

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on accelerated extrajudicial collateral enforcement mechanism**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The establishment of a comprehensive strategy to address the issue of non-performing loans (NPLs) is a priority for the Union. While addressing NPLs is primarily the responsibility of credit institutions and Member States, there is also a clear Union dimension to reducing current stocks of NPLs, as well as to preventing any excessive build-up of NPLs in the future. Given the interconnectedness of the banking and financial systems across the Union where credit institutions operate in multiple jurisdictions and Member States, there is significant potential for spill-over effects between Member States and the Union at large, both in terms of economic growth and financial stability.
- (2) An integrated financial system will enhance the resilience of the Economic and Monetary Union to adverse shocks by facilitating private cross-border risk-sharing, while at the same time reducing the need for public risk-sharing. In order to achieve these objectives, the Union should complete the Banking Union and further develop a Capital Markets Union. Addressing high stocks of NPLs and their possible future accumulation is essential to completing the Banking Union as it is important for ensuring competition in the banking sector, preserving financial stability and encouraging lending so as to create jobs and growth within the Union.

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<sup>1</sup> OJ C , , p. .

(3) In July 2017, the Council in its Action Plan to Tackle Non-Performing Loans in Europe called upon various institutions to take appropriate measures to further address the high number of NPLs in the Union and prevent their possible future accumulation. The Action Plan sets out a comprehensive approach that focuses on a mix of complementary policy actions in four areas: (i) bank supervision and regulation, (ii) reform of restructuring, insolvency and debt recovery frameworks, (iii) developing secondary markets for distressed assets, and (iv) fostering restructuring of the banking system. Actions in these areas are to be taken at national level and, where appropriate, at Union level. The Commission announced a similar intention in its Communication on completing the Banking Union of 11 October 2017, which called for a comprehensive package on tackling NPLs within the Union.

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(6) In the Action Plan, the Council invited the Commission to further analyse the possibility of enhancing the protection of secured creditors. The introduction of accelerated extrajudicial collateral enforcement as a swift mechanism for the recovery of collateral value would help prevent future accumulation of, and reduce the resolving costs for, NPLs, thereby supporting both credit institutions and purchasers of NPLs in recovering value. Moreover, the expected shorter time for enforcement might increase the value of NPLs as well as their attractiveness for investors, thus contributing to a more liquid secondary market for NPLs.

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- (40) Expedited and efficient out-of-court enforcement mechanisms which enable credit institutions to recover value from collateral in the case of a borrower's default are not available in all Member States, which means that in some Member States credit institutions are only able to enforce collateral based on a court decision or in court, which, depending on national frameworks, can mean that the procedures are lengthy and costly. Where available, the scope and efficiency of the extrajudicial enforcement procedures vary from one Member State to another. For that reason it is necessary to establish a minimum common framework and requirements for an accelerated extrajudicial collateral enforcement mechanism available in all Member States.
- (41) The inefficiency of some Member States' enforcement procedures is an important factor for low recovery rates where business borrowers default on secured credit agreements. The length of some existing procedures entails additional costs for secured creditors. In the Member States which have not established extrajudicial enforcement procedures for various types of collateral, secured creditors may, depending on the national frameworks, face lengthy judicial enforcement procedures.
- (42) Existing enforcement procedures within the Union sometimes result in a lack of level playing field for companies across the Union with regard to access to credit, particularly for SMEs which depend on bank credit more than larger companies. Uneven recovery rates across Member States lead to differences in the availability of bank credit for SMEs because the credit institutions' lending capacity decreases as NPLs accumulate on their balance sheets. This may lead to higher borrowing costs corresponding to place of establishment and irrespective of the real creditworthiness of the companies. Therefore, a minimum common framework would contribute not only to the efforts to prevent future accumulation of NPLs, but also to a more level playing field and access to bank credit by companies across the Union.

- (42a) Member States should have a choice of form and methods for the transposition of this Directive into national law provided that they achieve the result prescribed in this Directive, namely the introduction of the accelerated extrajudicial collateral enforcement mechanism, in such a way that all the minimum harmonisation elements of the Directive are addressed in a coherent manner. The Member States should be able, in particular, to amend their existing enforcement mechanism or create a new mechanism. Member States should also be free to introduce national rules that complement or supplement the provisions on the accelerated extrajudicial collateral enforcement mechanism provided for in this Directive. The accelerated extrajudicial collateral enforcement mechanism should be without prejudice to other enforcement mechanisms under national law.
- (42b) This Directive should not affect the application of, or establish rules on, private international law. In particular, Regulations (EU) No 1215/2012<sup>2</sup>, (EC) No 593/2008<sup>3</sup> and (EU) 2015/848<sup>4</sup> of the European Parliament and of the Council should continue to apply irrespective of the rules in this Directive. It should be noted that Regulation (EU) No 1215/2012 covers enforceability of authentic instruments, and does not cover enforceability of other extrajudicial documents. Since it would not be possible to address such issues in this sector-specific Directive, the cross-border enforceability of such other extrajudicial documents should be left to national law.
- (42c) Taking into account the objective of this Directive, namely, to help prevent further accumulation of NPLs in the banking system, this Directive should only apply to secured credit agreements concluded between credit institutions and business borrowers. Since this Directive should be an instrument of minimum harmonisation, Member States should be free to apply the same or similar extrajudicial enforcement mechanism also in the case of agreements concluded by creditors other than credit institutions as well as agreements concluded by debtors who are not business borrowers.
- (42d) This Directive should only apply to collateral which is owned by the business borrower. The relevant point of time for assessing whether the asset is owned by the business borrower should be the conclusion of the agreement on accelerated extrajudicial collateral enforcement mechanism. Since this Directive lays down minimum rules, Member States should be free to apply the same or similar enforcement mechanism also in the case of collaterals provided by third parties.
- (42e) This Directive should apply to credit agreements which are secured by identifiable immovable or movable assets. It should not apply to pledges, known in some Member States, which cover collectively movable assets of the business borrower without specifying such assets.
- (43) In order to protect consumers, credits provided to consumers should be excluded from the scope of the accelerated extrajudicial collateral enforcement mechanism. The Directive should not apply in cases where one of several borrowers is a consumer or where one of the owners of the collateral is a consumer. In order to protect sole entrepreneurs, this mechanism should not apply to credit agreements secured by residential property which is the primary residence of the sole entrepreneur.
- (43a) The accelerated extrajudicial collateral enforcement mechanism should be voluntary in two senses. First, both parties should agree on the clause to use accelerated extrajudicial collateral enforcement mechanism. Such an agreement could be included in the secured credit agreement or it could be made at a later point. This Directive should not affect parties' right

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<sup>2</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

<sup>3</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

<sup>4</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

to agree upon other enforcement mechanisms that may be available under national law, including those related to financial collateral arrangements. Second, the creditor should not be precluded from using other enforcement mechanisms that may be applicable under national law even where the parties have agreed on the possibility to use the accelerated extrajudicial collateral enforcement mechanism. At this phase, the choice of the mechanism is not up to the business borrower, who cannot request switching to another enforcement procedure, where the creditor has opted for exercising the agreed accelerated extrajudicial collateral enforcement mechanism.

- (44) The enforcement mechanism should be based on an agreement between the credit institution and the business borrower, and it should be necessary that the business borrower be informed about the consequences and conditions under which the accelerated extrajudicial collateral enforcement mechanism may be used by the creditor. Therefore, the conditions should be established in a written agreement, or in a notarised format where national law so provides, between the credit institution and the business borrower.
- (44a) The ~~secured-credit~~ agreement on the accelerated extrajudicial collateral enforcement mechanism should define the enforcement event, which means a triggering event after which the creditor can notify the business borrower of its intention to apply the mechanism and thereafter enforce the collateral. Member States should not limit the freedom of the credit institution and business borrower to agree on the enforcement event for instance by setting specific deadlines in their legislation, except where this is deemed appropriate by a Member State to protect business borrowers who are natural persons. The fact that the enforcement event has to be defined by the parties should not have any effect on, for instance, national civil law rules on what is regarded to be a default of payment.
- (45) In order to protect business borrowers, there should be a notification on the creditor's intention to enforce the collateral as well as appropriate measures to ensure that creditors afford business borrowers a reasonable period of time for execution of payment to avert this kind of enforcement. One possible means of transposing such a grace period into national law should be to provide for a reasonable minimum period, either in days or in a more descriptive manner, for the phase between notification and the moment when the enforcement may start. It should be a matter for national law to define the form of the notification, including the option of using a notary, bailiff, other public official or a person exercising a public function for serving it, and to define whether it is the moment of sending or receiving the notification that matters for the purposes of counting the grace period. When the parties define the grace period in the ~~secured-credit~~ agreement, they would take into account national laws transposing the obligation of the Member State to ensure that the creditor affords a business borrower a reasonable period of time for execution of payment.
- (46) In order to ensure that the accelerated extrajudicial collateral enforcement mechanism is an expedited and effective instrument to recover value from collateral, it should be possible that the ~~secured-credit~~ agreement on the accelerated extrajudicial collateral enforcement mechanism can serve as a basis for initiating the accelerated extrajudicial collateral enforcement mechanism without the need to obtain an enforceable title from a court.

- (46a) In order to allow certain public control, Member States should be able to provide that a notary, bailiff, other public official or a person exercising a public function carries out one or more tasks relating to the enforcement or the whole enforcement as well as verifies whether the conditions for using the accelerated extrajudicial collateral enforcement mechanism are fulfilled before enforcement may commence. In the context of this Directive, a person exercising a public function could also cover professionals, who are of private nature but who need to comply with their statutory obligations. Such a possibility should also cover a system where different persons act at different phases, and a system where public officials work as part, or as employees, of an enforcement authority or of a court. This should, however, not mean that a judge could carry out any parts of the enforcement mechanism or verify whether the conditions for using the accelerated extrajudicial collateral enforcement mechanism are fulfilled, unless where a challenge is made, without prejudice to national rules regarding the internal organisation of courts, which might provide that the duties of other officials can also be occasionally performed by judges.
- (47) Member States should have flexibility in deciding upon the method of enforcement which is made available to secured creditors for the purpose of the accelerated extrajudicial collateral enforcement: transfer of ownership through realisation, for instance by means of public auction or private sale, or transfer of ownership to the creditor, understood in some Member States as appropriation. It should be sufficient to transpose only one of these two methods if the chosen method covers enforcement of each type of security right and collateral.
- (48) In order to ensure that the creditor only recovers what it is due under the secured credit agreement, Member States should ensure that the creditor is not entitled to retain or claim any positive difference between the proceeds of the sale of the assets and the sum outstanding of the secured credit agreement or, in the case of appropriation, between the valuation amount of the asset and the outstanding sum. While this could mean paying the positive difference to the business borrower, it could also mean paying it to other creditors, depending on national frameworks. Where less than the sum outstanding of the secured credit agreement is recovered through this enforcement mechanism, Member States should be able to provide for a settlement of residual liabilities secured by the collateral under that agreement, in accordance with national law.
- (48a) The accelerated extrajudicial collateral enforcement mechanism should not affect the rights of those, who hold competing rights in the same collateral, in a manner different from what national law provides for proceedings otherwise used in enforcing secured debts. This would allow to maintain, for instance, a system where a Member State provides for expiration of all security rights after the realisation.
- (48b) Nothing in this Directive should affect the legal protection that business borrowers, creditors and third parties enjoy under existing or future Union and national laws. Member States should be able to provide for a possibility to challenge any aspect of the enforcement mechanism, such as the initiation thereof, and the amount and ground of the claim itself. Member States should be able to define at what phases of the procedure challenges can be made and what the time limits for lodging challenges are. This Directive should not affect the question of whether and when the challenges may have suspensive effects, and it should not affect national rules regarding the position of bona fide buyers of the asset.

- (48c) In order to avoid any inappropriate delays in the enforcement, Member States should put in place effective measures to discourage abusive challenges by business borrowers regarding the use of the accelerated extrajudicial collateral enforcement mechanism. Member States should be able to choose the measures, either existing or new, to achieve this objective. Such measures could include, for instance, not providing suspensive effects for appeals, providing that the party losing the challenge must as a main rule bear the litigation costs, or expeditious treatment of challenges.
- (49) This Directive should not deal with the issue of when secured credit agreements themselves can be transferred, but it should lay down rules on when the right to use the accelerated extrajudicial collateral enforcement mechanism is transferred along with secured credit agreements, where such agreements are transferred. Member States should ensure that, where a secured credit agreement which provides for the use of accelerated extrajudicial collateral enforcement mechanism is transferred by the credit institution to another credit institution or to a credit purchaser, that credit institution or credit purchaser acquires the right to avail itself of the accelerated extrajudicial collateral enforcement mechanism under the same terms and conditions as the credit institution, which concluded the secured credit agreement. This solution should mean that a Member State may require that a credit purchaser uses a supervised credit servicer to enforce the collateral through the accelerated extrajudicial collateral enforcement mechanism on behalf of the credit purchaser. The transferability explained above should not entail a transfer of the right to use accelerated extrajudicial collateral enforcement mechanism to credit purchasers before Member States have put in place the framework established in [Directive on credit servicers and credit purchasers<sup>5</sup>].
- (50) This Directive should be without prejudice to national laws regarding insolvency, restructuring and discharge of debt where such proceedings are initiated in respect of a business borrower. This would mean, for instance, that the realisation of the collateral pursuant to the accelerated extrajudicial collateral enforcement mechanism should be subject to a stay of individual enforcement actions where such a stay is provided for in national law. ~~It should be left to national law whether secured creditors have preferential access to the collateral under this enforcement mechanism even where liquidation proceedings are pending.~~
- (50a) ~~The provisions of Directives (EU) 2019/1023<sup>6</sup> and 2014/59/EU<sup>7</sup> of the European Parliament and of the Council<sup>8</sup> should apply notwithstanding this Directive, for instances as transposed into the laws of Member States, in particular in relation to the provisions on~~ the stay of individual enforcement actions<sup>7</sup>, should prevail over the provisions of this Directive as transposed into the laws of Member States. The Union and the Member States should be able to comply with their international obligations under the Convention on international interests in mobile equipment<sup>9</sup>, signed at Cape Town on 16 November 2001, and the Protocols thereto.

<sup>5</sup> Directive (EU) .../... of the European Parliament and of the Council of ... on ... (OJ ...).

<sup>6</sup> Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).

<sup>7</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

<sup>8</sup> ~~Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).~~

<sup>9</sup> OJ L 121, 15.5.2009, p. 8.

- (51) Given the limited availability of data on the number of extrajudicial procedures used to enforce collaterals, national authorities should collect information regarding the use of the accelerated extrajudicial collateral enforcement mechanism by credit institutions, including where they have authorised another party to carry out the enforcement on their behalf. In order to gain a better understanding of the effectiveness of the exercise of accelerated extrajudicial collateral enforcement mechanism within the Union, Member States should provide annual statistical data on these matters to the Commission starting from the first full calendar year following the end of the transposition period of this Directive.
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- (56) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (57) Since the objective of this Directive, namely to establish a minimum common framework and requirements for accelerated extrajudicial collateral enforcement to help prevent the future accumulation of NPLs ~~of credit institutions~~in the banking system across the Union cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

## **HAVE ADOPTED THIS DIRECTIVE:**

### **Title I**

#### **Subject matter, scope and definitions**

##### *Article 1*

##### **Subject matter**

This Directive lays down a minimum common framework and requirements for an accelerated extrajudicial collateral enforcement mechanism in respect of secured credit agreements concluded between credit institutions and business borrowers.



## Article 2

### Scope

- 1.
2. This Directive shall apply to secured credit agreements, concluded between credit institutions and business borrowers, which are secured by movable or immovable assets owned by the business borrower and posed as collateral to a credit institution in order to secure repayment of claims arising from the secured credit agreement.
3. This Directive shall not affect the protection granted to consumers pursuant, in particular, to Directives 2014/17/EU<sup>10</sup> and 2008/48/EC<sup>11</sup> of the European Parliament and of the Council, Council Directive 93/13/EEC<sup>12</sup> and other relevant Union consumer law and the national provisions transposing them as well as national consumer protection laws.
- 3a. This Directive is without prejudice to the Union rules on private international law, in particular rules related to the jurisdiction, recognition and enforcement of judgments, and applicable law.
- 3b. This Directive does not affect parties' right to agree upon other enforcement mechanisms that may be available under national law, including those related to financial collateral arrangements.
- 4.
5. This Directive shall not apply to:
  - (a)
  - (b)
  - (c) secured credit agreements concluded between credit institutions and business borrowers which are secured by the following:
    - (i) financial collateral arrangements as defined in point (a) of Article 2(1) of Directive 2002/47/EC<sup>13</sup>;
    - (ii) residential property which is the primary residence of a business borrower; or
    - (iii) claims where the debtor is a consumer.

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<sup>10</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

<sup>11</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

<sup>12</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

<sup>13</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

### Article 3

#### Definitions

For the purposes of this Directive, the following definitions apply:

- (1) ‘credit institution’ means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013<sup>14</sup>;
- (2)
- (3)
- (4) ‘business borrower’ means a legal or natural person, other than a consumer or a non-profit making entity, who has concluded a secured credit agreement with a credit institution;
- (5)
- (6) ‘secured credit agreement’ means an agreement, in which a credit is granted in the form of a deferred payment, a loan or other similar financial accommodation and which is secured by either of the following collateral:
  - (a) a mortgage, charge, lien or other comparable security right commonly used in a Member State in relation to immovable assets; or
  - (b) a pledge, charge, lien or other comparable security right commonly used in a Member State in relation to movable assets;
- (7) ‘credit purchaser’ means a credit purchaser as defined in [point (8) of Article 3] of the Directive on credit servicers and credit purchasers<sup>1</sup>, which is subject to the requirements imposed by the national laws transposing that Directive;
- (8) **‘credit servicer’ means a credit servicer as defined in [point (9) of Article 3] of the Directive on credit servicers and credit purchasers, which is subject to the requirements imposed by the national laws transposing that Directive;**
- (9)
- (10)
- (11) ‘consumer’ means a natural person who is acting for purposes which are outside his trade, business or profession.

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<sup>14</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

## TITLE V

### Accelerated Extrajudicial Collateral Enforcement

#### *Article 23*

##### **Conditions for the voluntary use of Accelerated Extrajudicial Collateral Enforcement**

1. Member States shall ensure that the accelerated extrajudicial collateral enforcement mechanism provided for in this Directive may be exercised by a creditor where all of the following conditions are fulfilled:
  - (a) the mechanism has been agreed upon in writing or, where so provided under national law, in a notarised format, by the credit institution and business borrower and that agreement specifies the enforcement event and the period of time, starting from the notification referred to in point (c), in which the business borrower may execute payment in order to avert the start of the enforcement;
  - (b) the business borrower has been clearly informed about the application and consequences of the accelerated extrajudicial collateral enforcement prior to the conclusion of the agreement referred to in point (a);
  - (c) after the enforcement event, the creditor has notified the business borrower, in writing, of all of the following:
    - (i) the creditor's intention to enforce the collateral through the accelerated extrajudicial collateral enforcement mechanism to satisfy the contractual obligations of the secured credit agreement;
    - (ii) the creditor's intention to use the enforcement measure under point (b) of the first subparagraph of Article 24(2), where such an enforcement measure exists under national law;
    - (iia) the date when the enforcement event has occurred;
    - (iii) the time period, in which the business borrower must execute the payment in order to avert the start of the enforcement in accordance with what has been agreed under point (a);
    - (iv) the default amount of the secured credit agreement due pursuant to the contractual obligations of the secured credit agreement;
  - (d) the business borrower has not executed the full payment as stipulated in the creditor's notification referred to in point (c).

Member States shall ensure that the agreement referred to in point (a) of the first subparagraph can serve as a basis for initiating the accelerated extrajudicial collateral enforcement mechanism without the need to obtain an enforceable title from a court, provided that the other conditions for exercising this mechanism, as laid down in national provisions transposing this Directive, are fulfilled.

For the purposes of point (a) of the first subparagraph, Member States may establish that in cases where a business borrower has paid at least 85 % of the amount of the secured credit agreement, the period referred to therein may be extended by at least six months.

Notwithstanding point (a) of the first subparagraph, Member States may, in cases where a business borrower is a natural person, provide for rules on the minimum period of default that may constitute an enforcement event.

2. Member States shall ensure that the business borrower is not permitted to dispose, to the detriment of the creditor where so provided under national law, of the collateralised assets as of receipt of the notification referred to in point (c) of the first subparagraph of paragraph 1 and is subject to a general duty to furnish all relevant information where the accelerated extrajudicial collateral enforcement mechanism is exercisable in accordance with paragraph 1.
3. Member States shall ensure that the creditor affords the business borrower a reasonable period of time for execution of payment after the notification under point (c) of the first subparagraph of paragraph 1 in order to avert the start of the enforcement.

#### *Article 24*

#### **Enforcement**

1. Member States shall ensure that collateral may be enforced pursuant to the accelerated extrajudicial collateral enforcement mechanism provided for in this Directive.
2. Member States shall provide for at least one of the following means to enforce the collateral as referred to in paragraph 1 for each type of security right and collateral:
  - (a) transfer of ownership by realisation in accordance with Article 25; or
  - (b) transfer of ownership to the creditor in accordance with Article 25a.

For each of these means, Member States may provide that a notary, bailiff, other public official or a person exercising a public function carries out one or more tasks relating to the enforcement or the whole enforcement. Member States may also provide that a notary, bailiff, other public official or a person exercising a public function verifies whether the conditions referred to in Article 23 are fulfilled before enforcement may commence.

- 3.
4. Member States shall ensure that a valuation of the assets is organised and that all of the following conditions are met:
  - (a)
  - (b) the valuation is conducted by a valuer independent from the parties;
  - (c) the valuation process is fair and the valuation amount is fair and realistic;
  - (d) the valuation is conducted specifically for the purposes of the enforcement of the collateral under paragraph 2 of this Article and after the creditor has notified the business borrower in accordance with point (c) of the first subparagraph of Article 23(1), unless, where so provided under national law, the creditor and business borrower agree to use a valuation which is conducted no earlier than six months prior to the enforcement event.
  - (e)

Member States may derogate from points (b) and (d) of the first subparagraph where the creditor and business borrower agree on a process regarding how the valuation amount is to be determined, in particular where they agree to use a clear market price where available for the asset.

- 4a. ~~Where the collateral is enforced by means of realisation in accordance with Article 25,~~ Member States may provide that a valuation is not necessary, **where the collateral is enforced by means of realisation in accordance with Article 25 and** ~~where~~ one of the following conditions is met:
- (a) the creditor and the business borrower agree, after the notification, not to organise a valuation; or
  - (b) a notary, bailiff, other public official or a person exercising a public function, who carries out tasks relating to the enforcement of this collateral, considers that a valuation is not necessary.
- 5.

## *Article 25*

### **Enforcement by realisation**

1. Member States shall ensure that the realisation of collateral is conducted in accordance with, at least, the following elements:
- (a)
  - (b) reasonable efforts have been made to attract the highest number of potential buyers;
  - (c) the business borrower, and any known third party with an interest in or right to the asset, have been informed of the realisation after the time period referred to in point (c)(iii) of the first subparagraph of Article 23(1) has elapsed, and in reasonable time prior to the realisation;
  - (d)
  - (e) where applicable, the asset is not to be sold with a price that is substantially less, as defined under national law, than the valuation amount, unless, where so provided under national law, there is a threat of imminent deterioration of the asset;
  - (f)
  - (g) the creditor is not entitled to retain, or claim, as the case may be, any positive difference between the proceeds of the sale of the asset and the sum outstanding of the secured credit agreement.

Member States shall define what reasonable time for the purposes of point (c) of the first subparagraph is.

- 2.
3. Where a Member State provides for further attempts of realisation, the asset may be sold at a lower price than that referred to in point (e) of the first subparagraph of paragraph 1, where so provided under national law.
4. Member States may regulate how the costs of the procedure or of the valuation are dealt with, including the option of deducting them from the proceeds of the sale.

## *Article 25a*

### **Enforcement by transfer of ownership to the creditor**

1. Member States shall ensure that the enforcement of the collateral through transfer of ownership to the creditor is conducted in accordance with, at least, the following elements:
  - (a) the creditor pays to the business borrower the positive difference between the valuation amount of the asset and the sum outstanding of the secured credit agreement;
  - (b) the business borrower, and any known third party with an interest in or right to the asset, have been informed of the transfer of the ownership after the time period referred to in point (c)(iii) of the first subparagraph of Article 23(1) has elapsed and in reasonable time prior to the transfer of ownership.

Member States shall define what reasonable time for the purposes of point (b) of the first subparagraph is.

2. Member States may regulate how the costs of the procedure or of the valuation are dealt with, including the option of deducting them from the positive difference to be paid out to the business borrower.

## *Article 27*

### **Competing rights in the collateral**

1. Member States shall ensure that the enforcement in accordance with national provisions transposing this Directive does not affect the rights of those, who hold competing rights in the same collateral, in a manner different from what national law provides for proceedings otherwise used in enforcing secured debts.
2. Member States may define how various enforcement procedures, which may have an impact on the same collateral, relate with each other, including in the case of judicial and extrajudicial enforcement procedures.

## *Article 28*

### **Right to challenge**

1. This Directive shall be without prejudice to legal protection that business borrowers, creditors and third parties enjoy under Union and national law, including any right to challenge the enforcement.
2. Member States shall put in place appropriate measures to discourage abusive challenges by business borrowers regarding the use of accelerated extrajudicial collateral enforcement mechanism.

## Article 30

### **Settlement of the outstanding amount**

In cases where the amount realised after the use of the accelerated extrajudicial collateral enforcement mechanism is an amount lower than the sum outstanding of the secured credit agreement, Member States may also provide for the settlement of residual liabilities secured by the collateral under that agreement, in accordance with national law.

## Article 31

### **Transfer of the right to use the accelerated extrajudicial collateral enforcement mechanism**

1. Member States shall ensure that, where a secured credit agreement which provides for the right to use the accelerated extrajudicial collateral enforcement mechanism is transferred to a credit institution or to a credit purchaser, that credit institution or credit purchaser acquires the right to use the accelerated extrajudicial collateral enforcement mechanism under the same terms and conditions as the credit institution that has concluded the secured credit agreement.  
**Member States may require that a credit purchaser appoints a credit servicer to use the accelerated extrajudicial collateral enforcement mechanism on behalf of the credit purchaser.**
2. Member States may also provide that, where a secured credit agreement which provides for the right to use the accelerated extrajudicial collateral enforcement mechanism is transferred to a party other than a credit institution or a credit purchaser, such a party acquires the right to use the accelerated extrajudicial collateral enforcement mechanism under the same terms and conditions as the credit institution that has concluded the secured credit agreement.
3. **Paragraphs 1 and 2 shall be without prejudice to national laws and requirements with regard to the transfer of credit agreements.**

## Article 32

### **Relationship with national laws regarding insolvency, restructuring and discharge of debt**

- 1.
2. Where proceedings concerning insolvency, restructuring or discharge of debt are initiated in respect of a business borrower, this Directive shall be without prejudice to national laws regarding insolvency, restructuring and discharge of debt.

## *Article 33*

### **Data collection**

- 1.
2. Member States shall ensure that credit institutions report, in the case of secured credit agreements that they enforce through accelerated extrajudicial collateral enforcement mechanism, to the authorities designated by a Member State, on an annual basis, the following information:
  - (a) the number of proceedings pursuant to the national provisions transposing this Directive initiated by notification, pending and finalised by realisation or transfer of ownership to the creditor, including:
    - (i) the number of proceedings in respect of movable assets; and
    - (ii) the number of proceedings in respect of immovable assets;
  - (b) the length of the proceedings from notification to the receipt of the proceeds of the realisation or to the transfer of ownership to the creditor;
  - (c)
  - (d) the recovery rate; and
  - (e) the number of secured credit agreements, which include the right to use accelerated extrajudicial collateral enforcement mechanism, transferred by a credit institution under Article 31, broken down by:
    - (i) transfers to credit institutions; and
    - (ii) transfers to parties other than credit institutions.
3. Member States shall collect and aggregate the data referred to in paragraph 2 of this Article and compile statistics from that aggregated data for full calendar years, starting with the first full calendar year following the end of the transposition period referred to in Article 41.
4. The statistics referred to in paragraph 3 shall be communicated to the Commission on annual basis and by 31 March of the year following the calendar year for which data are collected.



## **Title VIII**

### **Final provisions**

#### *Article 38a*

##### **Relationship with other acts and international instruments**

1. The following Directives shall apply notwithstanding this Directive:
  - (a) Directive (EU) 2019/1023 of the European Parliament and of the Council<sup>15</sup>;
  - (b) Directive 2014/59/EU of the European Parliament and of the Council<sup>16</sup>.
2. This Directive shall be without prejudice to the application of the Convention on international interests in mobile equipment as well as to the application of Protocols thereto.

#### *Article 40*

##### **Review clause**

1. By ... \*[five years from the end of the transposition period referred to in Article 41], the Commission shall carry out an evaluation of this Directive and present a Report on the main findings to the European Parliament, to the Council and to the European Economic and Social Committee.
2. Where the evaluation identifies important problems with the functioning of the Directive, the Report should outline how the Commission is intending to address the identified problems, including steps and timings of the potential revision.

[\* A date will be inserted by the Publication Office at the moment of publication of the Directive.]

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<sup>15</sup> Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).

<sup>16</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

*Article 41*

**Transposition**

1. By \*[two years from the date of entry into force of this Directive], Member States shall adopt and publish the measures necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply those measures from \*[two years from the date of entry into force of this Directive].

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

4. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

[\* A date of two years from the entry into force will be inserted by the Publication Office at the moment of publication of the Directive.]

*Article 42*

**Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 43*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*