Bank recovery and resolution: ranking of unsecured debt instruments in insolvency hierarchy

2016/0363(COD) - 30/11/2017 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 523 votes to 113, with 8 abstentions, a legislative resolution on the 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.

As a reminder, the proposed amendments to Directive 2014/59/EU is part of the efforts to implement in the European Union the standard the Total Absorption Loss Capacity (TLAC) standard adopted by the G20.

In order to enhance the operational execution and robustness of bail-in powers and to avoid legal uncertainty, the TLAC standard requires that liabilities may be eligible for TLAC only if they are subordinated to other liabilities, i.e. if they absorb losses in insolvency or in resolution prior to other preferred liabilities that are explicitly excluded from TLAC eligibility, such as derivatives, covered deposits or tax liabilities.

The TLAC standard provides, therefore, for a subordination requirement subject to certain exemptions, but it is not prescriptive on the way to achieve it.

The proposed Directive 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 that do not qualify as own funds instruments, but below other senior liabilities.

The European Parliaments position adopted at first reading under the ordinary legislative procedure amended the Commission proposal as follows.

Objective of the Directive: it is specified that the amending Directive shall lay down harmonised rules for the insolvency ranking of unsecured debt instruments for the purposes of the Union recovery and resolution framework, in particular to improve the effectiveness of the bail-in regime.

The amended Directive introduces a new provision specifying the priority ranking in insolvency hierarchy.

New class of non-preferred senior debt securities: to ensure that it fulfils the eligibility criteria described in the TLAC standard, it is specified that Member States shall 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;
- that the relevant contractual documentation related to their issuance and, where applicable, the prospectus explicitly refer to their lower ranking under normal insolvency proceedings.

In order to enhance legal certainty for investors, Member States shall ensure that ordinary senior debt instruments and other unsecured ordinary senior 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.

Maintaining eligibility: in order to ensure legal certainty for TLAC-regulated markets and entities, the amended text introduces appropriate grandfathering provisions for the eligibility of liabilities issued before the revised eligibility criteria come into effect.

Review: at the latest three years after the date of entry into force of the Directive, the Commission review the application of Directive 2014/59/EU in particular as regards the need for any further amendments with regard to the ranking of deposits in insolvency.

Transposition and entry into force: Member States shall comply with the Directive no later than 12 months from the date of entry into force of this amending Directive or 1 January 2019, whichever is the earlier.

In order 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.