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Financial Services and Capital Markets Union  
European Commission  
1049 Brussels  
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## **ICMSA RESPONSE TO THE EU COMMISSION IN RESPECT OF THEIR PROPOSAL FOR A DIRECTIVE ON CREDIT SERVICERS, CREDIT PURCHASERS AND THE RECOVERY OF COLLATERAL**

Dear Sirs,

We are writing on behalf of the International Capital Market Services Association ("**ICMSA**") to provide feedback on behalf of our members on the European Commission's "Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral" (2018/0063 (COD)) (the "**Proposed Directive**"). The ICMSA is a London-based self-regulatory organisation which represents international financial and non-financial institutions active in the provision of services to the international capital markets. The primary purpose of the ICMSA is to foster the highest standards in the practice and management of international capital market services, thereby facilitating the efficient functioning of the international capital markets.

### **1. Background**

Our members include international banks, corporate trustees and other service providers who, inter alia, act as facility agents, security trustees and security agents on a wide range of secured and unsecured lending transactions, securitisations and collateralised loan obligations ("**CLOs**"). Secured and unsecured lending transactions may comprise bilateral or syndicated loans between banks or other lenders and borrowers (who may be corporate entities, institutions or sovereigns but not consumers) (referred to herein as "**corporate loans**"); securitisations and CLOs involve the issue of securities (such as bonds) where the underlying collateral may constitute mortgages on residential or commercial properties (in the case of residential mortgage backed or commercial mortgage backed securitisations) or corporate or business loans in the case of CLOs. Our members may act as facility agent and/or security agent on corporate loans and as security trustee and/or bond trustee in the case of securitisations and CLOs.

On a corporate loan, the facility agent will act as agent for the lender or syndicate of lenders, carrying out an administrative role in relation to the loan and acting as a primary point of contact between the various parties and managing the flow of information and funds between the borrower and the lender(s). If the corporate loan is secured, the security agent will hold the benefit of security over the loan on trust on behalf of the lender(s) and, if directed to do so by the lender(s), will enforce the security on their behalf. On a securitisation or CLO, the bond trustee is appointed by the issuer of the securities but acts on behalf of the bondholders, holding the issuer's promise to pay under the bonds and other issuer covenants on trust for the benefit of itself and the bondholders and may enforce the terms of the bonds on their behalf. The security trustee, who may well be the same entity as the bond trustee, will hold the benefit of any security pledged on

trust in favour of the bondholders and other secured creditors. On a securitisation or CLO, in the ordinary course, neither the bond trustee nor the security trustee will have any contact with the underlying borrowers. Only mortgage or loan servicers would interact with the underlying borrowers on a securitisation or CLO, even if the security over the underlying collateral were to be enforced by the security trustee.

## **2. Our concerns in relation to the Proposed Directive**

While we support the laudable intentions of the Proposed Directive to remove impediments to loan transfers to non-bank institutions and to create a pan-EU regulatory framework and common standards for "loan servicers", we are writing to express our concern that the terms "credit agreement" and "credit servicer" set out in Article 3 (Definitions) of the Proposed Directive are so widely defined that they may result in facility agents and security agents/trustees<sup>1</sup> needing to be authorised as "credit servicers" under the Proposed Directive. This does not, however, seem to be the intention of the Proposed Directive as no reference to the authorisation of such agents or trustees is made in the Explanatory Memorandum to, or recitals of, the Proposed Directive and there is no explanation as to why authorisation of such service providers should be required.

### **2.1 Definition of "credit agreement"**

The definition of "credit agreement" refers to any "agreement as originally issued, modified or replaced, whereby a creditor grants or promises to grant a credit in the form of a deferred payment, a loan or other similar accommodation".

It could, therefore, include any corporate loan as well as loans to consumers or small or medium sized enterprises ("**SMEs**"), although there is no suggestion in the Explanatory Memorandum that the intention of the Proposed Directive is to protect corporate or institutional borrowers who are able to negotiate, and obtain independent legal advice in relation to, the terms of any credit agreement they enter into.

While we note that paragraph 5 of the Explanatory Memorandum states that the Proposed Directive "applies to purchasers and servicers of credit originally issued by a credit institution or its subsidiaries, irrespective of the type of borrower concerned", the focus of the Explanatory Memorandum is on non-performing loans ("**NPLs**") and on the need to protect consumer and SME borrowers where their loans are transferred to purchasers who are not banks, while facilitating the transfer of such NPLs to such non-bank purchasers.

We request, therefore, that the definition of "credit agreement" is limited to those entered into with consumers or SMEs. We note that credit servicing is a regulated activity in Ireland pursuant to the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the "**2015 Act**") but only credit agreements which are cash loans provided to relevant borrowers are in scope of the 2015 Act. "Relevant borrowers" are defined therein as either (i) natural persons (unless he/she is a professional client under MiFID or a regulated financial services provider ("**RFSP**")); or (ii) a SME but only to the extent that the credit was advanced to the SME by an RFSP.

### **2.2 Definition of "credit servicer"**

The definition of "credit servicer" is also very wide and refers to:

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<sup>1</sup> In this response, the term "trustee" refers to both security trustees and bond trustees.

"any natural or legal person, other than a credit institution or its subsidiaries, which carries out **one or more** [emphasis added] of the following activities on behalf of a creditor:

- (a) monitors the performance of the credit agreement;
- (b) collects and manages information about the status of the credit agreement, of the borrower and of any collateral used to secure the credit agreement;
- (c) informs the borrower of any changes in interest rates, charges or of payments due under the credit agreement;
- (d) enforces the rights and obligations under the credit agreement on behalf of the creditor, including administering repayments;
- (e) negotiates the terms and conditions of the credit agreement with borrowers, where they are not a "credit intermediary" as defined in Article 4(5) of Directive 2014/17/EU or Article 3(f) of Directive 2008/48/EC.;
- (f) handles borrowers' complaints."

While a mortgage servicer or loan servicer may perform most, or all of the activities described above, facility agents and security agents/trustees may also perform some of these activities on behalf of a creditor, which may be a "credit institution"<sup>2</sup> or "any legal person who has issued a credit in the course of his trade, business or profession, or a credit purchaser". For example, a security agent/trustee may perform duties that could be deemed to fall within the activities of "monitoring the performance of the credit agreement"; "collecting and managing information about the status of the credit agreement, of the borrower and of any collateral used to secure the credit agreement" and/or "enforcing the rights and obligations under the credit agreement on behalf of the creditor". A facility agent also performs activities that fall limbs (a) and (b) of the definition.

There is no suggestion in the Explanatory Memorandum that the intention of the Proposed Directive is to require that security agents/trustees and facility agents are authorised pursuant to the Proposed Directive and we would question why there is any need to authorise such service providers. Security agents/trustees owe fiduciary duties to the lenders, secured creditors and bondholders; facility agents are agents of, and provide administrative services to, institutional lenders; in each case, the terms of the appointment of the security agents/trustees and facility agents are clearly set out under the terms of the loan agreements or bond documentation to which they are party.

We note that the 2015 Act defines credit servicing as "managing and administering a credit agreement" and while it includes the activities of the type listed in the definition of "credit servicer" in the Proposed Directive (such as notifying the borrower of interest rate changes; taking necessary steps to collect or recover amounts due from borrowers; managing or administering day-to-day matters such as repayments, charges, errors and communications with the borrowers), it expressly excludes taking enforcement steps in relation to the credit agreement or appointing a servicer under the credit agreement. A facility agent or security agent/trustee would, therefore, not be required to be authorised under the 2015 Act; whereas they could be required to be so authorised under the Proposed Directive. The Proposed Directive could, therefore, be seen as imposing more onerous requirements than existing legislation within the EU.

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<sup>2</sup> As defined in the Proposed Directive as being a "credit institution" as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013, which refers to "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account".



We, therefore, request that the definition of "credit servicer" is limited to those who manage and administer credit agreements with consumers and SMEs and that taking steps to enforce a credit agreement or appointing a servicer are expressly excluded from the definition, as per the 2015 Act. This would reflect Article 15 of the Proposed Directive which only requires credit purchasers to appoint a credit institution or an authorised credit servicer to perform credit servicing activities in respect of agreements concluded with consumers. Why should the requirement for a credit servicer to be authorised generally not also be so limited to credit agreements concluded with consumers?

### **2.3 "Credit institutions"**

We note that the Proposed Directive does not apply to "the servicing of a credit agreement carried out by a credit institution established in the Union or its subsidiaries established in the Union" and while a number of our members are credit institutions or subsidiaries of such institutions, a significant number of our members are not credit institutions or credit institutions in the EU. Requiring security agents/trustees and facility agents who are not "credit institutions" to be authorised credit servicers could significantly limit the competitive market which currently exists for such service providers and would not seem to us to be proportionate, bearing in mind that security agents/trustees and facility agents have no interaction with consumers or SMEs and there is no suggestion in the Explanatory Memorandum that there is any need or intention to regulate the services provided by them. It would seem that such service providers could be unwittingly caught by the breadth of the definition of "credit servicer", when there is no intention to do so, which would not seem to us to accord with the EU principle of proportionality.

### **3. Conclusion**

We would, therefore, be very grateful if you could confirm that it is not the intention of the Proposed Directive to require security agents/trustees and facility agents to be authorised as "credit servicers". If the intention is that they are not required to be so authorised, we would be very grateful if you could consider amending the definition of "credit servicer" and "credit agreement" to limit them to the provision of credit administration services in relation to credit agreements with consumers and SMEs. If the definitions of "credit servicer" and "credit agreement" remain as currently drafted, it would seem to us that the Proposed Directive would mean that, post 1 July 2021, a facility agent and/or security agent/trustee acting in respect of a corporate loan or securitisation or CLO would either need to be a credit institution in the EU as defined under the Proposed Directive (namely a deposit-taking bank) or be an authorised credit servicer. In our view, this would create onerous obligations on such service providers, when there seems to be no perceived risk with the service that they currently provide and no reference to their requiring to be so authorised in the Explanatory Memorandum to, or recitals of, the Proposed Directive, and we are concerned that this could significantly limit the competitive market which currently exists for such service providers.

Yours faithfully,

**P.P.** Jillian Hamblin  
ICMSA Trustee Sub-Committee Chair