

New NPL Law in Germany

German Secondary Credit Market Act – Revitalization of the Non-Performing Loans Market and Creating New Market Opportunities?

INTRODUCTION

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On December [•], 2023 the German Secondary Credit Market Promotion Act (*Kreditweitmarktförderungsgesetz*) enters into force, which simplifies dealing in non-performing loans (“**NPLs**”) by introducing a new law, the German Secondary Credit Market Act (*Kreditweitmarktgesetz*).

The Secondary Credit Market Act transposes EU Directive 2021/2167 on credit servicers and credit acquirers of 24 November 2021 (“**Credit Servicer Directive**”) into German law.

This new law could significantly change the market for NPLs.



OBJECTIVE OF THE SECONDARY CREDIT MARKET ACT

The objective of the Secondary Credit Market Act is – like that of the Credit Servicer Directive – to strengthen the market for the sale of NPLs.

A further objective is to improve the handling and the conditions for the sale and acquisition of NPLs and to remove existing obstacles to transfers and the management of NPLs (such as bank licensing requirements for certain activities of acquirers of NPLs). In doing so, the law is expected to, on the one hand, reduce stocks of NPLs and prevent a future accumulation of such loans and, on the other hand, ensure an elevated level of protection for borrowers.

The Secondary Credit Market Act will [TBD] enter **into force on 30 December 2023**. A transitional period of six months is foreseen, during which credit service providers (*Kreditdienstleister*) which are not licensed yet but subject to a new license requirement under the new act (the so-called credit service institutions (*Kreditdienstleistungsinstitute*)) can continue their activities under the current legal framework.

KEY FEATURES OF THE SECONDARY CREDIT MARKET ACT

The Secondary Credit Market Act contains **regulations on:**

- the **obligations of acquirers and sellers of NPLs**;
- the **provision of credit services**; and
- the **supervision of credit service institutions**.

The statute establishes a **licensing procedure, business organization requirements** (e.g., in the form of organizational duties, requirements for the directors) and **reporting obligations** for providers of credit services (licensed as credit service institutions), as well as a **register** of authorized credit service institutions. According to the law, **supervisory responsibility** primarily rests with the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, "BaFin"*).

The Secondary Credit Market Act is only applicable to **NPLs**, which are defined as credit agreements that are classified as non-performing risk positions within the meaning of Art. 47a of the EU Capital Requirements Regulation (CRR). The term NPL includes, among other things, loans for which a default is deemed to have occurred and loans that are considered to be impaired under the applicable accounting framework.

SCOPE OF THE SECONDARY CREDIT MARKET ACT

The act defines **licensable credit servicing activities** to include – insofar as there is an NPL agreement or claims of the lender arising from an NPL agreement:

- collection and enforcement of due payment claims and other claims of the lender arising from such NPL agreement;
- renegotiation of rights, obligations or other material terms arising from such an agreement (insofar as the entity providing the service is not a credit intermediary (*Kreditvermittler*) within the meaning of EU Consumer Credit Directive (*Verbraucherkreditrichtlinie*) and the EU Residential Mortgage Credit Directive (*Wohnimmobilienkreditrichtlinie*));
- complaint handling; and
- informing the borrower of changes in interest rates, charges or payments due.

The Secondary Credit Market Act defines **credit service institutions** (*Kreditdienstleistungsinstitute*) as enterprises that provide a credit service on behalf of the credit acquirer (*Krediterwerber*) on a commercial basis or on a scale that requires a commercially organized business undertaking. Not regarded as credit service institutions are, in particular, credit institutions established in Germany that have a license to conduct credit business or CRR credit institutions established in another EEA member state.

Acquirers of NPLs who are not credit service institutions **must engage a credit institution or a credit service institution when performing licensable credit services**, if the credit agreement underlying the NPL was entered into with a natural person or with micro, small and medium-sized enterprises.

Credit service institutions may accept and hold funds from borrowers in order to transfer these funds to credit acquirers. For such purpose, credit service institutions must have a separate escrow account at a credit institution on which all funds received from borrowers have to be booked and held until they are transferred to the credit acquirer. These funds must be protected from the claims of other creditors of the credit service institution in the interests of the credit acquirer, in particular to the effect that they do not fall into the insolvency estate of the credit service institution in the event of insolvency and that its creditors do not have access to them by way of individual enforcement.

LICENSING REQUIREMENT FOR CREDIT SERVICE INSTITUTIONS

As a rule, credit service institutions operating domestically in Germany require a license from BaFin. Credit services may, however, also be offered by licensed domestic or EEA (CRR) credit institutions. Furthermore, a European passporting regime applies for credit service institutions, comparable to that already existing in the other areas of financial supervisory law.

OBLIGATIONS TRIGGERED BY ACQUISITIONS AND SALES OF NPLS

The Secondary Credit Market Act contains partly extensive, recurring duties of conduct, information duties and reporting duties for credit institutions that sell NPLs *vis-à-vis* respective acquirers of NPLs. For example, a seller must provide a potential acquirer of an NPL with the information on that NPL or the claims arising from the NPL as well as on the collateral, if any, which the acquirer requires in order to be able to assess the opportunities and risks of the transaction prior to the conclusion of the agreement. At the same time, information on the credit acquirers of NPLs is to be transmitted twice a year to BaFin and the German Federal Bank (*Deutsche Bundesbank*).

If the acquirer of NPLs wants to engage in any activity that triggers a license requirement under the German Banking Act (*Kreditwesengesetz*), it has to comply with regulatory requirements. Until now, that meant that the acquirer would need to obtain a banking license if it wanted to agree to prolongations of credit agreements with the borrowers (provided that such prolongations are effected commercially or on a scale that requires a commercially organised business undertaking). Under the new law, the licensed credit service provider (the engagement of which is mandatory if the credit agreement was concluded with a natural person or a micro, small or medium-sized entity) would carry out this activity so that the banking license requirement no longer applies for the acquirer in such case.

If a credit service provider is commissioned in this way, the credit acquirer must notify the BaFin and the German Central Bank of the name and address of the credit service provider no later than the day on which the credit services are first provided. In addition, further regular notification obligations must be fulfilled *vis-à-vis* the supervisory authorities.

PRACTICAL SIGNIFICANCE OF THE SECONDARY CREDIT MARKET ACT

Experience shows that licensing as an institution under the German Banking Act (*Kreditwesengesetz, KWG*) or the German Capital Investment Code (*Kapitalanlagegesetzbuch, KAGB*) requires a period of multiple months. The Secondary Credit Market Act, on the other hand, stipulates a 45-day period for BaFin to review the completeness of an application. In addition, if a complete application is submitted, BaFin must inform the applicant within 90 days after receipt of the application of its decision to grant or reject the issuance of the license. In addition, BaFin must publish notice of the licensing in the Federal Gazette (*Bundesgesetzblatt*) in accordance with applicable requirements.

BOTTOM LINE AND OUTLOOK

The extent of practical implications of the obligations related to the use of credit service providers, in particular the newly introduced credit service institutions, remains to be seen. The introduction of these requirements begs the question of whether there will be sufficient service providers who can fulfil this role in Germany in the future.

Further regulatory guidance is expected to be released soon. In this context, it is worth noting that in July 2023, the European Banking Authority (EBA) published a public consultation on its Draft Guidelines on the establishment and maintenance of national lists or registers of credit servicers under the Credit Servicer Directive.

YOUR CONTACTS

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