

Professional Purchasers of Non-Performing Credit: the new Law is ahead

This paper examines the regime for credit servicers and purchasers included in the Credit Servicers and Purchasers Bill, which amends the Financial System (Reform Measures) Act, the Consumer Credit Agreements Act, the Unified Regulation, Supervision and Solvency of Credit Institutions Act, the Real Estate Credit Agreements Act, and the recast version of the Insolvency Act.

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1. The Credit Servicers and Purchasers Bill (the 'Bill') has been introduced to the lower house (Official Journal of the Spanish Parliament of 14 March). This text, in addition to transcribing the content of Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC [consumer credit agreements] and 2014/17/EU [real estate credit agreements concluded with consumers] (the 'Directive'), introduces additional amendments to the 2011 Consumer Credit Act with regard to the protection of borrowers in situations of economic vulnerability, amendments that go further than those provided for in the Directive - the content of which is also incorporated into

Spanish law - unlike the amendment of the Real Estate Credit Agreements Act of 15 March 2019, limited by the Bill to transferring the content of the articles of the Spanish text of the Directive to that of the 2019 Act.

2. The Bill also amends the Financial System (Reform Measures) Act, the Credit Institutions (Unified Regulation, Supervision and Solvency) Act and the recast version of the Insolvency Act in matters related to the servicing and transfer of non-performing credit (NPC).

The Directive on credit servicers and credit purchasers is transposed into Spanish law more than a year late

3. The text currently passing through Parliament is made up of forty-two articles grouped into seven sections dedicated, respectively, to general provisions, the legal regime of credit servicers, credit purchasers, the regime for the activity of credit servicers and purchasers, administrative supervision, the complaints system, and the penalty regime. It includes five transitory provisions relating to consumer and real estate credit agreements entered into prior to the Bill coming into force as an Act, to the request for authorisation from the Bank of Spain by those who have been carrying out the activity of servicing NPC (request to be made by entities other than credit institutions and financial credit establishments), a transitory regime for the lodging of complaints by consumers and a provision on the registra-

tion of NPC transfers in the land registry. In its final provisions, the aforementioned laws are amended.

4. The purpose of the Bill is, therefore (Art. 1), the establishment of the legal regime applicable to the activity of credit purchasers and credit servicers with respect to NPC or NPC agreements entered into by credit institutions and financial credit establishments. In the transposition, the decision has been taken to include, together with credit originated by credit institutions, those of financial credit establishments. However, in contrast to the Directive, the Bill does not include NPC in its subject-matter scope and this is justified in its explanatory notes on account of the heterogeneity of the NPC market, a diversity that “is far from the circumstances of intervention envisaged by the directive: the promotion of the non-performing credit market to contribute to the reorganisation of financial institutions and, therefore, to financial stability”. This is without prejudice to the fact that Article 5 of the Bill, with regard to the reservation of activity (prior administrative authorisation from the Bank of Spain) provides that, when a non-performing credit becomes non-performing, its servicer may continue to carry out the servicing with respect to this credit.
5. The concept of non-performing credit results from the combination of two definitions contained in Article 2 of the Bill: that of a credit agreement, whereby “a credit institution or a financial credit establishment grants or promises to grant a credit in the form of a deferred payment, a loan or

other similar financial accommodation to a borrower”, and that of a non-performing credit agreement: “a credit agreement that is classified as a non-performing exposure in accordance with Article 47a of Regulation (EU) No. 575/2013 on prudential requirements for credit institutions”. From the list in Article 47a, those exposures in respect of which a default is considered to have occurred, those exposures considered to be impaired in accordance with this Regulation, those exposures that would likely not be paid back in full without realisation of collateral and those exposures in the form of a financial guarantee that is likely to be called by the guaranteed party stand out.

6. In a late and almost verbatim transposition of the Directive, the Bill defines credit servicers as “any legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor’s rights under a non-performing credit agreement, or to the non-performing credit agreement itself, on behalf of a credit purchaser, and carries out at least one or more credit servicing activities”, and credit purchasers as “any natural or legal person, other than a credit institution, that purchases a creditor’s rights under a non-performing credit agreement, or the non-performing credit agreement itself, in the course of its trade, business or profession”. Purchasers do not have to be credit institutions or financial credit establishments, which is consistent with the scope of the legislation since it does not apply to the purchase of credit by a credit institution established in the European Union, or by a financial credit establishment (Art. 5 of the Bill).
7. The new regime will not apply to credit servicing activities carried out by collective investment firms on behalf of the funds they manage, whether harmonised (UCITS) or non-harmonised (AIFMD), or to SICAVs that have not appointed a manager in accordance with the Collective Investment Schemes Act. Nor to the Sareb or the Deposit Guarantee Fund (DGF). Credit servicing activities carried out by notaries, personnel at the service of the Justice Administration and lawyers are also expressly excluded (Art. 4). This last exclusion (already provided for in the draft bill of May 2024) is unnecessary, since natural persons are, in the Bill, excluded from the definition of credit servicer, which is limited to legal persons in the transposition of the Directive.
8. The Bill includes, as is customary in the Union’s financial sector, the ‘European passport’ (cross-border activity of credit servicers without the need to apply for new administrative authorisation in the host state, and vice versa if they intend to perform it in Spain) in accordance with the procedure detailed in Articles 12 and 13 of the Bill. The free performance of credit servicing activities (passport) only applies to NPC originated by credit institutions - that covered by the Directive - so that for the servicing of non-performing credit or non-performing credit agreements by financial credit establishments, authorisation in Spain will be required.
9. Credit institutions and financial credit establishments do not require additional administrative authorisation for this activity, with certain articles of the Bill expressly applying to them when they act as credit servicers, including the penalty regime.
10. Like all financial institutions, the directors and managers of credit servicers must ful-

fil certain requirements of suitability and honourability as well as prove - the governing body as a whole - “adequate knowledge and experience to conduct the business in a competent and responsible manner” (Art. 6 of the Bill, which details the rest of the requirements that the entity applying for authorisation must meet; with regard to the documentation that must accompany the application, see Art. 9). On 15 December 2023, the European Banking Authority published its Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of credit servicers, as a whole, under Directive (EU) 2021/2167. The Bill also includes the regime for qualifying (significant) holdings in the capital of the credit servicer.

The Bank of Spain is the supervisory body for these financial institutions

11. These credit servicers will have to register in the relevant register created for this purpose at the Bank of Spain, which will publish the list of authorised credit servicers on an annual basis. In this regard, on 5 March 2024, the European Banking Authority issued its Guidelines on the establishment and maintenance of national lists or registers of credit servicers under Directive (EU) 2021/2167, guidelines that will be taken into account by the Bank of Spain when drawing up the content of the standardised forms for this purpose.
12. Articles 14 to 20 of the Bill (Title II) establish certain reporting obligations for credit institutions and financial credit establishments: as originators, they shall provide potential credit purchasers with the information referred to in Commission Implementing Regulation (EU) 2023/2083 of 26 September laying down implementing technical standards for the application of Article 16(1) of the Directive, information that should enable these purchasers to properly assess the value of the creditor’s rights or of the credit agreement itself and the likelihood of recovery of the value; likewise, the originators shall inform the Bank of Spain every six months on the identity of the credit purchasers and on other points referred to in Article 16 of the Bill.
13. Also in this Title II, the obligation is established for credit purchasers, be they domestic, EU or from a third country operating in Spain, to appoint a credit servicer or a credit institution or a financial credit establishment to carry out the credit servicing activities for NPC or NPC agreements, when these have been entered into with consumers. This information must be sent to the Bank of Spain.
14. It is clarified that the level of protection provided for consumers in current rules and regulations will not be affected by the sale of the NPC or NPC agreement, nor will the order of priority of claims established in the Insolvency Act or in the Credit Institution (Recovery and Resolution) Act 11/2015.
15. As regards the rules governing the activity of credit servicers and purchasers contained in Title III, of note are the obligations to

inform borrowers about the matters referred to in Article 22 of the Bill, as well as the duty to act in good faith, 'fairly and professionally', in a quasi-literal transcription of Article 10 of the Directive.

16. The content of the credit servicing agreement is also regulated when the credit purchaser does not carry out this activity himself but uses a professional credit servicer for this purpose. The latter must keep a series of documents for six years from the termination of the servicing agreement, including the aforementioned agreement (Art. 23). On the other hand, the credit servicer may outsource part of its activity, although this outsourcing does not release it from fulfilling the obligations established in the Bill.
17. The administrative supervision, inspection and penalty regime lies with the Bank of Spain. Title V covers the complaints system both internally for the credit servicer and externally: borrowers and guarantors may submit complaints to the Independent Administrative Authority for Financial Customer Protection relating to their interests and rights arising from alleged breaches of this Bill, its implementing regulations "and the standards or best financial practices and conventions that are applicable to credit service providers". The bill creating this authority was introduced to the lower house a year ago and is still passing through Parliament.
18. With regard to the amendments to other laws, we will simply refer to that of the Financial System (Reform Measures) Act 44/2002 of 22 November in assigning to the credit servicer the fulfilment of the obligations provided for the entities reporting to the Risk Information Centre, as well as that of Act 10/2014, of 26 June, in transferring the existing proportionality in penalties to non-credit institutions with respect penalties provided for credit institutions, to the amount of the penalties on members of the board of directors of the respective institutions.
19. Finally, Article 616 of the Insolvency Act is amended to add a new paragraph four, under which, in the same way that in no case may the restructuring plan of a payment service provider affect the claims arising from the funds received for the execution of payment transactions, nor to the credit derived from the funds received in exchange for electronic money issued in relation to the provision of payment services not linked to that issuance, "in no case may the restructuring plan of a credit servicer affect the funds of the borrowers received and held for the purpose of sending them to the credit purchasers". In line with this, Article 583(5) of this Act is deleted.