ICMSA RESPONSE TO EBA DRAFT CONSULTATION PAPER EBA/CP/203/07 ON EBA 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

1 Introduction to ICMSA Response

1.1 The International Capital Markets Services Association (**ICMSA**) is a London-based self-regulating organisation representing international financial and non-financial institutions active in the provision of services to the International Capital Markets, including in the European Union. Our members also act as facility agents and security agents in the European, African and Middle Eastern syndicated loan markets. Our membership includes universal banks, registrars, stock exchanges, law firms, the International Central Securities Depositories (**ICSDs**) and other service providers specialised in specific product segments. The primary purpose of the association is to foster the highest standards in the practice and management of international capital market services, thereby facilitating the efficient functioning of the market.

1.2 We welcome the opportunity to provide the views of the ICMSA on the draft consultation paper of the European Banking Authority (**EBA**) dated 19 April 2023 on the EBA Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of credit servicers (the **Consultation**) under Directive (EU) 2021/2167 (the **Directive**).

1.3 We appreciate that the Consultation considers the more specific Guidelines on the assessment of adequate knowledge and experience of the management or administrative organ of credit servicers by credit servicers and competent authorities, as required by Article 5(2) of Directive (EU) 2021/2167. We would, however, like to take this opportunity to reiterate a more general concern that has been raised both by the ICMSA in relation to: (i) the initial consultation on the proposed draft Directive on credit servicers and credit purchasers (see our response to the Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission in respect of their proposal for the Directive dated 7 June 2018); and (ii) in support of the response of the Financial Law Markets Committee to the consultation by the European Banking Authority on its draft implementing technical standards (ITS) specifying disclosure templates to be used for the provision of information in connection with the sale of non-performing loans (**NPLs**) dated 30 August 2022. We also note and support the concerns which, we understand, have been raised by the Loan Market Association in its various responses to the EBA and the European Commission on the Directive and on the draft ITS under the Directive and, in particular, its request for guidance that facility agents and security agents are not "credit servicers" subject to the obligations that apply to credit servicers under the Directive.

1.4 References in this response to "loans" are deemed to include references to notes in securitisation transactions; references to "lenders" are deemed to include references to "noteholders" or "bondholders" under such transactions, references to "facility agents" are deemed to include references to "loan agents" and references to "security agents" are deemed to include references to "security trustees".

2 ICMSA's concern regarding definition of "credit servicer" under the Directive

2.1 Facility agents and security agents would not generally consider themselves as credit servicers when applying the ordinary meaning of that term. Nor would the relevant transaction parties generally consider them as such. They have not, for example, been treated as credit servicers in Ireland to date, where credit servicing is already a regulated activity. However, the definition of "credit servicer" in the Directive is broad enough that it could be interpreted as including those roles where the underlying loan becomes an NPL.

The definition of "credit servicer" at Article 3(8) refers to a legal person that, in the course of its business, "manages and enforces the rights and obligations related to a creditor's rights" under an NPL, on behalf of a credit purchaser, and carries out at least one or more credit servicing activities.

Neither facility agents nor security agents would have the powers or discretions under a loan agreement to "manage" the rights and obligations related to a creditor's rights under NPLs, as the scope of their powers is specifically prescribed under the terms of the loan agreements and is generally limited to acting on the instructions of the lenders. Furthermore, facility agents do not generally have the power to "enforce" the rights of the lenders under the loan agreement and a security agent's powers and discretions are typically limited to enforcement on the instructions of the lenders.

Security agents and facility agents may, however, be involved in:

- "collecting or recovering from the borrower, in accordance with national law, any payments due related to a creditor's rights under a credit agreement" (Article 3(9)(a));
- "renegotiating with the borrower, in accordance with national law, any terms and conditions related to a creditor's rights under a credit agreement,..in line with the instructions given by the credit purchaser" (Article 3(9)(c)); or
- "informing the borrower of any changes in interest rates or of any payments due related to a creditor's rights under a credit agreement or to the credit agreement itself" (Article 3(9)(d)).

Any collection or recovery from the borrower of any payments due to a creditor would, however, be carried out as part of the enforcement of security by a security agent and in accordance with local laws regarding the enforcement of security and may involve the appointment of an insolvency practitioner under the local law. The security agent would not be interacting with a borrower on a regular, "business as usual" basis in collecting payments from it, in the way that a credit servicer would typically do. A facility agent may collect regular interest and principal payments from a borrower or inform the borrower of any changes in interest rates or of payments due but this would be within the terms of the loan agreement and not on enforcement.

A facility agent or security agent may be involved in agreeing and/or consenting to amendments to the terms and conditions of a loan agreement (and, usually, only pursuant to instructions and directions from the relevant lenders and/or secured parties), but is not likely to be involved in negotiating any commercial terms with the borrower; such process is much more likely to be conducted by the lenders directly with the borrower or via the Facility Agent as a conduit. To the extent any amendments are agreed and/or consented to by a facility agent or security agent, they would typically be acting on the instruction of the lenders.

2.2 Facility agents and security agents, as non-commercial parties, would not know whether lenders under a loan facility are "credit purchasers" within the meaning of the Directive or whether loans transferred to a new lender qualify as NPLs within the scope of the Directive. It would also not be possible for facility agents or security agents to be able to identify whether loans transferred to a non-bank entity were originated by an EU credit institution. As lenders can typically transfer their rights under a facility agreement, a loan agreement may come within scope of the Directive as a loan originated by an EU bank which may have been transferred to a non-bank; but, as the facility agent or security agent may not know the identity of the lenders in advance or at the time of transfer, a loan agreement in respect of which they are facility agent or security agent may have come within the scope of the Directive without their knowledge and they would not know when they are required to comply with the obligations that apply to credit servicers under the Directive. Furthermore, facility agents and security agents would not know whether loans had been classified as "non-performing" by a bank transferring its commitment in accordance with Article 47a of the Capital Requirements Regulation (CRR) at the time of sale. The increased monitoring and operational burden which would, therefore, result for facility agents and security agents if they were to be regarded as falling within the definition of "credit servicer" could, therefore, be significant and disproportionate to their roles.

2.3 The provisions of Articles 11 and 12 are far more extensive and are inconsistent with the roles of facility agents and security agents under existing documentation. Security agents are, under English law, trustees required to act in the interests of the secured creditors – the lenders or noteholders of a loan or securitisation – and neither a facility agent nor a security agent would expect to owe duties to a credit purchaser specifically (other than its duties to lenders or noteholders as a whole) or to have any duties to borrowers, which contravenes the contractual arrangement under the documentation and additionally, in the case of security agents, English trust law. Furthermore, Article 12 imposes specific duties on outsourcing by a credit servicer. While these may be appropriate in the context of credit servicing, it would not be appropriate to impose these obligations on a facility agent or security agent whose ability to delegate their responsibilities or retire from their roles is well-established under market-standard loan documentation. If facility agents and security agents were to be regarded as credit servicers under the Directive, these additional obligations – which may seem appropriate in the context of actual credit servicing but not in the context of being a facility agent or security agent – would likely render being a facility agent or security agent untenable.

3 Conclusion

We, therefore, request that guidance is given by the European Commission or the EBA to make it clear that facility agents and security agents in the usual course of their business are not regarded as "credit servicers" under the Directive, for the following reasons:

- Facility agents and security agents do not "manage and enforce" the creditor's rights under a non-performing loan in the normal course of their business; though, on enforcement, a security agent/trustee may enforce the security in accordance with the loan documentation and existing local security laws;

- It would not be possible for a facility agent or security agent to identify when a loan had become "non-performing" under the terms of the Directive or if it had been originated by an EU credit institution and transferred to a "credit purchaser" as defined under the Directive. There is, therefore, a risk that a loan which was not in scope of the Directive when a facility agent or security agent was appointed under the original transaction documentation may become in scope but, absent guidance and/or

an exemption, the role of facility agent and security agent may change to that of "credit servicer" (and the nature of their obligations change significantly) without the facility agent or security agent being aware of the change in the status of the loan; and

- If a facility agent or security agent were to be regarded as a "credit servicer" under the Directive, the obligations imposed on them under Articles 11 and 12 are inconsistent with their limited roles under existing market standard documentation and, additionally in the case of security agents would be contrary to English trust law, and are likely to render their ability to perform the roles of facility agent and security agent untenable, bearing in the mind the risks they might face in, unwittingly, becoming "credit servicers" during the tenure of the loan/transaction.

For and on behalf of the International Capital Markets Services Association

18 July 2023