

Update on implementation of Single Resolution Mechanism in Germany

The German Federal Government published a revised draft law implementing the Single Resolution Mechanism. As reported (see our Newsletter of March 2015), the draft included a proposal on the subordination of senior unsecured bonds in bank insolvency. The revised draft provides for several significant changes.

Introduction

On 30 April 2015 the German Federal Government published a revised draft law on amending national banking resolution laws with respect to the Single Resolution Mechanism (**SRM**) and the European law requirements on bank levy, following a first draft in March (*Abwicklungsmechanismusgesetz*, while the title of the first draft was *SRM-Anpassungsgesetz*).¹ Please refer to our Newsletter of March 2014 with further information on the original draft and further considerations. The following focuses only on the proposal for the subordination of senior unsecured debt instruments in an insolvency of a German CRR Institution, (i.e. CRR credit institutions and CRR investment firms) and the changes made to the original proposal.

Changes to the March draft

Aiming at supporting bail-in of bank debt instruments the Federal Government proposes to add additional paragraphs to section 46f of the German Banking Act (*Kreditwesengesetz*, **KWG**) which result in the statutory subordination of obligations under certain debt instruments issued by German CRR Institutions. This does not apply if either by contract or by statute the relevant instrument is even further subordinated. Likewise, if a contractual subordination agreement states that the relevant obligation ranks junior to any unsubordinated obligations then draft section 46f KWG deems that such obligations rank also junior to the obligations covered by the draft section 46f KWG.

Instead of a reference to debt instruments as defined in section 1 para 11 sentence 1 no. 3 KWG as proposed in the first draft, the revised proposal specifically enumerates the debt instruments for which the subordination regime shall be applicable. Such instruments are bearer bonds (*Inhaberschuldverschreibungen*), negotiable registered bonds (*Orderschuldverschreibungen*) and comparable rights, which are tradable on capital markets, as well as promissory notes (*Schuldscheindarlehen*) and non negotiable registered bonds (*Namenschuldverschreibungen*), which do not qualify as deposits. Money market instruments are not covered. Pursuant to section 1 para 11 sentence 3 KWG, money market instruments are such instruments that are tradable on the money market.²

The revised draft also excludes debt instruments which provide that the payment of interest or the amount of any interest payments depends on the occurrence or non-occurrence of an event which is uncertain at the point in time when the debt instruments are issued unless the

¹ See http://www.bundesfinanzministerium.de/Content/DE/Gesetztexte/Gesetzentwurfe_Arbeitsfassungen/2015-04-30-abwicklungsmechanismus.html

² In accordance with the administrative practice of the German Federal Financial Regulatory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, **BaFin**) this covers instruments with a term of up to twelve months, but there is no general rule in this respect.

interest is determined on the basis of a fixed or floating reference rate and settled by payment. In contrast, the original draft contained only a provision (which has been kept in the revised draft) that the proposed law does not apply if the repayment depends on the occurrence or non-occurrence of an event which is uncertain at the point in time when the debt instruments are issued.

Finally the official draft clarifies that draft section 46f KWG does not apply to insolvency proceedings which have been opened before 1 January 2016.

The text of the draft section 46f paras 5 to 8 KWG reads in an unofficial English translation as follows:

"Section 46 f KWG

[...]

(5) In insolvency proceedings over the assets of a CRR Institution claims arising from uncollateralised debt instruments within the meaning of para 7 shall be satisfied as if they were subordinated claims senior to any claims ranking pursuant to section 39 para 1 no. 1 of the Insolvency Code and, in case of claims of the same rank, proportionate to their notional, provided that no further subordination is contractually agreed or stipulated by law. In case a contractually agreed subordination provides for subordination immediately junior to non-subordinated insolvency creditors, it shall be deemed to have been agreed that the claims shall rank immediately junior to the claims under sentence 1.

(6) Para 5 does not apply to debt instruments for which it has been agreed that

1. the repayment or the amount of the repayment depends on the occurrence or non-occurrence of an event which is uncertain at the point in time when the debt instruments are issued or settled in a way other than by monetary payment; or

2. the payment of interest or the amount of the interest payments depends on the occurrence or non-occurrence of an event which is uncertain at the point in time when the debt instruments are issued unless the payment of interest or the amount of the interest payments solely depends on a fixed or floating reference interest rate and is settled by monetary payment.

(7) Debt instruments within the meaning of para 5 are bearer bonds [*Inhaberschuldverschreibungen*], negotiable registered bonds [*Orderschuldverschreibungen*] and rights comparable to these instruments, which by their nature are tradable on the capital markets, as well as promissory notes [*Schuldscheindarlehen*] and non-negotiable registered bonds [*Namenschuldverschreibungen*] which do not qualify as deposits pursuant to para 4 nos. 1 or 2. Money market instruments are not considered as debt instruments within the meaning of para 5.

(8) For insolvency proceedings which have been opened before 1 January 2016 the provisions in force until such date shall continue to apply."

Contacts

Christopher Bates

Partner, London

T: +44 20 7006-1041

E: chris.bates
@cliffordchance.com**Simon Gleeson**

Partner, London

T: +44 20 7006-4979

E: simon.gleeson
@cliffordchance.com**Simon Sinclair**

Partner, London

T: +44 20 7006-2977

E: simon.sinclair
@cliffordchance.com**Dr. Marc Benzler**

Partner, Frankfurt

T: +49 69 7199-3304

E: marc.benzler
@cliffordchance.com**Sebastian Maerker, LL.M.**

Partner, Frankfurt

T: +49 69 7199-1510

E: sebastian.maerker
@cliffordchance.com**Dr. Stefan Ueding**

Senior Associate, Frankfurt

T: +49 69 7199-3114

E: stefan.ueding
@cliffordchance.com**Dr. Gregor Evenkamp**

Partner, Frankfurt

T: +49 69 7199-3158

E: gregor.evenkamp
@cliffordchance.com**Habib Motani**

Partner, London

T: +44 20 7006-1718

E: habib.motani
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Mainzer Landstraße 46, 60325 Frankfurt am Main

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.