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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on amending Directive 2014/59/EU of the European Parliament and of the Council as regards the ranking of unsecured debt instruments in insolvency hierarchy [first reading] *- Confirmation of the final compromise text with a view to agreement*

Delegations will find below the final compromise text on the abovementioned Commission proposal, as a result of the trilogue of 25 October 2017.

DIRECTIVE (EU) …/…
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of …

on amending Directive 2014/59/EU of the European Parliament and of the Council as regards the ranking of unsecured debt instruments in insolvency hierarchy

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 Central Bank[1]

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure,

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[1] OJ C , , p. .
[2] OJ C , , p. .

Whereas:

(1) The Financial Stability Board (FSB) published the Total Loss-Absorbing Capacity (TLAC) Term Sheet ('the TLAC standard') on 9 November 2015 which was endorsed by the G-20 in November 2015. The ***objective of the*** TLAC standard ***is to ensure that*** global systemically important banks (G-SIBs), referred to as global systemically important institutions (G-SIIs) in the Union framework, ***"have the loss-absorbing and recapitalisation capacity necessary to help ensure that, in and immediately following a resolution, critical functions can be continued without taxpayers' funds (public funds) or financial stability being put at risk"***[3]***.*** In its Communication of 24 November 2015[4], the Commission committed ***itself*** to bring forward a legislative proposal by the end of 2016 that would enable the TLAC standard to be implemented ***into Union law*** by the internationally agreed deadline of 2019.

[3] ***3 Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution, Financial Stability Board, 9 November 2015***

[4] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, "Towards the completion of the Banking Union", 24.11.2015, COM(2015) 587 final

(2) The implementation of the TLAC standard in the Union needs to take ***into*** account ▌ the existing institution-specific minimum requirement for own funds and eligible liabilities ('MREL') applicable to all Union ▌ institutions ▌ as laid down in Directive 2014/59/EU of the European Parliament and of the Council[5]. As TLAC and MREL pursue the same objective of ensuring that Union ▌ institutions ▌ have sufficient loss absorbing ***and recapitalisation*** capacity, the two requirements should be complementary elements of a common framework. Operationally, the ***Commission proposed that the*** harmonised minimum level of the TLAC standard for G-SIIs ('the TLAC minimum requirement')***, and the eligibility criteria for liabilities used to comply with that standard,*** should be introduced in Union legislation through amendments to Regulation (EU) No 575/2013 of the European Parliament and of the Council[6], while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs ***and relevant eligibility criteria*** should be addressed through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council[7]. The relevant provisions of this Directive as regards the ranking of unsecured debt instruments in insolvency hierarchy are complementary ***to*** those in the aforementioned pieces of legislation and in Directive 2013/36/EU ***of the European Parliament and of the Council[8].***

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5 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

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

7 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1

8 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338

(3) ***In view of those proposals and in order to ensure legal certainty for markets and for entities subject to MREL and TLAC, it is important to ensure timely clarity about the eligibility criteria of liabilities used for compliance with MREL and with Union law implementing TLAC and to introduce appropriate grandfathering provisions for the eligibility of liabilities issued before the revised eligibility criteria come into effect.***

(4) Member States should ensure that ▌ institutions ▌ should have sufficient loss-absorbing and recapitalisation capacity to ensure smooth and fast absorption of losses and recapitalisation ▌ with a minimum impact on financial stability and ***while aiming to avoid an impact on*** taxpayers. This should be achieved through constant compliance by ▌ institutions ▌ with a TLAC minimum requirement ***that is to be implemented in Union law through an amendment of*** Regulation (EU) No 575/2013 and a requirement for own funds and ***eligible*** liabilities as provided in Directive 2014/59/EU.

(5) The TLAC standard, ***which is to be*** implemented in Union law ***through an amendment of*** Regulation (EU) No 575/2013, requires G-SIIs to meet the minimum TLAC requirement, with certain exceptions, with subordinated liabilities ▌ that rank in insolvency below ▌ liabilities ***excluded from TLAC*** ('subordination requirement'). ***Under the TLAC standard, subordination should be achieved through the legal effects of a contract ('contractual subordination'), the laws of a given jurisdiction ('statutory subordination') or a given corporate structure ('structural subordination'). Where required by Directive 2014/59/EU, institutions falling within the scope of that Directive should*** meet their firm-specific requirement with subordinated liabilities so as to ***minimise*** the risk of legal challenge by creditors on the basis that their losses in resolution are higher than the losses that they would incur under normal insolvency proceedings ***(the 'no creditor worse off' principle).***

(6) A number of Member States have amended or are in the process of amending the insolvency ranking of unsecured senior debt under their national insolvency law to allow their institutions to comply with the subordination requirement ***in a more efficient manner, thereby facilitating resolution.***

(7) The national rules adopted so far diverge significantly. The absence of harmonised Union rules creates uncertainty for issuing institutions, and investors alike and ***is likely to make*** the application of the bail-in tool for cross-border institutions more difficult. This ***is*** also ***likely to result*** in competitive distortions on the internal market given that the costs for institutions to comply with the subordination requirement and the costs borne by investors when buying debt instruments issued by institutions may differ considerably across the Union.

(8) In its Report on Banking Union, the European Parliament called on the Commission to present proposals to further reduce the legal risks of claims under the no-creditor-worse-off principle, and, in its conclusions of 17 June 2016[9], the Council invited the Commission to put forward a proposal on a common approach to the bank creditors' hierarchy to enhance legal certainty in case of resolution.

(9) It is, therefore, necessary to remove the significant obstacles in the functioning of the internal market and avoid distortions of competition resulting from the absence of harmonised Union rules on bank creditors' hierarchy and to prevent such obstacles and distortions from arising in the future. Consequently, the appropriate legal basis for this Directive should be Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the case law of the Court of Justice of the European Union.

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9 Council conclusions of 17 June 2016 on a roadmap to complete the Banking Union: http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642837_en.pdf

(10) In order to reduce to a minimum ***the*** costs of compliance with the subordination requirement and any negative impact on ▌ funding costs, this Directive should allow Member States to keep***, where applicable,*** the existing class of ***ordinary*** unsecured senior debt, which ▌ is less costly for ▌ institutions ▌ to issue than any other subordinated liabilities. ***In order to enhance the resolvability of institutions, this Directive*** should, nevertheless, require Member States to create a new ▌ class of 'non-preferred' senior debt that should ***rank in insolvency above own funds instruments and subordinated liabilities which do not qualify as own funds*** instruments, but ***below*** other senior liabilities. ***Institutions*** should remain free to issue debt in both ***senior and 'non-preferred' senior classes. Of those two classes, and without prejudice to other options and exemptions provided in the TLAC standard to comply with the subordination requirement,*** only the 'non-preferred' senior class should be eligible to meet the subordination requirement ▌. This should allow ▌ institutions ▌ to use for their funding or any other operational reasons the less costly ***ordinary*** senior debt while issuing ***debt in*** the new 'non-preferred' senior class ***to obtain funding while complying*** with the subordination requirement. ***Member States should be allowed to create several classes for other ordinary unsecured liabilities, provided that they ensure, without prejudice to other options and exemptions provided in the TLAC standard, that only the 'non-preferred' senior class of debt instruments is eligible to meet the subordination requirement.***

(11) To ensure that the new 'non-preferred' senior class of debt instruments meet the eligibility criteria ***as described in the TLAC standard*** and ***as set out in*** Directive 2014/59/EU, ***thereby enhancing legal certainty,*** Member States should ensure that ***those debt instruments have an original*** contractual maturity ▌ ***of at least one year, do not contain embedded derivatives and are not derivatives themselves***, and that the relevant contractual documentation related to their issuance ***and, where applicable, the prospectus,*** explicitly refers to their ***lower*** ranking under normal insolvency proceedings. ***Debt instruments with variable interest, derived from a broadly used reference rate, such as Euribor or Libor, and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, should not be considered to be debt instruments containing embedded derivatives solely because of those features. This Directive should be without prejudice to any requirement in national law to register debt instruments in the issuer's company registry for liabilities to meet the conditions for non-preferred senior class of debt instruments as provided in this Directive.***

(12) To enhance legal certainty for investors, Member States should ensure that ***ordinary unsecured debt instruments and other ordinary unsecured liabilities that are not*** debt instruments have a higher priority ranking in their national insolvency laws than the new 'non-preferred' senior class of debt instruments ▌. Member States should also ensure that the new 'non-preferred' senior class of debt instruments have a higher priority ranking than the priority ranking of own funds instruments ***and*** any ▌ subordinated liabilities ***which do not qualify as own funds.***

(13) Since the objectives of this Directive, namely to lay down ***harmonised*** rules for ***the insolvency ranking of unsecured debt instruments*** for the purposes of the Union recovery and resolution framework ***and in particular to improve the effectiveness of the bail-in regime***, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, 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 those objectives. ***In particular, this Directive should be without prejudice to other options and exemptions provided in the TLAC standard to comply with the subordination requirement.***

(14) It is appropriate for the amendments to Directive 2014/59/EU provided for in this Directive to apply to ***unsecured claims resulting from debt instruments*** issued on or after the date of application of this Directive . However, for legal certainty purposes and to mitigate transitional costs in as much as possible, ***it is necessary to introduce appropriate safeguards as regards the insolvency ranking of claims resulting from debt instruments issued before that date. Member States*** should ***therefore*** ensure that the ***insolvency ranking*** of all outstanding ***unsecured claims resulting from debt instruments that*** institutions have issued before that date is governed by the laws of the Member States as they were adopted ***at 31 December 2016. To the extent that certain national laws as adopted at 31 December 2016 could have already addressed the objective of allowing institutions to issue subordinated liabilities, part or all of the outstanding unsecured claims resulting from debt instruments issued prior to the date of application of this Directive should be able to have the same insolvency ranking as the 'non-preferred' senior debt instruments issued under the conditions of this Directive. In addition, after 31 December 2016 and before the date of entry into force of this Directive, Member States should be able to adapt their national laws governing the ranking in normal insolvency proceedings of unsecured claims resulting from debt instruments issued after the date of application of such laws in order to comply with the conditions laid down in this Directive. In that case, only the unsecured claims resulting from the debt instruments issued before the application of that new national law should continue to be governed by the laws of the Member States as adopted at 31 December 2016.***

(15) *This Directive should not prevent Member States from providing that this Directive should continue to apply when the issuing entities are no longer subject to the Union resolution framework due, in particular, to the divestment of their credit or investment activities to a third party.*

(16) *This Directive harmonises the ranking under normal insolvency proceedings of unsecured claims resulting from debt instruments and does not cover the insolvency ranking of deposits beyond the existing applicable provisions of Directive 2014/59/EU. This Directive is therefore without prejudice to any existing or future national laws of Member States governing normal insolvency proceedings that cover the insolvency ranking of deposits, to the extent that such ranking is not harmonised by Directive 2014/59/EU, irrespective of the date on which the deposits were made. By [date – 3 years after date of entry into force of this Directive], the Commission should review the application of Directive 2014/59/EC with regard to the ranking of deposits in insolvency and assess in particular the need for any further amendments thereof.*

(17) *To ensure legal certainty for markets and individual institutions and to facilitate the effective application of the bail-in tool, this Directive should enter into force on the day following that of its publication.*

HAVE ADOPED THIS DIRECTIVE:

Article 1

Amendments to Directive 2014/59/EU

1. ***In Article 2(1), point (48) is replaced by the following:***

"(48) 'debt instruments':

(i) for the purpose of points (g) and (j) of Article 63(1), means bonds and other forms of transferrable debt, instruments creating or acknowledging a debt, and instruments giving rights to acquire debt instruments; and

(ii) for the purpose of Article 108, means bonds and other forms of transferrable debt and instruments creating or acknowledging a debt."

2. ***Article 108 is replaced by the following***:

"Article 108
Ranking in insolvency hierarchy

1. Member States shall ensure that in national law governing normal insolvency proceedings:

(a) ***the following have the same priority ranking which is higher than the ranking provided for the claims of ordinary unsecured creditors:***

(i) ***that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU;***

(ii) ***deposits that would be eligible deposits from natural persons, micro, small and medium–sized enterprises were they not made through branches located outside the Union of institutions established within the Union.***

(b) ***the following have the same priority ranking which is higher than the ranking provided for under point (a):***

(i) ***covered deposits;***

(ii) ***deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency.***

2. Member States shall ensure that, for entities referred to in points (a), (b), (c) and (d) of Article 1(1), ordinary unsecured claims ***shall,*** in national law governing normal insolvency proceedings**,** have a higher priority ranking than that of unsecured claims resulting from debt instruments which meet the following conditions:

(a) the ***original*** contractual maturity of ***the*** debt instruments ***is of at least*** one year;

(b) they ***contain no embedded derivatives and are not derivatives themselves;***

(c) the relevant contractual documentation ***and, where applicable, the prospectus*** related to the issuance explicitly refers to the ***lower*** ranking under this ***paragraph***.

3. Member States shall ensure that ▌ unsecured claims resulting from debt instruments ***that meet the conditions laid down in points (a), (b) and (c) of*** paragraph 2 shall have a higher priority ranking in national law governing normal insolvency proceedings than the priority ranking of claims resulting from instruments referred to in points (a) to (d) of Article 48(1).

4. ***Without prejudice to paragraphs 5 and 7,*** Member States shall ensure that their national laws governing normal insolvency proceedings as they were adopted at ▌ 31 December 2016 ▌ apply to ***the ranking in normal insolvency proceedings of*** unsecured claims resulting from debt instruments issued by entities referred to in points (a), (b), (c) and (d) of Article 1(1) prior to [***the*** date of application ***entry into force of measures under national law transposing [insert title of this amending Directive].***

5. ***Where, after 31 December 2016 and before the [date of entry into force of this Directive], a Member State has adopted a national law governing the ranking in normal insolvency proceedings of unsecured claims resulting from debt instruments issued after the date of application of such national law, paragraph 4 of this Article shall not apply to claims resulting from debt instruments issued after the entry into force of that national law, provided that all of the following conditions are met:***

   (a) ***under that national law, and for entities referred to in points (a), (b), (c) and (d) of Article 1(1), ordinary unsecured claims have, in normal insolvency proceedings, a higher priority ranking than that of unsecured claims resulting from debt instruments which meet the following conditions:***

      (i) ***the original contractual maturity of the debt instruments is of at least one year;***

      (ii) ***the debt instruments contain no embedded derivatives and are not derivatives themselves; and***

      (iii) ***the relevant contractual documentation and, where applicable, the prospectus related to the issuance explicitly refers to the lower ranking under the national law;***

   (b) ***under that national law, unsecured claims resulting from debt instruments that meet the conditions laid down in point (a) of this paragraph have, in normal insolvency proceedings, a higher priority ranking than the priority ranking of claims resulting from instruments referred to in points (a) to (d) of Article 48(1).***

On the date of entry into force of measures under national law transposing [insert title of this amending Directive], the unsecured claims resulting from debt instruments referred to in point (b) shall have the same priority ranking as the one referred to in points (a), (b) and (c) of paragraph 2 and in paragraph 3.

6. For the purposes of point (b) of paragraph 2 and point (ii) of point (a) of paragraph 5, debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, shall not be considered to be debt instruments containing embedded derivatives solely because of those features.

7. Member States which, prior to 31 December 2016, have adopted a national law governing normal insolvency proceedings whereby ordinary unsecured claims resulting from debt instruments issued by entities referred to in points (a), (b), (c) and (d) of Article 1(1) are split into two or more different priority rankings or whereby the priority ranking of ordinary unsecured claims resulting from such debt instruments is changed in relation to all other ordinary unsecured claims of the same ranking, may provide that debt instruments with the lowest priority ranking among those ordinary unsecured claims have the same ranking as that of claims that meet the conditions of points (a), (b) and (c) of paragraph 2 and of paragraph 3.'

Article 2

Transposition

1. Member States shall ***bring into force*** the laws, regulations and administrative provisions necessary to comply with this Directive ***by ... [12 months from the date of entry into force of this Directive or 1 January 2019, whichever is the earlier]. They shall immediately inform the Commission thereof***.

Member States shall apply those measures ***as from the date of their entry into force in national law***.

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or ***shall*** be accompanied by such a reference on the occasion of their official publication. ***The methods of making*** such a reference is to ***shall*** be made ***laid down by Member States.***

3. Paragraph 2 shall not apply where the national measures of Member States in force before the date of entry into force of this Directive, comply with this Directive. In such cases, Member States shall notify the Commission accordingly.

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

Article 3

Review

By ... [three years after the date of entry into force of this Directive], the Commission shall review the application of Article 108(1) of Directive 2014/59/EU. The Commission shall assess in particular the need for any further amendments with regard to the ranking of deposits in insolvency. The Commission shall submit a report thereon to the European Parliament and to the Council.

Article 4

Entry into force

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

Article 5

Addressees

This Directive is addressed to the Member States.