Legal high Committee for
Financial markets of Paris

REPORT OF THE TLAC GROUP

of the Haut Comité Juridique
de la Place Financière de Paris

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9 rue de Valois 75001 Paris - Tél.: 33 (0)1 42 92 20 00 - hautcomite@hcjp.fr - www.hcjp.fr

The TLAC working group, whose members are listed in Annex A, was established by the Haut comité juridique de la place financière de Paris in order to study solutions to difficulties encountered by French financial institutions in connection with the TLAC principles established on an international level by the Financial Stability Board ("FSB"). The purpose of the TLAC principles is to improve the resolvability of systemically important financial institutions through the issuance of TLAC-eligible securities that can absorb losses incurred by these institutions while preserving their operational liabilities with a view to maintaining their activities.

The working group noted that a technical issue made it difficult for French banks to issue TLAC securities. Certain clauses in the terms and conditions of certain subordinated debt securities qualifying as regulatory capital prohibit the creation of new categories of TLAC-eligible subordinated. The group studied a number of possible solutions, including those proposed in Germany and Italy, to address this difficulty. The working group concluded that these solutions raised technical difficulties that made them sub-optimal.

Public authorities reached a similar conclusion after consulting with representatives of relevant professional associations. They proposed a new solution in the form of a modification of the ranking of creditors in case of liquidation of a financial institution (draft modification of l'article L.613-30-3 of the Monetary and Financial Code, set forth in Article 51 of the draft law on transparency, the fight against corruption and the modernization of economic life, known as the Sapin 2 law). This draft law seeks to create, under French law, a new category of senior creditors that comply with the TLAC principles while respecting the terms of the existing subordinated debt securities.

The purpose of this report is to evaluate the draft law proposed by the Government, particularly on the basis of principles of Constitutional Law.

The working group is of the view that the draft law will permit credit institutions to issue TLAC-eligible debt securities that do not constitute regulatory capital instruments. The working group believes that the approach adopted in the draft law does not raise any particular legal difficulties, including as a matter of Constitutional Law.

REPORT OF THE TLAC GROUP
OF THE HAUT COMITE JURIDIQUE DE LA PLACE FINANCIERE DE PARIS

Ranking of creditors of financial institutions under French law

On December 27, 2015, the French government published a draft of a modified version of Article L. 613-30-3 of the French Monetary and Financial Code, proposing to change the ranking of creditors of financial institutions (the "**Draft Modified Article**"). The text of the Draft Modified Article is included as an annex to this Report.

The purpose of the Draft Modified Article is to enable "*credit institutions to issue a new category of debt that would absorb losses in liquidation after subordinated instruments and before liabilities*" owed to "*creditors currently classified as senior*".[1]

The Draft Modified Article is intended to improve the resolvability of financial institutions, preserving their key operating liabilities while providing institutions with the flexibility to design their different debt issuance strategies. In addition, the Draft Modified Article would enable global systemically important banks ("**G-SIBs**") to comply with the Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution (the "**TLAC Requirements**") adopted on November 9, 2015 by the Financial Stability Board (the "**FSB**").[2]

The TLAC Requirements are intended to provide financial institutions with a sufficient level of equity and debt to absorb potential losses in the event of a resolution and to maintain their critical functions, while remaining in compliance with their applicable capital ratios, and without requiring taxpayer support. At least one-third of the TLAC Requirements must be satisfied with debt.

The FSB's proposals define the conditions that debt must satisfy in order to be counted as part of a financial institution's TLAC Requirements. In particular, eligible debt must rank below debt that is excluded from the TLAC Requirements, which includes primarily a bank's operating debt – liabilities under derivative instruments, insured deposits, other deposits held by individuals or SMEs, liabilities arising other than through a contract, secured debt, and debt that cannot be used to absorb losses in the event of a bank's resolution. This lower-ranked debt can be created in three ways: (i) by operation of law; (ii) through structural subordination (with TLAC debt issued by the parent and operating liabilities incurred at the subsidiary level) ; or (iii) by contract.

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[1] *See the press release entitled "Annonce du projet de réforme de la hiérarchie des créanciers des établissements de crédit," published on December 27, 2015, on the website of the French Ministry of Finance and Public Accounts (http://www.economie.gouv.fr/projet-reforme-hierarchie-creanciers-etablissements-credit) (the "**Communiqué**").*

[2] *See the document published by the FSB on November 9, 2015, entitled, "Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution – Total loss-absorbing Capacity (TLAC) Term Sheet".*

[3] *Structural subordination can be used where the parent is a holding company with a subsidiary financial institution.*

The option chosen in France is to modify Article L. 613-30-3 of the French Monetary and Financial Code, which establishes the ranking of debts in the event of a financial institution's liquidation, to create two new categories of debt[4] :

a) The first consists of currently existing claims that rank senior, as well as claims of future creditors that are not otherwise preferred and are not in the second category described below; and

b) The second consists of a new type of non-structured debt containing a contractual clause specifying that their owner or holder is a "senior creditor" within the meaning of the new provisions (and thus holds "Senior Non-Preferred Debt"); Senior Non-Preferred Debt may be issued after the law enters into effect.[5]

The Draft Modified Article specifies that creditors holding Senior Non-Preferred Debt will be repaid in the order provided for in the new provisions, in particular after the debts referred to in a) above, "*but before creditors holding subordinated instruments*" (meaning, in particular, holders of subordinated debt issued by financial institutions that is classified as Tier 2 capital ("T2") or Additional Tier 1 capital ("AT1").

The Draft Modified Article thus introduces a new category of debt between subordinated debt, on the one hand, and the debt currently classified as senior debt, on the other hand, permitting financial institutions to issue, in the future, unsubordinated debt instruments ranking below operating liabilities, making them eligible under the TLAC Requirements.

We have analysed the Draft Modified Article on the basis of, first, the requirements of the French Constitution and the European Convention on Human Rights and Fundamental Freedoms (the "**ECHR**") (**A.**); second, the principle that a creditor may not incur greater losses in resolution than it would have incurred in a liquidation, codified in Article L. 613-50 of the French Monetary and Financial Code (**B.**); and finally, the obligation to consult with the general meeting of the holders of Senior Non-Preferred Debt, for bond issuances falling within the scope of paragraph 3° of the Draft Modified Article (**C.**).

[4] The new categories of debt are, in turn, junior to all preferred creditors, namely: creditors holding liens, pledges or mortgages; depositors, with respect to the insured portions of their deposits (Article L. 613-30-3 I. 1°); and individuals, micro, small, and medium-sized business for the amount of their insured deposits (or deposits eligible to be insured) in excess of the maximum coverage amounts (Article L. 613-30-3 I. 2°).

[5] These instruments may be either non-structured debt instruments governed by French law or equivalent debt instruments governed by non-French law where the contract pursuant to which the instruments are issued provides that they fall within the new category of Senior Non-Preferred Debt.

A. Requirements under Constitutional Law and the ECHR

1.Preliminary Note on the Risk of Judicial Challenge

As a preliminary matter, we note that, despite the fact that the Draft Modified Article facilitates the implementation of the new provisions on the resolution of financial institutions introduced into French law by Order No. 2015-1024 of August 20, 2015[6], by facilitating implementation of the bail-in tool and thus the resolvability of financial institutions, the Draft Modified Article is still subject to potential constitutional review.[7]

Since the Draft Modified Article does not transpose provisions of the BRRD, but instead supplements the transposition by modifying the hierarchy of creditors in the event of a liquidation (to which the BRRD refers), and since national authorities have the ability to choose among possible solutions, the French Conseil Constitutionnel, if the matter were brought before it, would likely review the constitutionality of the Draft Modified Article without restriction.[8] We note, in addition, that the Draft Modified Article does not merely supplement the transposition of the BRRD, which began with Order No. 2015-1024 of August 20, 2015, but facilitates its implementation in anticipation of the TLAC Requirements.

2. The Principle of Equality

Previous decisions of the Conseil Constitutionnel rendered in the context of changes to laws on commercial bankruptcy have analysed modifications to creditors' rankings as a potential infringement of the principle of equality among creditors. Like earlier laws on bankruptcies of commercial companies examined by the Conseil Constitutionnel, the Draft Modified Article create differences of treatment between: (i) creditors under paragraph 3° of the Draft Modified Article and the holders of Senior Non-Preferred Debt; and (ii) between holders of Senior Non-Preferred Debt and subordinated creditors. Each of these differences may be reviewed in light of the constitutional principle of equality.

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[6] *Order transposing Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**BRRD**") into French law.*

[7] *Based on the constitutional requirement to transpose directives under Article 88-1 of the French Constitution, the Conseil Constitutionnel refuses to rule on the constitutionality of legislative provisions that "are limited to reflecting the necessary consequences of unconditional and specific provisions" of a European Union directive, unless the directive violates a rule or a principle "inherent to France's constitutional identity" (See, in particular, Decision No. 2006-540 DC of July 27, 2006, cited above, recital 19; 2006-543 DC cited above, recital 6, and with respect to a question of constitutional priority (a "QPC"), Decision No. 2010-79 QPC of December 17, 2010 M. Kamel D., recital 3).*

[8] *See Conseil Constitutionnel, Decision No. 2004-497 DC of July 1, 2004, supra, recital No. 20. Noting that the contested provisions of the transposing law were not limited to reflecting the necessary consequences of unconditional and specific provisions of the directive, the Conseil Constitutionnel reviewed the constitutionality of the provisions in question in the ordinary manner.*

Under well settled case law, however, the principle of equality "*does not prevent the legislature from resolving different situations differently, or from making exceptions to equality for reasons that are in the public interest, provided, in both cases, that the resulting difference in treatment is directly related to the purpose of the law creating it.*"[9]

In the two decisions on provisions changing creditors' rankings in connection with laws on commercial bankruptcy[10], the Conseil Constitutionnel denied claims based on the violation of the principle of equality, noting that holders of liabilities arising after commencement of bankruptcy proceedings (to whom the law had granted a preference) were "*in different situations with respect to the objective being sought*" by the law, which was to permit the business to continue its activities following commencement of the bankruptcy proceedings.[11]

Here, the differing treatment of different categories of creditors created by the Draft Modified Article may be justified by the different situations of those creditors with regard to the objective sought.

With respect to the situations of creditors covered by paragraph 3° of the Draft Modified Article and of creditors holding Senior Non-Preferred Debt

As noted in the introduction, the Draft Modified Article will enable financial institutions to issue debt instruments that absorb losses in liquidation and in resolution, satisfying the TLAC Requirements, in order to improve the resolvability of such institutions, so as to "*ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of its failure on the economy and the financial system*".[12]

By that measure, holders of Senior Non-Preferred Debt will be in a different position from that of the creditors referred to in paragraph 3° of the Draft Modified Article, since (i) there will be a new category of debt with a specific rank designed to achieve the desired result; and (ii) there is a qualitative difference between the Senior Non-Preferred Debt, which amounts to an investment, on the one hand, and the liabilities referred to in paragraph 3° of the Draft Modified Article, which include a financial institution's operating liabilities (such as customer deposits, derivatives and trade payables),

[9] See, for a recent decision, Decision No. 2014-415 QPC of September 26, 2014, recital 6.
[10] See Decision No. 84-183 DC of January 18, 1985, Law on the bankruptcy and court-ordered liquidation of businesses; Decision No. 2005-522 DC of July 22, 2005, Law on business preservation.
[11] Decision No. 2005-522 DC of July 22, 2005, cited above, recital 5. The Conseil Constitutionnel noted that "the legislature [had] created the contested preference in order to give a distressed business's creditors, whatever their status, an incentive to provide the necessary assistance to ensure that the company would remain in business; that with regard to that objective, those who take the risk of providing new assistance, by contributing cash or by providing goods or services, are in a different position from that of the creditor that merely agrees to forgive prior debts; that as a a result, the legislature did not violate the principle of equality".
[12] See Recital 5 of the BRRD.

on the other hand. The difference in the rank assigned to the two categories contributes to the objective being sought in the public interest, which is to improve the resolvability of the institution in question while preserving its operating liabilities, in order to ensure the continuity of the institution's critical functions, and, if necessary, to permit its sale to a third party in connection with the resolution, as well as, with respect to liabilities arising from derivative instruments, to minimize the propagation of systemic risk.

Moreover, it should be noted that in the decisions of the Conseil Constitutionnel discussed above, the preferences created by the contested provisions had the effect of retroactively downgrading debts arising prior to passage of the law, by definition without the consent of the creditors involved. The Draft Modified Article will not infringe the rights of the creditors referred to in paragraph 3° of the Draft Modified Article, who will rank higher than the holders of Senior Non-Preferred Debt, as indicated in the Communiqué. Nor is there any real infringement of the rights of holders of Senior Non-Preferred Debt, since the Draft Modified Article requires that for them to be assigned to a lower rank than that of "ordinary" unsecured creditors, the "*contract governing the issuance* ... [of the Senior Non-Preferred Debt must include a provision that] *provides that their owner or holder is unsecured within the meaning of this paragraph 4°* " of Article L. 613-30-3-I of the French Monetary and Financial Code. Stated otherwise, creditors holding Senior Non-Preferred Debt that ranks junior to the claims of other creditors will have agreed to that status under the contract governing the issuance.

With respect to the situations of creditors holding Senior Non-Preferred Debt and of subordinated creditors

The different treatment of subordinated creditors and holders of Senior Non-Preferred Debt created by the Draft Modified Article may also be justified by the difference between the positions of these two categories of creditors.

Subordinated debt issued by financial institutions almost always takes the form of AT1 or T2 capital. These capital instruments absorb losses before debt that is not considered capital, whether subordinated or unsecured. Naturally, then, they would absorb losses before the Senior Non-Preferred Debt. The different treatment between holders of subordinated debt (T2 and AT1) and holders of Senior Non-Preferred Debt therefore seems to us to be justified in light of the purpose of the Draft Modified Article, which is that holders of capital instruments issued by financial institutions will contribute in accordance with the hierarchy established in the BRRD. We do not believe that the Draft Modified Article breaches the equality of the different categories of creditors, since these creditors are in different positions with regard to the objective being sought.

3. Property Rights and the Right to Maintain Legally Binding Agreements

Some financial institutions have issued T2 capital instruments providing that their holders are guaranteed the same rank in liquidation as any other subordinated creditor (*pari passu* clauses).

Holders of such subordinated T2 instruments might attempt to assert that the Draft Modified Article, by creating a new legal category of creditors whose rank is between those of subordinated creditors and the creditors referred to in paragraph 3° of the Draft Modified Article, violate the *pari passu* clauses and effectively downgrade their instruments, since in the event of a liquidation, they will be required to absorb losses before holders of Senior Non-Preferred Debt, whereas all of these creditors would have absorbed losses on a *pari passu* basis if the new hierarchy had not been introduced. They could argue that this infringes their property rights or violates legally binding agreements.

With respect to the potential violation of the terms pursuant to which holders of T2 subordinated debt may exercise their property rights

Any infringement of property rights resulting from the Draft Modified Article is, it seems to us, merely potential. The Conseil Constitutionnel appears to analyse modifications of creditor rankings as a very indirect infringement of the terms pursuant to which the creditors may exercise property rights, considering that an infringement arises only "*in the event of insufficient assets*".[13] Moreover, in the current case, permitting the issuance of debt that is senior to subordinated debt does not really affect the economic balance between these debt holders, because financial institutions are not limited in the amount of senior debt that they may issue; holders of subordinated debt may therefore see their position gradually deteriorate, and their share of the financial institution's assets in liquidation decrease, as the financial institution issues senior instruments.[14] Therefore, while the Draft Modified Article may affect the value of certain financial instruments, it does not in any way legally infringe the property rights of the holders of those instruments, since these holders have no established rights with respect to the assets or property of the financial institution based on the order in which losses are absorbed in the event of a bank's resolution.

Furthermore, even if the Conseil Constitutionnel were to find an infringement of property rights, the Draft Modified Article would not necessarily be invalidated, as long as the infringement is: (i) justified on public interest grounds; and (ii) proportionate to the objectives sought by the law.

Here, the public interest that the legislature is trying to protect should remove any grounds for declaring the Draft Modified Article invalid. Given the very limited nature of the potential

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[13] *See Decision No. 84-183, cited above: the Conseil Constitutionnel held that it was only "in the event of insufficient assets" that debt guaranteed by a special security interest might be out-ranked by debt arising after commencement of bankruptcy proceedings.*

[14] *This risk is always brought to the attention of subscribers in the Risk Factors section of the issuance prospectus.*

infringement of creditors' property rights (as described above), the public interest argument should be sufficient to avoid invalidation based on that infringement.

With respect to the right to maintenance the economic equilibrium of legally binding contracts

The Conseil Constitutionnel protects the right to maintain the economic equilibrium of legally binding contracts on the basis of Articles 4 and 16 of the Declaration of the Rights of Man and of the Citizen. It requires that interference with legally binding contracts be justified by a sufficient public interest, and it will review the proportionality of any interference in light of the public interest being served.[15]

In this case, it seems to us that the Draft Modified Article does not infringe legally binding contracts, because the *pari passu* clauses included in the agreements governing the issuance of subordinated instruments would not be invalided by the effect of the Draft Modified Article and would continue to apply within the category of subordinated debt. The impact on legally binding agreements thus appears to be only an incidental result of the creation of a new category of debt that ranks senior to subordinated debt.

In any event, if the Draft Modified Article were to held to infringe agreements governing the issuance of T2 instruments, it seems to us that this "incidental" infringement would be justified by the public interest objective discussed above.

4. Infringement of the Legitimate Expectations of Creditors Protected by the ECHR

The European Court of Human Rights has ruled on whether State interference with the equilibrium of existing contracts through the passage of laws and regulations is compatible with property rights protected by Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms.

In particular, property rights relating to an established claim[16], or even to a "*legitimate expectation*" of a claim[17], are protected, but merely potential claims are not.[18]

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[15] *See Decision No. 98-401 DC of June 10, 1998 Loi d'orientation et d'incitation relative à la réduction du temps de travail (Law on orientation and incentives relating to the reduction of working hours), recital 29; No. 99-416 DC of July 23, 1999 Loi portant création d'une couverture maladie universelle (Law on the creation of universal medical coverage), recital 19; No. 99-423 DC of January 13, 2000 Loi relative à la réduction négociée du temps de travail (Law on the negotiated reduction of working hours), recital 42; No. 2000-436 DC of December 7, 2000 Loi relative à la solidarité et au renouvellement urbains (Law relating to solidarity and urban renewal), recital 50; No. 2001-451 DC of November 27, 2001 Loi portant amélioration de la couverture des non-salariés agricoles contre les accidents du travail et les maladies professionnelles (Law on the improvement of coverage of non-employee farmers against workplace accidents and professional diseases), recital 27; No. 2002-464 DC of December 27, 2002 Loi de finances pour 2003 (Finance Law for 2003), recital 54.*

[16] *See ECHR, December 9, 1994, Stran Greek Refineries and Stratis Andreadis v. Greece, Series A, No. 301-B.*

[17] *See ECHR, February 14, 2006, No. 67847/01, Lecarpentier et al. v. France.*

[18] *See ECHR, April 18, 2002, Ouzounis et al. v. Greece, JDH, suppl. ann. de la Seine, May 30, 2002, p. 6.*

As with the Constitutional Law analysis, it seems to us that the infringement of property rights or legitimate expectations of creditors here would at best be merely potential, and that the Government would have strong arguments that the interference was justified and proportionate. In that regard, the ECHR has shown, on one occasion, that it is likely to examine public interest arguments advanced by Governments with particular rigor.[19] It would therefore be helpful if the justification and proportionality of the measure in light of the public interest being pursued were documented in the preparatory documents or the legislative history of the Draft Modified Article, with facts and figures demonstrating the risks incurred for the banking system and the disadvantages for the economy if the measures in question are not passed.

B. With Respect to the Principle That No Creditor Should Incur Greater Losses in Resolution than in Liquidation

One difficulty that may arise during the resolution of a financial institution is not solved by the Draft Modified Article: the applicability of the principle that no creditor may incur greater losses in resolution than in liquidation. This difficulty is an inherent result of the structure of the hierarchy of creditors in liquidations of financial institutions, since this hierarchy does not exactly reflect the distinction that appears in the TLAC Requirements between debt that is subject to bail-in and debt that is excluded from bail-in pursuant to Article L.613-55-1 of the French Monetary and Financial Code. This issue exists already under current law. This difficulty affects neither the validity of the hierarchy of creditors proposed in the Draft Modified Article nor the validity of the ranking provisions that might be included in the terms of Senior Non-Preferred Debt, but it might be invoked by a creditor covered under paragraph 3° of the Draft Modified Article whose claim is reduced or converted into capital in connection with a bail-in.

This claim would be based on Article 613-50 of the French Monetary and Financial Code[20], which provides that no creditor may incur worse losses in resolution than in liquidation:

> *"II. - When it takes resolution action with respect to an entity mentioned in Article L. 613-34, the resolution college shall ensure compliance with the following provisions:*
>
> *1° Resolution actions affect, first, holders of the capital described in Book II Title I Chapter II or other equity securities up to the total amount of the capital instruments that they hold, and, second, creditors in the order of ranking of their claims. None of these equity holders or creditors shall incur losses greater than those that they would have incurred in connection with a court-ordered liquidation pursuant to Book VI of the French Commercial Code" (emphasis ours).*

[19] *In the matter of Lecarpentier et al. v. France, cited above.*
[20] *This article transposes Articles 74 and 75 of the BRRD into French law.*

However, in liquidation, the financial institution creditors referred to in paragraph 3° of the Draft Modified Article have the same rank and absorb losses equally, while in resolution certain of these creditors, referred to in L.613-55-1 of the French Monetary and Financial Code, are excluded from the bail-in (for example, commercial creditors in connection with the provisions of goods and services that are indispensable for operating the institution and creditors under certain derivative instruments used for hedging purposes, if they form an integral part of a cover pool).

Thus, in the event of a resolution, the creditors referred to in subparagaph 3° whose claims are reduced or converted into capital might invoke the above-mentioned principle to limit the bail-in of their claims to the proportion that they represent of total claims having the same rank. They could argue that they would otherwise incur losses greater than they would have incurred in liquidation, since certain creditors with the same ranking are not required to absorb losses.

This difficulty does not arise with respect to the Senior Non-Preferred Debt, however, because in a bail-in all of the Senior Non-Preferred Debt would be subject to reduction or conversion into capital before the liabilities referred to in paragraph 3° of the Draft Modified Article.

C. With Respect to Consultation of the General Meeting of the Senior N0n-Preferred Bondholders for Issuance of Bonds with the Rank Specified in Paragraph 3° of the Draft Modified Article

Under Article L.228-65 I of the French Commercial Code, the general meeting of the existing bondholders must be consulted "*on all measures intended to protect the bondholders and ensure performance of the loan agreement, and on any proposal seeking to amend the contract, including: ...4° Any proposal relating to the issuance of bonds conferring a preferential right relating to the claims of the general assembly of bondholders*".

This raises the question of whether, once the financial institutions have issued Senior Non-Preferred Debt, the issuance of bonds falling within the scope of the new paragraph 3° of Article L.613-30-3 (the "**Paragraph 3° Bonds**"), would trigger, pursuant to Article L.228-65 I 4°, a requirement to consult and obtain the approval of the Senior Non-Preferred bondholders, due to the fact that the Paragraph 3° Bonds will rank senior to the Senior Non-Preferred Debt.

There are several arguments that this consultation is not required:

(i) the credit ranking of holders of Senior Non-Preferred Debt, which is junior to that of the Paragraph 3° Bonds, is provided for by law, just as the ranking of subordinated creditors is provided for under Article L.228-97 of the French Commercial Code; and

(ii) holders of Senior Non-Preferred Debt will have expressly agreed to this junior ranking in advance, when they subscribed for these instruments, and the new issuance will not constitute a direct or indirect modification of the contract governing the issuance, since the new Article L.613-30-3 4° provides that "*the contract governing the issuance, whose initial term may not be shorter than one year, provides that the owner or holder is senior non-preferred, within the meaning of this paragraph 4°* ".

To assert that holders of Senior Non-Preferred Debt have the right to approve the issuance of bonds ranking senior to them would infringe the new hierarchy of creditors established by the law.

Similarly, an issuance of senior bonds does not require the prior authorization of the general meeting of subordinated bondholders subject to Article L.228-97 of the French Commercial Code, who in effect have a rank determined by the law and a degree of subordination to senior creditors that is contractually agreed in advance.

ANNEX

Draft Amendment to Article L. 613-30-3 of the Monetary and Financial Code

DRAFT AMENDMENT TO ARTICLE L.613-30-3 OF THE MONETARY AND FINANCIAL CODE

(boldface type indicates text added to the Article by the Draft Modified Article)

"Art. L.613-30-3. - I. - Where a judicial liquidation proceeding is brought against a financial institution under Book VI of the French Commercial Code, the following creditors shall absorb losses in proportion to their claims ranking after holders secured by liens, pledges or mortgages, **but before creditors holding subordinated instruments:**

"1° First, depositors to the extent of the portions of their deposits insured pursuant to Article L. 312-4 II 1° and the deposit and resolution insurance fund (*fonds de garantie des dépôts et de résolution*) to the extent of the claims it holds against the institution in question for amounts paid under Article L. 312-5 I or II;

"2° Second, individuals and micro, small, and medium-sized business as defined in Article 2.1 of the annex to Recommendation 2003/361/EC of the Commission of May 6, 2003 by reference to their annual revenues:

"a) To the extent of the portion of their deposits eligible for the insurance referred to in 1° that exceeds the coverage ceiling provided for in Article L. 312-16;

"b) To the extent of their deposits that would be eligible to be insured if they had not been deposited through branches of the institution in question located in a country that is not a Member State of the European Union and not a party to the agreement on the European Economic Area;

"3° Third, creditors not mentioned in paragraph 4°;

"4° Fourth, senior non-preferred creditors, which are:

a) owners of non-structured debt securities mentioned in Article L.211-1 II; and

b) owners or holders of an instrument or right mentioned in Article L.211-41 and having characteristics similar to those of a claim mentioned in subparagraph a);

to the extent of the amounts that are due to them in respect of such debt securities, instruments or rights, and provided that the agreement governing their issuance, the initial term of which may be no less than one year, provides that their owner or holder is a senior non-preferred creditor within the meaning of this paragraph 4°.

II. - A decree of the Conseil d'Etat will specify the conditions under which an instrument will be deemed non-structured within the meaning of I. 4°. The decree may provide that the initial term of the securities, instruments or rights mentioned in I. 4° shall be longer than one year.

Article on Entry into Force

I. Article L. 613-30-3 I. 4° of the French Monetary and Financial Code is applicable to instruments issued following the entry into effect of this law.

II. - Article L. 613-30-3 I. 3° and 4° of the French Monetary and Financial Code is applicable to liquidation proceedings opened following the entry into effect of this law.

ANNEX A

List of Members of the TLAC Working Group of the Haut Comité Juridique de la Place Financière de Paris

- **Me Andrew A. Bernstein**, attorney, Cleary Gottlieb Steen & Hamilton, LLP
  Chair of working group and rapporteur

- **Me Sophie de Beer**, attorney, Cleary Gottlieb Steen & Hamilton, LLP
  Co-rapporteur

- **M. Gérard Gardella**

- **Mme Marianne Thiery**, Trésor

- **M. Hubert Gasztowtt**, Trésor

- **M. Charles-Henri Weymuller**, Trésor

- **M. Edouard Fernandes-Bollo**, ACPR

- **M. Henri Deganay**, ACPR

- **M. Olivier Jaudoin**, ACPR

- **M. David Blache**, ACPR

- **M. Alain Gourio**, FBF

- **M. Bertrand Lussigny**, FBF

- **Me Didier Martin**, attorney, Bredin Prat

- **Me Alban Caillemer du Ferrage**, attorney, Jones Day

- **M. Christophe Arnaud**, Banque de France

- **Me Dominique Borde**, attorney, Paul Hastings