30 December 2023.

Credit agreements and credit services

Pursuant to s.2 para.3 of the Act "credit services" which can only be provided by a licensed credit servicing institution are the following services for a credit purchaser with regard to non-performing credit agreements or claims arising therefrom:

- the collection and enforcement of due payment claims;
- the renegotiation of rights, obligations or other material conditions arising from the loan agreement;
- the handling of complaints in connection with the agreement; and
- the notification of the borrower of changes in interest rates, charges or payments due in connection with the agreement.

Non-performing credit agreements are credit agreements that are classified as non-performing exposures within the meaning of art.47a of Regulation 575/2013,[11] i.e. in particular those pursuant to art.47a(3)(a) and art.178(1)(b)) of Regulation 575/2013 that are more than 90 days overdue.

Pursuant to the view of BaFin the collection of due payment claims includes also the registration and collection of payment claims through German insolvency proceedings and acting vis-à-vis the insolvency administrator.

Both the EU Directive and the Act do not use the term "loan agreement", but consistently refer to "credit agreements".

[3] It should be noted that both the EU Directive and the German Act refer to "non-performing credit agreements" rather than "non-performing loan agreements".
[4] Domestic legislation of the EU Member States need to be interpreted and applied in the light of the underlying relevant EU Directives: *Konstantinos Adeneler v Ellinikos Organismos Galaktos (ELOG) (C-212/04) ECLI* (C-212/04) ECLI: EU:C:2006:443 in annotation number 108: "When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC"—*https://curia.europa.eu/juris/liste.jsf?num=C-212/04*.
[5] "This Directive shall not apply to the following: … d) the transfer of a creditor's rights under a credit agreement, or of the credit agreement itself, transferred before the date referred to in Article 32(2), first subparagraph."
[6] "La présente directive ne s'applique pas: … d) au transfert des droits du créancier au titre d'un contrat de crédit, ou à la cession du contrat de crédit lui-même, transférés avant la date visée à l'article 32, paragraphe 2, premier alinéa."
[7] "Die vorliegende Richtlinie gilt nicht für … (d) die Übertragung der Ansprüche eines Kreditgebers aus einem Kreditvertrag oder die Übertragung des Kreditvertrags selbst, die vor dem in Artikel 32 Absatz 2 Unterabsatz 1 genannten Zeitpunkt stattgefunden hat." The relevant words are "*stattgefunden hat*".
[8] "La presente direttiva non si applica: … d) al trasferimento dei diritti del creditore derivanti da un contratto di credito o del contratto di credito stesso, verificatosi prima della data di cui all'articolo 32, paragrafo 2, primo comma" The relevant word is "verificatosi".
[9] When interpreting EU legislation of course all 24 official language versions of the EU Directive need to be taken into account and not only the four aforementioned. For a summary of the methods of interpretation used by the ECJ, see Dr J.P. Rinze, "Methods of Interpretation in EC-Law" (1994) 26 *Bracton Law Journal* 57.
[10] Preamble No.1 of the EU Directive.
[11] Regulation 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012 [2013] OJ L176/1.

The term "credit agreement" is defined in s.2 para.13 of the Act and art.3 no.4 of the EU Directive to mean 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 from such definition whether bonds and notes also fall under the definition of "credit agreement", since bonds and notes—even though to some extent in some instance they are not formally a "loan" from the German perspective—are nevertheless a form of financial assistance. Further, there are different approaches in various jurisdictions as to what the legal nature of a "bond" or a "note" is. For example, in Germany a "*Schuldschein*", even though often qualified as a note for regulatory purposes, actually is a loan, whereas an "*Inhaberschuldverschreibung*" is a bond under civil law to which in principle the rules on loans do not apply. In contrast thereto a "*Namensschuldverschreibung*" is often qualified as a bond to which loan rules apply. From the perspective of administrative courts in Germany even *Inhaberschuldverschreibungen* can be qualified as loans for German regulatory purposes.[12] Since the definition of "credit agreement" contained in s.2 para.13 of the Act and art.3 no.4 of the EU Directive also refer to "other similar financial assistance", the term "credit agreement" should accordingly be interpreted widely and should also include bonds and notes.[13] Consequently, the EU Directive and the Act do not only apply to "loans" within the traditional meaning, but also to bonds and notes, in particular in cases where loans are documented with note certificates or bonds.

Credit agreement of EU credit institution

Pursuant to s.1(2) no.1 of the Act and art.2 para.5 lit. b) of the EU Directive, the Act and the EU Directive do not apply to credit services if the credit agreement was not granted by a credit institution established in a Member State of the EU, except where the creditor's rights under the credit agreement, or the credit agreement itself, is replaced by a credit agreement extended by such credit institution. The term "credit institution" means in the context of the Act credit institutions within the meaning of s.1(1) sentence 1 of the German Banking Act (Kreditwesengesetz—KWG), including branches deemed to be credit institutions within the meaning of s.53(1) of the German Banking Act.

The background of the foregoing is that it is the purpose of the EU Directive to promote the EU Banking Union, to further develop the capital markets union (CMU), to enhance the resilience of the economic and monetary union and for that purpose to address high stocks of NPLs and their possible future accumulation in the EU banking sector.[14]

This has a number of different consequences:

- Loans granted and held by private or public insurance companies or credit funds or other non-bank lenders are probably not covered by the Act and the sale and servicing of a non-performing loan sold by such entities is probably not subject to the provisions and requirements of the Act.
- If despite of the foregoing a loan or non-performing loan was sold by such non-credit institution entity to an EU credit institution, then thereafter, a subsequent sale of the relevant non-performing loan is likely to be covered by the Act.
- In case of syndication of a loan with either non-EU credit institutions or EU non-bank lenders, any portion which is owed by an EU credit institution as lender of record will probably fall within the scope of the Act, even if other portions of such syndicated loan will not fall within the scope of the Act. It is an open issue whether any portion held by a non-EU credit institution or EU non-bank lender as lender of record for an EU credit institution as (sub-)participant falls within the scope of the Act or not. The better view is that in case of the EU credit institution not being the lender of record but only a (sub-)participant, then the Act should not apply in case of a sale of any non-performing sub-participation, because the Act assumes that the credit servicer can act directly vis-à-vis the borrower and exercise rights under the non-performing loan vis-à-vis the borrower, and any such rights would normally not be available to a mere (sub-)participant and accordingly could not be passed on to a servicer.
- Both the Act and the EU Directive only carve out loans of non-EU credit institutions and EU lenders which are not EU credit institutions, but neither the Act nor the EU Directive differentiates in respect of the law which governs the relevant loan agreement. That means that credit agreements governed by English law, New York law[15] or any other law which is not the law of an EU Member State, in principle also fall within the scope of the

[12] Judgment of *Verwaltungsgericht* Frankfurt/Main of 22 June 2016 in case 7 K 3073/15.F(1), published in *www.beck-online.de* (paywall) under BeckRS 2016, 56033 in respect of the term "Kreditgeschäft" contained in s.1 para.1 no.2 of the German Banking Act (KWG) in relation to the extension of "loans".
[13] Whether or not and how this would or should also apply to publicly listed and traded bonds and/or to bonds in respect of which a *Gemeinsamer Vertreter* (joint representative) has been appointed pursuant to the Schuldverschreibungsgesetz (German Bond Act) is an open issue.
[14] Preamble No.2 of the EU Directive.
[15] Whether and how the use of "Indenture Trustees" within a financing would affect the analysis under the Act or the EU Directive is an open issue which would need to be analysed on a case-by-case basis.

Act and of the EU Directive insofar as any loan portion of an EU credit institution as lender of record is concerned.

- In addition to the above, it is an open issue whether the Act and the EU Directive apply to loans held by EU credit institutions where the borrower is situated outside of the EU and the only nexus to the EU is that the holder of the loan receivable is an EU credit institution. Neither the definition of borrower (*Kreditnehmer*) contained in s.2 para.12 of the Act nor the definition of borrower contained in art.3 no.3 of the EU Directive refer to the borrower having to be situated in the EU. Accordingly, both the Act and the EU Directive could in legal theory apply to borrowers situated anywhere in the world outside of the EU. In particular, when taking into account that it is the purpose of the EU Directive to provide a framework for handling NPLs of EU credit institutions in order to make EU credit institutions more resilient, one might hold that NPLs held by EU credit institutions with borrowers situated outside of the EU should also fall within the scope of the EU Directive. However, it is also the purpose of the EU Directive and the Act to protect the rights of borrowers.[16] There is no reason for the EU to protect borrowers which are situated outside of the EU. Further, Preamble (41) to the EU Directive states that "Third-country credit purchasers might make it harder for Union borrowers to rely on their rights under Union law and for national authorities to supervise the enforcement of non-performing credit agreements." That Preamble (41) indicates that the term "borrower" should only refer to borrowers situated in the EU. Finally, art.3 no.11 of the EU Directive provides in the definition of "host Member State" that "'host Member State' means the Member State, other than the home Member State, in which a credit servicer has established a branch or where it provides credit servicing activities, and in any event where the borrower is domiciled, or its registered office is situated or, if under its national law it has no registered office, the Member State in which its head office is situated" and accordingly assumes that such EU Directive only applies to non-performing credit agreements where the borrower is situated within the EU. Accordingly, it can be concluded that neither the Act nor the EU Directive apply to loans held by EU credit institutions where the borrower is situated outside of the EU.
- Neither the EU Directive nor the Act contain a carve out of large borrowers from the scope of application of the EU Directive or the Act. Article 17 of the EU Directive provides that Member States of the EU shall provide for an obligation (i) of those credit purchasers who are resident in a Member State of the EU to appoint licensed credit service providers if the borrower is a consumer, and (ii) of those credit purchasers who are not resident in the EU to appoint licensed credit service providers if the borrower is a consumer or a micro, small or medium-sized enterprise (SME). Article 17 of the EU Directive provides Member States with the discretion to expand such obligations to other types of borrowers. Accordingly, the EU Directive in principle applies to any type of borrower, including large borrowers.

Obligations of sellers and purchasers of NPLs and distressed debt

Obligations of purchasers

Pursuant to s.7 of the Act the credit purchaser is in principle, and subject to the following, obliged to appoint a licensed "credit service provider" if the purchaser is not itself a "credit service provider".

Section 7 para.1 of the Act provides for an obligation to appoint a licensed credit service provider if the borrower is a consumer or a micro or SME.

Section 7 para.2 of the Act provides that a credit purchaser who is not resident in a Member State of the EU (e.g. credit purchasers resident in the UK or US) must appoint a licensed credit service provider through its EU representative (which must be appointed by it pursuant to s.9 of the Act).

It is not clear whether s.7 para.2 of the Act only is a clarification of s.7 para.1 in respect of the method of appointment of the credit service provider, i.e. "through its EU representative". If s.7 para.2 of the Act is only such a clarification, then the obligation of the non-EU credit purchaser to appoint a credit service provider only applies in cases of consumers or SMEs being the borrower

[16] This can be derived from preambles (6), (9), (20) and (61) to the EU Directive and from art.5 para.1 lit (f) of the EU Directive and s.14 paras 2 and 3 of the Act, which provide that a licence as credit servicer provider can only be granted to entities which apply an appropriate policy ensuring compliance with rules for the protection, and the fair and diligent treatment, of borrowers. Preamble (61) to the Directive states the following:

"(61) Since the objectives of this Directive, namely, to enhance the development of secondary markets for NPLs in the Union while ensuring further strengthened protection of borrowers, in particular of consumers, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."

under the non-performing credit agreement as set out in s.7 para.1 of the Act. However, if s.7 para.2 of the Act is intended to be more than just a clarification, then it could be interpreted to mean to expand the obligation of non-EU credit purchasers to appoint a credit servicer in case of any kind of borrowers, including large borrowers. The legislative materials relating to the Act, in particular the draft of the Act which had been provided by the German government, together with a detailed reasoning thereof,[17] is not clear in respect of the scope and meaning of s.7 para.2 of the Act. Accordingly, s.7 para.2 of the Act may be read to mean that in case of credit purchasers situated outside of the EU there shall be no restriction of the scope of relevant borrowers under the relevant non-performing credit agreements and that such a purchaser from outside of the EU shall under all circumstances be obliged to appoint a licensed credit services provider within the EU.

In any event, irrespective of whether s.7 para.2 of the Act applies to large borrowers as well, it certainly applies to borrowers who are either consumers or SMEs. The term SMEs includes any type of borrower which is an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million.[18] Taking into account the factual situation of many property holding companies in Europe, such PropCos will, when borrowing money, very often fall within the scope of the definition of SMEs.

Credit service provider

The term "credit service provider" includes (i) licensed credit service institutions which have been licensed either by BaFin pursuant to s.10 of the Act or which are grandfathered pursuant to s.46 of the Act,[19] (ii) credit service institutions resident in other Member States of the EU which have been licensed in such other Member States and which have been passported into Germany pursuant to s.23 of the Act, and (iii) pursuant to s.2 para.4 of the Act, licensed German credit institutions and CRR credit institutions from other Member States of the EU when providing credit services for a credit purchaser.

Cap on fees of credit service providers which credit purchaser can charge to borrower

Section 28 para.2 of the Act provides that ss.13e and 13f of the Rechtsdienstleistungsgesetz (Act on Rendering Legal Services) shall apply both to the credit purchaser and the credit service provider.

Section 13e provides that a creditor may only claim compensation from the debtor, i.e. the borrower, for the costs charged by a debt collection service provider for its activities up to the amount of the remuneration to which a lawyer would be entitled for these activities in accordance with the provisions of the German Lawyers' Fees Act (Rechtsanwaltsvergütungsgesetz).

Section 13f provides that in case a creditor of a claim instructs both a debt collection service provider and a lawyer to collect the claim, the creditor may only claim compensation for the costs incurred as a result up to the amount that would have been incurred if the creditor had only instructed a lawyer.

Section 28 para.2 of the Act does not provide (i) that such rules only apply to consumers as borrowers, nor (ii) does it provide that it applies only to German law governed credit agreements, nor (iii) does it make any reservation in respect of the rules on costs and expenses contained in the relevant credit agreements. Accordingly, one could take the point of view that such strict caps on fees also apply if the borrower is a corporate and the relevant credit agreement is governed by a law other than German law and even if it contains provisions on fees and costs which deviate from such German statutory rules. However, the purpose of ss.13e and 13f is to protect consumers. Such purpose is not relevant if the borrower is not a consumer, but a merchant or a corporate and such purpose is even more not relevant where the relevant credit agreement is not governed by German law and contains specifically negotiated provisions in respect of reimbursement of fees and costs. Consequently, the wording of s.28 para.2 of the Act should be interpreted narrowly in case of merchants or corporates as borrowers[20] and in particular in cases where the credit agreement is not subject to German law.

Obligations of Sellers of non-performing credit agreements

Section 6 para.1 of the Act (which implements art.15 of the EU Directive into German law) provides that a credit institution which is about to sell a non-performing credit agreement or rights and claims thereunder has an obligation to provide to a potential credit purchaser such information regarding a creditor's rights and, if applicable, the collateral, which is necessary to enable the prospective credit purchaser to conduct its own assessment of the value of the creditor's rights to be sold and the likelihood of recovery. Such disclosure needs to be made prior to entering into a contract for the transfer of that creditor's rights.

[17] Gesetzentwurf der Bundesregierung eines Gesetzes zur Förderung geordneter Kreditzweitmärkte und zur Umsetzung der Richtlinie (EU) 2021/2167 über Kreditdienstleister und Kreditkäufer sowie zur Änderung weiterer finanzmarktrechtlicher Bestimmungen (Kreditzweitmarktförderungsgesetz), BT-Drucksache 20/9093 of 6 November 2023.
[18] Article 2 of the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361) [2003] OJ L124/36.
[19] Which applies, if relevant notifications have been duly made to BaFin at the beginning of the year 2024, to service providers which were already active in German prior to 30 December 2023.
[20] But please note that the Higher Regional Court of Dresden (OLG Dresden) decided in a decision of 14 October 2022 in case 12 W 491/22—Neue Juristische Wochenschrift (NJW) 2023, 532—implicitly that at least s.13f of the Rechtsdienstleistungsgesetz is not only applicable to consumers as debtors but also to merchants as debtors.

It is not clear whether such disclosure obligation applies already from the start of the sales process or only after indicative bids or offers have been made by selected bidders or only after the mark-up phase has commenced. Whether and how the obligations under s.6 para.1 of the Act will be interpreted by courts, BaFin and Bundesbank in future will depend on how the term "*potenzieller Kreditkäufer*", as used in s.6 para.1, is to be interpreted, since the disclosure obligation under s.6 para.1 only applies vis-à-vis "*potenzielle Kreditkäufer*". The English language version of art.15 of the EU Directive uses the term "prospective credit purchaser" which seems to be more narrow and requiring more crystallisation of likelihood then the term "potential credit purchaser" (which term is *not* used in the English language version of the EU Directive) would be. On the other hand, the German language version of art.15 of the EU Directive uses the term "*potenzieller Kreditkäufer*" like s.6 of the Act and that term is wider than "prospective credit purchaser". The French language version of art.15 refers to "*l'acheteur de crédits potential*" and the Spanish language version refers to "posible comprador de créditos".[21] Accordingly, there is the need for official guidelines as to what a "*potenzieller Kreditkäufer*" or a "prospective credit purchaser" is. For practical reasons that term should not be understood to be very wide but should only include a group of bidders which has already been crystallised to some extent.

It is also not clear whether such obligations under s.6 para.1 of the Act can be waived by agreement between the seller of the non-performing credit agreement(s) and potential or actual bidders for the relevant portfolios or individual contracts, rights and claims. Since s.6 para.1 is based on art.15 of the EU Directive and since Germany is obliged to implement the EU Directive into German law, it is likely that the disclosure obligations thereunder cannot be contracted out by agreement between the relevant parties.

In any event, sellers of non-performing credit agreements or rights and claims thereunder should take note of a recent judgment of the German Federal Supreme Court (*Bundesgerichtshof*—BGH) of 15 September 2023 which sets up strict requirements for the timeliness and completeness of data rooms and data room updates.[22]

Further, s.6 para.2 of the Act provides that the selling credit institutions shall notify biannually to BaFin and Deutsche Bundesbank the following:

- the legal entity identifier (LEI) of the credit purchaser or, where applicable, of its representative;
- the aggregate outstanding balance of the creditor's rights under the non-performing credit agreements;
- the number and size of the creditor's rights under the non-performing credit agreements; and
- whether the transfer includes the creditor's rights under the non-performing credit agreements concluded with consumers and the types of assets securing the non-performing credit agreements, when applicable.

Licensing of credit servicers

Credit service institutions need to have a licence in accordance with s.10 of the 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 s.10(3) no.7 of the Act—in addition to many other documents to be provided. Such documents to be submitted include, inter alia:

- an extract from the commercial register and copies of the company's deed of incorporation and articles of association;
- the address of the company's registered office or head office;
- the names of the directors and members of the administrative or supervisory body of the company and of the persons and companies that have significant holdings in it;
- evidence that the managing directors and the members of the administrative or supervisory body of the company meet the requirements set out in s.15(1)–(3) (i.e. are reliable and knowledgeable and have not been subject to certain listed criminal or administrative proceedings);
- evidence that a managing director or a person appointed by the company fulfils the requirements set out in s.15 para.4 of the Act (i.e. has provided proof of his qualification pursuant to the provisions of the Rechtsdienstleistungsgesetz (Act on Rendering Legal Services));
- evidence that the owners of significant shareholdings in the company meet the requirements set out in s.16(1) of the Act (i.e. are reliable);
- a viable business plan, which must show (i) the nature of the planned business, (ii) the organisational structure of the credit services institution, indicating parent companies, financial holding companies and mixed financial holding companies within the group, and (iii) the information required to assess the proper business organisation of the credit services

[21] When interpreting EU legislation of course all 24 official language versions of the EU Directive need to be taken into account and not only the four aforementioned. For a summary of the methods of interpretation used by the ECJ, see Dr J.P. Rinze, "Methods of Interpretation in EC-Law" (1994) 26 *Bracton Law Journal* 57.
[22] BGH Urteil of 15.09.2023—V ZR 77/22, Neue Juristische Wochenschrift (NJW) 2023, 3423.

institution pursuant to s.14 para.1 of the Act, including the organisational duties pursuant to s.14 paras 2–4 of the Act and the planned internal control procedures;
- if the company intends to accept funds from borrowers, proof of the existence of a separated (trust) account with a credit institution in accordance with s.17(2) of the Act;
- any outsourcing agreements in accordance with s.20 of the Act; and
- a declaration as to whether the company has a registration pursuant to s.10(1) sentence 1 no.1 of the Rechtsdienstleistungsgesetz (Act on Rendering Legal Services) or is seeking such a registration.

These terms and requirements are in principle based on banking supervisory terminology for banking regulatory purposes. BaFin has issued a number of circulars defining these terms, applying banking supervisory terminology.

BaFin has also issued various forms which need to be filled in.

In summary, having gone through such a licensing process in practice, it can be said that such process is quite comprehensive and requires a lot of time and effort.