

ITALY INTRODUCES NON-PREFERRED SENIOR DEBT

Italy has introduced a new category of non-preferred senior debt (*strumenti di debito chirografario di secondo livello*) by means of the Law on the budget of the Italian government for 2018 (the "**2018 Budget Law**") approved on 23 December 2017. As from 1 January 2018, the date on which the 2018 Budget Law will enter into force, and in the event of the insolvency of credit entities ("**entities**"), non-preferred ordinary claims will rank behind ordinary claims (*crediti chirografari*) and ahead of subordinated claims. An ordinary claim will only be considered 'non-preferred' if it meets all of the conditions established for such purposes under the 2018 Budget Law.

Key issues

- Italy has introduced the new category of non-preferred senior debt.
- In case of insolvency of credit entities, non-preferred ordinary claims (*strumenti di debito chirografario di secondo livello*) will rank behind ordinary claims (*crediti chirografari*) and ahead of subordinated claims.

BACKGROUND

On 7 December 2017, the Council of the European Union and the European Parliament adopted the Directive of the European Parliament and of the Council amending Directive 2014/59/EU of 15 May 2014 (the "**BRRD**") as regards the ranking of unsecured debt instruments in the insolvency hierarchy of banks (the "**Directive**").

The Directive introduces non-preferred senior debt instruments as a new asset class ranking between traditional bank senior debt and subordinated Tier 2 debt, with the purpose of enabling banks to meet the subordination requirements emanating from the application of Total Loss-absorbing Capacity (the "**TLAC**") and Minimum Requirement for Own Funds and Eligible Liabilities ("**MREL**") regulations.

The Directive will become EU law from the day following its publication in the Official Journal of the EU. The scheduled date for the publication of the Directive in the EU Official Journal is 27 December 2017.

THE 2018 BUDGET LAW

The 2018 Budget Law, approved by the Italian Parliament on 23 December 2017, introduces a new Article 12-*bis* to Legislative Decree no. 385 of 1 September 1993 (as amended from time to time, the "**Italian Banking Act**") to include non-preferred ordinary claims (*strumenti di debito chirografario di secondo livello*), which will be those arising from debt instruments that meet the following conditions:

- they have been issued or created with an effective term equal to or greater than a year;
- they are not derivatives and have no embedded derivatives or derivative features; and
- the terms and conditions and, where applicable, the prospectus relating to the issue, include a clause establishing that they have a lower ranking vis-à-vis the remaining ordinary claims of the bank and, therefore, claims arising from these debt instruments will be paid after the remaining ordinary claims.

The 2018 Budget Law further provides that non-preferred ordinary debt may be issued by banks or entities that are members of a banking group, that the minimum denomination of non-preferred ordinary debt instruments must be Euro 250,000 and that they must be distributed to qualified investors only.

Non-preferred ordinary claims which meet the above conditions will rank behind ordinary claims (*crediti chirografari*) and ahead of subordinated claims and will be paid before them, as provided by Article 91 of the Italian Banking Act as amended by the 2018 Budget Law.

With the introduction of this new category, the possibility for Italian entities to issue senior debt instruments which meet the subordination requirement and are therefore eligible for MREL purposes and, where appropriate, for TLAC purposes, is now expressly acknowledged in the law. However, the 2018 Budget Law does not establish the other requirements with which such instruments will have to comply to be eligible liabilities. For such purposes, it will be necessary to take into account the current drafts from the European Commission, the Council of the European Union and the European Parliament of Article 72b of the Proposal for a Regulation amending Regulation (EU) No 575/2013, commonly known as CRR2.

The 2018 Budget Law also amends Article 60-*bis* of Legislative Decree no. 58 of 24 February 1998 (as amended from time to time, the "**Italian Financial Act**"), providing that also a SIM (*società di intermediazione mobiliare*) may issue non-preferred senior debt and that the same provisions on ranking under Article 91 of the Italian Banking Act would apply to such debt.

The 2018 Budget Law will enter into force on 1 January 2018.

Gioacchino Foti, Counsel of the Finance and Capital Markets Department comments on the 2018 Budget Law as follows: "*This is a very welcome development for the Italian market that catches up with the introduction of the new category of non-preferred senior debt by other European countries, such as Spain and France. We expect a high number of issuances of non-preferred senior debt in the coming year as Italian banks will seize the opportunity offered by the new legislation*".

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