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From: Mr Mario Draghi, President of the European Central Bank
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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: Opinion of the European Central Bank of 8 March 2017 on a proposal for a
Directive of the European Parliament and of the Council on amending
Directive 2014/59/EU as regards the ranking of unsecured debt
instruments in insolvency hierarchy (CON/2017/6)

Delegations will find hereby the above mentioned Opinion of the European Central Bank.

OPINION OF THE EUROPEAN CENTRAL BANK

of 8 March 2017

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

(CON/2017/6)

Introduction and legal basis

On 3 January 2017 and 17 February 2017, respectively, the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament for an opinion on a 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 hierarchy¹ (hereinafter the 'proposed directive').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed directive contains provisions affecting the basic task of the European System of Central Banks (ESCB) of implementing the monetary policy of the Union pursuant to the first indent of Article 127(2) of the Treaty, the ESCB's contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty, and the tasks conferred upon the ECB pursuant to Article 127(6) of the Treaty concerning policies relating to the prudential supervision of credit institutions. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. General observations

1.1 The ECB welcomes the proposed directive, which sets out amendments to Directive 2014/59/EU of the European Parliament and of the Council² relating to the insolvency ranking of holders of debt instruments issued by Union credit institutions, and certain other institutions, as part of a broader set of legislative proposals for amending the Union's financial services regulatory framework³. The amendments to Article 108 of Directive 2014/59/EU aim to enhance the implementation of the bail-in tool provided for under Directive 2014/59/EU and to facilitate the application of the minimum requirement for own funds and eligible liabilities (MREL) and the forthcoming total loss-absorbing capacity (TLAC) requirement⁴ concerning the loss-absorption and recapitalisation capacity of credit

¹ COM(2016) 853 final.

² 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).

³ The ECB has been consulted by the Council on the broader set of legislative proposals put forward by the Commission, and the ECB's opinion on those proposals may contain further observations relevant to the subject-matter of this opinion, in particular as regards the proposals for 'eligible liabilities instruments'.

⁴ See the Financial Stability Board's (FSB's) 'Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution: Total Loss-absorbing Capacity (TLAC) Term Sheet', 9 November 2015, available on the FSB's website at www.fsb.org.

institutions and investment firms. As such, the amendments provide an additional means for credit institutions and certain other institutions to comply with the forthcoming TLAC and MREL requirements and improve their resolvability, without constraining their respective funding strategies. This reform should be adopted as soon as possible to assist credit institutions in their preparations for meeting the new requirements, especially where such institutions are faced with a shortfall in building up the necessary levels of loss-absorbing liabilities (where subordination is required), and in light of potential constraints on the capacity of markets to rapidly absorb large volumes of new issuances.

- 1.2 The ECB fully shares the Commission's view that harmonised rules in the internal market on the treatment of certain bank creditors in insolvency and resolution are needed in order to reduce divergences between national rules concerning the loss absorbency and recapitalisation capacity of banks, which could distort competition in the internal market. The ECB notes that harmonisation in this area is particularly important to safeguard financial stability as well as to foster effective and efficient resolution action, including the implementation of the bail-in tool under Directive 2014/59/EU in a cross-border context, and to reduce uncertainty for issuers and investors.
- 1.3 The ECB reiterates its position⁵ that a common framework at Union level on the hierarchy of creditors, including as regards subordination of debt instruments and other similar financial instruments in bank resolution and/or insolvency proceedings, may help to advance the integration of the financial services markets within the Union and facilitate the tasks of the ECB with regard both to monetary policy and supervision within the Single Supervisory Mechanism.
- 1.4 The ECB considers that the proposed directive only provides for partial harmonisation and that additional reforms would be useful to promote further harmonisation in the hierarchy of creditor claims in bank insolvency. In particular, a general depositor preference rule, based on a tiered approach, should be enshrined in Union legislation. This would enhance resolvability by clarifying the hierarchy of creditors and facilitating the allocation of losses to unsecured bank debt instruments ahead of certain operational liabilities, while alleviating concerns regarding the 'no creditor worse off than under normal insolvency proceedings' principle⁶.

2. Specific observations

2.1 *New asset class of 'non-preferred' senior debt instruments*

The ECB welcomes the proposal in the proposed directive for the creation of a new asset class of 'non-preferred' senior debt instruments with a lower rank than ordinary senior unsecured debt instruments in insolvency. This lower rank is established by a statutory framework that recognises the contractual subordination arrangements contained in the relevant contractual terms and conditions for the issuance of such 'non-preferred' senior debt instruments.

⁵ See, for example, Opinions CON/2016/28, CON/2016/7, and CON/2015/31. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

⁶ See paragraph 3.1.2 of Opinion CON/2016/28 and paragraph 3.7.1 of Opinion CON/2015/35.

- 2.1.1 Regarding the requirement that the new asset class of ‘non-preferred’ senior debt instruments must have an initial maturity of one year, the ECB is of the opinion that credit institutions⁷ and certain other institutions should be allowed to issue ‘non-preferred’ senior debt instruments with initial maturities that are either more than or less than one year. While ‘non-preferred’ senior debt instruments with an initial or residual maturity of less than one year would not be eligible as regards meeting MREL or TLAC requirements, such instruments could still be bailed-in, thus increasing the institution’s loss-absorption capacity. The ECB notes that where ‘non-preferred’ senior debt instruments are issued with initial maturities of more than one year, this would positively extend the average maturity of this asset class, thereby contributing to improving the resolvability of institutions.
- 2.1.2 Regarding the requirement that the new asset class of ‘non-preferred’ senior debt instruments must have no derivative features, it might be worthwhile considering if further reflection would be useful as to whether the question of what constitutes a derivative feature could be usefully clarified for this purpose at this stage, possibly through the development of regulatory technical standards.
- 2.1.3 The ECB understands that the proposed framework for the statutory recognition of contractual subordination pursuant to the terms and conditions of ‘non-preferred’ senior debt instruments as a new asset class would not preclude Member States from maintaining a statutory subordination regime⁸. The proposed directive envisages that ‘non-preferred’ senior debt instruments will have a lower rank than ‘ordinary unsecured claims resulting from debt instruments with the highest priority ranking among debt instruments in national law governing normal insolvency proceedings’. However, this approach may not be easily accommodated in Member States where the subordination of senior unsecured debt instruments has already been established on a statutory basis in national law⁹, and where such instruments are currently allocated the lowest rank among senior liabilities. For these jurisdictions, the proposed directive could usefully clarify that ‘non-preferred’ senior debt instruments rank *pari passu* with senior unsecured debt instruments already subject to statutory subordination. Further differentiation in the hierarchy of creditor claims with ‘non-preferred’ senior debt instruments ranking at a different (lower) rank may not be necessary. In Member States where statutory subordination has already been implemented, credit institutions would be in a position to use the existing stock of senior debt instruments for loss absorption, without the immediate need to issue new ‘non-preferred’ senior debt instruments. In order to foster harmonisation as regards the manner in which subordination of senior unsecured debt instruments is achieved in the hierarchy of creditor claims, and to promote the creation of a single market for such debt instruments, it would be useful for the proposed directive to include a provision specifying that whenever existing debt instruments that are subject to statutory subordination reach maturity, new issuances of senior debt instruments that are intended to be subordinated should be aligned, where appropriate (e.g. no derivative features), with the regime established for ‘non-preferred’ senior debt instruments.

⁷ Note that ‘non-preferred’ senior debt instruments could also be issued by a subsidiary in the form of internal MREL for the purposes of a single point of entry strategy, and such instruments should also be available for loss-absorption in a pre-resolution phase, where the subsidiary as the issuing institution is not placed under resolution.

⁸ For discussion of national insolvency frameworks providing for statutory subordination of senior unsecured debt instruments, please see Opinions CON/2016/28 and CON/2015/31.

⁹ In this context statutory subordination means the subordination, based on a statutory framework applicable to the issuer, of an unsecured debt instrument that is not also subject to subordination pursuant to the terms and conditions of the debt instrument, i.e. contractual subordination.

2.1.4 It should be clarified that, for the purposes of the subordination requirements laid down in Regulation (EU) No 575/2013 of the European Parliament and of the Council¹⁰ and Directive 2014/59/EU, senior debt instruments subject to statutory subordination or structural subordination will remain eligible, subject to the applicable criteria for 'eligible liabilities instruments', in addition to the new asset class of 'non-preferred' senior debt instruments.

2.2 *Transitional arrangements*

The ECB draws attention to the need for clarity regarding the envisaged transitional arrangements applicable to senior unsecured debt instruments that are outstanding at the point in time when the new regime takes effect, including any grandfathering regime required (see paragraph 2.1.3). Such clarity is essential to ensuring legal certainty for investors and issuers during the transitional period. The ECB understands that existing national laws will continue to apply to debt instruments that were already outstanding prior to the date of application of the proposed directive. Moreover, the ECB considers that uncertainty may arise with respect to the applicable legal regime for new issuances in the interim period between the proposed directive's date of application and the date when the new regime is implemented in national insolvency law. In particular, the cut-off date for the application of national laws as envisaged in the proposed directive should be reconsidered as it is set well before the envisaged application date of the proposed directive. Due consideration should be given to the fact that it may take additional time for changes in national insolvency law to take effect following the implementation of the proposed directive.

2.3 *General depositor preference*

2.3.1 The ECB sees merit in the introduction of a general depositor preference, based on a tiered approach, in the Union¹¹. This would be complementary to the proposals set out in the proposed directive. Typically, under a general depositor preference rule all depositor claims rank higher than the claims of ordinary unsecured non-preferred creditors, whereas in a tiered depositor preference regime insured (or guaranteed) deposits rank higher than eligible deposits, but uninsured deposits still rank higher than other senior liabilities¹². It is worth noting that Member States are not precluded under Directive 2014/59/EU from establishing general depositor preference rules in national law¹³, and recently a number of Member States have done so¹⁴.

2.3.2 The ECB notes that conferring a priority ranking on all deposits is expected to enhance the implementation of the bail-in tool in resolution, because the resolution authority will be able to bail-in other senior unsecured bank debt instruments prior to deposits, while minimising the risk of

¹⁰ 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).

¹¹ See paragraph 3.1.2 of Opinion CON/2016/28 and paragraph 3.7.1 of Opinion CON/2015/35. See also Transcript of the questions and answers following the ECB President's Introductory statement to the ECB's press conference of 4 April 2013, available on the ECB's website at www.ecb.europa.eu.

¹² See the International Association of Deposit Insurers' 'Core Principles for Effective Deposit Insurance Systems', November 2014, p. 8. For example, a general (national) depositor preference has been embedded in US legislation since 1993, where in the liquidation of a failed insured depository institution a preference is granted by law to any domestic deposit liability of the institution ahead of any other general or senior liability of the institution. See sections 1821(d)(11)(A) and 1813(l)(5)(A) of Title 12, Chapter 16 of the U.S. Code.

¹³ See paragraph 3.1.3 of Opinion CON/2016/28.

¹⁴ See Article 91 of the Italian Banking Law (Legislative Decree no. 385 of 1 September 1993); Article 207 of the Slovenian Law on the resolution and winding-up of banks (OJ No. 44/2016); and Article 145A of the Greek banking law (Law 4261/2014).

compensation claims under the 'no creditor worse off' principle. The bail-in of such senior unsecured bank debt instruments is regarded as carrying a lower contagion risk than that of operational liabilities such as deposits. A general depositor preference is therefore likely to render the bail-in of senior unsecured bank debt instruments more effective and credible, thus fostering effective resolution action and reducing the need to have recourse to the resolution fund¹⁵.

2.3.3 In addition to enhancing resolvability, establishing a general depositor preference, based on a tiered approach, across the Union would promote further harmonisation in the Union as regards the hierarchy of creditor claims in bank insolvency¹⁶.

2.3.4 The current regime under Directive 2014/59/EU requires Member States to ensure that in national laws governing normal insolvency proceedings a higher priority ranking among unsecured claims is given to deposits up to the EUR 100 000 coverage level ('covered deposits'), which are guaranteed by the deposit guarantee scheme (DGS)¹⁷. A second priority ranking is granted to eligible deposits exceeding the EUR 100 000 coverage level held by natural persons or micro, small or medium-sized enterprises¹⁸. Large corporate deposits rank below, typically *pari passu* with other claims of ordinary unsecured creditors of the credit institution in accordance with national laws. The ECB understands that the ranking of other preferential claims, such as tax and employee wage claims, is determined by the applicable national laws. A general depositor preference, based on a tiered approach, could be achieved by introducing a third priority ranking in Article 108 of Directive 2014/59/EU for other deposits, such as large corporate deposits, deposits by credit institutions, collective investment undertakings, pension funds etc., which would rank below the higher priority ranking for covered deposits and the preference for certain eligible deposits, but ahead of other senior liabilities¹⁹.

2.4 Treatment of Tier 2 instruments

Despite the improvement sought by the proposed directive, the ongoing fragmentation between national insolvency regimes may continue to pose challenges. This is particularly the case in respect of the treatment of Tier 2 instruments and other subordinated liabilities in insolvency and resolution. Whereas some national insolvency regimes differentiate between the rank of Tier 2 instruments and that of other subordinated liabilities in insolvency, in other jurisdictions Tier 2 instruments rank *pari passu* with other types of subordinated liabilities. This may complicate the exercise of bail-in powers, such as write-down and conversion, by the resolution authorities under Directive 2014/59/EU, since Tier 2 instruments are to be bailed-in prior to subordinated debt where the latter does not constitute Additional Tier 1 or Tier 2 capital²⁰. Further harmonisation should be sought in this area, for example

15 See paragraph 3.1.2 of Opinion CON/2016/28 and paragraph 3.7.1 of Opinion CON/2015/35.

16 See paragraph 3.7.3 of Opinion CON/2015/35.

17 Note that the DGS enjoys the same priority ranking where it is subrogated to the rights and obligations of depositors following reimbursement of covered deposits.

18 The same ranking is also granted to deposits which would be eligible for coverage under the DGS had they not been made through branches of Union credit institutions located in a jurisdiction which is not a Union or European Economic Area Member State.

19 Certain smaller credit institutions may predominantly rely on large deposits (i.e. deposits above EUR 100 000 other than from natural persons, micro, small or medium-sized enterprises) with a remaining maturity of at least one year to meet their MREL requirement, provided no subordination requirement is imposed by the resolution authority. The ECB notes that the Commission proposes to amend Article 45(4)(f) of Directive 2014/59/EU and to introduce a new Article 45b into Directive 2014/59/EU (which refers to the new Articles 72a and 72b of Regulation (EU) No 575/2013), and these proposed amendments are understood not to preclude reliance on large corporate deposits with a remaining maturity of at least one year for the purpose of meeting MREL requirements in the same manner as under the current regime.

20 See Article 48(1) of Directive 2014/59/EU.

by requiring that national insolvency regimes should be aligned in such a way that Tier 2 instruments are treated differently and rank below other subordinated liabilities. Another area for further consideration is the ranking of intra-group liabilities in the hierarchy of creditor claims in bank insolvency.

2.5 *Effect on the eligibility of debt instruments as collateral for Eurosystem credit operations*

The ECB notes the potential implications of subordinating senior debt instruments to other debt instruments of the same issuer with respect to the eligibility of the former as collateral for Eurosystem credit operations. Guideline (EU) 2015/510 of the European Central Bank (ECB/2014/60)²¹ sets out a single framework that applies in the Eurosystem to assets that may be submitted as eligible collateral for such operations. In order to be eligible as collateral, marketable assets must be debt instruments fulfilling the eligibility criteria laid down in Guideline (EU) 2015/510 (ECB/2014/60). Pursuant to Article 64 of the Guideline, 'eligible debt instruments shall not give rise to rights to the principal and/or the interest that are subordinated to the rights of holders of other debt instruments of the same issuer'²².

2.6 *Technical observations and drafting proposals*

Where the ECB recommends that the proposed directive should be amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 8 March 2017.

The President of the ECB

Mario DRAGHI

[...]

Explanation

The proposed amendments to paragraph (4) aim to clarify that senior unsecured debt instruments issued by credit institutions (and certain other institutions) before the date of implementation of this Directive in national law will continue to rank at the level specified in national insolvency law in force on the day prior to such date.

21 Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (OJ L 91, 2.4.2015, p. 3).

22 See, in particular, paragraph 3.3 of Opinion CON/2016/7.

Technical working document
relating to ECB Opinion (CON/2017/6)²³

Drafting proposals

Text proposed by the European Commission	Amendments proposed by the ECB²⁴
Amendment 1	
Recital 9	
<p>(9) In order to reduce to a minimum credit institutions and investment firms' costs of compliance with the subordination requirement and any negative impact on their funding costs, this Directive should allow Member States to keep the existing class of unsecured senior debt, which has the highest insolvency ranking among debt instruments and is less costly for credit institutions and investment firms to issue than any other subordinated liabilities. It should, nevertheless, require Member States to create a new asset class of 'non-preferred' senior debt that should only be bailed-in during resolution after other capital instruments, but before other senior liabilities. Credit institutions and investment firms should remain free to issue debt in both classes while only the 'non-preferred' senior class should be eligible to meet the subordination requirement of Regulation (EU) No 575/2013 and of Directive 2014/59/EU. This should allow credit institutions and investment firms to use for their funding or any other operational reasons the less costly senior debt while issuing the new 'non-preferred' senior class for compliance with the subordination</p>	<p>(9) In order to reduce to a minimum credit institutions and investment firms' costs of compliance with the subordination requirement and any negative impact on their funding costs, this Directive should allow Member States to keep the existing class of unsecured senior debt, which has the highest insolvency ranking among debt instruments and is less costly for credit institutions and investment firms to issue than any other subordinated liabilities. It should, nevertheless, require Member States to create a new asset class of 'non-preferred' senior debt that should only be bailed-in written-down and/or converted into equity during resolution, or written-down and/or converted into equity for non-resolution entities in accordance with the banking group's single point of entry resolution strategy by means of contractual triggers or the authorities' statutory point of non-viability powers, after other capital instruments, but before other senior liabilities. Credit institutions and investment firms should remain free to issue debt in both classes while of these two asset classes only the 'non-preferred' senior class should be</p>

²³ This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published in the Legal framework section of the ECB's website alongside the opinion itself.

²⁴ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
requirement.’	eligible to meet the subordination requirement of Regulation (EU) No 575/2013 and of Directive 2014/59/EU. This should allow credit institutions and investment firms to use for their funding or any other operational reasons the less costly senior debt while issuing the new 'non-preferred' senior class for compliance with the subordination requirement.’
<p><u>Explanation</u></p> <p><i>This clarification is necessary to ensure that for the purposes of the subordination requirement of Regulation (EU) No 575/2013 and of Directive 2014/59/EU senior unsecured debt instruments subject to statutory subordination or structural subordination will remain eligible (subject to the applicable criteria for 'eligible liabilities instruments'), in addition to the new asset class of 'non-preferred' senior debt instruments. In addition, it is noted that 'non-preferred' senior debt instruments could also be issued by a subsidiary in the form of internal MREL, and such instruments should also be available for loss-absorption in a pre-resolution phase, where the subsidiary as the issuing institution is not placed under resolution.</i></p>	
<p>Amendment 2</p> <p>Recital 10</p>	
<p>‘(10) To ensure that the new 'non-preferred' senior class of debt instruments meet the eligibility criteria of Regulation (EU) No 575/2013 and of Directive 2014/59/EU, Member States should ensure that their initial contractual maturity spans one year, that they have no derivative features, and that the relevant contractual documentation related to their issuance explicitly refers to their ranking under normal insolvency proceedings.’</p>	<p>‘(10) To ensure that the new 'non-preferred' senior class of debt instruments meet the eligibility criteria of Regulation (EU) No 575/2013 and of Directive 2014/59/EU, Member States should ensure that their initial contractual maturity spans one year, that they have no derivative features, and that the relevant contractual documentation related to their issuance explicitly refers to their ranking under normal insolvency proceedings.’</p>
<p><u>Explanation</u></p> <p><i>Credit institutions (and certain other institutions) should be allowed to issue 'non-preferred' senior debt instruments with initial maturities that are either above or below one year. While 'non-preferred' senior debt instruments with an initial or residual maturity of less than one year would not be eligible as regards meeting MREL or TLAC requirements, such instruments could still be bailed-in, thus increasing the institution's loss-absorption capacity.</i></p>	

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
Amendment 3 Recital 11	
<p>‘(11) To enhance legal certainty for investors, Member States should ensure that standard senior debt instruments have a higher priority ranking in their national insolvency laws than the new 'non-preferred' senior class of debt instruments under normal insolvency proceedings. 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 or any other subordinated liabilities and that, contrary to such instruments or liabilities, the 'non-preferred' senior class of debt instruments could only be bailed-in when the issuing institution is placed under resolution.’</p>	<p>‘(11) To enhance legal certainty for investors, Member States should ensure that standard unsecured debt instruments, which have the highest insolvency ranking among debt instruments, have a higher priority ranking in their national insolvency laws than the new 'non-preferred' senior class of debt instruments under normal insolvency proceedings. Where outstanding senior unsecured debt instruments are statutorily subordinated to other ordinary senior liabilities, under national insolvency law, Member States should ensure that the new class of ‘non-preferred’ senior debt instruments ranks <i>pari passu</i> with the statutorily subordinated senior unsecured debt instruments. In order to foster harmonisation as regards the manner in which subordination of senior unsecured debt instruments is achieved in the hierarchy of creditor claims, and to promote the creation of a single market for such debt instruments, whenever existing debt instruments that are subject to statutory subordination reach maturity, new issuances of senior unsecured debt instruments that are intended to be subordinated should, where appropriate (e.g. no derivative features), be aligned with the regime established for ‘non-preferred’ senior debt instruments. Member States should also ensure that the new 'non-preferred' senior class of debt instruments have has a higher priority ranking than the priority ranking of own funds instruments or any other subordinated liabilities and that, contrary to such instruments or liabilities, the 'non-preferred' senior</p>

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
	<p>class of debt instruments could only be bailed-in written-down and/or converted into equity when the issuing institution is placed under resolution, or written-down and/or converted into equity for non-resolution entities in accordance with the banking group’s single point of entry resolution strategy by means of contractual triggers or the authorities’ statutory point of non-viability powers.’</p>
<u>Explanation</u>	
<p><i>The amendments make it clear that if a Member State has introduced statutory subordination in national insolvency law then that Member State should ensure that the new class of contractually ‘non-preferred’ senior debt instruments will rank pari passu with senior unsecured debt instruments subject to such statutory subordination, i.e. at the lowest rank among senior liabilities. In order to foster further harmonisation in the hierarchy of creditor claims, however, whenever existing debt instruments subject to statutory subordination reach maturity, new issuances of senior unsecured debt instruments that are intended to be subordinated should, where appropriate (e.g. no derivative features), be aligned with the regime established for ‘non-preferred’ senior debt instruments. In addition, it is noted that ‘non-preferred’ senior debt instruments could also be issued by a subsidiary in the form of internal MREL, and such instruments should also be available for loss-absorption in a pre-resolution phase, where the subsidiary as the issuing institution is not placed under resolution.</i></p>	
Amendment 4	
Recital 12	
<p>‘(12) Since the objectives of this Directive, namely to lay down uniform rules for bank creditor hierarchy for the purposes of the Union recovery and resolution framework, 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 Regulation does not go beyond what is necessary</p>	<p>‘(12) Since the objectives of this Directive, namely to lay down uniform more harmonised rules for bank creditor hierarchy for the purposes of the Union recovery and resolution framework, 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 Regulation does not go beyond what is</p>

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
in order to achieve those objectives.'	necessary in order to achieve those objectives.'
<p><u>Explanation</u></p> <p><i>Since the proposed directive will not achieve 'uniform' rules for the hierarchy of creditor claims in the Union's recovery and resolution framework, a reference to 'more harmonised' rules seems more appropriate.</i></p>	
<p>Amendment 5</p> <p>Recital 13</p>	
<p>'(13) It is appropriate for the amendments to Directive 2014/59/EU provided for in this Directive to apply to liabilities issued on or after the date of application of this Directive and to liabilities still outstanding as of that date. However, for legal certainty purposes and to mitigate transitional costs in as much as possible, Member State should ensure that the treatment of all outstanding liabilities that credit institutions and investment firms have issued before that date is governed by the laws of the Member States as they were adopted on [31 December 2016]. Outstanding liabilities should thus continue to be subject to the regulatory requirements set out in Directive 2014/59/EU and the relevant national law in the version that was adopted on [31 December 2016].'</p>	<p>'(13) It is appropriate for the amendments to Directive 2014/59/EU provided for in this Directive to apply to liabilities issued on or after the date of application of this Directive and, to the extent feasible, to liabilities still outstanding as of that date. However, for legal certainty purposes and to mitigate transitional costs in as much as possible, Member States should ensure that the treatment of all outstanding liabilities that credit institutions and investment firms have issued before that the date of implementation of this Directive in national law is governed by the laws of the Member States in force on the day prior to the date of implementation of this Directive in national law as they were adopted on [31 December 2016]. Outstanding liabilities should thus continue to be subject to the regulatory requirements set out in Directive 2014/59/EU and the relevant national law in the version that was adopted on [31 December 2016].'</p>
<p><u>Explanation</u></p> <p><i>The proposed amendments primarily clarify that senior unsecured bank debt instruments issued before the date of implementation of this Directive in national law will continue to rank at the level specified in national insolvency law in force on the day prior to the date of implementation of this Directive in national law. The addition of the words 'to the extent feasible' is suggested to highlight that the scope for changes that may be effected with respect to outstanding debt instruments by means of the proposed amendments is not unlimited.</i></p>	

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
Amendment 6 Article 1(1), 1(2) (NEW), 1(3) (NEW), and 1(4) (NEW)	
<p>‘Article 1</p> <p>Amendments to Directive 2014/59/EU</p> <p>1. The words "of deposits" are deleted from the title of Article 108 and the word "non-preferred" is deleted from point (a) of the first subparagraph of Article 108.’</p>	<p>‘Article 1</p> <p>Amendments to Directive 2014/59/EU</p> <p>1. The words "of deposits" are deleted from the title of Article 108 and the word "non-preferred" is deleted from point (a) of the first subparagraph of Article 108.</p> <p>2. The following point (-a) is inserted before point (a) in the first subparagraph of Article 108:</p> <p>“(a) deposits, other than those referred to in points (a) and (b), have a priority ranking which is higher than the ranking provided for other ordinary unsecured claims;”.</p> <p>3. The words “the claims of ordinary unsecured, non-preferred creditors” are replaced by the words “under point (-a)” in point (a) of the first subparagraph of Article 108.’</p> <p>4. The words "point (a)” are replaced by the words “points (a) and (-a)” in point (b) of the first subparagraph of Article 108.’</p>
<p><i>Explanation</i></p> <p><i>These amendments are designed to achieve a general depositor preference rule for deposits based on a tiered approach, while fully respecting the existing priorities enjoyed by covered and other specified eligible deposits under the existing provisions of Article 108 of Directive 2014/59/EU of the European Parliament and of the Council²⁵. A priority ranking for all deposits should enhance the bail-in regime under Directive 2014/59/EU, because the resolution authorities will be able to bail-in other senior</i></p>	

²⁵ 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).

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<i>unsecured bank debt before deposits, while minimising the risk of 'no-creditor-worse-off' claims. This depositor preference is broader in scope than eligible deposits as defined under Directive 2014/49/EU of the European Parliament and of the Council²⁶.</i>	
Amendment 7 Article 1(2)	
<p>'2. The following paragraphs are added after the end of Article 108:</p> <p>"2. Member States shall ensure that, for entities referred to in points (a), (b), (c) and (d) of Article 1(1), ordinary unsecured claims resulting from debt instruments with the highest priority ranking among debt instruments 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:</p> <p>(a) the initial contractual maturity of debt instruments spans one year;</p> <p>(b) they have no derivative features;</p> <p>(c) the relevant contractual documentation related to the issuance explicitly refers to the ranking under this subparagraph.'</p>	<p>'25. The following paragraphs are added after the end of Article 108:</p> <p>"2. Member States shall ensure that, for entities referred to in points (a), (b), (c) and (d) of Article 1(1), ordinary unsecured claims resulting from debt instruments with the highest priority ranking among debt instruments 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:</p> <p>(a) the initial contractual maturity of debt instruments spans one year;</p> <p>(ab) they have no derivative features; and</p> <p>(be) the relevant contractual documentation related to the issuance explicitly refers to the ranking under this subparagraph.</p> <p>Notwithstanding the preceding sentence, in Member States where ordinary unsecured claims resulting from debt instruments with the highest priority ranking among debt instruments under national law governing normal insolvency proceedings, as it stood prior to the adoption of the legal instruments necessary to comply with [this Directive], are statutorily subordinated to other ordinary senior liabilities, Member States shall ensure</p>

²⁶ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

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	<p>that debt instruments that meet the conditions referred to in this paragraph rank <i>pari passu</i> as such statutorily subordinated senior unsecured debt instruments under national insolvency law.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Credit institutions (and certain other institutions) should be allowed to issue 'non-preferred' senior debt instruments with initial maturities that are either above or below one year. While 'non-preferred' senior debt instruments with an initial or residual maturity of less than one year would not be eligible as regards meeting MREL or TLAC requirements, such instruments could still be bailed-in, thus increasing the institution's loss-absorption capacity.</i></p> <p><i>The proposed new sentence would facilitate the implementation of Article 1(2) in Member States where senior unsecured debt instruments are statutorily subordinated to ordinary senior liabilities based on national insolvency law. Insofar as, in these Member States, senior unsecured debt instruments issued by credit institutions (and certain other institutions) already rank last among senior liabilities, further differentiation in the hierarchy of creditor claims by establishing 'non-preferred' senior debt instruments at a different rank might not be necessary.</i></p>	
<p style="text-align: center;">Amendment 8</p> <p style="text-align: center;">Article 1(3)</p>	
<p>'3. Member States shall ensure that ordinary unsecured claims resulting from debt instruments referred to in 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).'</p>	<p>'3. Member States shall ensure that ordinary unsecured claims resulting from debt instruments that meet the conditions referred to in paragraph 2 shall have a higher priority ranking in national law governing normal insolvency proceedings than the priority ranking of claims resulting from own funds instruments or any other subordinated debt (where such subordinated debt does not constitute Additional Tier 1 or Tier 2 capital)referred to in points (a) to (d) of Article 48(1).'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Amendment for the sake of clarity since Article 48 of Directive 2014/59/EU refers to the sequence of write-down and conversion in resolution rather than insolvency.</i></p>	

Text proposed by the European Commission	Amendments proposed by the ECB ²⁴
Amendment 9 Article 1(4)	
<p>'4. Member States shall ensure that their national laws governing normal insolvency proceedings as they were adopted at [31 December 2016] apply to ordinary unsecured claims resulting from debt instruments issued by entities referred to in points (a), (b), (c) and (d) of Article 1(1) prior to [date of application of this Directive – July 2017].'</p>	<p>'4. Member States shall ensure that their national laws governing normal insolvency proceedings as they were adopted at [31 December 2016] in force on the day prior to the date of implementation of this Directive in national law apply to ordinary 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 implementation of this Directive in national law [date of application of this Directive – July 2017].'</p>
<p><u>Explanation</u></p> <p><i>The proposed amendments to paragraph (4) aim to clarify that senior unsecured debt instruments issued by credit institutions (and certain other institutions) before the date of implementation of this Directive in national law will continue to rank at the level specified in national insolvency law in force on the day prior to such date.</i></p>	