

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Consultation Document

Consultation on Amendments to the Banking Act

[MFSA REF: 02-2018]

2nd March 2018

Closing Date: 16th March 2018

Note: The documents circulated by the MFSA for the purpose of consultation are in draft form and comprise proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

Note for Consultation

1. Purpose:

The purpose of this document is to consult interested parties on proposed amendments to the Banking Act, Chapter 371 of the Laws of Malta (the Act).

The main aim of these amendments is to transpose the recently published Directive (EU) 2017/2399 of the European Parliament and of the Council amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy (the “Directive”). This Directive harmonises the ranking under normal insolvency proceedings of unsecured claims resulting from debt instruments and does not cover the insolvency ranking of deposits beyond the existing applicable provisions of BRRD.

The current article 29A of the Act, which mainly transposes article 108 of the BRRD, already provides for the ranking of creditors under insolvency. With the new proposed sub-article to article 29A a new ranking is being introduced with respect to unsecured claims arising from debt instruments.

Furthermore, unlike in the case of the Depositor Compensation Scheme, the Resolution Fund does not have a priority ranking with respect to any contributions not paid by a credit institution which has been declared insolvent. The proposed amendments are catering for this deficiency. It should be noted that the creditors listed in article 29A (2) of the Act shall rank *pari passu*.

2. Consultation and how to respond

Any feedback on the proposed amendments should reach the MFSA by not later than Friday 16th March 2018. Please send your responses by e-mail to communications@mfsa.com.mt.

3. The main proposed amendments

1. Article 2: Add the following new definition:

“Resolution Fund” means the resolution financing arrangement under the Recovery and Resolution Regulations;

2. Article 29A:

(a) New sub-article 2 (c):

(c) the Resolution Fund in relation to any contribution or contributions that may be due to it by the credit institution in accordance with the provisions of the Recovery and Resolution Regulations:

(b) New sub-article (3A):

(3A) Without prejudice to the provisions of sub-articles (1), (2) and (3), ordinary unsecured claims shall have a higher priority ranking than that of unsecured claims resulting from debt instruments that meet the following conditions:

- (a) the original contractual maturity of the debt instruments is of at least one year;
- (b) the debt instruments contain no embedded derivatives and are not derivatives themselves:

Provided that debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, shall not be considered to be debt instruments containing embedded derivatives solely because of those features;

- (c) the relevant contractual documentation and, where applicable, the prospectus related to the issuance explicitly refer to the lower ranking under this sub-article.”;

(c) New sub-article (5)

(5) For the purposes of this article:

- (a) “debt instruments” shall mean bonds and other forms of transferrable debt and instruments creating or acknowledging a debt;
- (b) “derivatives” shall mean those financial instruments defined in point (44) (c) of Article 4(1) of Directive 2014/65/EU; and referred to in Annex I, Section C (4) to (10) thereto.

Communications Unit

Malta Financial Services Authority

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