Legal perspectives on sovereign debt: Moderator's introduction

Diego Devos[1]

Ladies and Gentlemen:

This morning we will have the debatable pleasure to discuss some legal issues associated with sovereign risk matters, in particular in the context of debt crises and debt restructuring.

I said "debatable pleasure" mostly for the non-lawyers who are in attendance as part of an economic seminar where legal issues generally appear as out of place or quite ancillary, quite the perception of the role of lawyers in a central bank world.

In the case of sovereign debt crises, it seems that there is however some appetite to understand a little more the legal implications of certain developments widely reported in the press, for example on the occasion of the so-called Euro-area crisis (in particular last year's Greek debt restructuring), and also on the other side of the Atlantic through the recent US courts' decisions regarding the implementation of the Argentina exchange offers following Argentina's default in 2001.

Many questions were indeed raised especially over the past year, some of which were already evoked by Jaime Caruana and by Hung Tran in their respective speeches of yesterday: What is a sovereign default? What are the criteria? We talked yesterday about the definition of "default" and of "credit event" under rating agencies' methodology and CDS terms which may not coincide with all types of defaults. When there is a sovereign default, what are the consequences for the investors and creditors given the absence of an insolvency framework applicable to sovereign states?

In particular, are creditors obliged to accept all the new financial conditions set by the sovereign state wishing to reorganise its debt to access again the financial markets? If not, what are the alternatives? There is, of course, the hold-out aggressive litigation strategy, which is generally costly, time-consuming, uncertain and which could be highly disruptive for financial markets, but at the same time, in all fairness, those speculative creditors may also force sovereigns to observe a certain market discipline and to pay attention to the conditions of their debt reorganisation.

To avoid the hold-out judicial actions, is it possible to organise at least some sort of orderly sovereign debt restructuring mechanism, as suggested by the IMF a decade ago and promoted again recently by various circles? One may think of course first about the imposition of *collective action clauses* to impose through a majority decision new financial conditions on the dissenting minority bondholder community, especially when such CACs are combined with *aggregation clauses* to consolidate in this respect all the various government debt issues and make more difficult the reaching of a blocking minority. There are also other stipulations such as the so-called *exit consents* to make a sovereign debt issue less liquid or less

[1] General Counsel, Bank for International Settlements.

attractive in terms of litigation strategy by amending the non-financial terms of the bonds. We have seen that CACs may either be stipulated from the onset in the initial contractual bond terms, as it should now be the rule in the Euro-area pursuant to the European Stability Mechanism Treaty for government securities with a maturity above one year, or even retroactively by way of mandatory national legislation as it happened for Greek law-governed sovereign bonds subject to last year's restructuring.

In the Euro-area, the interventions of the ECB to support the Euro were of course widely welcomed, but with some doubts expressed as to the legality of the massive purchase on the secondary markets by the ECB and the central banks of the Eurosystem of Euro-area domestic government bonds in order to facilitate the continued access by the relevant sovereigns to market borrowings at an acceptable level. This was criticised in particular as being contrary to the EU Treaty's prohibition of the monetary financing of state deficits.

The role of the ECB and the Eurosystem in the support to the Greek banking sector was also criticised based on equality of treatment considerations, and there are even some judicial actions pending against the ECB from Italian investors, for having escaped the Greek exchange offer's drastic conditions, in a way similar to the IMF and other multilateral development banks (also the ESM) which are claiming a "*preferred creditor status*" when lending to a country in difficulty to avoid cuts on their resulting lending claims.

Finally, the recent decisions from the US Court of Appeals and from the famous Judge Griesa in New York in the *litigations opposing Argentina to some speculative hedge funds (the so-called "vulture funds")*, that would oblige (subject to further court review) Argentina to pay equally old and new bondholders because of *pari passu* stipulations in the defaulted Argentina bonds – given precisely the absence of CACs, have generated a huge debate in the international financial community as to the implications of such case law for debt restructuring in general.

To address these burning and complex legal questions, we have the privilege to have today three eminent speakers to cover these topics:

- Lee Buchheit, partner at Cleary Gottlieb, "the" expert in sovereign debt restructuring, will address some of the main general questions regarding debt restructuring.
- Antonio Saínz de Vicuña, General Counsel of the ECB, will of course talk about the role of the ECB in the European debt crisis under Treaty principles and about some important legal issues which arose in particular as part of the Greek debt restructuring.
- Finally, Rodrigo Olivares Caminal, distinguished professor of the University of London, will concentrate on the interpretation of *pari passu* provisions especially in the light of the Argentine case.

You will then have the floor for a first round of questions (and I already know that our colleague Sebastian Soler from the Central Bank of Argentina would like to intervene at that point to express some views regarding the recent US judicial developments).

For now, I would like to give the floor to our first guest speaker.

Lee, the floor is yours.