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## Bank Recovery and Resolution Directive

### National depositor preference issues

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#### The impact of prioritising “covered” or “eligible” deposits on non-EEA depositors

This paper identifies an important issue which legislators should address in the event that covered deposits or eligible deposits (i.e. those deposits which are eligible for EU deposit insurance under the Deposit Guarantee Schemes Directive) are to be provided a higher status in the creditor hierarchy than other deposits.

Providing preference to covered deposits and/or eligible deposits over other deposits (“national depositor preference”) would have the effect of discriminating against deposits made through branches of EU institutions located outside the EEA. Such deposits are not eligible for deposit insurance under EU deposit guarantee schemes and would therefore fall outside the definitions of covered deposits and eligible deposits. Deposits made through non-EEA branches would therefore not be provided the same priority as deposits made in the EEA, resulting in them bearing losses in resolution or liquidation ahead of EEA depositors. Such discriminatory treatment is not appropriate and raises the following issues:

- It unfairly subordinates non-EEA depositors to EEA depositors, resulting in them suffering greater losses.
- It will discourage cross-border cooperation, incentivising non-EEA jurisdictions to take their own independent resolution action rather than cooperating in a global approach to resolution.
- It will encourage greater requirements for subsidiarisation and ring-fencing in non-EEA jurisdictions which will seek to ensure that depositors in their jurisdiction are not discriminated against.
- It is likely to dissuade non-EEA jurisdictions from recognising the effects of EU resolution proceedings.
- It could make it more difficult for EU institutions to attract deposits in non-EEA jurisdictions, adversely affecting their competitiveness.
- It could make transfers of non-EEA deposits to a purchaser or bridge institution more difficult to achieve.
- It is contrary to the FSB’s *Key Attributes on Effective Resolution Regimes for Financial Institutions* which require that “national laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable.”<sup>1</sup>

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<sup>1</sup> See Key Attribute 7.4. See also FSB, *Reducing the moral hazard posed by systemically important financial institutions*, available at [http://www.financialstabilityboard.org/publications/r\\_101111a.pdf](http://www.financialstabilityboard.org/publications/r_101111a.pdf), which requires that jurisdictions “eliminate

For these reasons, the UK<sup>2</sup> and other Member States have criticised the priority given to deposits made in the US over deposits made through branches outside the US on these grounds. It would therefore be counterproductive to introduce national depositor preference through the BRRD.

The Council's General Approach on the BRRD gives priority to covered depositors and certain eligible deposits and accordingly gives rise to the above concerns. We set out below some proposed amended drafting which would address this issue by providing equal treatment to EEA and non-EEA deposits.

## **Article 98a**

### **Ranking of deposits and multilateral development banks in insolvency hierarchy**

1. Member States shall ensure that in national law governing normal insolvency proceedings for institutions:

(i) deposits from natural persons and micro, small and medium-sized enterprises which are either (a) eligible deposits; or (b) Non-EEA Preferred Deposits; and

(ii) liabilities to the European Investment Bank;

have a higher priority ranking than the claims of ordinary unsecured, non-preferred creditors.

2. Member States shall ensure that in national law governing normal insolvency proceedings, all covered deposits and Non-EEA Preferred Deposits up to a maximum of €100,000 or equivalent value per depositor shall be provided a higher priority ranking than the liabilities given priority over claims of ordinary unsecured, non-preferred creditors in Article 98a(1) above.

New definition:

**"Non-EEA Preferred Deposits"** means deposits made through branches of an institution located outside the EEA which, save for the fact that they were made through branches located outside the EEA, meet the remaining criteria to be eligible deposits.

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Should you have any questions or wish to discuss, please do not hesitate to contact any of us via the details listed below.

Yours sincerely,

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those provisions in national laws that hamper fair cross-border resolution such as depositor priority rules within resolution that give preferential treatment to domestic depositors over those of foreign branches."

<sup>2</sup> See for example FSA Consultation Paper on Addressing the implications of national depositor preference regimes  
<http://www.fsa.gov.uk/static/pubs/cp/cp12-23.pdf>