JONES DAY

COMMENTARY

JULY 2017

A New Category of Debt Securities in Belgium: Senior Non-Preferred Notes

IN SHORT

The Situation: Belgium has introduced senior non-preferred notes, a new category of debt securities available to banking institutions.

The Result: In the event of a liquidation, senior non-preferred notes will rank ahead of subordinated notes, but behind "ordinary" senior preferred notes and any claims benefiting from legal or statutory preferences.

Looking Ahead: Senior non-preferred notes should ease the implementation of the Financial Stability Board's requirement relating to the total loss absorbing capacity, intended to increase the likelihood that a global systemically important bank can continue operations after entering into resolution.

On July 20, 2017, Belgium adopted legislation establishing a new category of debt securities available to credit institutions and investment firms ("banking institutions"). The law provides for a new Article 389/1 into the Law of April 25, 2014, on the status and supervision of credit institutions ("Belgian Banking Law"). It will be published in the *Belgian State Gazette* shortly. In particular, Article 389/1 aims at increasing the effectiveness of the bail-in tool and introduces a new category of claims in the statutory drecitor hierarchy in the case of a liquidation procedure (*procédure de liquidation/liquidatieprocedure*) of a banking institution.

New Category of Debt Securities: Senior Non-Preferred Notes

Article 389/1, para. 2 of the Belgian Banking Law now divides senior notes into: (i) senior preferred notes, retaining the same ranking as the previous senior notes; and (ii) senior non-preferred notes.

Senior non-preferred notes are direct, unconditional, senior, and unsecured (*chirographaires/chirografair*) obligations. In the case of liquidation, they will rank senior to subordinated notes but junior to both ordinary senior preferred notes and to claims benefiting from legal or statutory preferences.

Main Features of Senior Non-Preferred Notes

Senior non-preferred notes must incorporate a monetary claim. Excluded are securities that foresee a payment in kind.

Senior non-preferred notes may be issued in either the form of bonds in accordance with the Belgian Companies Code or of deposit certificates in accordance with the law of July 22, 1991, on dematerialized treasury notes and deposit certificates. They may be governed by Belgian or foreign law.

Furthermore, senior non-preferred notes must have the following characteristics:

- Their principal amount and interest may not be contingent on the occurrence of an event that is uncertain at the time of the issue, except, with respect to interest only, if it can be calculated at any time in accordance with a formula established in the notes' terms (such as an index or a floating rate);
- Their maturity may not be less than one year; and
- Their terms must expressly provide that the claim is unsecured (*chirographaire/chirografair*) and that their ranking is as set forth in Article 389/1, para. 2 of the Belgian Banking Law.

> Their principal amount and interest, in principle, may not be contingent on the occurrence of uncertain events.

An issuer's call option may be included in the notes' terms, provided that the redemption amount is determined in advance.

The offering of senior non-preferred notes need not be reserved to professional clients, contrary to what the Belgian legislator originally envisaged.

Senior Non-Preferred Notes are "Bail-inable" and May Be Considered as Eligible Liabilities

Bail-inable. Senior non-preferred notes may not be counted as own funds under the Capital Requirements Regulation (EU) No. 575/2013 of the European Parliament and of the Council of June 26, 2013, on prudential requirements for credit institutions and investment firms. However, they are bail-inable and may therefore be operative when the bail-in tool is exercised in the case of judicial liquidation or resolution. In the case of a failed banking institution's recapitalization, the senior non-preferred notes would be written down or converted before the senior preferred notes, given the hierarchy of claims under new Article 389/1 of the Belgian Banking Law.

Eligible Liabilities. Senior non-preferred notes are intended to be eligible liabilities of a banking institution, to be counted toward its minimum requirement for own funds and eligible liabilities ("MREL") under Article 45 of Directive 2014/59/EU, which establishes an EU-wide framework for the recovery and resolution of credit institutions and investment firms (as implemented in Articles 267/3 and 459 of the Belgian Banking Law). Senior non-preferred notes may also facilitate implementation of the Financial Stability Board's requirement relating to the total loss-absorbing capacity ("TLAC") of a global systemically important bank ("G-SIB"), as set forth in the Financial Stability Board's term sheet of November 9, 2015, on "Principles on Loss-absorbing and Recapitalisation Capacity of Global Systemically Important Banks in Resolution." Senior non-preferred notes could therefore be taken into account in case of MREL/TLAC resolution for the solvency ratio of a banking institution.

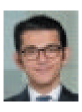
The TLAC concept is intended to enhance the chances that a G-SIB's operations can continue after entering into resolution. This is to minimize any impact on financial stability and the risk of a G-SIB requiring extraordinary public support, ensure the continuity of critical functions, and avoid exposing taxpayers to loss. Application of the TLAC requirements is anticipated to occur as of January 1, 2019.

THREE KEY TAKEAWAYS

1. Belgium has introduced senior non-preferred notes as a new category of debt securities to facilitate bail-in in the event of a liquidation of a banking institution.
2. Senior non-preferred notes must have certain characteristics.
3. Senior non-preferred notes are designated as "bail-inable" and may be considered as eligible liabilities toward a banking institution's minimum requirement for own funds and eligible liabilities.

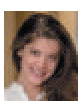
CONTACTS

Matthieu Duplat
Brussels



Serkan Alhan
Brussels

Thomas Flament
Brussels



Roxane de Giey
Brussels

YOU MIGHT BE INTERESTED IN: Go To All Recommendations >>

French Government Passes Ordinance to Promote Bond Financings

Belgian Financial Regulator's Tightening of Investor Protection Against Unfair Contract Terms

ECJ: Clarification on Withdrawing State Aid from Companies Deemed "Undertaking in Difficulty"

SUBSCRIBE SUBSCRIBE TO RSS