Nordea

To the Ministry of Finance 15 June 2018

Statement to the draft government proposal for legislation on the ranking of the claims of credit institutions' and certain investment service firms' creditors, request for statements VM033:00/2018

We think that the draft government proposal in general adopts what is required by the Directive (EU) 2017/2399 (the "Directive"). There are however some items that we would like to address, a few of general nature and a couple of more specific items.

General

There appears to be some inconstancy, or at least room for alignment in the use of terms both in the draft proposal at large but also in the proposed amendments to the legislation when it comes to references to the claim or nature of the claim. For instance, there are terms such as promissory note, bonds, loan, financial instruments etc. which implies that in certain situation a claim must be based on a specific form (e.g. a bond). We do believe it is very important to emphasise in the government proposal and the legislation that the form on which the claim is based on is not relevant and that the regulated ranking of claims can be applied irrespective of the form of the claim. Instead of several different terms used we would suggest the use of term "claim" (Sw. fordran, Fi. saatava) both in the government proposal and the proposed legislation. This would be in line with the expressions used generally in the Act on the Ranking of Claims.

Amendments to Credit Institutions Act

Section 4 A, paragraph 4 – we suggest that the references to promissory note and loan should be replaced with references to "claim" as per above.

Section 4 A, paragraph 5 – we suggest that the references to bond and loan should be replaced with "claim" as per above. In addition, considering that this provision is referencing section 6, subsection 6, paragraph 3 of the Act on the Ranking of Claims, it should be clarified in the government proposal that this would apply not only to claims based on the bonds but to all type of claims.

Relating to timing of the applicability of the amendments – we suggest that the references to financial instruments should be replaced with term "claim" as per above. Relating to this we would suggest a clarification in the government proposal under "Key suggestions" and where it is needed, that there is nothing that prevents parties in relation to claims based on instruments issued prior to the implementation to contractually agree in the terms and conditions that ranking of such claims would align to the implemented legislation.

Acquiring funding from the international debt capital markets is always subject to prevailing market conditions, and therefore issuers do not have constant access to the markets. In order to meet relevant TLAC requirements in time, G-IIs may want to retain the optionality of issuing instruments that are by their terms and conditions deemed to be non-preferred senior instruments and have a capability by their terms and conditions to align with the Directive as implemented in the Finnish legislation. The holders of these instruments (i.e. creditors of the claims based on them) would have contractually agreed to these terms and conditions. Therefore, the alignment of these instruments by their terms and conditions with the implemented legislation should not be seen as unpredicted or unfavourable to their holders, which must be the purpose of the provision in Article 108.4 of the Directive. As we understand it there is nothing under Finnish law that would prevent the alignment but for the avoidance of doubt it would be desired to have that clarification in the preparatory works of the legislation.

Banks in other European countries have issued new debt instruments with contractual ranking status prior to national implementation. Alignment is commonplace in the structure of those instruments. Also, banks in some countries are allowed to apply regulation retroactively for the new debt instruments issued prior to the implementation.

In a typical structure, the claims with contractual ranking status issued prior to the implementation can be aligned to statutory ranking status post-implementation. As explained earlier, a credit institution may need to start issuing the new debt instruments prior to the implementation in order to meet the regulatory TLAC requirements. However, one cannot issue new debt instruments with statutory ranking status prior to the implementation of the Directive. The method generally used in such debt issues is to strike a balance between being able to meet the regulatory requirement in time and trying to achieve one type of ranking status for all new debt instruments. The alignment clause used in such structure can avoid potentially perceived different ranking status of such claims compared to the ranking status of claims to be issued under the statutory ranking status. The alignment in the structure will also be beneficiary for the resolution authority in case of bail-in and resolution, as it provides debt instruments with only one type of statutory ranking status.

Amendments to Act on Commercial Banks and Other Credit institutions in the Form of a Limited Company

We would like to make a note regarding the amendments proposed to the above act that aim to clarify that AT1 instruments are not included in the relevant calculation. This amendment is stated to be made to clarify the test of insolvency under the Limited Liability Companies Act. However, we are questioning whether there really is a test of insolvency under the Limited Liability Companies Act where the inclusion of the AT1 instruments in the liabilities is debatable. The test under the Limited Liability Companies Act referred to in the proposal is rather a test of sufficiency (whether the assets match the claims) and used only for a limited liability company under liquidation rather than a test of insolvency (the ability to meet debt as it matures). In case the assets of the company in liquidation do not match the claims, the liquidators shall apply for the bankruptcy of the limited liability company. However, in accordance with the Bankruptcy Act, a prerequisite for a company to be declared bankrupt is that it must be insolvent, i.e. unable to meet debt as it matures. Therefore, the actual test of insolvency is in the Bankruptcy Act in which the inclusion of the AT1 instruments is not relevant. We are therefore questioning if the inclusion of the proposed amendment is really needed.

Nordea Bank AB (publ)

Drafted by: Janne Lanki, Senior Legal counsel