

Irish Credit Servicing – Looking to the Future

Further to our recent update¹ on the EU Credit Servicing Directive (the "Directive"), the Department of Finance (the "DOF") has completed its public consultation and published² its initial decisions as to which discretions will be exercised in the context of the transposition of the Directive into Irish law.

The decisions of the DOF are susceptible to change prior to the 29 December 2023 deadline for transposition. However, there is sufficient clarity at this point to draw conclusions as to how the market will operate from 2024 onward and to highlight points that participants should keep in mind, particularly in the context of any ongoing or planned Irish asset loan portfolio disposals and acquisitions.

Background to the Consultation Paper

The Consultation Paper published by the DOF invited replies to 10 questions relating to Member State discretions provided by the Directive. We participated in one of the industry responses submitted; below we highlight some of these discretions, which are important to keep track of in other member states as, depending on how they are transposed, they will also impact each of those local markets.

Key Themes

Separate Irish credit ownership and servicing regimes will apply depending on the loan

Article 17 of the Directive gives Member States the discretion to require EU-based credit purchasers to appoint a credit servicer in relation to credit agreements *other than* non-performing loans originated by EU credit institutions and concluded with consumers (such core regulated loans, "Bank Consumer NPLs"). Various exclusions apply, including transfers to EU credit institutions.

Ireland has decided not to expand the Directive's reach in this way, so the Directive will only apply in Ireland to Bank Consumer NPLs. However, Ireland has also decided to retain its existing credit servicing regime which predates the Directive and with which participants in the Irish loan portfolio markets will be very familiar (the "Existing Regime")³. This regime will need to be modified to now exclude Directive NPLs, but will otherwise remain in place in respect of "matters and agreements not expressly covered by the scope of the Directive".

The Existing Regime is more expansive, most notably in that holding legal title and exercising key decisions or control over the loan portfolio are regulated credit servicing activities. However, the housing of these functions in a

¹ <https://maples.com/en/knowledge-centre/2023/3/transposition-of-the-credit-servicing-directive>

² <https://www.gov.ie/pdf/?file=https://assets.gov.ie/261714/016b965c-2df5-4788-ba63-efbc1f25c314.pdf#page=null>

³ This applies to all personal loans and certain forms of indirect credit, PCP and hire-purchase contracts which have been originated by a regulated lender, as well as certain SME loans, in each case whether performing or non-performing and with the resulting regulatory regime applying to both primary and secondary sales for the life of the loan.

regulated credit servicer has brought benefits; for example, the splitting of legal and beneficial title allows for more efficient secondary sales and results in no consumer disruption other than on a change of servicer.

As such, and in order to avoid dual regimes operating across mixed portfolios, the ideal final Irish position (whether by law or regulatory guidance) will be to allow Irish credit servicers and purchasers to opt into the Existing Regime for Directive NPLs (e.g. by allowing the credit servicer to hold legal title on these loans).

Further below, we also discuss the scope uncertainty in the Directive itself that presently exists which may further impact the servicing of legacy portfolios.

Existing Irish-authorized credit servicing firms to be automatically deemed licenced for Directive purposes – passport opportunities

Given the Existing Regime is considered by the Irish government as broadly equivalent to the Directive, Ireland will exercise the discretion provided in Article 32(2) to automatically recognise existing Irish-authorized credit servicing firms as licenced for Directive purposes. As such, there will be no disruption or transition in relation to the Irish credit servicing and loan portfolio markets.

Further, Irish firms will be able to immediately avail of the EU-wide credit servicing passport regime provided for in the Directive. Ireland's recognised advantages in attracting foreign direct investment, competing in financial services and as an access point for the EU market, combined with its long history of credit servicing (including as a highly-regulated sector since 2015) create exciting possibilities for Ireland to establish itself as a preferred country of establishment for credit servicing. Leveraging its natural talent pool, robust regulatory reputation and developed financial sector, Ireland is an attractive destination for credit servicers looking to expand their operations into the EU market.

Ability to hold funds

Ireland will exercise the discretion provided in Article 6(2) of the Directive to allow credit servicers to receive and hold underlying borrower funds. Accordingly, the transposing legislation will incorporate additional Directive requirements with which credit servicers licenced to hold funds must comply as a condition of authorisation, including the requirement that funds received from borrowers are credited to a separate account with a credit institution and that such funds are protected in the interest of the credit purchaser against the claims of other creditors of the credit servicer, particularly in the event of insolvency.

Allowing the credit servicer to collect and hold funds benefits the functionality of the loan portfolio market and reduces consumer disruption. As noted above, further consideration should be given to Directive NPLs in this context to allow the credit servicer to also hold legal title as per current market practice.

Credit reporting – current operational practice maintained

Article 17(5) of the Directive provides a discretion as to whether the appointed credit servicer is required to comply, for and on behalf of a credit purchaser, with additional obligations imposed by national law on purchasers, including in relation to credit registers. In Ireland, this discretion will not be exercised and in respect of credit register reporting, the DOF has stated that the existing credit reporting framework is appropriate and effective.

In Ireland, legal title holders of loans to Irish persons must report credit data under the Credit Reporting Act 2013. For Irish loan portfolios, given that legal title holding is regulated under the Existing Regime, the credit servicing firm is obliged to register and report and this is also often expressed as a contractual duty in the credit servicing agreement. Further, in other contexts, credit reporting agents report on behalf of credit

owners, for usual outsourcing reasons but also for efficiency purposes given how the Irish credit register and associated IT system work operationally.

In practice, therefore, as Ireland will not exercise this discretion it should mean current practice will be continued (regardless of where legal title is held).

Unresolved Questions

Signing or completion – when will the new regime apply?

Article 2(5) of the Directive states that it does not apply to transfers of Bank Consumer NPLs "transferred before" 29 December 2023 (the "Relevant Date"). It is unclear from the Directive how this applies to loan portfolio sales signed prior to the Relevant Date but yet completed, although in Ireland there is a market understanding that the Directive regime will only apply to deals signed after that date. Further, EU transposition deadlines are often missed by Member States, so local implementing law may not be enacted at the relevant time for any deals signing and / or completing near this date. The position is ameliorated in Ireland somewhat by the operation of the Existing Regime, the intended deemed licencing of existing firms for new regime purposes and the small number of possible credit institution sellers in the present market.

Cut-off date? Status of secondary sales and books originally sold prior to the Relevant Date?

A second point arising from Article 2(5) is that the Directive does not expressly limit its scope to primary sales by EU credit institutions; rather, it simply applies to transfers of Bank Consumer NPLs originated by such firms. In addition, the language is not limited expressly to Bank Consumer NPLs first transferred after the Relevant Date.

The language makes sense to catch onward / secondary transfers of in-scope loans, i.e. from

a continuation of consumer protection rights and the functioning of the NPL single market. Indeed, provisions of the Directive deal directly with secondary sales by non-bank credit purchasers. However, the wording leaves open the question of whether the Directive is to also apply to onward sales of legacy portfolios originally sold by a credit institution before the Relevant Date.

In the Irish context, the DOF has stated the Existing Regime will be maintained for "matters and agreements not expressly covered by the scope of the Directive" and it is presently understood in the market that the regime is only to apply to Bank Consumer Loans first sold by an EU credit institution after the Relevant Date.

While the market will no doubt resolve these issues as transactions occur, it would be helpful if the transposing Irish legislation clarified them where permissible. This is particularly the case given the stated intention to retain the Existing Regime, which decision was likely informed by local political requirements.

Summary and Analysis

As noted above, the DOF decisions are subject to change. On balance, they are likely to be well received by NPL market participants. In particular, the decision to permit credit servicers to receive and hold funds on behalf of credit purchasers will contribute towards the policy aims of the Directive; namely, reducing the obstacles to purchasing, selling and servicing cross-border credit in the EU. The decision to maintain the Existing Regime alongside the new regime will require NPL market participants to consider how best to structure transactions in order to ensure compliance with the respective requirements under each regime.

We look forward to seeing the resolution of the outstanding issues as the Directive is transposed.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

Dublin

Stephen McLoughlin

+353 1 619 2736

stephen.mcloughlin@maples.com

Callaghan Kennedy

+353 1 619 2716

callaghan.kennedy@maples.com

Stephen Carty

+353 1 619 2023

stephen.carty@maples.com

Philip Keegan

+353 1 619 2122

philip.keegan@maples.com

Lorna Smith

+353 1 619 2125

lorna.smith@maples.com

Joe O'Neill

+353 1 619 2169

joe.o'neill@maples.com

September 2023

© MAPLES GROUP

This update is intended to provide only general information for the clients and professional contacts of the Maples Group. It does not purport to be comprehensive or to render legal advice.