Proposed EU Directive May Create New Burdens for Managers of Debt Funds and Their Advisers

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In March this year, the European Commission published a proposal for a Directive that aims to reduce the volume of nonperforming loans ("NPLs") in Europe (the "Commission Proposal"). Even though the Directive is meant to focus on the secondary market for NPLs, the Commission Proposal goes much further and also covers the secondary market for any loans issued by EU banks including performing loans ("EU Loans").

Commission Proposal's broader scope. The Commission Proposal would cover any person buying, or being involved in managing and monitoring, EU Loans. That would include any fund or fund manager when investing in performing or nonperforming EU Loans and any manager or adviser assisting in managing and monitoring such EU Loans.

The Commission Proposal would also cover non-EU purchasers (*e.g.*, non-EU funds) and non-EU advisers or managers of such funds. They would be required to designate an EU representative who would be fully responsible for compliance with the obligations imposed on such non-EU credit purchaser under the Commission Proposal.

Exemption for credit institutions. Credit institutions and their subsidiaries would be exempt from the new requirements on the basis that they are regulated. However, as currently drafted, that exemption does not apply to fund managers regulated under AIFMD and advisers and managers that are regulated under MiFID, which is a very important omission.

Authorisation, reporting and disclosure obligations. The Commission Proposal would impose an authorisation requirement, and new reporting and disclosure obligations, on the buyers and servicers of EU Loans. They would have to provide competent authorities with information about the EU Loans. The Commission Proposal would also mandate new procedural requirements, including a requirement to provide all "necessary information" to enable a credit purchaser to assess the value of the EU Loan and the likelihood of recovery.

Status of the Commission Proposal. The European legislative process is still at an early stage. Neither the EU Parliament nor the Council of the EU has yet published its take on the Commission Proposal and the negotiations between the legislative bodies will follow. Hopefully, the industry's concern—that the scope of the Commission Proposal is unnecessarily broad—will be heard.

Comment. The Commission Proposal seems to go beyond its declared purpose. It is to be hoped that the scope will be narrowed, and restricted to the stated purpose: to tackle the buildup of NPLs. There is no need to include performing loans within the scope of this Directive.

In addition, it is also important to exclude fund managers and MiFID-regulated firms. The Commission Proposal suggests that existing regulation is the basis for the exemption of credit institutions from the scope of the Directive. It is therefore to be hoped that regulated fund managers, their funds, and MiFID advisers and portfolio managers will be included in the exemption that currently only covers credit institutions.

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Please do not hesitate to contact us with any questions.

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