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ALERT MEMORANDUM

Beyond Bail-in – EU Proposals on Moratorium and Creditor Hierarchy[1]

December 12, 2016

On November 23, 2016, the EU Commission published legislative proposals amending Directive 2014/59/EU (BRRD) with a view to *inter alia* (A) introducing a new pre-resolution moratorium tool and (B) modifying creditor hierarchy in insolvency.

Moratorium Tool

The EU proposal introduces a 5-day suspension ("moratorium") tool which could be used in early intervention, i.e. *before* the institution has reached the point of non-viability or is placed in resolution.

Creditor Hierarchy

The EU proposal introduces a new rank in insolvency ("senior non preferred") for *long term debt instruments*, which will rank *senior to regulatory capital and subordinated debt*, but *junior to other unsecured liabilities*. These debt instruments would therefore be bailed-in before other unsecured liabilities (such as operational liabilities, derivatives and deposits), which is designed to improve the resolvability of EU institutions and facilitate compliance with the Financial Stability Board's "total loss absorbing capacity" (TLAC) standard.

This proposal builds upon legislation recently enacted in certain Members States including France, Germany and Italy, and closely aligns with the French "Sapin 2" law enacted on December 9, 2016.

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[1] This alert memorandum is an update of our previous alert memorandum entitled "Beyond Bail-in - German and Italian Proposals Affecting Bondholder Rights" of September 21, 2015: https://www.clearygottlieb.com/~/media/cgsh/files/news-pdfs/beyond-bail-in-german-and-italian-proposals-affecting-bondholder-rights.pdf

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I. Moratorium Tools

1. Existing EU Framework

Directive 2014/59/EU (BRRD) currently provides EU resolution authorities with significant powers to "bail-in" (i.e. write-down or convert into equity, in whole or in part) but also suspend, amend, transfer or otherwise modify eligible liabilities of an institution placed in resolution, in order to ensure that losses are borne first by shareholders and creditors instead of taxpayers.

"Ipso Facto" Prohibition in Early Intervention and Resolution

Article 68 of BRRD prohibits counterparties of an institution with respect to which early intervention or resolution measures are taken from exercising any termination, suspension, modification, netting or set-off rights on the sole basis of such early intervention or resolution measures, provided that the substantive obligations under the contract continue to be performed. The prohibition also applies to contracts entered into by counterparties with the institution's guaranteed or supported subsidiaries and contracts with any group entities that contain cross-default provisions.

Suspension Tool in Resolution

The BRRD provides for a payment suspension tool applicable to debt instruments and other eligible liabilities *in resolution*. Specifically, Article 63(j) of BRRD gives EU resolution the power to "amend or alter the *maturity* of debt instruments and other eligible liabilities issued by an institution under resolution or amend the *amount of interest* payable under such instruments and other eligible liabilities, or *the date on which the interest becomes payable*, including by *suspending payment for a temporary period*". The suspension is not limited in time.

This suspension tool has been used, for instance, in the context of the resolution of Heta Asset Management AG (Heta). On April 10, 2016, the Austrian Financial Market Authority, acting as resolution authority, extended the maturity of eligible liabilities until the contemplated date of dissolution of Heta, i.e. December 31, 2023 at the latest.

2-Day Stays in Resolution

The BRRD also provides the possibility for EU resolution authorities to apply "resolution stays", i.e. suspend, *for a maximum of 2 business days* (i) the payment and delivery obligations of an institution placed in resolution, (ii) the right of the institution's counterparties to enforce security interests and (iii) the right of such counterparties to terminate contracts to which the institution (and, in certain cases, its subsidiaries) are a party, subject to certain exceptions.

2. New Moratorium Proposals

The Commission's proposals would amend the existing framework in several respects and are expected to enter into force in 2019.

5-Day Moratorium in Early Intervention

As noted by the Commission in the Impact Assessment document, there is currently no harmonized moratorium tool at EU level at the supervisory or early intervention phase, i.e. prior to the point of non-viability and placement in resolution. The Commission considers that such tool would be useful in order to freeze liquidity for a short period to assess the situation of the bank.

The EU Proposal therefore introduces in Articles 27 and 29a BRRD a moratorium power, i.e. the power by EU resolution authorities to "*suspend any payment or delivery obligation*".

This power is more far-reaching than the existing suspension tool in resolution, insofar as it can be applied:

- by the competent supervisory authority and not only the resolution authority;

- at the stage of so-called "early intervention", i.e. at a point where the institution has not reached the point of non-viability or placement in resolution, but is in a situation in which it infringes or, due, *inter alia*, to a rapidly deteriorating financial condition (including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points) is likely in the near future to infringe its prudential requirements;

- to suspend delivery as well as payment obligations;

- to all liabilities (including secured liabilities, derivatives and deposits, but excluding covered deposits, covered investor claims and liabilities to central counterparties or central banks).[2]

However, the moratorium tool would be subject to the following conditions:

- it would be applicable only to the extent necessary to allow the competent supervisory authority and/or resolution authority to assess whether the institution meets the condition for early intervention and/or the "fail or likely to fail" condition for placement in resolution, and for the duration necessary to make such assessment, not to exceed 5 working days;

- when the moratorium tool is used, payment or delivery obligations of the entity's counterparties under the contracts would be suspended for the same period of time;

- payment or delivery obligations that would have been due during the suspension period would be due immediately upon expiry of that period; and

- when using the moratorium tool , authorities would be required to have regard to its impact on the orderly functioning of financial markets.

The drafting of this provision is somewhat circular in that the moratorium tool is proposed to be used only *once* the institution meets the conditions for early intervention,[3] but also *for the purpose of assessing* whether the institution meets those conditions, i.e. necessarily *before* such time.

5-Day Moratorium in Resolution

In addition to the above-mentioned suspension tool in resolution, the proposal introduces in Article 63(n) of BRRD a new resolution tool, consisting in the power for the EU resolution authority, after having consulted the competent supervisory authority, to suspend payment or delivery obligations to which the institution is a party, if necessary *for the effective application of one or more resolution tools* or for the purposes of *the valuation pursuant to Article 36*."

This tool has a broader scope than the existing suspension tool in resolution in that :

- it would apply to delivery and not just payment obligations;

- it would apply to all liabilities (including secured liabilities, derivatives and deposits, but excluding covered deposits, covered investor claims and liabilities to central counterparties and central banks);[4]

However, it would be applicable for a maximum period of 5 working days.

The drafting of this provision is also somewhat circular, in that this moratorium tool is a resolution tool, i.e. an instrument to be used only *once* the institution is determined to meet the conditions for resolution[5], but at the same time is supposed to be used for purposes of an Article 36 valuation, which is a pre-requisite to placement in resolution and is necessarily carried *before* such time.[6]

As a practical matter, it appears that the intention is for competent authorities to be able to exercise the 5-day moratorium tools immediately prior to early intervention (i.e. during the supervisory phase), as well as, if necessary, immediately prior to placement in resolution (i.e. during the supervisory or early intervention phase), without prejudice to the existing *ipso facto* prohibition and 2-day resolution stays.

This raises the issue of whether it is proportionate to restrict creditor rights at a time at which the institution has not reached early intervention or resolution triggers, and whether it is justifiable to restrict these rights not on the basis of the institution's objective situation but for the purpose of giving more time to authorities to make their assessment. In this respect , it should be noted that, under the current drafting of Articles 29a and 63(n),

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2 With respect to central counterparties : see below.

3 See Article 27(1) of BRRD: "*Where an institution infringes* […] or is likely in the near term to infringe [prudential requirements".

4 With respect to central counterparties : see below.

5 See Article 63(1) of BRRD : "Member States shall ensure that the resolution authorities have all the powers necessary to apply the resolution tools to institutions […] *that meet the applicable conditions for resolution*".

6 See Article 36(1) of BRRD: "*Before* taking resolution action or exercising the power to write down or convert relevant capital instruments resolution authorities shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution […] is carried out by a person independent from any public authority".

competent authorities could use the moratorium tools several times in connection with the same crisis situation (e.g. first for making an Article 36 valuation, then to assess the "fail or likely fail" test, then to determine which resolution tools to apply), thereby restricting creditor rights for a potentially significant period of time.

Treatment of Liabilities to Third Country Central Counterparties

Exclusion from Bail-in

The proposal excludes from bail-in *liabilities with a remaining maturity of less than 7 days to third country central counterparties (CCPs) recognized by ESMA* under the third country equivalence regime set forth in Regulation 2012/648/UE (EMIR).[7] A total of 21 third country CCPs have already been recognized by ESMA under EMIR.[8] Liabilities to third country CCPs *not recognized by ESMA*, however, are not excluded from bail-in.

Exclusion from 5-day moratorium tools and 2-day resolution stays

The proposal would exclude from both the 5-day moratorium tool in early intervention as well as from the 5-day moratorium tool in resolution "*payment and delivery obligation*s owed to "CCPs" and "third country CCPs recognized by ESMA pursuant to [EMIR]".

It would also amend the exclusions from the 2-day resolution stays so as to exclude the application of such stays to both "CCPs" and "third country CCPs recognized by ESMA pursuant to [EMIR]".

It is unclear whether obligations to third country CCPs *not recognized by ESMA* are also excluded. Indeed, the definition of "CCP" for purposes of BRRD is set forth in Article 2(1) of Regulation 2012/648/EU(EMIR), i.e. "*a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer*". This definition covers all counterparties, whether EU or non-EU and whether or not authorized or recognized by ESMA.[9]

However, the proposal appears to interpret "CCP" as referring only to EU CCPs, as a result of which the exclusion would apply to EU CCPs and recognized third country CCPs, *but not to third country CCPs not recognized by ESMA*.[10]

This divergence between ESMA and the Commission on the interpretation of the definition of "CCP" should be clarified.

II. <u>Creditor Hierarchy</u>

1. The Existing EU Framework

The BRRD currently requires capital and debt instruments of an institution in resolution to be written down or converted in accordance with the following loss-absorption waterfall:

- *first*, Common Equity Tier 1 items;

- *second*, Additional Tier 1 instruments;

- *third*, Tier 2 instruments;

- *fourth*, subordinated debt that is neither Tier 1 nor Tier 2 capital, in accordance with the hierarchy of claims in insolvency under national law;

-*fifth*, eligible liabilities, in accordance with the hierarchy of claims in insolvency under national law;

- *sixth*, deposits from natural persons and micro, small and medium-sized enterprises that exceed the amount of covered deposits.

Claims within the same rank must be reduced *pari passu* among themselves, and the "no creditor worse off" principle applies, i.e. creditors must not suffer a worse treatment in resolution than they would have suffered in insolvency and are entitled to compensation for the difference.

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7 Liabilities with a remaining maturity of less than 7 days to EU CCPs that are systems designated in accordance with Directive 98/26/EC (and to their participants) are already excluded from bail-in under Article 44(2)(f) BRRD.

8 Third countries determined equivalent for these purposes to date are: the U.S., Australia, Canada, Hong Kong, Japan, Mexico, Singapore, South Africa, South Korea, Switzerland. See list of recognized CCPs:

https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf

9 This interpretation was confirmed by ESMA in the Q&A on EMIR (See Question 12j)

10 See Recital 22 of the Proposal (BRRD): "The exclusion of specific liabilities of credit institutions or investment firms from the application of the bail-in tool or from powers to suspend certain obligations, restrict the enforcement of security interests or temporarily suspend termination rights in [BRRD], *should equally cover liabilities in relation to CCPs established in the Union and to third country CCPs recognised by ESMA*."

As an exception to the *pari passu* treatment, but without prejudice to the "no creditor worse off" principle, certain categories of eligible liabilities can be excluded from the resolution waterfall pursuant to Article 44(3) BRRD in certain circumstances, e.g. if the liability cannot be bailed-in within a reasonable time or is necessary to ensure critical functions, or if the bail-in of such liability would cause widespread contagion or destruction in value.

As a result, except under the Article 44(3) powers (which may, however, give rise to indemnity claims under the "no creditor worse off" principle), and unless national insolvency law provides for a hierarchy among those liabilities, the BRRD does not allow EU resolution authorities to bail-in certain liabilities in priority to others (e.g. corporate depositors, operational creditors and holders of derivative liabilities are required to be bailed-in *pari passu* with senior debt investors), which as a practical matter prevents bail-inability of senior bonds and therefore impedes resolvability.

EU Member States have therefore started to amend national insolvency laws to ensure that senior bonds would rank junior to other ordinary unsecured liabilities, but have adopted diverging approaches (See Section 3 below).

The internationally agreed TLAC standard put forward by the Financial Stability Board in November 2015 also seeks to (*inter alia*) address this issue in that by requiring global systemically important banks (G-SIBs) to hold a minimum amount of "minimum external loss-absorbing capacity" (Minimum TLAC) to ensure that sufficient resources are available for write-down or conversion. Minimum TLAC must be met to a large extent with resources that are either regulatory capital or unsecured liabilities that have a remaining maturity of at least one year and are capable of absorbing losses, i.e. (i) do not consist of certain excluded liabilities (covered or short term deposits, derivatives, structured notes, preferred or secured liabilities, liabilities that are legally excluded from bail-in or cannot be bailed-in without giving rise to material risk of successful legal challenge or indemnity claims, e.g. under the "no creditor worse off" principle) and (ii) are subordinated (including through a junior rank under insolvency law) to such excluded liabilities.

2. The EU Proposal

Overview

The EU proposal would require Member States to introduce a new statutory "senior non preferred" ranking in insolvency, which will include liabilities that have the following characteristics:

- they are unsecured claims arising out of debt instruments (i.e. bonds and other forms of transferable debt);

- their initial contractual maturity is at least one year;

- they have no derivative features; and

- the contractual documentation expressly refers to this ranking.

Senior non-preferred debt will rank senior to regulatory capital and subordinated debt; but junior to highest ranking debt instruments, a class which should include ordinary unsecured liabilities (such as standard senior liabilities, short term debt instruments, operational liabilities, derivatives and ordinary deposits).

The new ranking will not have retroactive effect, i.e. it will only apply to newly-issued instruments.

Member States will be required to implement these provision into national law on an accelerated timeframe, i.e. by July 2017.

Key Impacts

- The new ranking will allow EU G-SIBs to issue senior debt that counts towards their Minimum TLAC requirements. Senior non-preferred debt will also allow institutions to meet their institution-specific "Minimum Requirement for Own Funds and Eligible Liabilities" (MREL), which applies to all EU institutions and not only G-SIBs, where competent supervisory authorities require MREL to be met with instruments that are subordinated to ordinary unsecured liabilities.[11]

[11] The proposals published by the Commission on November 23, 2016 would also modify the BRRD as well as Directive 2013/36/UE (CRD IV) and Regulation 2013/575/UE (CRR) to implement TLAC requirements and, more broadly, align TLAC and MREL requirements.

- The fact that senior non-preferred bonds will rank junior to other types of unsecured liabilities (including standard senior debt, short term debt instruments, operational liabilities, derivatives and ordinary deposits) and therefore be bailed-in before such other liabilities in the event of resolution bolsters resolvability while ensuring that these other liabilities (which do not result from an investment decision but to ordinary contractual dealings with the bank) are exposed to a lower risk of bail-in.

- Due to the fact that senior non-preferred bonds will rank senior to regulatory capital and subordinated debt, they will be subject to bail-in *only in resolution* and will *not be subject to mandatory write-down and conversion at the point of non-viability under Article 59 of BRRD* (which applies to regulatory capital instruments only).

- Due to the fact that the new ranking will apply only to *newly-issued instruments*, it should not affect the ranking in insolvency of existing senior debt holders, who will automatically rank senior to newly-issued senior non-preferred debt in insolvency and resolution.

- It would increase harmonization of creditor rankings at EU level and reduce the divergence in approaches seen so far across Member States, which creates uncertainty for investors and potential difficulties when applying the bail-in tool in a cross-border context.

3. Impact on Existing National Regimes

(a) France

In France, the "Sapin 2" law enacted on December 9, 2016 modifies the hierarchy of creditor claims in insolvency in line with the EU proposal, which is modeled on the French approach.[12]

Specifically, Article L.613-30-3-I-4 of the French Monetary and Financial Code creates a new "senior non preferred" rank which will include liabilities that have the following characteristics:

- they are unsecured claims arising out of debt instruments (i.e. bonds and other forms of transferable debt whether issued under French or foreign law, as well as *bons de caisse* or similar instruments issued under the laws of an EU Member State that have not been offered to the public);

- their initial contractual maturity is at least one year;

- they have no "structured" features; and

- the contractual documentation expressly refers to this ranking.

Senior non-preferred debt will rank senior to regulatory capital and subordinated debt; but junior to ordinary unsecured liabilities (including standard senior liabilities, short term debt instruments, operational liabilities, derivatives and deposits).

The new ranking applies to newly issued instruments only. Existing senior notes will be automatically rank senior to newly-issued senior non preferred notes.

Given the close alignment with the EU proposal, it is not expected that French law will need to be further amended to implement the EU proposal (although the concept of "structured" features will need to be defined by decree).

(b) Germany

In Germany, the Resolution Mechanism Act (*Abwicklungsmechanismusgesetz*) was enacted in late 2015.[13] Among other things, the German Resolution Mechanism Act changes the ranking in insolvency of certain senior unsecured debt instruments issued by German CRR institutions (*i.e.*, CRR credit institutions and CRR investment firms) such as, among other things, bearer bonds and registered bonds (the "**Relevant Debt Instruments**").

According to new sections 46f(5) through (8) of the German Banking Act (*Kreditwesengesetz*), as introduced by the German Resolution Mechanism Act, in an insolvency scenario, any senior unsecured debt other than Relevant Debt Instruments is to be discharged first. Consequently, any other senior unsecured debt is granted priority over the Relevant Debt Instruments, and any Relevant Debt

[12] A draft Sapin 2 law was proposed in March 2016.

[13] http://www.bundesfinanzministerium.de/Content/DE/Downloads/Gesetze/2015-11-05-Abwicklungsmechanismusgesetz.pdf;jsessionid=C82462A6AC0CE238ECD5D95E49A55378?__blob=publicationFile&v=3

Instruments would rank junior to such other senior unsecured debt. Relevant Debt Instruments, however, would continue to rank senior to any debt that is otherwise statutorily or contractually subordinated. The change in ranking does not apply to debt obligations which are exempt from bail-in pursuant to the German rules implementing article 44(2) BRRD such as, *inter alia*, covered deposits and obligations vis-à-vis bank employees, as well as money market instruments and structured products such as derivatives. [14]

The provision whereby senior unsecured debt is granted priority over Relevant Debt Instruments applies from January 1, 2017. It will apply not only to Relevant Debt Instruments issued after such date, but also *any and all Relevant Debt Instruments outstanding on such date*.

The main reason for the change in ranking of Relevant Debt Instruments was to facilitate the application of the bail-in tool by creating a class of eligible liabilities that can be easily and quickly determined because such liabilities are neither complex nor related to critical functions or core business lines. Also, it was expected that the change in ranking of Relevant Debt Instruments should facilitate their TLAC-eligibility without the need, or reducing the need, for German G-SIBs to issue new (subordinated) debt, because Relevant Debt Instruments, after January 1, 2017, would rank junior to operational liabilities.

Although the EU Proposal, according to proposed article 108(4) BRRD, is supposed not to apply to debt instruments outstanding prior to the date of application of the EU Proposal, the Proposal, if enacted as proposed, will likely require changes in Germany to the insolvency ranking of bank debt as described above. Pursuant to the German Resolution Mechanism Act, Relevant Debt Instruments (whether issued before or after January 1, 2017) by operation of law rank junior to *all* other senior unsecured debt. The EU proposal, however, provides the issuing banks with flexibility to issue debt instruments ranking *equal* to other senior unsecured debt (including debt instruments that would currently constitute Relevant Debt Instruments) or ranking *junior* to such debt, but senior to subordinated debt. Hence, the German legislature would have to introduce the option for banks to issue debt instruments ranking in insolvency in line with the EU proposal (*e.g.*, by adjusting the features of Relevant Debt Instruments to the EU proposal), and thereby grant German banks the option to also issue debt securities that rank equal to the bank's other senior unsecured debt. In such context, the German legislature would also need to decide where debt instruments issued after the date of application of the EU Proposal and complying therewith would rank in relation to Relevant Debt Instruments issued prior to such date.

(c) Italy

The Italian implementation of the BRRD generally mirrors the text of the directive[15]. However, with respect to the implementation of article 108[16], it went one step further extending the depositor preference beyond what is required by the directive. Indeed, the Italian rules modify the creditors' hierarchy that should apply to bank insolvency (*liquidazione coatta amministrativa*) and - as a consequence - resolution proceedings commenced after January 1 2019[17], making "other deposits" (*i.e.*, deposits that are not covered by article 108 BRRD) senior to other unsecured debt of the bank.

It appears that the rationale behind the new provision lies in the lower risk expectation of bank depositors *vis-à-vis* investors in bank debt and

[14] For details of this exemption for structured products, see our alert memorandum "BaFin and FMSA Issue Guidance on Ranking of Bank Bonds in Insolvency" of August 9, 2016: https://www.clearygottlieb.com/~/media/cgsh/files/alert-memos/alert-memo-pdf-version-201680.pdf

[15] Italy implemented the BRRD through two Legislative Decrees.: While the first decree (No.180 of 2015; the "Resolution Decree") has implemented mostly the BRRD provisions on resolution, the second decree (No. 181 of 2015; the "Amending Decree" and together with the Resolution Decree, the "Decrees") amended relevant provisions of the Italian Banking Act (Legislative Decree No. 385 of 1 September 1993 or the "TUB") and the Italian Securities Market Law (Legislative Decree No. 58 of 24 February 1998 or the "TUF"). For a summary of a few salient aspects of the Italian implementation of the BRRD, please see our alert memorandum available at https://www.clearygottlieb.com/news-and-insights/publication-listing/implementation-and-first-application-of-the-brrd-in-italy22

[16] Also, despite being legally on-demand, deposits are a more stable source of funding and pose a lower risk if compared to other types of bank funding, such as interbank liquidity.

[17] See article 1(33) of Amending Decree amending article 91of the TUB and article 3(9) of the Amending Decree.

counterparties in derivatives. In case of insolvency, "other deposits" (including those held by corporate clients) shall rank senior to other unsecured debt, right after covered deposits, deposit guarantee schemes, and the part of individuals' and SME's eligible deposits exceeding EUR 100,000, which all benefit from the preferential treatment under article 108 BRRD.[18] The ranking of certain unsecured debt below "other deposits" should also facilitate the bail-in of such unsecured debt as it makes easier to comply with the "no creditor worse off"-principle.

While it is likely that the Italian provision was drafted taking into account the TLAC requirement, it seems to fall short from making senior unsecured debt issued by Italian G-SIBs (which, as of today, consists only of Unicredit) automatically eligible under the TLAC requirements.

Indeed, the Italian rules on creditors' hierarchy in insolvency proceedings may facilitate the application of the bail-in tool with respect to banks' senior unsecured debt and, thus, help compliance with the TLAC requirement, since banks' senior unsecured debt will be more likely to be TLAC eligible as it would not rank *pari passu* with deposits that may be considered "excluded liabilities" (*i.e.*, liabilities that cannot be included in the external TLAC requirement) at least to the extent they are "*sight deposits and short term deposits (deposits with original maturity of less than one year)*". However, although subordinated to deposits, senior unsecured debt would still rank *pari passu* with other excluded liabilities under point 10 of the FSB TLAC term sheet of November 9, 2015 (*e.g.*, liabilities arising from derivatives or structured notes). Therefore, further contractual or structural subordination would likely be needed for an Italian G-SIB to issue senior unsecured debt that qualifies for TLAC purposes.

The approach taken by the Italian implementation of the BRRD differs from that being proposed by the EU Proposal.[19] In case such proposal will be adopted in its current form, Italy will likely need to amend rules on creditor hierarchy in order to provide for a "*'non preferred' senior class for unsecured debt*". It is unclear whether, in doing so, it will maintain the "super-seniority" of "other deposits" or revise the rules recently adopted before their first application. If Italy will maintain such "super-seniority", the ranking of senior unsecured debt in an insolvency (or resolution) scenario vis-à-vis other unsecured debt shall depend on when the debt was issued and the proceedings initiated. Indeed:

- in insolvency (or resolution) proceedings initiated prior to January 1, 2019, senior debt that either was issued prior to July 2017 or lacks the characteristics to qualify as *'non preferred' senior debt* shall rank *pari passu* with "other deposits" and senior to *'non preferred' senior debt* issued after July 2017
- in insolvency (or resolution) proceedings initiated after January1, 2019, senior debt that either was issued prior to July 2017 or lacks the characteristics to qualify as *'non preferred' senior debt* shall rank junior to "other deposits" but senior to *'non preferred' senior debt issued* after July 2017.

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[18] See article 91(1-bis) of the Italian Banking Act as amended by the Amending Decree: "*By derogation to article 2741 of the Italian Civil Code and article 111 of the Bankruptcy Act, in distributing the assets liquidated pursuant to paragraph 1 above:*

a) the following creditors rank senior to other unsecured creditors: 1) the part of individuals, microenterprises, small and medium enterprises' deposits eligible for reimbursement and above the amount provided for under article 96-bis(5); 2) the deposits under 1) above, at non-EU branches of banks incorporated in Italy;

b) the following rank senior to the creditors indicated under a) above: 1) covered deposits; 2) credits by the deposit guarantee schemes subrogated to the rights and obligations of covered depositors;

c) other depositors at the bank rank senior to other unsecured creditors, but junior to creditors under letters a) and b) above."

[19] Indeed, the Explanatory Memorandum accompanying the EU proposal mentions that the Commission considered to provide for a "statutory preference for all deposits vis-à-vis senior debt" but opted for the "creation of a specific 'unpreferred' senior class for unsecured debt" as "the most cost effective way" to ensure compliance with TLAC and MREL requirements through subordinated debt.