Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy

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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[(3)],

Whereas:

(1) On 9 November 2015, the Financial Stability Board (FSB) published the Total Loss-absorbing Capacity (TLAC) Term Sheet ('the TLAC standard'),which was endorsed by the G20 in November 2015. The objective of the TLAC standard is to ensure that global systemically important banks (G-SIBs), referred to in the Union framework as global systemically important institutions (G-SIIs), 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. In its communication of 24 November 2015 entitled 'Towards the completion of the Banking Union', the Commission committed itself to bringing forward, by the end of 2016, a legislative proposal that would enable the TLAC standard to be implemented into Union law by the internationally agreed deadline of 2019.

(2) The implementation of the TLAC standard into Union law 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[(4)]. 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. Concretely, 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 law through amendments to Regulation (EU) No 575/2013 of the European Parliament and of the Council[(5)], while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs as well as relevant eligibility criteria should be addressed through targeted amendments to Directive 2014/59/EU and to Regulation (EU) No 806/2014 of the European Parliament and of the Council[(6)].

This Directive, which concerns the ranking of unsecured debt instruments in insolvency hierarchy, is complementary to the aforementioned legislative acts, as proposed to be amended, and to Directive 2013/36/EU of the European Parliament and of the Council[(7)].

(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 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. That should be achieved through constant compliance by institutions with the TLAC minimum requirement, which is to be implemented in Union law through an amendment of Regulation (EU) No 575/2013, and with a requirement for own funds and eligible liabilities as provided for in Directive 2014/59/EU.

(5) The TLAC standard requires G-SIIs to meet the TLAC minimum requirement, with certain exceptions, with subordinated liabilities that rank in insolvency below liabilities excluded from TLAC ('subordination requirement'). Under the TLAC standard, subordination is to be achieved through the legal effects of a contract (known as contractual subordination), the laws of a given jurisdiction (known as statutory subordination) or a given corporate structure (known as 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 the creditors' losses in resolution are greater than the losses that they would have incurred 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 rules on 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. The absence of harmonised Union rules 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 could differ considerably across the Union.

(8) In its resolution of 10 March 2016 on the Banking Union[(8)], the European Parliament called on the Commission to present proposals to reduce further the legal risks of claims under the no creditor worse off principle, and, in its conclusions of 17 June 2016, the Council invited the Commission to put forward a proposal on a common approach to the bank creditors' hierarchy to enhance legal certainty in the event 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 is Article 114 of the Treaty on the Functioning of the European Union.

(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 that do not qualify as own funds instruments, but below other senior liabilities. Institutions should remain free to issue debt in both the senior and the non-preferred senior classes. Of those two classes, and without prejudice to other options and exemptions provided for in the TLAC standard to comply with the subordination requirement, only the non-preferred senior class should be eligible to meet the subordination requirement. That is intended to enable institutions to use the less costly ordinary senior debt for their funding or any other operational reasons and to issue 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 for 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 meets 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 refer 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 provided for 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 has a higher priority ranking than the priority ranking of own funds instruments and the priority ranking of any subordinated liabilities that 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 but can rather, 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 for 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 the purposes of legal certainty and to mitigate transitional costs 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 adopted at 31 December 2016. To the extent that certain national laws as adopted at 31 December 2016 already address 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 recovery and resolution framework because of, in particular, 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 29 December 2020, the Commission should review the application of Directive 2014/59/EU with regard to the ranking of deposits in insolvency and assess in particular the need for any further amendments thereto.

(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 ADOPTED THIS DIRECTIVE:

(**1**) OJ C 132, 26.4.2017, p. 1.

(**2**) OJ C 173, 31.5.2017, p. 41.

(**3**) Position of the European Parliament of 30 November 2017 (not yet published in the Official Journal) and decision of the Council of 7 December 2017.

(**4**) 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).

(**5**) 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).

(**6**) 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).

(**7**) 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).

(**8**) Not yet published in the Official Journal.