

**Bank recovery measures:
Litigation risk
in the context of EU State-aid rules and
secondary EU legislation**

Dimitris Tsibanoulis

Frankfurt, 19 March 2014

- On 10 July 2013, the European Commission amended its temporary state aid rules for assessing public support to financial institutions during the crisis by means of the adoption of the Communication ‘on the application of State aid rules to support measures in favour of banks in the context of the financial crisis’ (Banking Communication 2013/C 216/01)
- The Communication contains streamlined rules for any crisis-related State support to credit institutions to be effected as of August 2013 in the form of provision of guarantees, recapitalisations or impaired asset relief measures.

The main changes introduced by the Communication are aimed at improving the restructuring process and the level playing field between banks. In particular:

- 1) Banks will be required to work out a sound plan for their restructuring before they can receive recapitalisations or asset protection measures.
- 2) In case of capital shortfalls, bank shareholders and junior debt holders (subordinated debt holders) will be required to contribute to the relevant bank's recovery before said bank can actually request public funding.

Method adopted by the Communication

- Identification of relevant capital shortfall
- Submission of restructuring plan
- *Ultimum refugium*: burden-sharing requirements
 - Debt to equity in order to restore regulatory capital
- State-aid only after approval of the restructuring plan by the EU Commission

- **Effective restructuring process:**

Banks need to work out a restructuring plan, including a capital raising plan, demonstrating how they will become profitable before they can receive any public support. If the viability of a given bank cannot be restored, an orderly winding down plan needs to be submitted instead.

- **Burden-sharing requirements:**

Banks with a capital shortfall must receive shareholders' and subordinated debt-holders' contribution before asking for public funds. This will level the playing field between similar banks located in different Member States and reduce financial market fragmentation, observed during the prior stages of the financial crisis. Exceptions would be possible where financial stability is at risk or where a bank has already managed to significantly close the capital gap, and the residual amount needed from the State is small compared to the size of the bank's balance sheet.

The Greek draft provision implementing the new EU state-aid requirements: Proposal for the introduction of a new article in the law on the Hellenic Financial Stability Fund through a draft law submitted to the Parliament on 18 March 2014

Scope:

Addressing capital shortfall of viable (perhaps already recapitalised) credit institutions with private means prior to providing state aid support by the HFSF

Means:

Voluntary and mandatory measures. The latter instructed by the Bank of Greece and activated by a Cabinet Act

Burden sharing – Mandatory measures

Hierarchy (creditors' waterfall):

1. Shareholders
2. Hybrid capital holders (preference shares)
3. Junior (subordinated) debt holders

Legitimacy of recovery measures within the context of corporate restructuring and banking license revocation: A recent decision of the Greek Council of State [419/2014]

Issues:

Bail-in in non-insolvency process before the BRR Directive

- Legal risk with regard to public intervention to property rights
- Shareholders' rights: Contravention of the company law directives? (usurping of the powers the General Assembly / Second Company Law Directive)
- Evaluation through private evaluator: deprivation of property against the principles of the Constitution demanding full compensation upon Court Decision and the Human Rights Convention?