

The background of the slide is a faded, low-angle photograph of the Propylaea, a monumental gateway to the Acropolis of Athens. The image shows the grand architecture with its Doric columns and intricate carvings, set against a sky with soft, white clouds. The overall tone is light and professional.

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**Public and private interest in cross
border Bail-in proceeding**

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Conflicts in case of Resolution and Bail-in

- Resolution is a decision taken by a territorial authority
 - How to manage for international institutions with assets in multiple jurisdictions ?
- Resolution is an administrative proceeding
 - Determining the trigger for opening restructuring proceedings will raise the question of whether bail-in is legally considered an “insolvency proceeding” in the relevant jurisdictions
- Resolution could be qualified as nationalization and be entitled to the sovereign immunity
 - Fir Tree capital v. Anglo Irish Bank [2011]
- Resolution is not a Court decision :
 - No exequatur and no recognition by foreign jurisdictions : Paris, Septembre 4, 2012, Lazard v. Citi
- Bail-in tools could be challenged by Courts
 - « Metliss » problem ;

Protection of Property Right

- A write-down of debts will affect the property rights of creditors and so in considering the constitutionality of such proceeding, account will have to be taken of the constitutional guarantee of private property

Protection of Property Right

- Article 1 of the First Protocol to European Convention on Human Rights (ECHR)
- Article 17 of the Charter of Fundamental Rights of the E.U.
 - Both texts are protecting property rights (« *peaceful enjoyment of his possessions* »)
- Any interference must be
 - (i) duly justified by an overriding interest (« *public interest* »)
 - (ii) provided by law
 - (iii) respect the principle of proportionality (« *fair compensation and respect of international law* »)

Neftyanaya Kompaniya Yukos v. Russia, app. 14902/04 of September 2011

- European Court of Justice of Human Rights has a large experience on protection property right, in particular after the German reunification and due to numerous litigations from former Eastern European countries.
- Last case examined by the Court (2011): the Yukos case.
- Russia's largest and most profitable company and its CEO were accused of embezzlement and tax evasion in the early 2000. The case finally went to the European Court of Human Rights.
- The Court firstly read out Article 1 of Additional Protocol n°1 (article relating to the right to property). It is from paragraph 554 of the case that we see, that the Court gives the indication of use of the exception to the right to property.

Public interest

- Interference with property rights may be justified only if it pursues a legitimate aim in the public interest :
“(...) an interference with peaceful enjoyment of possession must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” (Jahn and Others v. Germany, ECHR 2005-VI, § 93, 30 June 2005).
- What is “fair” ? ECJHR let discretion to local laws :
“The Court will respect the legislature’s judgment as to what is in general interest unless that judgment be manifestly without reasonable foundation” (Mellacher and Others v. Austria, 19 December 1989, Series A n° 169, § 45).
- The 2012 European Resolution framework refers to “public interest” to justify bail-in powers and deprivation of rights for shareholders and bondholders.
- “Public interest” in the draft directive is defined in close relation with various objectives (article 26), all “of equal significance”, including the continuity of critical functions, the protection of clients funds and assets, the minimization of the unnecessary destruction of value and the cost of resolution, as well as the protection of financial stability
 - Absence of definition of Financial stability
- What means “public interest” on a worldwide basis ?

Cross border effects of Bail-in

- **Two approaches to increase the likelihood of the cross-border recognition of bail-in power:**
 - One approach would be in each jurisdiction to ensure that debt instruments issued by banks in their jurisdictions include provisions that give effect to any restructuring the home authorities might impose. This approach would add a consensual element to an otherwise involuntary process - which could make it easier to give effect to the restructuring in some jurisdictions. However, by definition, such an approach could only be applied to newly issued debt instruments
 - An alternative approach would be to ensure that relevant jurisdictions put in place legislation that recognizes bail-in powers that are implemented by the authorities in other jurisdictions. One way to do this would be through the direct recognition of orders made by the competent authority in the home jurisdiction (e.g., the home regulator) in other relevant jurisdictions. An alternative would be for the competent authority in the host jurisdiction to issue parallel or protective measures consistent with those taken by the home jurisdiction.
- **The IMF has proposed a framework for enhanced coordination for the resolution of cross-border banks (IMF, 2010).**

IMF Approach

- For IMF, a restructuring for international banks would be implemented on the basis of the following principles and applied on a legal-entity-specific basis:
 - The *home-country authorities* would initiate, approve, and implement the restructuring process;
 - The statutory bail-in powers could, in principle, apply to all liabilities of the ailing bank, including liabilities “held” abroad and claims governed by foreign laws (foreign *lex contractus*);
 - The process of debt restructuring would be governed by the law of the home country (*lex fori concursus*). However, this process could be undermined by separate proceedings in third countries, including concurrent territorial insolvency procedures of jurisdictions hosting branches.

Conclusion

- Whether or not the statutory bail-in is applied directly to a single legal entity or to more than one member of the group, the effectiveness of the statutory bail-in will depend crucially on the extent to which all relevant jurisdictions will give effect to its terms.

THANK YOU

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