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Subordinated Bonds and the Fulfilment of Their Obligations in the Event of State Aid

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A bond is a debt security, under which its issuer undertakes to repay to the bondholder the principal of the bond and the interest (the coupon) at a specified point in time, which is to be considered as the redemption of bonds. Bonds have several types: bonds issued by the public sector, bonds issued by capital companies, publicly available bonds, private bonds, convertible bonds, contingent convertible (CoCo) bonds, exchangeable bonds, exchange bonds, callable bonds, subordinated bonds, etc. In economic circulation, subordinated bonds are widespread securities. The subordinated obligation in the bond distinguishes the subordinated bond from other bonds. At the same time, the underlying relationship entails significant risks for the fulfilment of the obligations arising from the bond, which is outweighed by the higher profitability of such bonds. However, there are cases where the obligations arising from subordinated bonds are never met. Such cases may be based not only on the insolvency of the issuer of the subordinated bonds but also on the existence of State aid received by the issuer. In view of the recent financial difficulties of several banks, the likelihood of an issuer that has received State aid being able to meet its obligations under subordinated bonds becomes a particularly acute matter.

Keywords: subordinated bonds, securities, subordinated obligation, State aid, insolvency proceedings.

Contents

Introduction

The global economic turmoil caused by Russia's illegal invasion of Ukraine in February 2022 and the resulting rising energy and commodity prices also had an impact on financial markets and their participants. This was the basis for decisions by both the European Central Bank[1] and the Open Market Committee of the Federal Reserve System of the United States of America (hereinafter – the US) to raise the base interest rates.[2] As a result of these decisions, the base interest rate in both the European Union and the US reached its highest level since 2007, when the world experienced one of its worst financial crises.

As a result of these financial market turbulences, both *Credit Suisse*,[3] a Swiss-based credit institution, and *Silicon Valley Bank*,[4] a credit institution based in the US state of California, experienced financial difficulties in March 2023. Although *Credit Suisse* was merged into the Swiss-based *UBS Group AG*[5] and *Silicon Valley Bank's* deposit and loan portfolio was acquired by the North Carolina-based *First Citizens Bank*[6], without the direct involvement of public funds in the rescue of these two credit institutions, there are a number of cases in history where it has not been possible to restore credit institutions to solvency without public funding.

Between January 2007 and June 2012, a total of 85 credit institutions from around the world experienced insolvency problems. 37 of them were rescued with the involvement of public funds (state and municipal).[7] The list of these credit institutions includes *Parex banka*, which operated in the Republic of Latvia and whose rescue, through the state-owned joint stock company *Latvijas Hipotēku un zemes banka*, involved a total of almost 1 billion lats from the Latvian state budget.[8]

Credit institutions can use a variety of mechanisms to strengthen their financial position, from borrowing money to issuing various securities. Specific loans and the proceeds of certain securities, such as subordinated bonds, may even be credited to the capital of the credit institution, thereby strengthening it.

At the same time, credit institutions facing financial difficulties are particularly concerned about the ability of their customers and investors to recover the funds they are owed. Even if a credit institution has sufficient funds to meet the claims of all its customers (depositors) and investors, in some cases, for example, because of State aid, some of its customers and investors may not be able to recover their funds at all.

The purpose of this article is to provide an insight into subordinated bonds, the concept and nature of the subordinated obligations they contain, as well as the

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1 Key ECB interest rates. Available: https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.lv.html [last viewed 07.04.2023].

2 ASV turpina celt procentu likmes aizdevumiem [The US continues to raise interest rates on loans]. Available: https://www.lsm.lv/raksts/zinas/ekonomika/23.03.2023-asv-turpina-celt-procentu-likmes-aizdevumiem.a502005/ [last viewed 07.04.2023].

3 Latest update for our clients and stakeholders. Available: https://www.credit-suisse.com/about-cs/en.html [last viewed 07.04.2023].

4 What Happened to Silicon Valley Bank? Available: https://www.investopedia.com/what-happened-to-silicon-valley-bank-7368676 [last viewed 07.04.2023].

5 Latest update for our clients and stakeholders. Available: https://www.credit-suisse.com/about-cs/en.html [last viewed 07.04.2023].

6 What Happened to Silicon Valley Bank? Available: https://www.investopedia.com/what-happened-to-silicon-valley-bank-7368676 [last viewed 07.04.2023].

7 List of banks acquired or bankrupted during the Great Recession. Available: https://en.wikipedia.org/wiki/List_of_banks_acquired_or_bankrupted_during_the_Great_Recession [last viewed 07.04.2023].

8 PAREX bankas restrukturizācija [Restructuring of PAREX Bank]. Available: https://www.possessor.gov.lv/darbibas-jomas/problematiskie-aktivi/parex-bankas-restrukturizacija [last viewed 07.04.2023].

modalities of the fulfilment of the obligations arising from such bonds, by revealing the limitations that the fact that the borrower (issuer) has received State aid imposes on the fulfilment of the obligations arising from subordinated bonds and other subordinated obligations.

1. Subordinated bonds and subordinated obligations arising from them

Before explaining the nature of a subordinated bond and the subordinated obligations it contains, it is first necessary to understand what a bond is. According to Article 1(1)(43) of the Financial Instruments Market Law,[9] a bond is a "debt security" or "transferable securitised debt". In Latvian financial literature, a bond is defined as a debt security that evidences an investment of its owner's funds and confirms the issuer's obligation to pay a regular fixed income and to reimburse the nominal value of this security at a specified maturity date,[10] whereas *Forbes*, the world-famous economic magazine, explaining the term "bond", stated that: "Bonds are investment securities whereby an investor lends money to a business or government for a fixed period of time in exchange for regular interest payments."[11] Therefore, bonds as debt securities are not only found in the private sector but also in the public sector.[12]

According to the data from the Securities Industry and Financial Markets Association, the size of the bond market, or the total amount of publicly traded bonds issued on an exchange, was USD 126.9 trillion worldwide in 2021.[13] At the same time, bonds come in several forms: publicly traded bonds, privately traded bonds, secured and unsecured bonds, as well as convertible bonds, contingent convertible bonds, mandatory convertible bonds, reverse convertible bonds, exchangeable bonds, exchange bonds, callable bonds, discounted bonds, and subordinated bonds, etc.

A look at the *Nasdaq Riga* corporate debt securities list shows that subordinated bonds account for a fifth (9 out of 44 issues) of all bonds issued and currently traded in the Baltics.[14] Subordinated bonds are therefore a common type of bond in civil circulation.[15]

Subordinated bonds were first issued in the US, when the *General Finance Corporation* issued subordinated bonds at 5% for a maturity of 10 years, an unprecedentedly high interest rate for 1936. Following the example of the *General*

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[9] Finanšu instrumentu tirgus likums [Financial Instrument Market Law] (20.11.2003). Available: https://likumi.lv/ta/id/81995-finansu-instrumentu-tirgus-likums [last viewed 07.04.2023].

[10] *Praude, V*. Finanšu instrumenti 1 [Financial instruments 1]. Rīga: Burtene, 2009, 217. lpp.

[11] *Napoletano, E*. What is a Bond? Available: https://www.forbes.com/advisor/investing/what-is-a-bond/ [last viewed 07.04.2023].

[12] *Zeņķis, P*. Obligāciju veidu un civiltiesiskās apgrozības attīstība [Development of bond types and civil circulation]. In: Tiesības un tiesiskā vide mainīgos apstākļos. Latvijas Universitātes 79. starptautiskās zinātniskās konferences rakstu krājums [Law and the legal environment in changing circumstances. Proceedings of the 79th International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2021, 183.–190. lpp.

[13] 2022 Capital Markets Fact Book. Available: https://www.sifma.org/wp-content/uploads/2022/07/CM-Fact-Book-2022-SIFMA.pdf [last viewed 07.04.2023].

[14] Korporatīvie parāda vērtspapīri. Baltijas Regulētais tirgus [Corporate debt securities. Baltic Regulated Market]. Available: https://nasdaqbaltic.com/statistics/lv/bonds [last viewed 07.04.2023].

[15] *Zeņķis, P*. Subordinētās obligācijas – jēdziens un būtība [Subordinated bonds – concept and essence]. In: Latvijas Republikas Satversmei – 100. Latvijas Universitātes 80. starptautiskās zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2022, 103.–109. lpp.

Finance Corporation, other major US corporations began to use this form of financing to boost their economic growth.[16]

The key difference between subordinated bonds and other similar instruments and other types of bonds and loans is the subordination of the enforcement of the claims embodied in them. Subordination (*Nachrangigkeit* – German) means that in the event of insolvency (or liquidation of the borrower (issuer)), all claims of senior creditors (including those arising from ordinary bonds) are satisfied first, then the claims of the holder of the subordinated claim and finally the claims of the equity providers (shareholders)[17] for payment of the liquidation quota arising from the equity securities they hold.

German legal doctrine recognises that, even historically, the most important distinction that distinguished any other agreement from a subordinated agreement was that, in the case of such an agreement, a subordinated obligation was created along with the principal obligation, whereby the person lending his funds to the merchant at the same time undertook not to demand the accelerated repayment of that loan, and also agreed to be a party to one of the last rounds of creditors in the event that the merchant to whom the funds were lent went into insolvency, liquidation or reorganisation proceedings.[18] In view of this, it was recognised at an early stage of the development of this instrument that a situation in which subordinated obligations would be satisfied before "ordinary" obligations would not be permissible.[19]

The legal definition of subordinated obligations in the regulatory framework of the Republic of Latvia is provided, for example, in Article 1(59) of the Credit Institution Law,[20] stating that subordinated obligations are –

> *…obligations which arise for a credit institution from a loan (regardless of the type of the transaction entered into) and which, on the basis of the agreement entered into with the credit institution, gives the right to the lender to reclaim the loan early only in case of insolvency or liquidation of the credit institution and only after satisfying the claims of all other creditors, however, prior to satisfying the claims of shareholders.*

In the Roman-Germanic legal system, it is generally stated that a non-statutory subordinated loan covers various types of loan in which the claims of the lender can be satisfied only after the claims of other creditors in the insolvency or liquidation process of the borrower.[21] Therefore, a subordinated loan and the obligations arising from it may also be embodied in a bond as a security.

At the same time, subordinated obligations are also known as mezzanine financing (*Mezzanine-Finanzierung* – German). The most common form of mezzanine financing

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[16] *Johnson, R.* Subordinated Debentures: Debt That Serves as Equity. The Journal of Finance, Vol. 10, 1955, p. 4.

[17] *Westermann, H. P. (Red.), Berger, K. P.* Münchener Kommentar zum Bürgerlichen Gesetzbuch [Munich Commentary on the Commercial Code]. Band 4. Schuldrecht. Besonderer Teil I. §§ 433–534. Finanzierungsleasing. CISG. 8. Auflage. München: C. H. Beck, 2019, Vorbemerkung (Vor § 488), Rn. 107.

[18] *Calligar, M*. Subordinated Agreements. Yale Law Journal, Vol. 70, 1971, p. 376.

[19] Ibid., p. 378.

[20] Kredītiestāžu likums [Credit Institution Law] (05.10.1995). Available: https://likumi.lv/doc.php?id=37426 [last viewed 07.04.2023].

[21] *Herresthal, C. (Red.), Fest, T*. Münchener Kommentar zum Handelsgesetzbuch [Munich Commentary on the Commercial Code]. Band 6. Bankvertragsrecht. Recht des Zahlungsverkehrs. Kapitalmarkt- und Wertpapiergeschäft. Ottawa Übereinkommen über Internationales Factoring. 4. Auflage. München: C. H. Beck, Verlag Vahlen, 2019, N. Einlagengeschäft, Rn. 96.

is the mezzanine loan, of which the subordinated loan is one type.[22] However, mezzanine financing may be secured by means of various legal transactions[23] in which a subordinated obligation is created at the time of the conclusion of an agreement containing a clause establishing a subordinated obligation or by means of a public offer by a commercial company to create a subordinated obligation to which the creditor's consent has been expressed. For example, a tender offer for a subordinated bond on a stock exchange.[24]

In the case of mezzanine financing, crowdfunding (*Crowdfunding-Finanzierung* – German), venture capital financing (*Risikokapital-Finanzierungen* – German) or any other complex financing, the subordination of fulfilment of the obligations does not derive from a rule of law but from an agreement – a private law arrangement between the parties.[25]

This is also in line with the Latvian legal framework. For instance, point 2.1 of Cabinet of Ministers Regulation No 241 "Rules on mezzanine loans to improve the competitiveness of economic operators"[26] states that a mezzanine loan is:

> *a long-term investment loan with an increased credit risk. It is subordinated to a long-term loan or financial leasing provided by a credit institution or its subsidiary and is reinforced by a lower level of collateral than a long-term loan or financial leasing provided by a credit institution or its subsidiary.*

Consequently, in accordance with point 4 of the said Regulation, the procedure for granting mezzanine loans shall be determined in accordance with civil law agreements.

Mezzanine financing is one of the modern forms of financing which, because of its structure, cannot be credited either to equity or outside or leveraged capital and is in fact considered to be a kind of intermediate financing characterised, on the one hand, by increased participation in business risks compared with outside capital and, on the other hand, by its exclusion from the share capital of the company, which in turn implies that the provider of this financing is not entitled to participate in the management of the capital company. The main objective of mezzanine financing is to improve the capital structure of the capital company, the mezzanine borrower, by increasing the equity quota within a certain time limit, thereby allowing it to raise outside capital while avoiding the creation of minority shareholders or increasing their influence over the company's decision-making freedom.[27]

In contrast to ordinary obligations, subordinated obligations could be considered as "debt serving as equity".[28] This is based on the fact that, in the case of subordinated bonds, the proceeds from their issue may be credited to the issuer's capital, which

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[22] *Derleder, P., Knops, K.-O., Bamberger, H. G. (Hrsg.), Hoffmann, J.* Deutsches und europäisches Bank- und Kapitalmarktrecht [German and European banking and capital market law]. Band 1. 3. Auflage. Berlin, Heidelberg: Springer, 2017, § 24, Rn. 96.

[23] Ibid., pp. 94–95.

[24] *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

[25] Ibid.

[26] Noteikumi par mezanīna aizdevumiem saimnieciskās darbības veicēju konkurētspējas uzlabošanai [Rules on mezzanine loans to improve the competitiveness of economic operators] (13.05.2014). Available: https://likumi.lv/ta/id/266226-noteikumi-par-mezanina-aizdevumiem-saimnieciskas-darbibas-veiceju-konkuretspejas-uzlabosanai [last viewed 07.04.2023].

[27] *Derleder, P., Knops, K.-O., Bamberger, H. G. (Hrsg.), Hoffmann, J.* Deutsches und europäisches, Rn. 84–85.

[28] *Everett, E.* Subordinated Debt – Nature and Enforcement. Business Lawyer (ABA) Vol. 20, 1965, p. 954.

in turn implies that the creation of subordinated obligations may serve as a tool to increase the capital available to the issuer itself.

Specific regulation at the European Union level on the legal effect of subordinated investments on capital is foreseen for credit institutions and investment brokerage firms. These legal issues are governed by Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (hereinafter – Regulation 575/2013).[29] According to Article 62 of Regulation 575/2013, subordinated loans, irrespective of their form, are to be considered, alongside other financial instruments, as an investment in the Tier 2 capital of a firm if a number of the conditions laid down in Article 63 of Regulation 575/2013 can be established.[30]

[29] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance. OJ, L 176, 27.06.2013, pp. 1–337. Available: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32013R0575 [last viewed 07.04.2023].

[30] Capital instruments shall qualify as Tier 2 instruments, provided that the following conditions are met: (a) the instruments are directly issued by an institution and fully paid up; (b) the instruments are not owned by any of the following: (i) the institution or its subsidiaries; (ii) an undertaking in which the institution has participation in the form of ownership, direct or by way of control, of 20% or more of the voting rights or capital of that undertaking; (c) the acquisition of ownership of the instruments is not funded directly or indirectly by the institution; (d) the claim on the principal amount of the instruments under the provisions governing the instruments ranks below any claim from eligible liabilities instruments; (e) the instruments are not secured or are not subject to a guarantee that enhances the seniority of the claim by any of the following: (i) the institution or its subsidiaries; (ii) the parent undertaking of the institution or its subsidiaries; (iii) the parent financial holding company or its subsidiaries; (iv) the mixed activity holding company or its subsidiaries; (v) the mixed financial holding company or its subsidiaries; (vi) any undertaking that has close links with entities referred to in points (i) to (v); (f) the instruments are not subject to any arrangement that otherwise enhances the seniority of the claim under the instruments; (g) the instruments have an original maturity of at least five years; (h) the provisions governing the instruments do not include any incentive for their principal amount to be redeemed or repaid, as applicable by the institution prior to their maturity; (i) where the instruments include one or more early repayment options, including call options, the options are exercisable at the sole discretion of the issuer; (j) the instruments may be called, redeemed, repaid or repurchased early only where the conditions set out in Article 77 are met, and not before five years after the date of issuance, except where the conditions set out in Article 78(4) are met; (k) the provisions governing the instruments do not indicate explicitly or implicitly that the instruments would be called, redeemed, repaid or repurchased early, as applicable, by the institution other than in the case of the insolvency or liquidation of the institution and the institution does not otherwise provide such an indication; (l) the provisions governing the instruments do not give the holder the right to accelerate the future scheduled payment of interest or principal, other than in the case of the insolvency or liquidation of the institution; (m) the level of interest or dividends payments, as applicable, due on the instruments will not be amended on the basis of the credit standing of the institution or its parent undertaking; (n) where the issuer is established in a third country and has been designated in accordance with Article 12 of Directive 2014/59/EU as part of a resolution group the resolution entity of which is established in the Union or where the issuer is established in a Member State, the law or contractual provisions governing the instruments require that, upon a decision by the resolution authority to exercise the write-down and conversion powers referred to in Article 59 of that Directive, the principal amount of the instruments is to be written down on a permanent basis or the instruments are to be converted to Common Equity Tier 1 instruments; where the issuer is established in a third country and has not been designated in accordance with Article 12 of Directive 2014/59/EU as a part of a resolution group the resolution entity of which is established in the Union, the law or contractual provisions governing the instruments require that, upon a decision by the relevant third-country authority, the principal amount of the instruments is to be written down on a permanent basis or the instruments are to be converted into Common Equity Tier 1 instruments; (o) where the issuer is established in a third country and has been designated in accordance with Article 12 of Directive 2014/59/EU as part of a resolution group the resolution entity of which is established in the Union or where the issuer is established in a Member State, the instruments

It is the subordination itself that puts creditors whose claims arise from subordinated obligations at a major disadvantage compared to "ordinary" creditors.[31] An opinion of the Advocate General of the Court of Justice of the European Union, explaining the nature of subordinated obligations, states that a subordinated obligation from the perspective of the creditor means:

> *to make funds available to the issuer over a particularly long period of time* […]. *A higher return than would be yielded by an ordinary loan serves to reward both the term over which the capital invested is committed and the associated risk attaching to its repayment. After all, the capital is repayable only after the claims of all other creditors, including unsecured creditors, have been satisfied.*[32]

Thus, in accordance with the recognition of the Constitutional Court of the Republic of Latvia, it can be judged already from the nature of subordinated obligations that the subjects of subordinated obligations assume with them a significant risk of commercial activity, which also includes a potential restriction or even loss of property rights in the event of unsuccessful commercial activity.[33]

It follows from the above that, for a debtor (issuer) not facing financial difficulties, subordinated bonds with the subordinated obligation they contain are not very different from other types of bonds and loans. This is also confirmed by the recognition in German legal doctrine that outside insolvency and liquidation proceedings there are no restrictions on the enforcement of the claims (other than those already mentioned).[34]

However, it must be emphasised that the subordination of the claim does not start with the commencement of insolvency or liquidation proceedings, but long before,[35] which bondholders should be aware of when acquiring subordinated bonds with higher risk-taking to obtain higher returns.[36] The above has also been recognised by the Constitutional Court of the Republic of Latvia, stating that:

> *The risk that in the event of financial difficulties of a commercial company the fulfilment of the subordinated obligations might be restricted was assumed*

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may only be issued under, or be otherwise subject to the laws of a third country where, under those laws, the exercise of the write-down and conversion powers referred to in Article 59 of that Directive is effective and enforceable on the basis of statutory provisions or legally enforceable contractual provisions that recognise resolution or other write-down or conversion actions; (p) the instruments are not subject to set-off or netting arrangements that would undermine their capacity to absorb losses.

31 *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

32 Opinion of Advocate General Yves Bot of 12 November 2015 in case No. C-483/14, para. 34. Available: https://curia.europa.eu/juris/document/document.jsf;jsessionid=F7143F19E60E9522CF0F27034578069E?text=&docid=171401&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1680980 [last viewed 07.04.2023].

33 Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

34 *Goette, W., Habersack, M., Kalss, S. (Hrsg.), Verse, D. A., Schürnbrand, J.* Münchener Kommentar zum Aktiengesetz [Munich Commentary on the Stock Corporation Act]. Band 4. §§ 179–277. 5.Auflage. München: C. H. Beck, 2021, Erster Unterabschnitt, Kapitalerhöhung gegen Einlagen, Vorbemerkung, Rn. 38.

35 *Giedinghagen, J., Keller, T.* Das qualifizierte Nachrangdarlehen [The qualified subordinated loan]. Neue Juristische Wochenschrift Spezial, 2020, Heft 7.

36 *Berger, K. P.* Fremdkapitalnahe Mezzanine-Finanzierungen [Debt-based mezzanine financing]. Zeitschrift für Bankrecht und Bankwirtschaft, 2008, Heft 2.

by the persons with the establishment of the subordinated obligations, namely by agreeing to become the subjects of the subordinated obligations.[37]

The primary disadvantage that a person assumes to suffer for a particularly high return is that the creditor has no means of obtaining early repayment of its loan and, in the event of the liquidation, insolvency or reorganisation of the company, the creditor will only receive its payment after all "ordinary" creditors, but before the claims of shareholders (members) have been satisfied.[38] These differences between subordinated obligations and "ordinary" obligations (e.g. a loan) lead to the conclusion that these obligations are primarily distinguished from ordinary obligations by their order of fulfilment rather than by any substantive differences in the legal framework.[39]

Accordingly, neither the fact that the funds underlying the obligation may be used to carry out operations which are normally carried out with equity capital, such as increasing the borrowing base, nor the fact that, from the perspective of creditors, the transfer of funds to a merchant by way of a subordinated obligations may in certain respects be treated as a contribution to the capital of the undertaking, alter the nature of the obligation.[40] In particular, if a subordinated obligation is created by the acquisition of subordinated bonds issued, the obligations arising from those subordinated bonds must first be treated as obligations arising from the bond, and only when this is relevant (for example, in the event of the liquidation or insolvency of the issuer) is it worth analysing further the subordinated aspects of those bonds.[41]

Finally, it is important to note that the subordination clause cannot be waived by the parties. In particular, the subordination clause agreement must not be conditional and fixed-term, i.e., it cannot be for a shorter term than the main obligation, otherwise the funds transferred to the issuer from the subordinated loan as part of the bond issue will inevitably be converted into an ordinary loan. Thus, in certain respects, such an arrangement for legal purposes may be regarded as an agreement for the benefit of third parties – all other creditors.[42]

2. State aid and its impact on the fulfilment of subordinated obligations

At the same time, insolvency problems of a subordinated bond issuer will not necessarily lead to the insolvency proceedings of the issuer ending in the liquidation of that issuer. Although, following the adoption of Regulation (EU) No. 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund[43] (hereinafter – Regulation 806/2014), public funds generally should not

[37] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No 2014-36-01, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[38] Judgment of the Court of Justice of the European Union of 19 July 2016, Case C-526/14, Kotnik and Others, para. 27. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62014CJ0526 [last viewed 07.04.2023].

[39] *Everett, E.* Subordinated Debt, p. 955.

[40] Ibid., p. 954.

[41] *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

[42] *Herresthal, C. (Red.), Fest, T.* Münchener Kommentar zum Handelsgesetzbuch, Rn. 90–91.

[43] Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain

be involved in the rescue of a credit institution, the use of public funds to resolve the insolvency of a credit institution through the Single Resolution Fund is not entirely excluded. Regulation 806/2014 allows for the granting of "extraordinary public financial support", which constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union[44] pursuant to Article 3(1)(29) thereof, to rescue the financial difficulties of a credit institution.

Thus, while the lessons from the financial crisis of 2007–2009 have limited the use of State aid to rescue credit institutions, they have not been completely ruled out. At the same time, even if State aid is granted and the issuer obtains sufficient funds to cover all creditors' claims, the granting of State aid still has a significant impact on the fulfilment of the issuer's subordinated obligations.

The Constitutional Court of the Republic of Latvia has initiated a number of cases following constitutional complaints of shareholders of *Parex banka* and persons related to them, in which the issue of the impact of State aid on the receipt of the fulfilment of the obligations arising from the subordinated obligations has been examined.[45] The authors of this article, at the request of the Constitutional Court, have also provided their opinion on the impact of State aid on the receipt of the fulfilment of obligations arising from subordinated obligations and the legality of such restrictions in one of such cases.

For example, in case No. 2020-49-01[46] initiated before the Constitutional Court of the Republic of Latvia, the compliance of Article 8(1) and Article 8^{1}(2) and (3) of the Law on Control of Aid for Commercial Activity[47] with Articles 1, 91, 92 and 105 of the Constitution of the Republic of Latvia[48] was contested. Article 8(1) of the Law on Control of Aid for Commercial Activity states:

> *If a commercial company which is facing financial difficulties receives aid in accordance with the laws and regulations governing aid for commercial activities, from the moment of granting aid for commercial activities until the end of the provision of aid, observing the provisions laid down in the decision of the European Commission or national laws and regulations on granting aid and irrespective of the effective legal obligations of a commercial company, the commercial company is prohibited from fulfilling subordinate obligations (including the prohibition to repay a loan, calculate, accumulate*

investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010. OJ, L 225, 30.7.2014, pp. 1–90. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0806 [last viewed 07.04.2023].

[44] Consolidated version of the Treaty on the Functioning of the European Union. OJ, C 326, 26.10.2012, pp. 47–390. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=celex%3A12012E%2FTXT [last viewed 07.04.2023].

[45] See, for instance: Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01 Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023]; Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[46] Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023].

[47] Komercdarbības atbalsta kontroles likums [Law on Control of Aid for Commercial Activity] (19.06.2014). Available: https://likumi.lv/ta/id/267199-komercdarbibas-atbalsta-kontroles-likums [last viewed 07.04.2023].

[48] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 23.03.2023].

or pay out an interest or other remuneration for such loan) irrespective of the moment when the subordinate obligations were established.

Therefore, Article 8(1) of the Law on Control of Aid for Commercial Activity prohibits the issuer from fulfilling its subordinated obligations, including, for example, the redemption of subordinated bonds, until the end of the aid granted to it.

The authors have already concluded that the early enforcement of claims arising from subordinated bonds and other subordinated obligations is only possible in the event of insolvency or liquidation of the issuer, which is why in some respects such a subordination arrangement for legal purposes can be considered as an agreement for the benefit of third parties – all other creditors. State aid to a commercial company facing difficulties also has a similar function.

When granting State aid, States aim to promote economic or social development.[49] As is clear from the annotation to the law "Amendments to the Credit Institution Law" of 29 October 2009,[50] the purpose of State aid to credit institutions is to help restructure a bank facing financial difficulties and restore its liquidity.[51] The Constitutional Court of the Republic of Latvia has recognised that "State aid protects the whole of society from the negative consequences that could result from the mismanagement and subsequent insolvency of a commercial company".[52] It is financial stability that is considered to be the most important factor in assessing the need for State aid to the financial sector.[53]

It is important that State aid is granted to commercial companies to remedy the negative consequences of their financial difficulties.[54] Given that banks are at the heart of the financial system, granting State aid to a bank avoids negative consequences not only for the bank but for the financial system as a whole, including the bank's customers and investors.

At the same time, it must be emphasised that granting State aid to a bank does not protect all its customers and investors. As recognised by the Constitutional Court of the Republic of Latvia, "The fundamental right to property enshrined in Article 105 of the Constitution does not guarantee the right to be protected from business risk. Shareholders and subordinated creditors may benefit from the successful operation of

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[49] European Commission. Common Principles for an Economic Assessment of the Compatibility of State Aid Under Article 87.3, p. 1. Available: https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf [last viewed 07.04.2023].

[50] Grozījumi Kredītiestāžu likumā [Amendments to the Credit Institution Law] (22.10.2009). Available: https://likumi.lv/ta/id/199747-grozijumi-kreditiestazu-likuma [last viewed 07.04.2023].

[51] Likumprojekta "Grozījumi Kredītiestāžu likumā" anotācija [Annotation to the draft law "Amendments to the Credit Institution Law"]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/ACBEA9C446D6A9B9C225764E003B2835?OpenDocument [last viewed 07.04.2023].

[52] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 20. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[53] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'). OJ, C 216, 30 July 2013. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/PDF/?uri=CELEX:52013XC0730(01)&from=EN [last viewed 07.04.2023].

[54] Decision of 18 September 2017 of the Panel of the Constitutional Court of the Republic of Latvia on refusal to initiate a case (Application No. 138/2017), para. 7. Available: https://www.satv.tiesa.gov.lv/decisions/kolegijas-2017-gada-18-septembra-lemums-pieteikums-nr-138-2017/ [last viewed 07.04.2023].

a credit institution, but at the same time are exposed to the most substantial risk"[55] and "The State is not obliged to prevent the loss of [property] value due to market factors".[56] Thus, even if State aid is granted, the State does not guarantee the right of a participant in a risky business venture to be protected against commercial risk.[57] This is also established in the case law of the European Court of Human Rights.[58] Since the reduction in the value of the property of shareholders (members) or subordinated obligation lenders and subordinated bondholders results from the fact that the credit institution is in financial difficulties, the fact that those financial difficulties are alleviated by the granting of State aid does not allow shareholders (members) and creditors of subordinated obligations to rely on being protected to the same extent as any other creditor – the depositor.

All State aid measures are based on three factors: the viability of companies, the principle of burden-sharing and competition. State aid must therefore be limited to the minimum necessary and the shareholders and the beneficiary must make an appropriate contribution to the restructuring costs from their own resources.[59] As recognised by the Constitutional Court of the Republic of Latvia, it is precisely because the creditors of the subordinated obligations have accepted that they have the right to demand early fulfilment of the subordinated obligations only in the event of insolvency or liquidation of the commercial company and after all other creditors' claims have been satisfied, but before the claims of members or shareholders have been satisfied, that they must assume co-responsibility in a situation where the commercial company is in financial difficulties.[60]

As explained in the letter of the Minister of Finance to the responsible committee of the Parliament of the Republic of Latvia, with which the proposal for the inclusion of the first paragraph of Article 8 of the Law on Control of Aid for Commercial Activity was submitted, the need and purpose of such regulation is:

> […] *to prevent commercial companies that have received or intend to receive aid granted to commercial companies facing financial difficulties and which have subordinated obligations, not primarily to repay the aid received but to fulfil the subordinated obligations, which is contrary to the interests of society and taxpayers.* […] *Under the draft law, it is presumed that the aid provided to commercial companies will be used primarily to ensure the functioning of commercial companies and not to pursue the pecuniary interests of certain individuals.*[61]

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[55] Judgment of the Constitutional Court of the Republic of Latvia of 19 October 2011 in case No. 2010-71-01, para. 23.6. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-71-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[56] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[57] Ibid.

[58] *Harris, D. O'Boyle, M., Bates, E., Buckley, C.* Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights. 2nd ed., Oxford: Oxford University Press, 2009, p. 665.

[59] *De Kok, J.* Competition Policy in the Framework and Application of State Aid in the Banking Sector, European State Aid Law Quarterly, Vol. 14, issue 2, 2015, p. 228. Available: https://www.jstor.org/stable/pdf/26689495.pdf [last viewed 07.04.2023].

[60] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[61] Ibid., para. 18.

As the Constitutional Court of the Republic of Latvia has recognised, if the State is involved in the rescue and restructuring of a commercial company which, without State aid, would most likely become insolvent, and it is as a result of State aid that the commercial company can successfully continue its activities, it would not be in accordance with the principle of justice that those entities, which benefited most when the commercial company was performing well, would not participate in its rescue and restructuring.[62]

Thus, the restriction preventing the enforcement of the subordinated obligations, as required by the European Union in Commission Decision (EU) No. 2015/162,[63] serves the purpose of ensuring that the creditors of the subordinated obligations do not receive an undue advantage, that public funds are not wasted and that the amount of the aid is returned to the State budget as far as possible. This restriction is aimed at safeguarding the important interests of taxpayers and society as a whole, and it is essential that creditors of subordinated obligations also bear a burden that is proportionate to the burden borne by taxpayers when aid is granted to a commercial company.[64]

It follows from the above that State aid is granted with the aim of protecting only depositors and not everyone connected with the credit institution. In particular, given that State aid consists of State budget resources which are the common property of the whole of society, it is granted in the interest of the whole of society. Consequently, the objective of State aid is to protect the public – the depositors – and not individual persons – the shareholders (members) of the credit institution or creditors of subordinated obligations, such as bondholders of subordinated bonds issued by the credit institution.

Even in the absence of State aid, the general framework for the satisfaction of creditors' claims provides that creditors of a credit institution's subordinated obligations and shareholders (members) of a credit institution are protected to a much lesser extent than depositors. This principle is reflected in Articles 139^2 to 139^5 of the Credit Institution Law, according to which the claims of creditors of the credit institution's subordinated obligations are satisfied last and the claims of shareholders (members) are satisfied very last. Although Articles 139^2–139^5 of the Credit Institution Law do not specifically regulate the procedure for repayment of State aid, bearing in mind that the purpose of granting State aid to a bank is to protect its depositors, it must be concluded that repayment of State aid must be made before the claims of the creditors of the subordinated obligations and shareholders (members) are satisfied. Since the State is not obliged to ensure, through the State aid mechanism, that the creditors and shareholders (members) of the subordinated obligations receive the satisfaction of their claims, there is no reason for the credit institution, if it is unable to repay the State aid, to satisfy the claims of the creditors of the subordinated obligations and shareholders (members) first.

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[62] Judgment of the Constitutional Court of the Republic of Latvia of 19 October 2011 in case No. 2010-71-01, para. 19.3. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-71-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[63] Commission Decision (EU) 2015/162 of 9 July 2014 on the State aid SA.36612 (2014/C) (ex 2013/NN) implemented by Latvia for Parex (notified under document C(2014) 4550) Text with EEA relevance. OJ, L 27, 3.2.2015, pp. 12–36. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0162 [last viewed 07.04.2023].

[64] Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01, para. 25. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023].

It follows that the subordinated bondholders and other creditors of subordinated obligations are exposed to the risk that they will not be able to enforce their claims because the debtor has insufficient funds. At the same time, as recognised by the Constitutional Court of the Republic of Latvia, the right to property does not guarantee the right to be protected from the risk of commercial activity.[65] Consequently, the State is not obliged to prevent the loss of value of property as a result of market factors.[66] Also, at present, no law guarantees that a creditor will always be able to enforce its claims, as there are various risks that may affect this possibility.[67]

At the same time, Article 8^{1}(1) of the Law on Control of Aid for Commercial Activity provides:

> *If a commercial company which is in financial difficulty and receives aid in accordance with the laws and regulations governing aid for commercial activity, not later than six months prior to the term of liquidation of the commercial company specified in the decision of the European Commission or in the national laws and regulations regarding the granting of aid, concludes that the aid for commercial activity has not been fully repaid and will not be repaid until the end of the term of the provision of the aid, the commercial company shall terminate the activity and shall initiate the liquidation procedure of the commercial company, taking into account the conditions provided for in Paragraph two and three of this Article.*

Article $8.^{1}$(2)(1), on the other hand, states that, until the aid for commercial activity is repaid, the inability to repay the aid for commercial activity and the non-fulfilment of the subordinate obligations shall not constitute a basis for initiating insolvency proceedings. Thus, even if the creditors of the subordinated obligations do not receive the satisfaction of their claims, they are not entitled to initiate insolvency proceedings against the commercial company that has received State aid.

By way of comparison, it is also recognised in the German legal literature that the claims of subordinated creditors, like those of member-lenders, cannot compete with the claims of other "regular" creditors and cannot be the basis for insolvency proceedings.[68] Section 19(1) of the German Insolvency Code[69] states that: "overindebtedness is also a reason to open insolvency proceedings for a legal entity." According to Section 19(2) of the German Insolvency Code, on the other hand,

> *Overindebtedness exists if the debtor's assets no longer cover existing obligations to pay, unless it is highly likely, considering the circumstances, that the enterprise will continue to exist for the next 12 months. As regards claims in respect of the restitution of shareholder loans or claims deriving from legal transactions corresponding in economic terms to such a loan for which the creditors and the debtor have agreed, in accordance with*

[65] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[66] *Harris, D. O'Boyle, M., Bates, E., Buckley, C.* Harris, O'Boyle and Warbrick, p. 665.

[67] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[68] *Braun, E. (Hrsg.), Bäuerle, E. (Bearb.)*. Insolvenzordnung (InsO) [Insolvency Code (InsO)]. Kommentar. 5, neu bearbeitete Auflage. München: Verlag C. H. Beck, 2012, § 39, Rn. 20.

[69] Insolvenzordnung [Insolvency Statute of the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/inso/ [last viewed 07.04.2023].

> *section 39(2), that they rank lower behind the claims set out in section 39(1), nos. 1 to 5 in the insolvency proceedings, consideration is not to be given to the obligations under sentence 1.* [Authors' emphasis]

The German legal doctrine draws the clear conclusion from the cited provision that the non-satisfaction of a claim by a subordinated creditor, just like a claim for repayment of a loan by a shareholder (member), cannot be the basis for the commencement of insolvency proceedings.[70] Thus, in Germany, in all cases, subordinated obligations do not constitute grounds for filing insolvency proceedings, even irrespective of whether the merchant in question has received State aid.

At the same time, it should be noted that according to Article 8^1(3) of the Law on Control of Aid for Commercial Activity, the Enterprise Register of the Republic of Latvia is obliged to exclude a commercial company from the commercial register also if the aid for commercial activity has not been repaid or the subordinated obligations have not been fulfilled in the course of liquidation of the commercial company. Thus, the non-fulfilment of subordinated obligations and the non-repayment in full of aid for commercial activity do not preclude the exclusion of a company that has received aid for commercial activity from the commercial register and the non-fulfilment of these obligations does not constitute grounds for initiating insolvency proceedings.

Consequently, the prohibition in Article 8^1(2)(1) of the Law on Control of Aid for Commercial Activity for creditors of subordinated obligations to file for insolvency proceedings prior to repayment of State aid is also considered logical and appropriate, given the nature of the subordinated obligations. In the authors' view, this provision ensures that the insolvency proceedings of a commercial company which has received State aid are not used as a means of securing the pecuniary interests of creditors of subordinated obligations and shareholders (members), which would be contrary to the purpose of the State aid. However, the regulation in Article 8^1(3) of the Law on Control of Aid for Commercial Activity, which allows for the exclusion of a commercial company that has received State aid from the commercial register irrespective of the fact that the subordinated obligations have not been fulfilled, is a logical step to ensure that such a commercial company is excluded from the commercial register without going through insolvency proceedings, which would be contrary to the purpose of State aid.

In view of all the above, it follows that the granting of State aid to an issuer has a significant impact on the fulfilment of its subordinated bonds and other subordinated obligations. At the same time, given that the purpose of granting State aid to a bank is to protect its depositors and not the creditors of the subordinated obligations and shareholders (members) who are required to participate in the rescue of the credit institution, such restrictions on the enforcement of claims arising from the issuer's subordinated bonds and other subordinated obligations have a legitimate aim which justifies the restriction of the rights of the subordinated bondholders and other creditors of subordinated obligations.

Summary

The main difference between subordinated bonds and other similar instruments, on the one hand, and other types of bonds and loans, on the other hand, is the subordination of the enforcement of the claims embodied in them. Subordination means

[70] *Braun, E. (Hrsg.), Bußhardt, H. (Bearb.)*. Insolvenzordnung, § 19, Rn. 14.

that in the event of insolvency (or liquidation of the borrower (issuer)), all claims of senior creditors (including those arising from ordinary bonds) are satisfied first, then the claims of the holder of the subordinated claim and finally the claims of the equity providers (shareholders) arising from the equity securities they hold. Therefore, a situation in which the receipt of the fulfilment of subordinated obligations precedes the receipt of the fulfilment of "ordinary" obligations is not permissible.

Irrespective of the form in which the subordinated obligations are created, their subordination is not derived from a rule of law but from a contractual agreement. Thus, the creation of subordination is linked to a private law arrangement of the parties.

The funds raised under the subordinated obligations, by their subordinate nature, cannot be credited to either equity or outside or leveraged capital and are in fact regarded as a kind of intermediate capital, characterised, on the one hand, by increased participation in business risks compared with outside capital and, on the other hand, by its exclusion from the share capital of the company, which in turn implies that the creditor is not entitled to participate in the management of the capital company. Thus, in contrast to ordinary obligations, subordinated obligations could be considered as "debt serving as equity". The subordination puts creditors whose claims arise from subordinated obligations at a major disadvantage compared to "ordinary" creditors.

The subordination of a claim under a bond does not begin with the commencement of insolvency or liquidation proceedings of the issuer but with the conclusion of an agreement between the parties to create subordinated obligations.

While the lessons from the financial crisis of 2007–2009 have limited the use of State aid to rescue credit institutions, Regulation 806/2014 and the Single Resolution Mechanism as a whole have not completely ruled it out. At the same time, even if State aid is granted and the debtor (issuer) due to State aid obtains sufficient funds to cover all creditors' claims, the granting of State aid has a significant impact on the fulfilment of the debtor's (issuer's) subordinated obligations.

Article 8(1) of the Latvian Law on Control of Aid for Commercial Activity prohibits the issuer from fulfilling its subordinated obligations, including, for example, the redemption of subordinated bonds, until the end of the aid granted to it. Precisely because the creditors of the subordinated obligations have accepted that they have the right to demand early fulfilment of the subordinated obligations only in the event of insolvency or liquidation of the commercial company and after all other creditors' claims have been satisfied, they must assume co-responsibility in a situation where the commercial company is in financial difficulties. Therefore, the granting of State aid does not allow shareholders (members) and creditors of subordinated obligations to rely on being protected to the same extent as any other creditor – the depositor.

Since State aid is granted for the purpose of protecting only depositors and not everyone connected with a credit institution, and given that State aid consists of State budget resources which are the common property of society as a whole, it is granted in the interest of society as a whole. Consequently, State aid is not intended to protect the shareholders (members) of a credit institution or the creditors of subordinated obligations, such as the bondholders of subordinated bonds issued by a credit institution.

Even in the absence of State aid, the general framework for the satisfaction of creditors' claims provides that creditors of a credit institution's subordinated obligations and shareholders (members) of a credit institution are protected to a much

lesser extent than depositors. This principle is reflected in Articles 139^2 to 139^5 of the Credit Institution Law, according to which the claims of creditors of the credit institution's subordinated obligations are satisfied last and the claims of shareholders (members) are satisfied very last. Although Articles 139^2–139^5 of the Credit Institution Law do not specifically regulate the procedure for repayment of State aid, bearing in mind that the purpose of granting State aid to a bank is to protect its depositors, it must be concluded that repayment of State aid must be made before the claims of the creditors of the subordinated obligations and shareholders (members) are satisfied. The granting of State aid to a debtor (issuer) has a significant impact on the fulfilment of its issued subordinated bonds and other subordinated obligations. At the same time, given that the purpose of granting State aid to a bank is to protect its depositors and not the creditors of the subordinated obligations and shareholders (members) who are required to participate in the rescue of the credit institution, such restrictions on the enforcement of claims arising from the issuer's subordinated bonds and other subordinated obligations have a legitimate aim which justifies the restriction of the rights of the subordinated bondholders and other creditors of subordinated obligations.

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