



TRUTH  
COMMITTEE  
ON PUBLIC  
DEBT

Preliminary report

The Truth Committee on Public Debt (Debt Truth Committee) was established on April 4, 2015, by a decision of the President of the Hellenic Parliament, Ms Zoe Konstantopoulou, who confided the Scientific Coordination of its work to Dr. Eric Toussaint and the cooperation of the Committee with the European Parliament and other Parliaments and international organizations to MEP Ms Sofia Sakorafa.

Members of the Committee have convened in public and closed sessions, to produce this preliminary report, under the supervision of the scientific coordinator and with the cooperation and input of other members of the Committee, as well as experts and contributors.

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# Executive Summary

In June 2015 Greece stands at a crossroads of choosing between furthering the failed macroeconomic adjustment programmes imposed by the creditors or making a real change to break the chains of debt. Five years since the economic adjustment programmes began, the country remains deeply cemented in an economic, social, democratic and ecological crisis. The black box of debt has remained closed, and until a few months ago no authority, Greek or international, had sought to bring to light the truth about how and why Greece was subjected to the Troika regime. The debt, in the name of which nothing has been spared, remains the rule through which neoliberal adjustment is imposed, and the deepest and longest recession experienced in Europe during peacetime.

There is an immediate democratic need and social responsibility to address a range of legal, social and economic issues that demand proper consideration. In response, the President of the Hellenic Parliament established the Truth Committee on Public Debt (Debt Truth Committee) in April 2015, mandating the investigation into the creation and the increase of public debt, the way and reasons for which debt was contracted, and the impact that the conditionalities attached to the loans have had on the economy and the population. The Truth Committee has a mandate to raise awareness of issues pertaining to the Greek debt, both domestically and internationally, and to formulate arguments and options concerning the cancellation of the debt.

The research of the Committee presented in this preliminary report sheds light on the fact that the entire adjustment programme, to which Greece has been subjugated, was and remains a politically orientated programme. The technical exercise surrounding macroeconomic variables and debt projections, figures directly relating to people's lives and livelihoods, has enabled discussions around the debt to remain at a technical level mainly revolving around the argument that the policies imposed on Greece will

improve its capacity to pay the debt back. The facts presented in this report challenge this argument.

All the evidence we present in this report shows that Greece not only does not have the ability to pay this debt, but also should not pay this debt first and foremost because the debt emerging from the Troika's arrangements is a direct infringement on the fundamental human rights of the residents of Greece. Hence, we came to the conclusion that Greece should not pay this debt because it is illegal, illegitimate, and odious.

It has also come to the understanding of the Committee that the unsustainability of the Greek public debt was evident from the outset to the international creditors, the Greek authorities, and the corporate media. Yet, the Greek authorities, together with some other governments in the EU, conspired against the restructuring of public debt in 2010 in order to protect financial institutions. The corporate media hid the truth from the public by depicting a situation in which the bailout was argued to benefit Greece, whilst spinning a narrative intended to portray the population as deservers of their own wrongdoings.

Bailout funds provided in both programmes of 2010 and 2012 have been externally managed through complicated schemes, preventing any fiscal autonomy. The use of the bailout money is strictly dictated by the creditors, and so, it is revealing that less than 10% of these funds have been destined to the government's current expenditure.

This preliminary report presents a primary mapping out of the key problems and issues associated with the public debt, and notes key legal violations associated with the contracting of the debt; it also traces out the legal foundations, on which unilateral suspension of the debt payments can be based. The findings are presented in nine chapters structured as follows:

**Chapter 1, Debt before the Troika**, analyses the growth of the Greek public debt since the 1980s. It

concludes that the increase in debt was not due to excessive public spending, which in fact remained lower than the public spending of other Eurozone countries, but rather due to the payment of extremely high rates of interest to creditors, excessive and unjustified military spending, loss of tax revenues due to illicit capital outflows, state recapitalization of private banks, and the international imbalances created via the flaws in the design of the Monetary Union itself. Adopting the euro led to a drastic increase of private debt in Greece to which major European private banks as well as the Greek banks were exposed. A growing banking crisis contributed to the Greek sovereign debt crisis. George Papandreou's government helped to present the elements of a banking crisis as a sovereign debt crisis in 2009 by emphasizing and boosting the public deficit and debt.

**Chapter 2, Evolution of Greek public debt during 2010-2015**, concludes that the first loan agreement of 2010, aimed primarily to rescue the Greek and other European private banks, and to allow the banks to reduce their exposure to Greek government bonds.

**Chapter 3, Greek public debt by creditor in 2015**, presents the contentious nature of Greece's current debt, delineating the loans' key characteristics, which are further analysed in Chapter 8.

**Chapter 4, Debt System Mechanism in Greece** reveals the mechanisms devised by the agreements that were implemented since May 2010. They created a substantial amount of new debt to bilateral creditors and the European Financial Stability Fund (EFSF), whilst generating abusive costs thus deepening the crisis further. The mechanisms disclose how the majority of borrowed funds were transferred directly to financial institutions. Rather than benefitting Greece, they have accelerated the privatization process, through the use of financial instruments.

**Chapter 5, Conditionalities against sustainability**, presents how the creditors imposed intrusive conditionalities attached to the loan agreements, which led directly to the economic unviability and unsustainability of debt. These conditionalities, on which the creditors still insist, have not only contributed to lower GDP as well as higher public borrowing, hence a higher public debt/GDP making Greece's debt more unsustainable, but also engineered dramatic changes in the society, and caused a humanitarian crisis. The Greek public debt can be considered as totally unsustainable at present.

**Chapter 6, Impact of the "bailout programmes" on human rights**, concludes that the measures implemented under the "bailout pro-

grammes" have directly affected living conditions of the people and violated human rights, which Greece and its partners are obliged to respect, protect and promote under domestic, regional and international law. The drastic adjustments, imposed on the Greek economy and society as a whole, have brought about a rapid deterioration of living standards, and remain incompatible with social justice, social cohesion, democracy and human rights.

**Chapter 7, Legal issues surrounding the MOU and Loan Agreements**, argues there has been a breach of human rights obligations on the part of Greece itself and the lenders, that is the Euro Area (Lender) Member States, the European Commission, the European Central Bank, and the International Monetary Fund, who imposed these measures on Greece. All these actors failed to assess the human rights violations as an outcome of the policies they obliged Greece to pursue, and also directly violated the Greek constitution by effectively stripping Greece of most of its sovereign rights. The agreements contain abusive clauses, effectively coercing Greece to surrender significant aspects of its sovereignty. This is imprinted in the choice of the English law as governing law for those agreements, which facilitated the circumvention of the Greek Constitution and international human rights obligations. Conflicts with human rights and customary obligations, several indications of contracting parties acting in bad faith, which together with the unconscionable character of the agreements, render these agreements invalid.

**Chapter 8, Assessment of the Debts as regards illegitimacy**, odiousness, illegality, and unsustainability, provides an assessment of the Greek public debt according to the definitions regarding illegitimate, odious, illegal, and unsustainable debt adopted by the Committee.

Chapter 8 concludes that the Greek public debt as of June 2015 is unsustainable, since Greece is currently unable to service its debt without seriously impairing its capacity to fulfill its basic human rights obligations. Furthermore, for each creditor, the report provides evidence of indicative cases of illegal, illegitimate and odious debts.

Debt to the IMF should be considered illegal since its concession breached the IMF's own statutes, and its conditions breached the Greek Constitution, international customary law, and treaties to which Greece is a party. It is also illegitimate, since conditions included policy prescriptions that infringed human rights obligations. Finally, it is odious since the IMF knew that the imposed measures were undemocratic, ineffective, and would lead to serious violations of socio-economic rights.

Debts to the ECB should be considered illegal since the ECB over-stepped its mandate by imposing the application of macroeconomic adjustment programmes (e.g. labour market deregulation) via its participation in the Troika. Debts to the ECB are also illegitimate and odious, since the principal *raison d'être* of the Securities Market Programmeme (SMP) was to serve the interests of the financial institutions, allowing the major European and Greek private banks to dispose of their Greek bonds.

The EFSF engages in cash-less loans which should be considered illegal because Article 122(2) of the Treaty on the Functioning of the European Union (TFEU) was violated, and further they breach several socio-economic rights and civil liberties. Moreover, the EFSF Framework Agreement 2010 and the Master Financial Assistance Agreement of 2012 contain several abusive clauses revealing clear misconduct on the part of the lender. The EFSF also acts against democratic principles, rendering these particular debts illegitimate and odious.

The bilateral loans should be considered illegal since they violate the procedure provided by the Greek constitution. The loans involved clear misconduct by the lenders, and had conditions that contravened law or public policy. Both EU law and international law were breached in order to sideline human rights in the design of the macroeconomic programmes. The bilateral loans are furthermore illegitimate, since they were not used for the benefit of the population, but merely enabled the private creditors of Greece to be bailed out. Finally, the bilateral loans are odious since the lender states and the European Commission knew of potential violations, but in 2010 and 2012 avoided to assess the human rights impacts of the macroeconomic adjustment and fiscal consolidation that were the conditions for the loans.

The debt to private creditors should be considered illegal because private banks conducted themselves irresponsibly before the Troika came into being, failing to observe due diligence, while some private creditors such as hedge funds also acted in bad faith. Parts of the debts to private banks and hedge funds are illegitimate for the same reasons that they are illegal; furthermore, Greek banks were illegitimately recapitalized by tax-payers. Debts to private banks and hedge funds are odious, since major private creditors were aware that these debts were not incurred in the best interests of the population but rather for their own benefit.

The report comes to a close with some practical considerations.

**Chapter 9, Legal foundations for repudiation and suspension of the Greek sovereign debt**, presents the options concerning the cancellation of debt, and especially the conditions under which a sovereign

state can exercise the right to unilateral act of repudiation or suspension of the payment of debt under international law.

Several legal arguments permit a State to unilaterally repudiate its illegal, odious, and illegitimate debt. In the Greek case, such a unilateral act may be based on the following arguments: the bad faith of the creditors that pushed Greece to violate national law and international obligations related to human rights; preeminence of human rights over agreements such as those signed by previous governments with creditors or the Troika; coercion; unfair terms flagrantly violating Greek sovereignty and violating the Constitution; and finally, the right recognized in international law for a State to take countermeasures against illegal acts by its creditors, which purposefully damage its fiscal sovereignty, oblige it to assume odious, illegal and illegitimate debt, violate economic self-determination and fundamental human rights. As far as unsustainable debt is concerned, every state is legally entitled to invoke necessity in exceptional situations in order to safeguard those essential interests threatened by a grave and imminent peril. In such a situation, the State may be dispensed from the fulfilment of those international obligations that augment the peril, as is the case with outstanding loan contracts. Finally, states have the right to declare themselves unilaterally insolvent where the servicing of their debt is unsustainable, in which case they commit no wrongful act and hence bear no liability.

People's dignity is worth more than illegal, illegitimate, odious and unsustainable debt

Having concluded its preliminary investigation, the Committee considers that Greece has been and still is the victim of an attack premeditated and organized by the International Monetary Fund, the European Central Bank, and the European Commission. This violent, illegal, and immoral mission aimed exclusively at shifting private debt onto the public sector.

Making this preliminary report available to the Greek authorities and the Greek people, the Committee considers to have fulfilled the first part of its mission as defined in the decision of the President of the Hellenic Parliament of 4 April 2015. The Committee hopes that the report will be a useful tool for those who want to exit the destructive logic of austerity and stand up for what is endangered today: human rights, democracy, peoples' dignity, and the future of generations to come.

In response to those who impose unjust measures, the Greek people might invoke what Thucydides mentioned about the constitution of the Athenian people: "As for the name, it is called a democracy, for the administration is run with a view to the interests of the many, not of the few" (Pericles' Funeral Oration, in the speech from Thucydides' History of the Peloponnesian War).

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# Introduction

Since May 2010, Greece has been implementing a macroeconomic adjustment programme as a condition for accessing “financial assistance” from the International Monetary Fund, fourteen eurozone Member states represented by the European Commission, the European Financial Stability Facility, and the European Central Bank. The programme consists of neoliberal policy measures that involve deep spending and job cuts in the public sector, extended deregulation of the private sector, tax increases, privatizations, and structural changes (misleadingly called “reforms”).

These internationally imposed measures, supposedly aimed at reducing the country’s budget deficit and public debt to sustainable levels, have pushed the economy into a deep recession - the longest recession experienced in Europe during a period of peace. Millions were thrown into poverty, unemployment, and social exclusion, while human rights, particularly economic and social rights, were grossly undermined. Public services and infrastructure such as schools, hospitals, courts, and municipalities around the country have been merged, shut-down, or otherwise suffocated, in order to achieve fiscal targets specified by the creditors that have been widely criticized as unacceptable and unrealistic. Human lives, the social fabric, the state structure, and the natural environment suffered wounds that will take a long time to heal, or are irreversible, as is the case for those who lost or took their own lives during the memoranda period, when the suicide rate rose to unprecedented levels.

In response to this situation, and within the framework of the Parliament’s responsibility to the Greek people, on 4 April 2015, the President of the Hellenic Parliament decided to establish a Special Committee of the Hellenic Parliament. The Truth Committee on Public Debt, or Debt Truth Committee, was given the mandate to investigate the truth about the creation and the intolerable increase of the public debt, as well as to audit the debt, and to promote the international cooperation of the Hellenic Parliament with the European Parliament and the Parliaments of other countries, as well as with International Organizations, in matters of debt. The Committee aims to address the

full range of legal, social, and economic issues that demand proper consideration in relation to the debt, and also to raise awareness among Greek citizens, the international community, and international public opinion.

This preliminary report, available in Greek and English, presents the main findings of the Committee in the first phase of its work. It is expected that the findings of the Committee will raise issues that will be further analysed and investigated in the second phase, over the course of the year ahead. The findings presented here are preliminary and as the Committee continues its proceedings, the analysis is expected to be further corroborated, articulated and refined.

The primary aim of this preliminary report is to highlight key areas of contention, and to define specific issues that need to be brought into public consideration.

After this introductory section, which presents the context and methodology of our analysis as well as the definitions of illegal, illegitimate, odious, and unsustainable debt, the rest of the report is structured as follows. Chapters 1 and 2 examine the development of the Greek public debt between 1980 and 2015. Chapter 3 traces key characteristics of the current creditors of Greece. Chapter 4 presents a summary of the debt mechanisms related to the agreements signed by Greece and the Troika since 2010. Chapters 5 and 6 analyse the conditionalities attached to the loan facility and other agreements, as well as their impact on the sustainability of debt from both a human rights and a macroeconomic perspective. Chapter 7 proceeds to the legal issues regarding the Memoranda of Understanding and the Loan Agreements, and examines how they were developed and adopted. Chapter 8 provides an assessment of the Greek public debt based on the definitions of illegitimate, odious, illegal, and unsustainable debt as adopted by the Committee during its Plenary Session of May 4-7th, 2015. Finally, after this analysis of the multifaceted issues related to the Greek public debt, Chapter 9 concludes and presents the options concerning the cancellation of debt, and especially the conditions under which a sovereign state can exercise the right to unilateral repudiation or suspension of payment of debt under international law.



# The Work of the Truth Committee on Public Debt

## Context

The decision to create the Truth Committee and realize an audit of the Greek public debt is justified for three main reasons.

First, the audit of the public debt is a basic democratic right of citizens as well as a sovereign right of a nation. There can be no democracy without transparency regarding state finances, and it is immoral to ask citizens to pay for debt without knowing how and why this debt was created. It is also very important to audit the debt because substantial sacrifices are demanded from and/or imposed on the Greek society and the Greek state in order to honour the payment of debt.

Second, debt audit is also an institutional duty of the State according to European law. It responds to the obligation created by Regulation

(EU) No. 472/2013 of the European Parliament and of the Council on 21 May 2013, which enjoins a Member State subject to a macroeconomic adjustment programme to “carry out a comprehensive audit of its public finances in order, *inter alia*, to assess the reasons that led to the build-up of excessive levels of debt as well as to track any possible irregularity” (Paragraph

9 of Article 7). This obligation was entirely neglected by the previous Greek governments and the Troika institutions.

Third, debt audit is also an obligation stemming from international law. The United Nations Guiding Principles on Foreign Debt and Human Rights (A/HRC/20/23), adopted by the UN Human Rights Council in July 2012, calls upon States to undertake periodic audits of their public debt, in order to ensure transparency and accountability in the management of their resources, and also to inform future borrowing decisions.

A central objective of the Truth Committee on Pub-

lic Debt is to respond to the United Nations call for transparency and accountability in the management of resources. Another objective is to explain to the Greek people how and why the debt, whose onerous repayment has been demanded from them during the last five years, was created and managed.

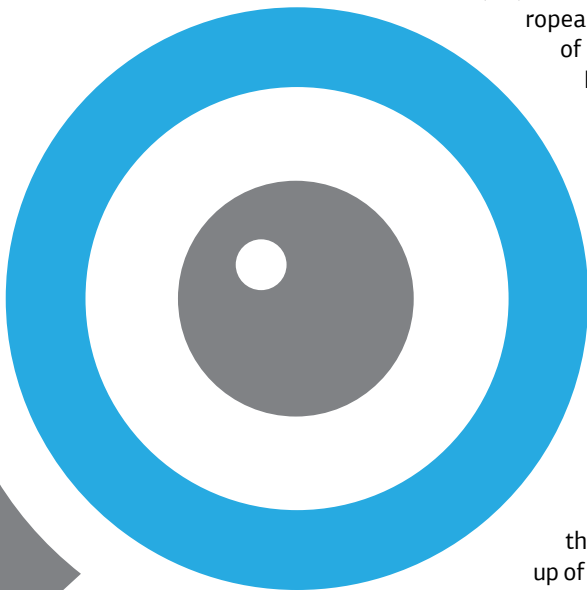
## Composition of the Truth Committee on Public Debt

The Truth Committee on Public Debt is an independent Committee, created by the President of the Hellenic Parliament under a Regulation thereof. It is chaired by the President of the Hellenic Parliament, Zoe Konstantopoulou, its scientific coordinator, Professor Eric Toussaint and MEP Sofia Sakorafa, responsible for its relations with the European Parliament and other Parliaments and Institutions. It comprises members from Greece and ten other countries. Most have internationally recognized competence, expertise and experience in the subject matters of audit, public debt, human rights protection, international law, constitutional law, international finance, macroeconomics, anti-corruption and transparency guarantees; others contribute the rich and precious experience of local or international social movements. The Committee also receives the cooperation of experts and authorities, as well as of Parliament services and society at large. The work of the Committee is open to society and to those who wish to contribute as experts, witnesses, sources, or members. Indeed, during the first two months of the Committee’s work, there have been considerable offers of contribution, which have been or will be taken into account. The members of the Committee offer their work *ex gratia*, and they did not, do not, and will not receive any remuneration for their work.

## Mandate and Objectives of the Truth Committee on Public Debt

The Truth Committee was given the mandate to examine the nature of Greek public debt, as well as the historical, financial, and other processes related to the contracting and accumulation of debt; also to identify what part or proportion of the debt can be defined as illegitimate, illegal, odious, or unsustainable.

The Truth Committee designs the debt audit in a manner conducive to enhancing transparency and accountability in the management of Greek public finances. It also formulates arguments and traces the legal foundations concerning the cancellation of the debt.





## Limitations

During the first two months of their work, the members of the Truth Committee worked intensively in order to carry out the analysis of public debt and present the preliminary conclusions in this report. However, this time frame is not sufficient to fully analyse the mechanisms of debt accumulation in Greece for the whole period from 1980 to 2015. Therefore, the Truth Committee had to prioritise the issues and in particular the periods to be examined as a matter of urgency.

Furthermore, the Truth Committee has not yet received all the legal and official documents that are necessary to corroborate its findings and analyze all aspects of the Greek debt; it also takes note of the fact that, in an initial answer to the Committee, the Bank of Greece, through its Director, refused to transmit documents, which are essential to the audit. The Committee will insist that these documents (namely bank transactions concerning the loan agreements) are duly transmitted to it. In the coming months, we expect to enjoy the full collaboration of the Greek institutions involved in the administration of public debt, especially in providing all legal documents, data, and accountability registers which will help us to complete the audit and accountability procedures.

Nevertheless, the work carried out by the Truth Committee to date allows us to present some important preliminary findings and policy implications. These preliminary findings shed new light on issues of debt, and demonstrate the importance of further investigations and audit procedures. Therefore, the Committee will continue pursuing its work during the coming months, and is expected to present its final report by May 2016.

## The time frame of analysis

One of the goals of the Truth Committee is to present a complete overview of the evolution of the Greek public debt from 1980 to 2015, accompanied by an analysis of the trends, processes, and operating cycles of the transactions that gave rise to such liabilities, that can be reached through the procedures of a debt audit. Given the time limitations, in the first phase of the audit the Truth Committee prioritized the examination of the Memoranda period from May 2010 until January 2015 in this preliminary report of 17-18 June 2015.

The institutions and procedures that came to the fore in the Memoranda Period did not appear *ex nihilo*. Our preliminary analyses of the period from 1980 to 2010, concerning in particular certain incidents of conspicuous corruption, which burdened the public budget,

demonstrate the importance of further investigations and audit procedures. These will form part of our work in the second phase.

## Objectives of report

This report is addressed to the authorities of the Hellenic Republic, but not only to them. As mentioned previously, an objective of this report is to raise the awareness of the Greek population, the international community, and the international public opinion. In order to fulfill this objective, while remaining rigorous, the Committee decided to spare no efforts to make this document widely accessible to the public. This implied in particular the need to remain concise; a document of several hundred pages would not manage to achieve this objective. But it also meant making efforts to avoid obfuscation. We try to explain our points in clear and non-technical language, particularly as regards the more technical aspects. Only in this way can the Report be read by people without specialist technical knowledge, who however form the bulk of any society, and participate as they must in democratic deliberation. It is exactly for this reason that some documents dealing with rather technical aspects or analysing in more depth some key points presented in this Report will be posted online in their complete version.

## Sources of documents and data

Official documents and data are essential in order to reach the truth about the process of accumulation of Greek public debt. In order to fulfill its mission, the Committee used and analyzed the following documents and data (non-exhaustive list):

- Official documents such as contracts, treaties, agreements, programs, memoranda;
- Annual reports of the ECB, Bank of Greece, HFSF;
- Official statistics from Eurostat, ELSTAT, OECD, Bank of Greece, Ministry of Finance, Public Debt Management Agency, European Commission;
- Academic journal articles, research reports, and newspapers;
- Public hearings of witnesses;
- Meetings with the authorities;
- Criminal case file transmitted to the Hellenic Parliament by the economic crime prosecutors (September – November 2012) concerning public statements of former Greek representative to the IMF, Mr. P. Roumeliotis.

# Definition of terms

In this report, the following terms have the meanings respectively assigned to them hereunder:

## Illegitimate debt

Debt that the borrower cannot be required to repay because the loan, security or guarantee, or the terms and conditions attached to that loan, security or guarantee infringed the law (both national and international) or public policy, or because such terms or conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, or because the loan, security or guarantee was not used for the benefit of the population or the debt was converted from private (commercial) to public debt under pressure to bailout creditors.

## Illegal debt

Debt in respect of which proper legal procedures (including those relating to authority to sign loans or approval of loans, securities or guarantees by the representative branch or branches of Government of the borrower State) were not followed, or which involved clear misconduct by the lender (including bribery, coercion and undue influence), as well as debt contracted in violation of domestic and international law or had conditions attached thereto that contravened the law or public policy.

## Odious debt

Debt, which the lender knew or ought to have known, was incurred in violation of democratic principles (including consent, participation, transparency and accountability), and used against the best interests of the population of the borrower State, or is unconscionable and whose effect is to deny people their fundamental civil, political, economic, social and cultural rights.

## Unsustainable debt

Debt that cannot be serviced without seriously impairing the ability or capacity of the Government of the borrower State to fulfil its basic human rights obligations, such as those relating to healthcare, education, water and sanitation and adequate housing, or to invest in public infrastructure and programmes necessary for economic and social development, or without harmful consequences for the population of the borrower State (including a deterioration in the living standards). Such debt is payable but its payment ought to be suspended in order to allow the state to fulfil its human rights commitments.

# Acronyms

- BIS:** Bank for International Settlements
- CDS:** Credit Default Swap
- CFR:** Charter of Fundamental Rights
- CJEU:** Court of Justice of the European Union
- COFOG:** Classification of the Functions of Government
- CRC:** Convention on the Rights of the Child
- DSA:** Debt Sustainability Analysis
- ECB:** European Central Bank
- ECHR:** European Convention of Human Rights
- ECSR:** European Consortium for Sociological Research
- ECtHR:** European Court on Human Rights
- ED:** Executive Directors
- EFF:** Extended Fund Facility
- EFSF:** European Financial Stability Facility
- EFSM:** European Financial Stabilisation Mechanism
- EIB:** European Investment Bank
- ELA:** Emergency Liquidity Assistance
- ELSTAT:** Hellenic Statistical Authority
- ESA95:** European System of national and regional accounts
- ESCB:** European System of Central Banks
- ESC:** European Social Charter
- ESM:** European Stability Mechanism
- EU:** European Union
- EURIBOR:** Euro Interbank Offered Rate
- EWHC:** High Court of Justice of England and Wales
- GAO:** General Account Office
- GDP:** Gross Domestic Product
- HFSF:** Hellenic Financial Stability Fund
- HRADF:** Hellenic Republic Asset Development Fund
- ICESCR:** the International Covenant on Economic, social and cultural rights
- ICJ:** International Court of Justice
- ICSID:** International Centre for Settlement of Investment Disputes
- IIF:** Institute of International Finance
- ILC:** International Law Commission
- ILO:** International Labour Organization
- IMF:** International Monetary Fund
- LTRO:** Long-term Refinancing Operation
- NCB:** National Central Bank
- NSSG:** National Statistical Service of Greece
- OECD:** Organisation for Economic Co-operation and Development
- OMT:** Outright Monetary Transactions
- PDMA:** Public Debt Management Agency
- PSI:** Private Sector Involvement
- SBA:** Stand-By Arrangement
- SDR:** Special Drawing Rights
- SMP:** Securities Market Programme
- TEU:** Treaty on European Union
- TFEU:** Treaty on the Functioning of the European Union
- VCLT:** Vienna Convention on the Law of Treaties

## CHAPTER 1

# Debt before the Troika

**G**reece's public debt is a legacy of past trends. This first chapter analyses the growth of the Greek debt since the early 1980s. Our main findings are the following:

- Rather than being a product of high public budget deficits, the increase of debt was clearly related to the growth in interest payments. Greece entered the crisis with a debt inherited over the period of debt accumulation of 1980-1993; the main contributor to debt accumulation was the 'snowball effect' – present when the implicit interest rate on the debt is higher than GDP nominal growth. This explains two thirds of the increase of debt between 1980 and 2007.

- Public expenditure was lower than that of other Eurozone members. The only primary public spending which was higher (as a ratio to GDP) was in defence expenditures, about which a series of corruption scandals need to be further investigated. The excessive spending in defence constitutes €40 billion of the debt created from 1995 to 2009.

- Primary deficits feeding the debt have been further affected by poor performance in income tax collection and employers' contributions to social security collection. These were much lower than the rest of Eurozone, and are attributed to fraud and illicit capital flows - explained below - benefiting only a minority of the population. The cumulative losses due to these two types of income from 1995 to 2009 explain the remaining growth of debt.

- Illicit capital outflows provoked further tax revenue loss, amounting to €30 billion from 2003 to 2009. This was accompanied by lower amounts of spending for other expenditures, like social security, education and R&D as compared to other EU countries.

- Adopting the euro led to a drastic increase of private debt, from 74.1% to 129.1% of GDP, to which major European private banks, as well as Greek banks, were exposed. This provoked a banking crisis in 2009, which triggered the Greek sovereign debt crisis.

### 1. The growth of the debt: an overview

Three distinct phases can be observed in the evolution of public debt between 1981 and 2009 (Figure 1.1):

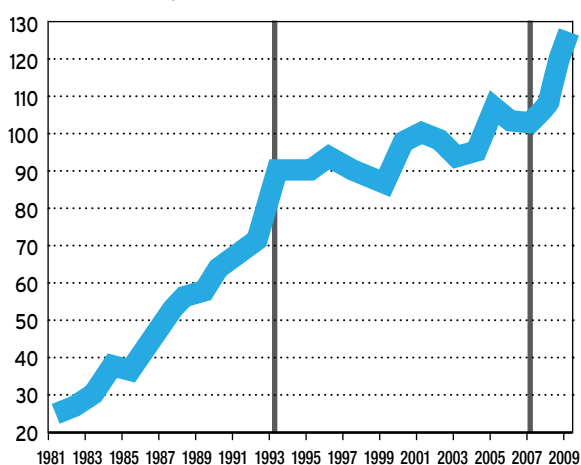
- 1981-1993: after Greece joined the European Union in 1981, we observe a strong increase of public debt, from 25% to 91% of GDP.

- 1993-2007: quasi-stabilization from 91% to 103% of GDP. During this period, Greece enters into the Eurozone in 2001 with a debt of 100% of GDP and a deficit close to 3%, which will be impugned in 2004<sup>1</sup>.

- 2007-2009: sharp increase from 103% to 113% which, after a contested<sup>2</sup> statistical revision, jumps to 127% of GDP, amounting to approximately €300 billion euros.

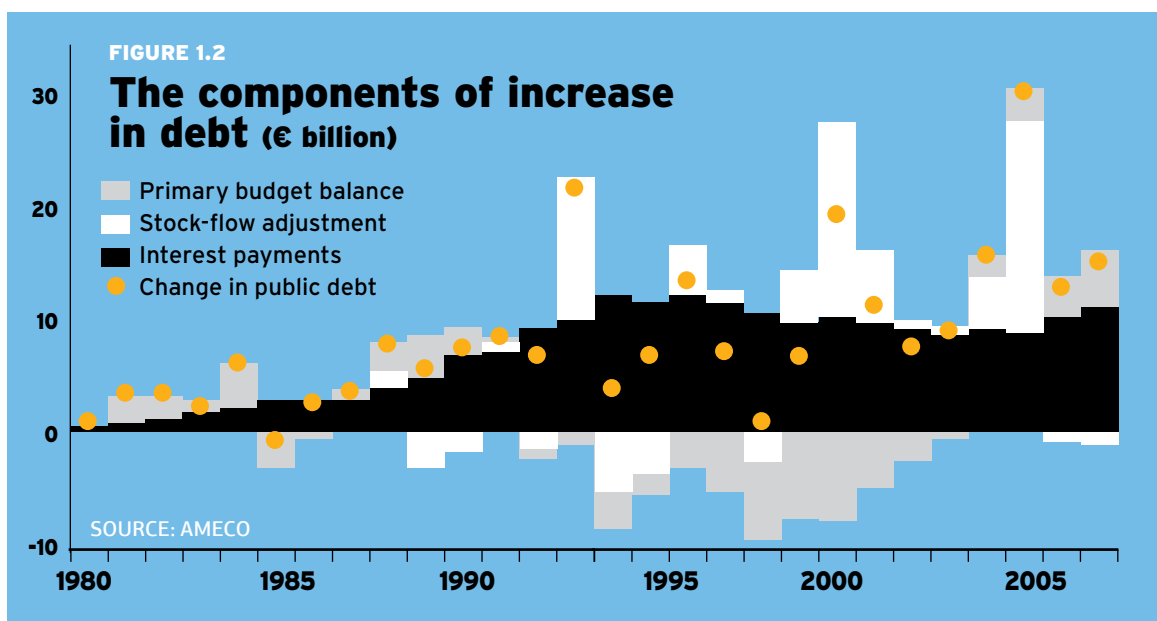
**FIGURE 1.1**  
**Debt-to-GDP ratio 1980-2009**

The annual change in public debt is the addition of three elements:



SOURCE: AMECO

- Primary budget balance: measured as the difference between expenditures excluding interests pay-



ments and fiscal revenues

- Interest payments
- Stock-flow adjustment measured as the statistical difference between the change in the debt stock and the total annual deficit

Once this decomposition is applied, as in Figure 1.2, the major role that interest payments play in increasing public debt is clear.

**The debt-to-GDP ratio can be disaggregated into three distinct elements:**

- Primary budget balance (in % of GDP)
- Stock-flow adjustment (in % of GDP)
- 'Snowball effect' (in % of GDP) which is positive when the implicit interest rate paid to service government debt is higher than the nominal GDP growth rate.

Table 1.1 below summarizes the contribution of these different factors to the change in the debt-to-GDP ratio. Between 1980 and 1993, the debt-to-GDP ratio increased by 70.4 percentage points of GDP: the 'snowball effect' contributed 58% to this change, cumulated primary balance by 32%, and stock-flow adjustments by a further 10%. For the period 1993-2007, the contribution of the 'snowball effect' itself is higher than the change in the debt-to-GDP ratio.

TABLE 1.1

**Factors contributing to the debt-to-GDP ratio**

	1980-1993	1993-2007
Change in the debt-to-GDP ratio	70.4	11.9
of which: "Snowball effect"	40.6	13.5
Primary balance	22.4	-25.1
Stock-flow adjustment	7.4	23.5

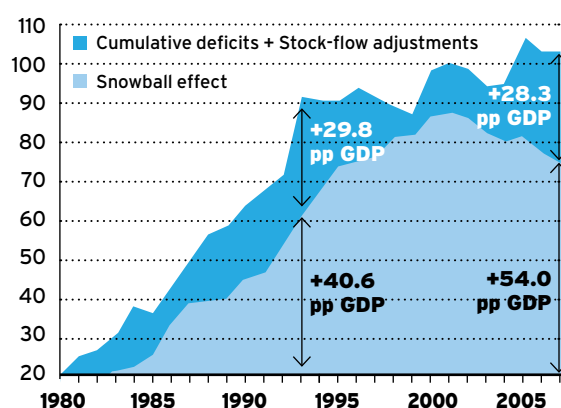
**This first insight leads us to the following three conclusions:**

1. Prior to 2007, Greek debt was the main heir to debts accumulated during the period 1980-1993.
2. The snowball effect was the main contributor to this change. This effect was triggered by high interest rates combined with a decrease in the exchange rate of the drachma.
3. Although fiscal deficits were important, they were not the main cause in the increase of the debt.

The results are summarized in Figure 1.3: between 1980 and 2007, the debt-to-GDP ratio increased by 82.3 percentage points of GDP. Two thirds of this change (65.6%) is attributable to the 'snowball effect' and only a third (33.4%) to the cumulative deficits, including stock-flow adjustments.

FIGURE 1.3

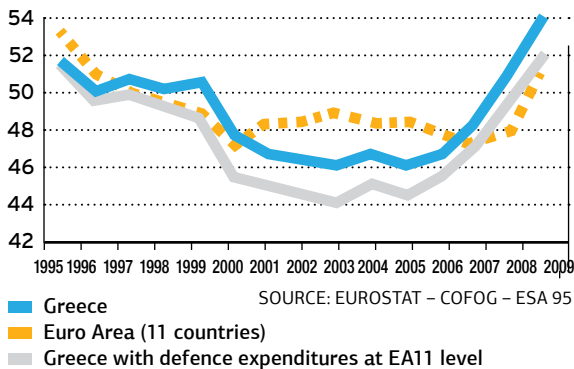
**Components of the Greek debt (% of GDP) 1980 - 2007**



1. Contrary to what is frequently proclaimed, Greek public expenditure (excluding defence) does not explain the debt increase. Public expenditure was lower than in Euro Area countries (EA-11, which comprises Euro-Area countries excluding Greece).

FIGURE 1.4

### Comparative evolution of total general government expenditure (1995-2005)



SOURCE: EUROSTAT – COFOG – ESA 95

From 1995 to 2009 the average expenditure is lower in Greece (48%) than in EA-11 (48.4%). Available data indicate that Greece maintains a higher primary expenditure only on defence spending, with Greece at 3% of GDP, compared to the average of 1.4%. As a counterfactual scenario we estimate that if the percentage of GDP devoted to defence spending was equal to the level spent in EA-11, then the total public expenditure as ratio to GDP would have been lower in Greece than in EA-11 countries until 2007.

We estimate that overspending in defence contributed to a debt increase of at least €40 billion<sup>3</sup>. Most of this spending is due to large-scale contracts for the purchase of military equipment supplied by companies based in current creditor countries<sup>4</sup>. Concerns about illegal operations, such as bribery, have been raised in several cases, particularly regarding excessive pricing or inadequacy of the equipment<sup>5</sup>. Greece’s current lenders linked the 2010 bailout to the confirmation of pending military purchase orders, even though a part of this spending contributes to common EU defence objectives<sup>6</sup>, which should not, under normal circumstances, have been paid by Greece alone.

The primary deficits that contribute and feed the growth of public debt are mainly due to low levels of collection of public revenues. The taxes and social contributions collected after 1999 decreased to levels close or lower than 34% of GDP, in contrast with a level of more than 40% in the Eurozone countries.

As illustrated in Figure 1.5, the low levels of income tax collection and insufficient actual contributions of employers to social security explain the difference between public revenues in Greece and in the EA-18 countries. The difference is mainly due to fraud facilitated by corrupt and inefficient collection mechanisms, limited and complacent sanctions for fraud and weak procedures<sup>7</sup> for recovering unpaid taxes and contributions amounting to €29.4 billion at the end of 2009<sup>8</sup>.

The debt that was contracted to compensate for low levels of income tax collection represents €88 billion during this period<sup>9</sup>. This increase in debt mainly benefited a minority of the population, as the majority, 77.5% of the population in 2009<sup>10</sup>, which is dependent on wages or pension incomes, are on the whole reliable tax sources. Low tax collection is also attributable to unjust tax legislation which facilitates the legal tax evasion of privileged groups. The shortfall of revenues attributable to insufficient actual social contributions of employers (rather than employees) represents €75 billion during this period.

Corporate income tax reductions have contributed to the deficit, as corporate income tax has been progressively reduced from 40% to 25% over the period. As a result, while in 2000 the contribution of this tax represented 4.1% of GDP (and 3% in EA-18), after 2005 it reached a level lower than EA-18 levels (2.5%) and 1.1% in 2012.

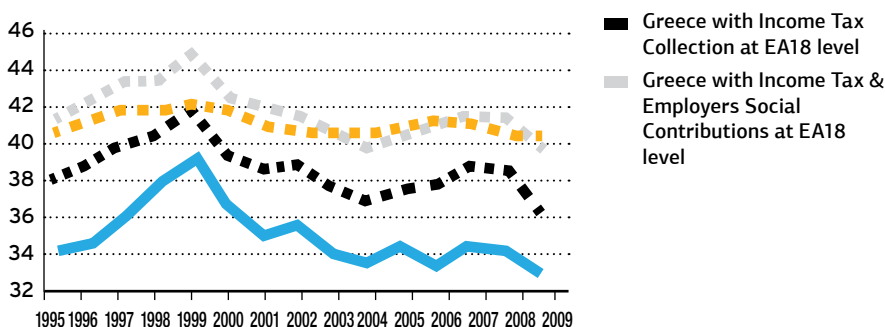
### 2. Illicit capital outflows: last but not least leak variable

The website LuxLeaks<sup>11</sup> provides information on nine Greek firms which benefited from “fiscal agreements” with Luxembourg. These are Babcock & Brown, BAWAG, Bluehouse, Coca Cola HBC, Damma Holdings, Eurobank, Macquarie Group, Olayan Investments Company Establishment and Weather Investments.

Illicit capital outflows are an even more radical way to evade taxes. To approximate their annual amounts, we used data from Global Financial Integrity<sup>12</sup>, a NGO which evaluates illicit outflows as the difference between the financial outflows from a country and the inflows received from that country by the rest of the world. As this methodology can only identify the most visible part of financial outflows, its results must be

FIGURE 1.5

### Comparative evolution of total collection of taxes and social security contributions





considered as a lower bound<sup>13</sup>. The detailed data available for Greece show a cumulated outflow of €200 billion between 2003 and 2009.

TABLE 1.2

### Illicit financial outflows (€ billion)

2003	2004	2005	2006	2007	2008	2009	2003-2009
41.2	31.8	0.0	33.0	53.1	2.8	40.5	202.5

SOURCE: GLOBAL FINANCIAL INTEGRITY<sup>14</sup>

To assess the impact of these illicit capital outflows, we assume a moderate tax rate of 15% (half the actual). The shortfall for government revenue is therefore €30 billion. With an appropriate legislation preventing illicit financial outflows, and fair taxation, the Greek public debt would have been (taking in account the interest payments) €40 billion lower in 2009.

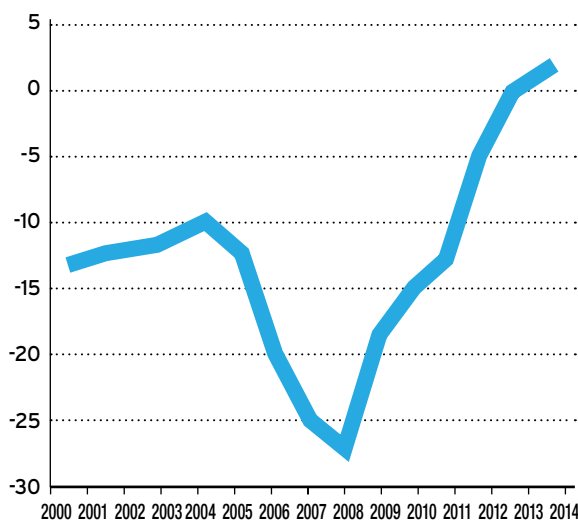
### 3. After the accession to the euro area (2001)

The economic growth after 2001 was mainly driven by a growth of consumption and led to an increase of the deficit of the trade balance. The main trade partners of Greece have benefited from the Greek economic expansion of that period by increasing their exports to Greece. These exports included military equipment as well as telecommunication equipment, some of which are related to corruption and financial scandals. The most well-known are the cases of submarines, Leopard tanks and Siemens procurement.

FIGURE 1.6

### Balance of Trade in Goods and Services

Balance of Trade in Goods and Services in € Billion

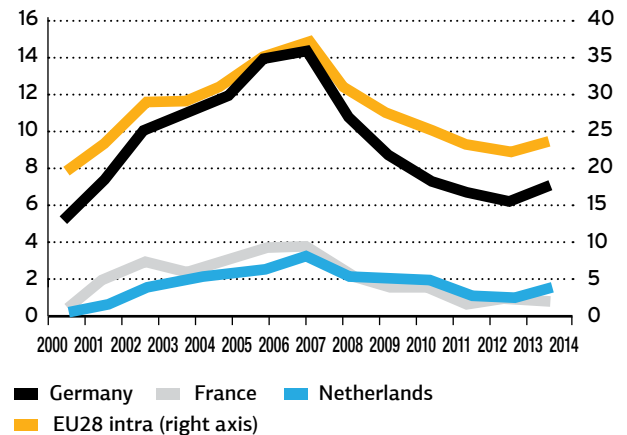


SOURCE: BANK OF GREECE – ANNUAL BALANCE OF GOODS AND ANNUAL BALANCE OF SERVICES

FIGURE 1.7

### Greek imports after 2002

Greek Imports of Goods in € Billion



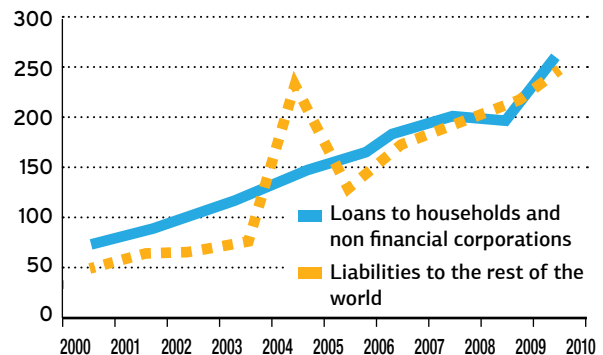
SOURCE: EUROSTAT - CN8

### 4. Low real interest rates provoked increased exposures of Greek and European banks to Greek private debt

As inflation in Greece was higher than in the Euro Area after 2001, the Greek public and private borrowers could offer attractive nominal interest rates to foreign financial creditors attracting an inflow of foreign capital to both private and public sector. Important European private banks, mainly French and German, have participated actively in the sharp increase of private loans in Greece, such as through the direct participation in Greek banks as in the case of Geniki and Emporiki. The risks of creating a bubble through such an excessive exposure were not adequately considered. This led to GDP growth rates being higher than in the rest of the Euro Area. During this period, the public debt to GDP ratio remained relatively stable while the private debt to GDP increased fairly rapidly from 74.1% (2001) to 129.1% (2009)<sup>15</sup>.

FIGURE 1.8

### The sharp increase of private loans given by Greek banks relied on international finance

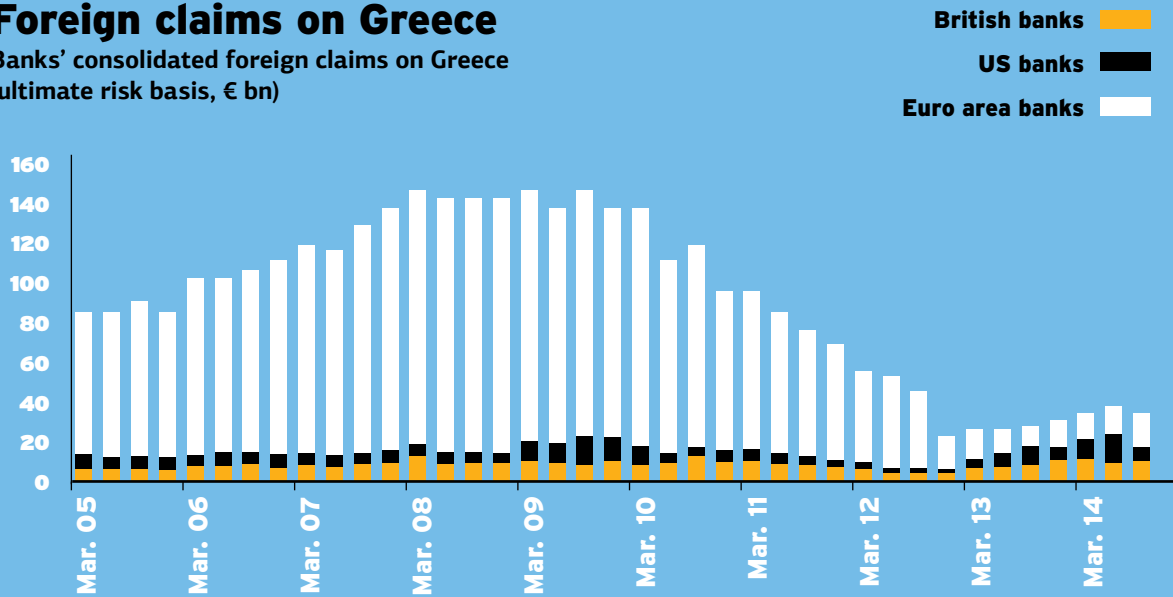


SOURCE: BANK OF GREECE – FINANCIAL ACCOUNTS

FIGURE 1.9

## Foreign claims on Greece

Banks' consolidated foreign claims on Greece (ultimate risk basis, € bn)



SOURCE: BIS; CONSOLIDATED ULTIMATE RISK BASIS. EA INCLUDES AT, BE, DE, ES, FR, IE, IT, NL

In 2009, with the beginning of the recession in the Greek economy, private Greek and foreign banks faced increasing risks from non-performing private loans. The foreign banks (essentially EU banks) had a high exposure to Greece (€140 billion), against public sector (45%), banks (16%) and the non-financial private sector (39%)<sup>6</sup>.

In 2009, Greek and foreign banks faced greater risks than Greece with regard to its sovereign debt<sup>17</sup>. The bailout of the Greek economy with public money without a restructuring of public debt was an advantageous solution for foreign banks: it offered them time to diminish, at a relatively low cost, their exposure at least to Greek public and banking sectors. It was also an advantageous solution for the Greek banks, which diminished their exposure to the public sector from €45.4 billion in the 2nd quarter of 2009 to €23.9 billion the 4th quarter of 2011<sup>18</sup>. George Papandreou's government

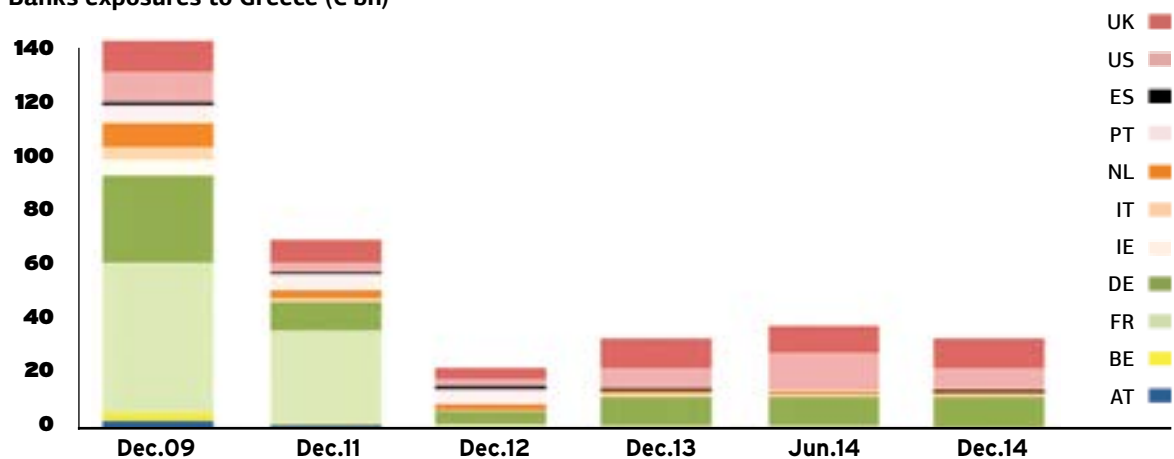
by emphasising and boosting the public deficit and debt in 2009 helped to present elements of a banking crisis as a sovereign debt crisis (See Chapter 2). Frequent announcements about a deteriorating situation provoked speculation in Greek sovereign CDS, thus increasing – past the point of affordability – the interest rates requested to roll-over expiring Greek bonds.

Throughout this report we demonstrate how the majority of the bailout loans given to Greece after 2010, under strict conditionality, have been used for the exclusive benefit of private banks, whether to reimburse their holdings of government bonds or for the recapitalisation of Greek banks. Far from the frequent assertions that the loans “assist” or “aid” the population or the state their purpose paints an altogether different picture; the private financial sector is the primary beneficiary from the Troika's loans.

FIGURE 1.10

## Foreign Banks' exposure to Greece

Banks exposures to Greece (€ bn)



SOURCE: BIS; CONSOLIDATED ULTIMATE RISK BASIS.



1. This concerns the SWAPS of Goldman Sachs affair and changes in the treatment of military purchases used to lower deficits and debt in order to enter the Eurozone.

2. This relates to discrepancies arising from illegalities in debts certified and later incorporated that led to an increase of the debt. Notable examples are the enterprise debts, hospital arrears, ambiguous treatment of Goldman Sachs's swaps and finally, operations leading to an underestimation of GDP.

3. Bank of Greece, 2014. Annual Report 2013. Available at: <http://goo.gl/tVICPO> [Accessed June 12, 2015].

4. "SIPRI Military Expenditure Database — [www.sipri.org](http://www.sipri.org)," accessed June 13, 2015, [http://www.sipri.org/research/armaments/milex/milex\\_database](http://www.sipri.org/research/armaments/milex/milex_database). <http://armstrade.sipri.org/armstrade/page/values.php>

5. *Ibid.*

6. For example, the defence of EU borders, NATO strategic plans (PATRIOT missiles and F-16) and NATO external operations in Libya, Somalia and Eastern Mediterranean, see Milakas, 2012. Debt and Military Spending. How They Sold Us "Trash" for "Gold"! OnAlert.gr. Available at: <http://goo.gl/DCrW4v> [Accessed June 12, 2015].

7. For example, more than 110.000 tax cases are pending in the courts and approximately 5% of the amounts of cases judged are ever recovered. Ministry of Finance of Greece, 2015. Statistical Data. Available at: <http://goo.gl/Y3rCu1> [Accessed June 12, 2015].

8. Kathimerini, 19.02.2015. Available at: <http://goo.gl/42r6iO> [Accessed June 2015 ]9 Calculation based on the difference between actual tax income and that which would have been received if the average Eurozone rates were applied. Eurostat COFOG – ESA-95.

10. *Op. Cit* 7.

11. ICIJ, 2015. Explore the Documents: Luxembourg Leaks Database. Available at: <http://goo.gl/r707T4> [Accessed June 12, 2015].

12. GFI, 2015. Global Financial Integrity. Available at: <http://goo.gl/djEv1n>.

13. Economist Intelligence Unit, 2010. Country Report: Greece; OECD, 2009. OECD Economic Surveys GREECE. Available at: <http://goo.gl/v23QuX> [Accessed June 12, 2015]; ELIAMEP, 2010. Economic Fact Sheet Greece 2009/10.

14. *Op. Cit.* 12.

15. OECD, 2015. OECD Statistics. Available at: <http://goo.gl/i4sQSY> [Accessed June 12, 2015].

16. OECD, 2015. OECD Statistics. Available at: <http://goo.gl/i4sQSY> [Accessed June 12, 2015].

17. Including BNP, Société Générale and Crédit Agricole for France (through its participation in Emporiki), Commerzbank, Baden Bank, Postbank and DZ Bank for Germany and NBG, Agricultural Bank, Piraeus, EFG Eurobank, Hellenic Postbank and Alpha for Greece.

18. Bank of Greece, 2015. Financial Accounts. Available at: <http://goo.gl/JW85TX> [Accessed June 12, 2015].

# Evolution of the Greek public debt during 2010-2015

## SUMMARY

**A**s the economy started to deteriorate in 2008, the Greek banking system was confronted with a solvency crisis. The main objective of the first loan agreement of May 2010, amounting to €110 billion, was to rescue banks with exposure to Greek public debt. The loan allowed for European and Greek banks to reduce their exposure to Greek bonds, transferring the risk to multilateral and bilateral creditors. As the economy shrank as a consequence of austerity measures, imposed in an attempt to service debt, the fiscal situation continued to deteriorate leading to an increase in the debt to GDP ratio.

The second agreement, which involved additional loans amounting to €130 billion and a haircut of 53.5% of the face value of Greek bonds, worsened the crisis. Among the losers of PSI were public entities which suffered losses of €16.2 billion. Most of these losses accrued to pension schemes, with losses of €14.5 billion. In stark contrast, Greek banks were fully compensated while private foreign creditors were partly compensated on the losses induced by the haircut through the use of “sweeteners”.

The management of the crisis was a failure as a result of the fact that it was approached as a sovereign debt crisis when reality it was a banking crisis.

### 1. From 2009 to May 2010

The snap elections on October 4 of 2009 signaled one of the biggest victories of PASOK during the last decades, gaining 43.92% of the votes. PASOK owed this victory to its pre-election promises. With the famous phrase “we have money”, proclaimed during a rally in rural Greece, the leader of PASOK won the elections. PASOK promised a new period of increased redistribution of wealth, tackling the social problems of the “generation of 700 euro” and protecting the most vulnerable. Nonetheless, just a few weeks after the elections, a series of substantial revisions of statistical data [see box] took place. As a result, the political climate changed sharply.

The Greek crisis arose from the fragile position of the Greek banking system, demonstrated through the high degree of leverage of the banking sector as a whole. The dependence on short term funding of the banking sector created significant liquidity issues, as well as solvency concerns, which eventually led in October of 2008 for the government of K. Karamanlis to provide an aid package of aid to the banks amounting to €28 billion. From this amount, €5 billion were provided to ensure compliance with banking capital requirements. The rest of the resources were promised in the form of guarantees. As it can be observed in figure 2.1, the first increase in the sovereign risk spread took place in this moment, long before G. Papandreou officially declared the exclusion from the markets of the country in the spring of 2010.

FIGURE 2.1

### Greece Government Bond 10Y Implied Yield on 10 Year Bonds



SOURCE: TRADING ECONOMICS.COM | PUBLIC DEBT MANAGEMENT AGENCY (POMA)

Between the end of 2009 and the beginning of 2010, the continuous announcements of new austerity measures (i.e. spending cuts) and downgrades of Greece by rating agencies marked the betrayal of the pre-election

# Falsification of public deficit and public debt

After the Parliamentary Elections of 2009 (4/10/2009), the newly elected government of G. Papandreou illegally revised and increased both the public deficit and debt for the period before the memorandum of 2010. As it will be shown, European authorities collaborated with the new government in the process of irregular and successive increases in the official statistics for the public deficit and debt.

## Hospital liabilities

The public deficit estimation of 2009 was increased through several revisions: the public deficit as a share of GDP increased from 11.9% in the first revision to 15.8% in the last.

One of the most choking falsification examples of the public deficit is related to the public hospitals' liabilities.

In Greece, as in the rest of the EU, suppliers traditionally provide public hospitals with pharmaceuticals and medical equipment. Due to the required invoice validation procedures required by the Court of Audit, these items are paid after the date of delivery. In September 2009, a large number of non-validated hospital liabilities for the years 2005-2008 was identified, even though there was not a proper estimation of their value. On the 2nd of October 2009, within the usual Eurostat procedures, the National Statistical Service of Greece (NSSG) sent to Eurostat the deficit and debt notification tables. Based on the hospital survey traditionally carried out by the NSSG, these included an estimate of the outstanding hospital liabilities of €2.3 billion. On a 21st of October notification, this amount was increased by €2.5 billion. Thus, total liabilities increased to €4.8 billion. The European authorities initially contested this new amount given the unusual circumstances under which it took place suspicious procedures:

"In the 21st October notification, an amount of €2.5 billion was added to the government deficit of 2008 on top of the €2.3 billion. This was done according to the Greek authorities under a direct instruction from the Ministry of Finance, in spite of the fact that the real total amount of hospital liabilities is still unknown, that there was no justification to impute this amount only in 2008 and not in previous years as well, and that the NSSG had voiced its dissent on the issue to the GAO [General Account Office] and to the MOF [Ministry of Finance]. This is to be considered as a wrong methodological decision taken by the GAO".<sup>1</sup>

However, in April 2010, based on the Greek government's "Technical Report on the Revision of hospital Liabilities" (3/2/2010),<sup>2</sup> Eurostat not only gave in to Greece's new government demands about the contested amount of €2.5 billion, but also included an additional €1.8 billion. Thus, the initial amount of €2.3 billion, according to the Notification Table of the 2nd of October 2009, was increased to €6.6 billion, despite the fact that the Court of Audit had only validated €1.2 billion out of the total. The remaining €5.4 billion of unproven hospital liabilities increased the public deficit of 2009 and that of previous years.

These statistical practices for the accounting of hospital liabilities clearly contravene the European Regulations ESA95

(see ESA95 par. 3.06, EC No. 2516/2000 article 2, Commission Reg. EC No. 995/2001) and the European Statistics Code of Practice, especially regarding the principles of independence of statistical measurements, statistical objectivity and reliability.

It is important to highlight that a month and a half after the illegal increase of the public deficit, the Ministry of Finance called the suppliers and asked them to accept a 30% discount on the liabilities for the 2005-2008 period. Thus, a large part of hospital liabilities was never paid to pharmaceutical suppliers by the Greek government, while the discount was never reflected in official statistics.<sup>3</sup>

## Public corporations

One of several falsification cases concerns 17 public corporations (DEKO). ELSTAT<sup>4</sup> and Eurostat, transferred the liabilities of the 17 DEKO from the Non-financial Corporations sector to the General Government sector in 2010.

This increased public debt in 2009 by €18.2 billion.

This group of corporations had been classified as Non-financial corporations after Eurostat had verified and approved their inclusion in this category. It is important to emphasize that there were no changes on this issue in the ESA95 methodology between 2000 and 2010.

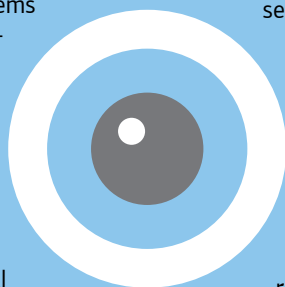
The reclassification took place without carrying out the required studies; it also took place overnight after the ELSTAT Board was dispersed. In this way the president of ELSTAT was able to introduce the changes without questions from the Board members. Thus, the role of the national experts was completely ignored, inducing a conflict with the ESA95 Regulations. Consequently, the institutionally established criteria for the classification of an economic unit into the General Government sector was infringed.<sup>5</sup>

## Goldman Sachs swaps

Another case of unsubstantiated increase of public debt in 2009 is related to the statistical treatment of swaps with Goldman Sachs. The one-person ELSTAT leadership increased the public debt by €21 billion. This amount was distributed ad hoc over the four year period between 2006 and 2009. This was a retroactive increase of Greece's public debt and was done in contradiction of EC Regulations.

In total, it is estimated that as a result of these technically unsupported adjustments, the budget deficit for 2009 was increased by an estimated 6 to 8 percentage points of GDP. Likewise, public debt was increased by a total of €28 billion.

We consider the falsification of statistical data as directly related to the dramatization of the budget and public debt situation. This was done in order to convince public opinion in Greece and Europe to support the bail-out of the Greek economy in 2010 with all its catastrophic conditionalities for the Greek population. The European parliaments voted on the "rescue" of Greece based on falsified statistical data. The banking crisis was underestimated by an overestimation of the public sector economic problems.



promises of the new government. This paved the way for the deterioration of the fiscal situation that allowed, under an “emergency situation”, to approve further injection of public resources to re-capitalise Greek banks. These measures quelled the expansion of the crisis to other European banks, effectively transferring the burden of the crisis to the Greek taxpayers.

The new austerity measures that the government of George Papandreou announced in February and March 2010 accelerated the deterioration of public finances. As a result, the yields of Greek bonds increased. The Greek government declared the loss of market access and officially requested, on April 23rd, the support of other Eurozone members and the IMF, following the decision of the European Summit on March 25. The situation was dramatized, although there were other alternatives to cover the financing gaps of the 2010 budget such as:

- Restructuring of the banking sector, in a similar vein to the measures taken in Scandinavian countries in the 90’s and Iceland in 2008.
- Increase domestic borrowing.
- Bilateral loans from non-euro countries.
- Buy-back of Greek bonds from secondary market.
- Accepting more of the €25 billion offered in the last auction of 2010 when the government sought to borrow.
- Other alternatives include the cessation of payments and cancellation of debt.

TABLE 2.1

### Issuance of government bonds 2009 - 2010

	AUCTION DATE	MATURITY DATE	CPN	AMOUNT AUCTIONED	AMOUNT OFFERED	AMOUNT ACCEPTED
10 YEAR BOND	11-Mar-09	19-Jul-09	6,00%	7.5	11.7	7.5
5 YEAR BOND	07-Apr-09	20-Aug-14	5,50%	7	10.5	7
3 YEAR BOND	05-May-09	20-Mar-12	4,30%	7.5	13.8	7.5
10 YEAR BOND	10-Jun-09	19-Jul-09	6,00%	8	20.6	8
5 YEAR BOND	02-Feb-10	20-Aug-15	6,10%	8	25	8
10 YEAR BOND	11-Mar-10	19-Jun-20	6,25%	5	16.145	5

SOURCE: PDMA, ISSUANCE CALENDAR & SYNDICATION AND AUCTION RESULTS.

## 2. The Memorandum of Understanding of May 2010

The first loan agreement of €110 billion (€80 billion from the Eurozone countries and €30 billion from the IMF) was accompanied by what the President of the ECB, Jean Claude Trichet, described as “strict condition-

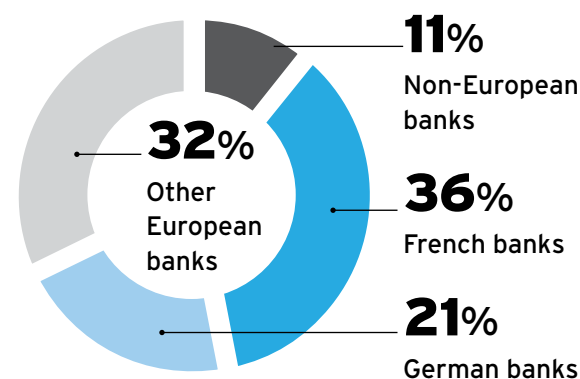
alities”<sup>6</sup>. The program focused, namely, on three “key challenges”: First, to restore confidence and fiscal sustainability through a front-loaded fiscal effort, second, to restore competitiveness through reforms like wage and benefit cuts, and third to safeguard financial sector stability.<sup>7</sup>

In reality, the aim of the first loan was to offer a safe emergency exit to private bondholders that wanted to reduce their exposure to Greek bonds, in a context in which the likelihood of nominal haircuts on the value of the bonds was significantly high.

FIGURE 2.2

### Consolidated BIS-reporting Bank Claims on Greece

end-2009, percent of total claims



SOURCE: BIS CONSOLIDATED BANK STATISTICS AND IMF STAFF ESTIMATES

The exposure of foreign banks to Greek public and private debt is recognized as the key reason behind the unwillingness of debtors to apply an early haircut on bonds: “The exposure of French banks to Greece was €60 billion, whereas Germany’s was €35 billion euro worth<sup>8</sup>; if they were obliged to take steep losses on their Greek papers – and on their other euro government bond holding as well – the financial system’s viability would come under a huge cloud”<sup>9</sup>. Hence, its possible to argue that the first

loan agreement and the MoU were designed to rescue the private creditors of the country, specially banks, and not Greece.

## 3. From May 2010 to February 2012

As a result of the refusal of creditors to agree on a haircut of Greek bonds, sovereign debt since the end of 2009 until the end of 2011 increased from €299 billion to €355 billion. This is an increase of 18,78%. More

importantly, there was a dramatic change in the profile of the debt. Due to the massive sell off of Greek bonds by European and Greek banks, public debt privately held was transferred to other Eurozone member states and the IMF. The share of bonds in the total Greek debt decreased from 91.1% in 2009 to 70.5% in 2011, while the share of loans increased from 5.2% in 2009 to 25.3% in 2011.<sup>10</sup>

In 2010 and 2011 the unprecedented recession (contraction of GDP of 4.9% and 7.2% respectively) led to a failure in the achievement of nearly all the fiscal targets (from tax revenues to the reduction of the budget deficit). In the meantime, the increasing popular anger against austerity led to a political crisis.

Starting from February 2011, the Troika began to ask for additional spending cuts and measures. This was a clear indication that the first Memorandum was quickly becoming out-dated. On October 26, 2011 the Council of the European Union decided a new program for Greece, amounting to €130 billion of additional loans. This represented an increase in the value of a previous offer presented in July 2011, which amounted to €109 billion. In the framework of a European Summit, the voluntary participation of private bondholders to take a approximately 50% haircut in the nominal value of the bonds was proposed. A modified version of this proposal, called PSI+ (Private Sector Involvement), materialized under the second loan agreement.

#### 4. The PSI

The progressive change in the composition of the debt paved the way for a restructuring process with the participation of private bondholders. The restructuring of Greek debt was completed on March 9 through the exchange of bonds with new ones bearing a haircut. The total amount of debt prior to the exchange was reduced in February 2012 by €106 billion. This decrease failed to reduce the debt burden of the country as a new loan agreement totalling €130 billion was settled. This amount included an initial allocation of €48 billion to be destined for bank recapitalization. It is clear then that this loan agreement was also designed to protect and minimize the losses of the financial sector. It is not a coincidence that the negotiations that took place during the winter of 2012, which led to a “happy end” for the creditors, were headed by officials of the Institute of International Finance and its then managing director and ex-banker Charles Dallara.

Among the biggest losers of PSI+ were public entities and small bondholders. With the adoption of two laws, the deposits of hundreds of public entities suffered losses of a total value of €16.2 billion. Most of the losses were imposed on pension schemes, totalling €14.5 billion (from a total of capital reserves of €21 billion). These losses had no impact on the total amount of outstanding debt because of their intergovernmental nature of this debt. Another group, which

registered significant losses, were the small bondholders. It is estimated that more than 15.000 families lost their life savings. This was a result of the fact that for many years sovereign bonds were promoted and sold as a zero-risk form of saving. The unequal distribution of losses opened a social wound, as highlighted by the 17 suicides that have been recorded to date among those who lost their savings<sup>11</sup>. The injustice is made evident if we compare the refusal of the PSI+ scheme to compensate this small group of bondholders, while at the time providing full compensation to Greek banks and the provision of “sweeteners” to foreign banks. The social impact of the PSI+ was augmented as a result of the draconian and punitive terms that accompanied it (cuts in salaries, privatizations, dismantling of the collective bargaining system, mass redundancies of public employees, etc). In addition, the issue of the new bonds under British and law (which makes its restructuring with a sovereign decision much more difficult) undermines sovereign rights to the benefit of creditors.

The neutral impact on Greek debt of the 2012 restructuring on debt sustainability became evident very soon. In the summer 2013 the same promoters of PSI+, who initially advocated for it as a permanent solution of the sovereign debt crisis, where issuing calls for a new restructuring.

#### 5. From 2012 to 2015

The restructuring of the Greek debt was completed in December 2012 when the ECB implemented a buy back of Greek bonds. This reduced the debt further. Nevertheless, this buy back at a price of 34 cents per euro allowed some hedge funds, like Third Point of Dan Loeb, to generate hefty profits in a short space of time making \$500 million<sup>12</sup>.

During the period of the “Greek rescue” (2010–2014) sovereign debt experienced its biggest increase and got out of control, increasing from €299.690 billion, 129.7% of GDP, to €317.94 billion, 177.1% of GDP. In the meantime the share of bonds decreased from 91.12% in 2011 to 20.69% in 2014 and the share of loans increased from 5.21% in 2009 to 73.06% in 2014. In particular, the EFSF’s loans constituted 68.4% of the overall Greek debt. The totally ineffective character, in an economic sense, of the two loan agreements was proved in 2015 during the discussions for a new restructuring of the debt. The need for restructuring is a result of the fact that “the two support programmes for Greece were a colossal bail-out of private creditors”<sup>13</sup>.

Setting aside the specific causes of the unsustainability of Greek debt, it is notable that a substantial increase in sovereign debt took place all over the world in the aftermath of the 2007 crisis. According to the IMF, general government debt between 2008 and 2014 increased from 65% of GDP to 79.8% globally, from 78.8% to 105.3% in advanced economies and from 68.6% to



94% of GDP in the Euro area<sup>14</sup>. Sovereign debt was a way for the private financial sector to pass the costs of the crisis of 2007 onto the public sectors across the world.

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6. "Loans are not transfers, and loans come at a cost. They come not only at a financial cost; they also come with strict conditionality. This conditionality needs to give assurance to lenders, not only that they will be repaid but also that the borrower will be able to stand on its own feet over a multi-year horizon. In the case of Greece, this will require courageous, recognisable and specific actions by the Greek government that will lastingly and credibly consolidate the public budget" ECB, 2010. Keynote speech at the 9th Munich Economic Summit. Available at: <https://www.ecb.europa.eu/press/key/date/2010/html/sp100429.en.html> [Accessed June 12, 2015].

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## CHAPTER 3

# Greek public debt by creditor in 2015

The institutions that created the Troika are the main creditors to Greece, and as a group they apply tremendous pressure to secure their repayment. This chapter lays out the basic set of relevant issues that the Committee wants to highlight looking at the main current creditors - the EU member states, the EFSF, the IMF, the ECB and private creditors. We present the contentious nature of these debts, delineating their key characteristics, which are further analysed in Chapter 8. The majority of the loans received from the bailouts were used to repay existing debts. Approximately 10% of the bailout programme was used to finance the budget, as shown in Table 3.1.

TABLE 3.1'

### Use of official funding, 2010 to 2015

	TOTAL	%
Official Funding Received	243.2	100.0%
Amortization (exc. Short term debt)	112.5	46.3%
Bank recapitalization	48.2	19.8%
PSI related costs	34.5	14.2%
Other	23.4	9.6%
Budget Balance	24.6	10.1%

TABLE 3.2

### Public debt of Greece by component, as of 30/04/15<sup>2</sup>

ITEM	MILLIONS OF EUROS	%
T-Bills	14,943.9	4.8%
Bonds	39,380.1	12.6%
Bonds held by European Central Banks (ANFA)	7,309.3	2.3%
Bonds held by ECB (SMP)	19,874.1	6.4%
Loans from Bank of Greece	4,265.0	1.4%
Special and bilateral foreign loans (EIB)	7,094.5	2.3%
Other Foreign Loans	5,081.0	1.6%
Loans from EFSF	130,909.1	41.9%
Bilateral loans from Eurozone member states	52,900.0	16.9%
Loans from IMF	20,634.6	6.6%
Short-term loans (REPOS)	10,286.9	3.3%
<b>TOTAL</b>	<b>312,678.5</b>	



## 1. Bilateral Loans

■ The pooled bilateral loans were set up in May 9 of 2010 and disbursed over six quarterly tranches. Total disbursements amounted to €52.9 billion<sup>3</sup>.

TABLE 3.3

### Composition of Bilateral Loans to Greece (millions euros)

Germany (KfW)	15,165.3
France	11,388.6
Italy	10,007.5
Spain	6,649.9
Netherlands	3,193.7
Belgium	1,942.5
Austria	1,555.0
Portugal	1,102.4
Finland	1,004.0
Ireland	347.4
Slovenia	243.5
Luxembourg	139.9
Cyprus	109.6
Malta	50.6
<b>TOTAL</b>	<b>52,899.9</b>

■ The bilateral loans are put into effect through the combination of the Intercreditor Agreement and the Loan Facility Agreement, as described in Chapter 4. It was declared that initiating these loans with a high interest rate would act as an “incentive to return to market-based financing as soon as feasible”<sup>4</sup>.

■ As a result of this policy choice €2,614 billion of interest payments were made to the member states by March 2012<sup>5</sup>. Set at the variable rate of 3-month Euribor plus 300 basis points extra charge for the first three years<sup>6</sup>, the original rates were onerous. With the Euribor rate peaking at 1.609% in August 2011<sup>7</sup> the interest on the bilateral loans reached over 4.6%. As some of the creditor countries’ borrowing costs were lower than the lending rate,<sup>8</sup> some lenders profited out of the loans. The gradual easing of the loans’ terms<sup>9</sup>, currently at Euribor + 50 basis points is an implicit admission that the original terms were usurious.

■ The loans were portrayed as if used to assist Greece in paying wages and pensions. Indicative of this portrayal is Eurogroup president Juncker’s statement that disbursements are used to recapitalize banks, pay wages, pensions and government suppliers.<sup>10</sup> This is however misleading. The bilateral loans were used primarily for debt repayment: between May 2010 and September 2011 86% of the loans were used solely for debt repayment.<sup>11</sup> The re-

mainder was not even used in its entirety for budget support, but rather to pay for the setting up of the Hellenic Financial Stability Fund.<sup>12</sup>

## 2. EFSF

■ The EFSF, based in Luxembourg, was created in 2010 to preserve financial stability in Europe<sup>13</sup>. Nonetheless, by creating additional debts for individual member states, the scheme deteriorated the economic situation for Europe as a whole and especially for Greece.

■ EFSF loans are financed through the issuance of funding instruments, which are backed by guarantees of euro-area member states. Guarantees were increased from €440.00 billion in 2010 to €779.78 billion in 2011<sup>14</sup>. By 2013, Portugal, Greece, Ireland and Cyprus had stepped out from the EFSF changing the guarantees of the EFSF to €724.47 billion, which remains the current commitment<sup>15</sup>. As the number of highly rated guarantors of the fund dwindles, as occurred after France’s downgrade, so too does the stability of the EFSF. Eventually the scheme was replaced by the ESM.

■ The EFSF disbursed €141.8 billion of which €10.9 was returned on the 27th February 2015, leaving €130.9 billion debt to Greece<sup>16</sup>. From the total disbursed amount, €108.2 billion (76.3%) was disbursed in 2012, €25.3 billion (17.8%) in 2013, and €8.3 billion (5.9%) in 2014. The repayment of these loans will stretch to 2054.

■ The interest rates of EFSF loans are calculated on the following basis: Greece pays the EFSF financing cost plus 10 basis points guarantee fee. For each loan disbursement, there is an additional loan disbursement fee of 50 basis points. The country finances EFSF activities, bearing all of its costs, *even if for whatever reason* the disbursement of the Pre-Funding Operations does not take place. This scheme has imposed significant costs for Greece<sup>17</sup> and the amount paid as ‘service fee’ between 2012 and 2014 totaled €740 million<sup>18</sup>. PSI-related debts, for a time, incurred interest, but since 2014 all EFSF interest payments are deferred until 2023.

■ Only a small share of the loans contributed to the government’s regular expenditure<sup>19</sup>. The bailout was disbursed mainly in EFSF securities: notes worth €34.6 billion subsidized the PSI, €11.3 billion notes were used in the ‘Debt buy back’ and €37.3 billion has been currently borrowed for the Greek banks.

■ The majority of the EFSF bailout was disbursed ‘in kind’, not in euros. Cashless operations constitute 65.4% of total EFSF loans<sup>20</sup>. As elaborated in Chapter 4, the EFSF facilitates an exchange of obligations, meaning that the loans are, on the whole, not designed to enter Greece, but rather be used directly, *inter alia*, for the repayment of debts.

## 3. IMF

■ The European Parliament and the IMF acknowledge that the IMF programme results were “uneven” and contained “notable failures”<sup>21</sup>. This is a gross underestimation of the extent of the deceit towards the Greek people.

■ Concrete negotiations surrounding the size and

type of the loan between the IMF and Greece had begun from March 2010<sup>22</sup>. First Deputy Managing Director, Lipsky, assured the Greek representative to the IMF that the Greek loan size would be decided by the Board on a political basis, rather than calculated according to the quota allowance<sup>23</sup>. The Stand-By Arrangement (SBA) loan was concluded at a record breaking amount of 3,212% of Greece's quota<sup>24</sup>.

■ The IMF knew from the outset that there was no historical precedent for such a scale of fiscal adjustment<sup>25</sup>, stating in March 2010 that the programme would result in "sharp contraction of demand, and an attendant deep recession, severely stretching the social fabric"<sup>26</sup>. As such, several members of the Board pointed to the programme's "immense" risks<sup>27</sup>.

■ Waivers of applicability for performance criteria were accepted by the IMF Board in seven out of the ten programme reviews<sup>28</sup> highlighting that ubiquitous observance of conditionality was not essential for continued provision of financing<sup>29</sup>, whilst also indicating intrusive and unreasonable conditions. The IMF insists on reforms despite "considerable social unrest" and "popular dissatisfaction with reforms"<sup>30</sup>.

■ The systematic bias and lack of transparency in the IMF's methodology for forecasting is evidenced by the IMF's Internal Evaluation Office, particularly in high profile cases and lending under exceptional access<sup>31</sup>. The original Debt Sustainability Analysis was positively skewed to the upside, utilising grossly unrealistic assumptions discussed in Chapter 5 and 6. IMF staff could not sign off that Greek debt was sustainable in the medium term to a high probability and as such did not qualify for exceptional access under the second criterion on debt sustainability so the Board necessitated an amendment to its policy during the same Board meeting that approved Greece's SBA<sup>32</sup>, a fact resented by several EDs<sup>33</sup>.

■ Despite overt admission that mid-term debt sustainability is lacking, programme approval rested on excessively onerous repayment burdens<sup>34</sup>. Over the past five years (May 2010 to 2015) over €3 billion has been paid in interest and charges<sup>35</sup>. The interest rate for the second programme is the basic rate of charge (currently SDR interest rate plus 100 basis points), plus a surcharge of 200 basis points on credit outstanding above 300% of the quota. This rises to 300 basis points when the amount outstanding three years after the programme began is over 300% of quota, and includes a 50 basis points service charge for each amount drawn.

As of end 2014 €23.9 billion is recorded as an outstanding debt to the IMF<sup>36</sup>; this is recorded as a promissory note issued by the Greek government, and kept at the Bank of Greece which acts as a fiscal agent for the Hellenic Republic vis-a-vis the IMF.

## 4. ECB

### ■ The ECB bought Greek bonds in the secondary market

In May 2010 the ECB established the Securities Markets Programme (SMP). Under the terms of this Decision, from May 2010 to September 2012, the ECB bought over €210 billion of public bonds issued by Italy, Spain, Ireland, Portugal and Greece on the secondary market<sup>37</sup>. The outstanding amount is €138,1 billion<sup>38</sup> in 29 May 2015, with €27 billion owed by Greece<sup>39</sup>.

### ■ The ECB is Greece's biggest creditor in the short and medium term

After the EFSF and the IMF, the ECB is Greece's third largest creditor, with Greece owing €27 billion in April 2015. However, no other creditor has so many claims on Greece until the end of the decade, not even the IMF. Greece has to pay €6.7 billion to the ECB and other central banks of the European System of Central Banks in 2015 and €23 billion over the next five years.

### ■ The ECB bought Greek debt on the secondary market in order to serve the interests of European private banks

This programme violates Article 123 of TFEU, which prohibits direct purchases of public debt by the ECB or other Central Banks. The ECB has used this mechanism at its discretion for undemocratic purposes interfering in the political sovereignty of European member states and acting against their Constitutions between May 2010 and July 2012, when it was substituted by the Outright Monetary Policy Program. This decision served the interests of the private financial sector, allowing the French and German banks to reduce exposure on their holdings of Greek bonds. The IMF is very clear about that: "A *delayed debt restructuring also provided a window for private creditors to reduce exposures and shift debt into official hands*"<sup>40</sup>. Moreover, the purchase by the ECB of significant quantities of bonds on the secondary market increased the price of these financial instruments. This allowed the bondholders to reduce their losses the moment they sold them. We should also note that between May 2010 and September 2012, the ECB decided to freeze the SMP several times, which created market stress and had an

TABLE 3.4

## Summary of IMF Disbursements and Payments (Billions of Euros), end 2014

TYPE	DATE OF ARRANGEMENT	EXPIRATION DATE	AMOUNT DRAWN	PRINCIPAL REPAID
SBA	9/05/2010	14/03/2012	20.1	9.1
EFF	15/03/2012	14/03/2016	11.9	0

SOURCE: IMF, FINANCIAL STATISTICS, USING THE PROGRAMME EXCHANGE RATE AS DEFINED IN EACH TECHNICAL MOU.

influence on different political decisions, such as the increase in the EFSF lending capacity to €440 billion. Such political influence clearly falls beyond the mandate given to the ECB and it represents a questionable breach of its function.

#### ■ The ECB bought Greek debt with conditionalities

Contrary to the statutes necessitating the ECB to act independently, the ECB's interventions in the secondary market was predicated on political decisions regarding beneficiary member states, particularly with regard to the reduction of their public deficit. The ECB decision of 14 May 2010 creating the SMP states: "The Governing Council will decide on the scope of the interventions. The Governing Council has taken note of the statement of the euro area Member State governments that they 'will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures' and the precise additional commitments taken by some euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances. (...) As part of the Eurosystem's single monetary policy, the outright purchase of eligible marketable debt instruments by Eurosystem central banks under the programme should be implemented in accordance with the terms of this Decision"<sup>41</sup>.

On 31st May 2010, Jean-Claude Trichet, President of the ECB, stated the ECB's response to the recent tensions in financial markets: "It is crucial that governments implement rigorously the measures needed to ensure fiscal sustainability. It is in the context of these commitments only that we have embarked on an intervention programme in the securities markets. (...) The Securities Market Programme is an extraordinary action, which was undertaken in the situation of severe tensions in financial markets. I would like to stress that the rigorous application of the adjustment programmes by governments is essential to guarantee the progressive return to a more normal functioning of financial markets"<sup>42</sup>.

#### ■ The ECB profits from Greek debt

The ECB purchased Greek bonds under the SMP cheaper than their nominal value on the secondary market but asked for full reimbursement (nominal value and interest payment). One estimation<sup>43</sup> cites that the ECB spent €40 billion to acquire the estimated face value of €55 billion, which if held to maturity, the ECB would reap the full difference between the price paid and the repayment plus interest. The ECB has already received hefty interest from Greece, as the rates on the Greek bonds it holds are high.

Although the ECB holds far less Greek debt than it does from Italy or Spain, Greece pays much more interest to the ECB. Over the course of 2014, the Greek Government paid €298 in interest on ECB loans, which represents 40% percent of the €728 million income that the ECB received from the total interest paid by the five countries in the SMP program. This is despite the fact that the Greek debt with the ECB represents only 12% of the total<sup>44</sup>.

TABLE 3.5

### Debt due to the ECB by countries under the SMP (February 2015)<sup>45</sup>

COUNTRIES	PERCENTAGE OF THE TOTAL
Italy	52%
Spain	20%
Greece	12%
Portugal	10%
Ireland	6%

After the public revelation that the ECB and the National Central Banks (NCBs) made profits on the SMP program, the Euro-area governments agreed in November 2012 to transfer an amount equal to any profit on SMP holdings of the country's debt as long as it complies with the conditions of its surveillance program<sup>46</sup>. The ECB owes Greece almost €2 billion from the profits the ECB has made<sup>47</sup>. Mario Draghi said "the income generated by Greek government bonds acquired by the ECB under the SMP is part of the ECB's net profit. The ECB's net profit is distributed to all NCBs of the euro area according to their shares in the ECB capital key, including the NCBs of the countries that are subject to an EU-IMF financial assistance programme (...) not only the ECB but also all the euro area NCBs have purchased bonds under the SMP in the past, which means that income on Greek government bonds has been accrued by both the ECB and the NCBs. Furthermore, I would like to stress that (i) the euro area NCBs cannot distribute specific ("earmarked") income to their shareholders before having calculated the overall profit (or loss) in a financial year; and (ii) they can only distribute their profits to their shareholders (including the respective governments), and not directly to a Member State that is not a shareholder"<sup>48</sup>.

#### ■ The ECB did not participate in the debt restructuring of 2012

In February 2012 the restructuring of Greek debt involved a reduction of 53.5% of Greek sovereign securities held by private creditors. However the ECB refused to participate in the debt restructuring, whether through canceling part of the debt stock, postponing its maturity or reducing the interest rates. This was justified under the premise of "independence from any government"<sup>49</sup>.

## 5. Private creditors

"The protection of bondholders was seen as an EU necessity in the interests of financial stability"<sup>50</sup>; The Budgets Committee in the European Parliament acknowledges "we have in fact transferred the wild card from private banks to governments"<sup>51</sup>.

#### ■ Domestic financial sector

Despite the widely held affirmations that the Greek financial sector was solvent, the problems in the Greek financial sector were significant. Mission chief Poul Thomsen underscored that "financial sector stress" in the Greek economy is a key problem that determined market access loss for the sovereign<sup>52</sup>.

TABLE 6

## State Aid to the Financial Sector, billion euro

	2008	2009	2010	2011	2012-2014	TOTAL
Recapitalisation measures		3.77		2.53	37.3	<b>43.6</b>
Guarantees		1.5	26.68	56.3		<b>84.48</b>
Liquidity measures other than guarantees	0.47	4.26	6.9	6.64		<b>18.27</b>
<b>TOTAL</b>	<b>0.47</b>	<b>9.53</b>	<b>33.58</b>	<b>65.47</b>	<b>37.3</b>	<b>146.35</b>

SOURCE: DG COMPETITION<sup>5</sup>

### ■ Foreign banks

The *strictly confidential* document detailing the IMF Board meeting of Greece's SBA mentions that "Dutch, French and German chairs conveyed to the Board the commitments of their commercial banks to support Greece and broadly maintain their exposures"<sup>54</sup>. Instead, the foreign banks disrespected their commitment, and as detailed in Chapter 4 of this report, the bailout mechanisms facilitated the transfer of debt ownership from private banks to the official sector. The European Parliament reaffirms that the bailouts shielded the "banking sector from losses by transferring large amounts of programme country sovereign debt from the balance-sheet of the private sector to that of the public sector"<sup>55</sup>.

### ■ PSI Holdouts

Out of the eligible €205.5 billion, the final participation was €199.2 billion. The Troika's bailout loans, far from being utilized to help pay for wages and pensions are instead used to reward the holdouts, many of which are known vulture funds, by repaying them in full.<sup>56</sup> From May 15, 2012 until the end 2015, €3.615 billion has been repaid at an average of 4.3% interest.

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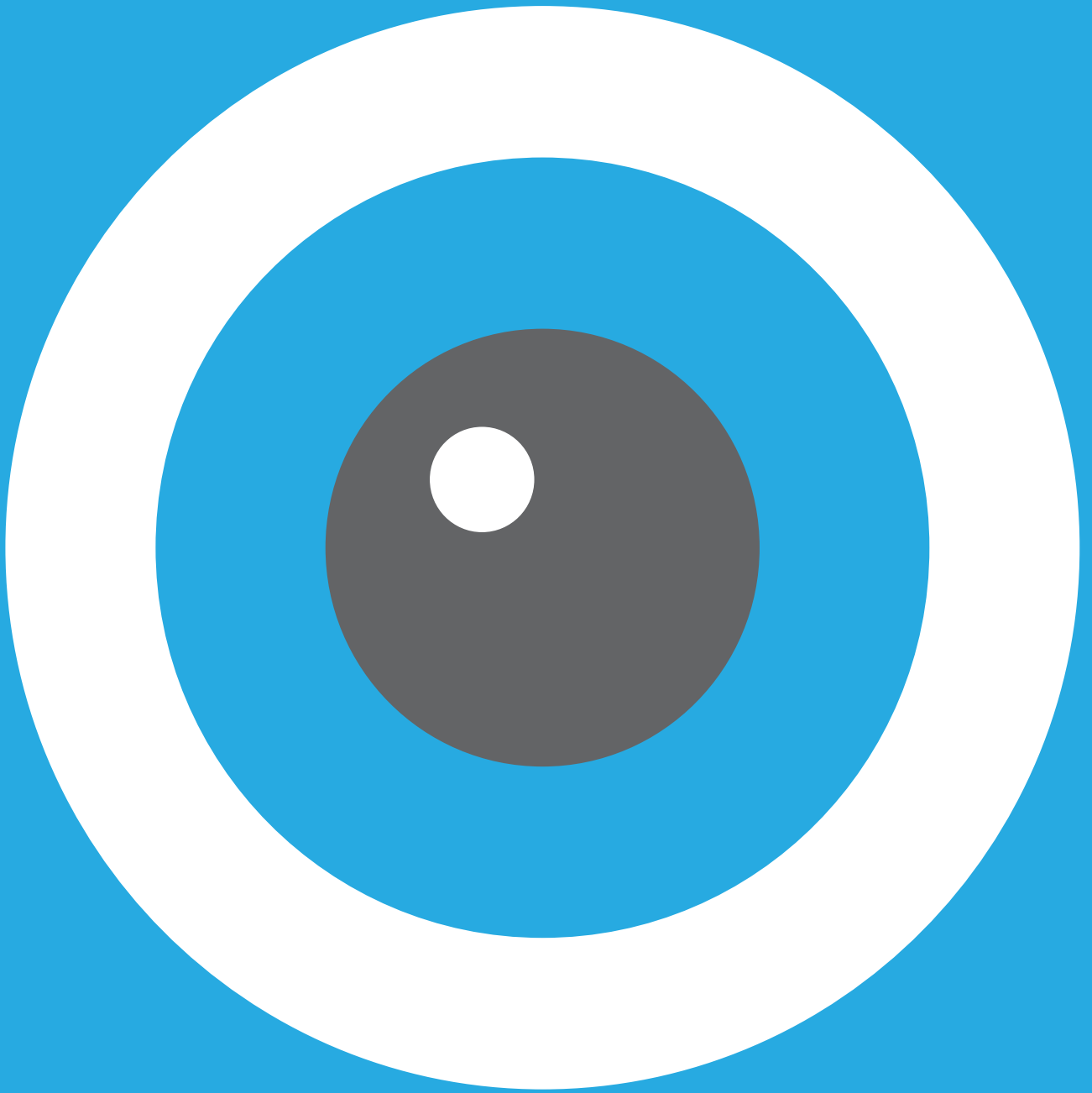
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# Debt Mechanism in Greece

The set of debt agreements implemented in Greece since May 2010 were organized in the context of a joint<sup>1</sup> EU Commission and ECB technical mission, which drew on the IMF's expertise<sup>2</sup> - called the Troika. The justification for these agreements was to address the debt crisis, by making financial support conditional on the implementation of the Memorandums' measures.

In reality, they provided the tools for the generation of a great amount of debts towards bilateral creditors and EFSF, deepening the debt crisis. The Memorandum's measures destructively affected Greece's economy and peoples' life.

The analysis of the complex texts of the agreements reveal the use of mechanisms that, rather than support Greece, allowed for the majority of borrowed funds to be transferred to financial institutions, whilst at the same time, also accelerated the privatization process, through the use of financial instruments. Greece had to pay all manner of abusive costs for this process.

What follows is a summary description of some mechanisms identified in the analyzed agreements.

## 1. MECHANISM under the Loan Facility Agreement and Intercreditor Agreement

The 2010 set of agreements<sup>3</sup> generated pooled bilateral debts by creating a mechanism that provided the transformation of existing debt securities into bilateral loans.

### 1.1. Mechanism

The mechanism applied was hidden in an Annex, wherein another agreement exists: the "Assignment Agreement". It allows, through completion of a simple form<sup>4</sup>, the transformation of bondholders, i.e. an "Existing Lender" into a new Party to the agreement, a "New Lender", called a "Committed Lender".

The mechanism utilizes an account<sup>5</sup> opened in the ECB by the Commission, created for processing

all payments on behalf of the Parties, KfW and the borrower. Prior to the balancing date, all amounts received on the ECB account are distributed to "Committed Lenders"<sup>6</sup>. Thus, the disbursements made by the bilateral creditors into the ECB account would go straight to the "Committed Lenders", i.e., the bondholders of existing Greek debt obligations.

### 1.2 Result

The bilateral debt did not benefit Greece, but the banks that held far-below par value existing debt securities. The table below evidences the transformation of ownership<sup>7</sup>:

TABLE 4.1

## Gross External Debt Bank of Greece, Statistics Department

Billions of euros, end of reporting period  
- in market value

GENERAL GOVERNMENT <sup>5</sup>	Q1 2010	Q4 2014
<b>Long-term</b>		
Debt securities	200.006	<b>36.109</b>
Loans	12.915	<b>226.784</b>

## 2. MECHANISMS under the Master Financial Assistance Facility Agreement MFAFA

In 2012, another set of agreements<sup>8</sup> was implemented in Greece, which resulted in the recapitalization of Greek banks, as well as the purchase, exchange and recycling of debt instruments through the PSI and the Debt Buy Back. They generated a large amount of debt with EFSF, other obligations and a great amount of costs.

The MFAFA is connected to the Memorandum of Understanding<sup>9</sup> and covers multiple agreements with the following objectives<sup>10</sup>:



TABLE 4.2

## Summary of Transactions mentioned in the Memorandum

TRANSACTIONS MENTIONED IN THE MEMORANDUM	EFSF FACILITIES	AMOUNT
Voluntary Liability Management Transaction	PSI LM Facility	up to EUR <b>30,000,000,000</b>
Buy-Back Offer	ECB Credit Enhancement Facility	of EUR <b>35,000,000,000</b>
Bond Interest Transaction	Bond Interest Facility	of EUR <b>5,500,000,000</b>
Bank Recapitalization Transaction	Existing Bank Recapitalization Facility	up to EUR <b>23,000,000,000</b>

### 2.1 MECHANISM 1:

#### Applied to the programme Recapitalization of Financial Institutions

The information in the HFSF Annual Report 2012 and 2013 and the analysis of the MFAFA agreement reveals this mechanism.

1. EFSF issues “Funding Instruments” of different types<sup>11</sup>, such as Floating-Rate Notes (FRN EU000A-1GOAL3) settled as “Pass-through”<sup>12</sup> negotiated on the Luxembourg Bourse<sup>13</sup>.

2. EFSF delivers<sup>14</sup> the proceeds of the disbursement to the Hellenic Fund Stability Facility (HFSF), according to the Acceptance Notice<sup>15</sup> mentioned in the HFSF Annual Report.

3. Greek private banks issue GREEK BANK INSTRUMENTS<sup>16</sup> and HFSF acquires them, using the procedures of the EFSF facility.

4. Bank of Greece registers the EFSF bonds (related to the FRN obligations), thus generating a debt obligation reflected as an EFSF Loan.

5. HFSF creates securities<sup>17</sup> over the GREEK BANK INSTRUMENTS, and the Bank of Greece will pay interest in favor of EFSF, in addition to fees, costs, expenses or taxes.

#### 2.1.1. Result

The operation exclusively benefits the Greek private banks, while an obligation to Greece reflected as a new Loan with EFSF is generated. HFSF generates other obligations by creating securities over the GREEK BANK INSTRUMENTS.

### 2.2 MECHANISM 2:

#### Applied to the PSI programme

The PSI’s purpose<sup>18</sup> is a voluntary exchange of debt instruments related to existing “Greek domestic debt obligations” and “other Greek Debt obligations”.

#### The mechanism involves:

1. EFSF finances the PSI up to €30 billion by issuing EFSF DEBT SECURITIES<sup>19</sup>. It may be funded by risky market operations such as currency and hedge arrangements.

2. Wilmington Trust (London) Limited<sup>20</sup> is the Bond Trustee and establishes the terms under which Greece will issue sovereign bonds named NEW GREEK BONDS<sup>21</sup> up to €70 billion that co-finances the operation.

3. PSI allows for re-finance, renewal and roll over<sup>22</sup> operations, including of the instruments that finance the operation.

4. Interest<sup>23</sup> accrued under certain outstanding sovereign bonds issued or guaranteed by Greece was exchanged by NEW GREEK BONDS.

#### 2.2.1 Result

The analyzed mechanisms show that PSI represents a great damage for Greece, instead of the announced haircut that hit mostly small investors, as explained in Chapter 2.

The PSI generated a large amount of debt obligations towards the EFSF, and provided the creation of the NEW GREEK BONDS that benefit international investors.

#### The PSI also allowed:

■ the transformation of interests and “other” un-specific obligations into debt with EFSF;

■ the use of public debt to finance risky market operations, with all costs and losses borne by Greece;

■ the introduction of an expanding automatic course for EFSF debts, through roll over, re-financing, and renewing operations of the same previous operations.

### 2.3. MECHANISM 3: Applied to the Debt Buy-Back Operation programme

The Debt Buy-Back Operation (DBB)<sup>24</sup> was meant to buy back existing debt instruments issued or guaranteed by Greece, specifically destined to buy the NEW GREEK BONDS issued in the context of the PSI operation<sup>25</sup>. The DBB is connected to another agreement the ECB Credit Enhancement Facility Agreement, whose purpose is to permit Greece to finance<sup>26</sup> the acquisition of EFSF Debt Securities needed for the purpose of the Buy-Back Offer.

#### The mechanism operates as:

1. A purchase offer is prepared according to prices specified<sup>27</sup> by holders of NEW GREEK BONDS.

2. ECB<sup>28</sup> notifies EFSF about the existing NEW GREEK BONDS that will be bought back.

3. EFSF delivers<sup>29</sup> EFSF DEBT SECURITIES drawn to finance Debt Buy-Back Operations.

4. ECB receives the EFSF DEBT SECURITIES<sup>30</sup> and uses them for the purpose of effecting settlement un-

der such Buy-Back Offer by ECB as Greece's Agent<sup>31</sup>.

5. Greece will keep the NEW GREEK BONDS repurchased until maturity or cancel them<sup>32</sup>.

6. Greece records a debt with EFSF.

### 2.3.1 Result

The problematic NEW GREEK BONDS issued in the context of the PSI programme were recycled and exchanged into a new obligation for Greece, reflected as Loans with EFSF.

## 3. Acceleration of the privatisation process

The ownership of strategic assets and profitable public enterprises has always been the prime objective of the elite private sector. Such objective has been satisfied by the debt system, which functions as the justification to oblige the selling out of State properties to pay debts.

MFAFA introduced the issuing of financial instruments called SECURITISATION NOTES, which allow not only for the acceleration of the privatization process, but also the direct use of those notes to pay debts owed to EFSF.

### The mechanism involves:

1. Private Special purpose Companies or Funds issuing SECURITISATION NOTES<sup>33</sup>.

2. SECURITISATION NOTES are structured by or on behalf of Greece or the Greek privatization agency – HRADF<sup>34</sup> - which holds:

■ shares in state owned companies which will be privatized;

■ land and buildings, natural gas storage rights, economic rights, voting rights or other assets or rights which will be privatized;

■ the right to proceeds of privatization transactions whose rights have been transferred to such company by Greece.

3. SECURITISATION NOTES facilitate the financing of the Privatization process through the Hellenic Republic Asset Development Fund - HRADF.

4. Greece may use SECURITISATION NOTES to pay EFSF Loans<sup>35</sup>. If Greece pays the debt to EFSF in cash, it will use privatization proceeds, as specified in the *Medium Term Fiscal Strategy Framework*, imposed by the IMF, the European Commission and the ECB. The document explicitly states: “the net revenue generated will be reimbursed to Treasury for debt reduction”.

### 3.1 Result:

The use of SECURITISATION NOTES accelerated the privatization process.

Greece's State Assets are transformed into a payment method for EFSF.

## 4. Conclusion

The analyzed mechanisms show that the set of agreements did not support Greece, but served the interests of the private financial sector.

The agreements generated a current outstanding debt of €183.9 billion towards bilateral creditors and EFSF, besides other liabilities and abusive costs. They also provided a solid tool to accelerate the privatiza-

tion process, and to enable the transformation of public assets as means for debt payments.

The agreements contain abusive clauses, such as<sup>36</sup>: “provisions which are fully or in part invalid, illegal or unenforceable shall be interpreted and thus implemented according to the spirit and purpose of this Agreement and the Facility Specific Terms”, and others, as further analyzed in Chapter 7.

All agreements were subject to compliance with the Memorandums which had devastating consequences.

The result is a tremendous damage to Greece and the population. Perhaps this is no surprise; the agreement mandated the use of Cleary, Gottlieb Steen & Hamilton<sup>37</sup> as a private legal advisor<sup>38</sup>. This firm is known in Latin America for its advice on the transformation of odious and lapsed external debt into new bonds under the “Brady Plan”. This represented a disaster for many Latin American countries, as proven during the Official Debt Audit in Ecuador (CAIC<sup>39</sup>) and the Parliamentarian Investigation Commission in Brazil (CPI<sup>40</sup>).

These primary findings demonstrate the importance of further investigations and audit procedures.

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Article 2 (2) and Article 1, Definitions “Invitation”.

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# The conditionalities against sustainability

## SUMMARY

**T**he outcome of the Memoranda has been a deep economic recession, coupled with a terrible social regression. Reality did not confirm the economic projections made by the IMF in 2010. Instead of a quasi-stagnation (-1.5%), between 2009-2014 GDP declined by 22%.

- The “rescue programmes” were based on patently wrong assumptions and its unsustainability was predictable. However, the main goals were the rescue of private creditors and the forced imposition of neo-liberal reforms in Greece.

- The conditionalities have been counter-productive in terms of their aims regarding debt sustainability, and simultaneously engineered dramatic changes in society. Economic performance has deteriorated, competitiveness has not been restored, and the debt-to-GDP ratio increased.

- The current scenarios of the IMF and the EC are still based on the same unrealistic assumptions. These assumptions greatly hinder the future growth of the country and, especially, its ability to engage in developmental and ecological transition.

- These detrimental impacts (on GDP, investment, labour productivity, output/capital ratio and employment) amount to a radical change of economic circumstances. An ecologically and socially sustainable economic development is incompatible with the existing austerity policies. For this reason, the Greek public debt can be considered as totally unsustainable at present.

Greece has been implementing the so-called structural reforms (in labour and product markets, pensions, health) along with the MoUs, as the OECD points out: “Since 2009-10, Greece has the highest OECD rate of responsiveness to structural reforms”<sup>1</sup>.

In its June 2013 evaluation, the IMF congratulates Greece for its pension reform as being “one of the main achievements of the program”<sup>2</sup>. The outcome of these policies has been a deep economic recession, coupled with a terrible social regression, as documented in Chapter 6.

### 1. When economic dogmatism meets political will

In May 2010, the report from the IMF on the Request for Stand-By Arrangement<sup>3</sup> made projections associated to the programme of fiscal consolidation. GDP was supposed to decrease by only 1.5% between 2009 and 2014 (-4.0% in 2010, -2.6% in 2011, +1.1% in 2012 and +2.1% in 2013 and 2014). In reality, GDP declined by 22% in this period.

This substantial divergence was perfectly predictable, even inside the IMF. Many executive directors expressed their deep scepticism on these “overly benign” economic projections at the board meeting on 9th May 2010<sup>4</sup>. They raised “considerable doubts about the feasibility of the program”, which could prove to be “ill-conceived and ultimately unsustainable”: “It is very likely that Greece might end up worse off after implementing this program” which is only “a bailout of Greece’s private-sector bondholders, mainly European financial institutions”.

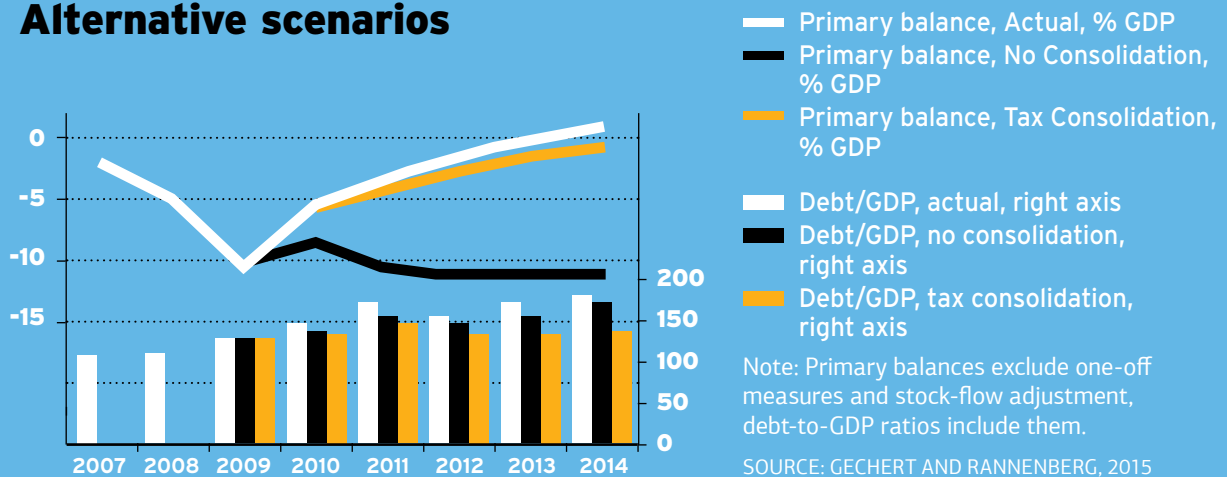
The final decision was nevertheless pushed forward by the US and most European directors arguing that “the *striking thing* is that the [Greek] private sector is fully behind the program” and “debt restructuring has been ruled out by the Greek authorities themselves”.

This clearly assumed decision relied on the *ad hoc* theory of “expansionary fiscal consolidation”<sup>5</sup> which was summarized a little later by the President of the ECB: “It is an error to think that fiscal austerity is a threat to growth and job creation”<sup>6</sup>.

As early as October 2010, the IMF becomes more cautious and discovers that “fiscal consolidation typically has a contractionary effect on output”<sup>7</sup>. In 2011 the IMF’s Chief Economist, Oliver Blanchard admitted that austerity is bad for growth<sup>8</sup> and formalised this in the 2013 admission that “fiscal multipliers were substantially higher than implicitly assumed by forecasters”<sup>9</sup>. Given that access to Fund resources is designed to enable countries to “correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity”<sup>10</sup>

FIGURE 5.1

## Alternative scenarios



the IMF operations in Greece clearly and intentionally breached the Fund's objectives.

The outcome is a systematic underestimation of the recessionary effects of the adjustment program. In 2010, the entire first programme even assumed renewed market access from 2012 and the end of financing by the 'Troika' as soon as 2013<sup>11</sup>.

Another "mistake" admitted by the IMF was that "ex ante debt restructuring was not attempted" although "one way to make the debt outlook more sustainable would have been to attempt to restructure the debt from the beginning". Instead, "a delayed debt restructuring also provided a window for private creditors to reduce exposures and shift debt into official hands"<sup>12</sup>.

### 2. A general deterioration of economic performance

The austerity policies had a dramatic effect on investment: the volume of gross capital formation fell by 65% in 2014 compared to 2008 and the labour productivity by 7%<sup>13</sup>. The latter is the result of a decrease in capacity utilisation rate which is reflected in the growth of the fixed capital to GDP ratio, from 3.6 in 2007 to 4.9 in 2013 and 4.8 in 2014. In the manufacturing sector, the capacity utilisation rate decreased from 73.5% in 2006-2010 to 65% in 2013 and 67.7% in 2014<sup>14</sup>. The increase in the fixed capital to GDP ratio also explains the fall of profitability, which has been much more important, since 2007, in Greece than in the euro area, despite the substantial growth of profit margins.

The adjustment policies greatly hinder the future growth of the country and its ability to engage in development and ecological transition. The consequences of such policies are serious, not only for the present, but also for the future of Greece.

### 3. Competitiveness has not been restored

The trade balance is almost zero in 2014. But this is not due to the success of adjustment policies. This rebalancing has been achieved by a decrease in im-

ports, which is itself the result of the recession. The internal devaluation was meant to restore competitiveness<sup>15</sup>, but wage cuts were not passed on to export prices: since 2008, unit labour costs have fallen by 24% compared to the trade partners of Greece. But export prices remained flat and export profit margins increased by 36% (relative to competitors). The EC itself has highlighted this phenomenon: "profit margins increased – particularly in tradable industries – thus absorbing part of the reduction in unit labour costs"<sup>16</sup>.

### 4. The design of the conditionalities increased the debt to GDP ratio

Calculations by the Hans Boeckler Foundation in Germany show that without austerity the Greek economy would only have stagnated rather than lose 25% of its GDP<sup>17</sup>. Consequently, in the absence of austerity, the 2014 debt to GDP ratio would actually be 8.1 percentage points lower (see Figure 5.1). Furthermore, had only tax increases been implemented, without spending cuts, the 2014 estimated debt to GDP ratio would be 37.1 percentage points below its actual level.

The implementation of fiscal and wage austerity in Greece, which already lacks structural competitiveness, produced prolonged recession and unemployment with adverse feedback effects on the financial fragility of the government<sup>18</sup>.

A New Deal Plan for Greece<sup>19</sup>, based on an EU-funded transfer of €19.8 billion, which could be used to finance a direct job creation programme of at least 300,000 jobs for unemployed workers<sup>20</sup>, combined with a moratorium on interest payments to public sector institutions, would have been significantly more successful in terms of growth, employment, and debt to GDP ratio.

### 5. The humanitarian damage of conditionalities made debt economically more unsustainable

As a result of the changes in minimum wages, collective bargaining processes, public wages, and the rise in unemployment, real wages were 17.2% lower in



TABLE 5.1

## Effects of the actual fall in the wage share in Greece on growth, tax revenues, debt and public debt/GDP

	Wage Share (%)*	Estimated loss in growth in GDP (constant prices, %)**	Estimated loss in nominal GDP, bn€**	Actual current tax burden as a ratio to GDP (%)*	Loss in tax revenue bn€**	Implicit interest rate (%)*	Additional interest payments on additional borrowing, bn€**	Additional public debt, bn€**	Estimated cumulative change in public debt/GDP (%) due to the additional debt due to the fall in wage share**
	1	2	3	4	5 (3*4/100)	6	7 (3 in previous year*6/100)	8 (5+7)	9
2010	60.090								
2011	59.828	-0.242	-0.552	35.526	-0.196			0.196	0.444
2012	57.697	-1.967	-4.088	37.065	-1.515	2.737	0.005	1.521	3.833
2013	55.078	-2.418	-4.590	36.821	-1.690	2.386	0.036	1.726	7.798

\*Actual data supplied by AMECO European Commission DG ECFIN.

\*\* Own calculations based on estimations by Onaran and Obst 2015, based on the methodology in Onaran and Galanis 2012.

2014 compared to 2009. The share of wages in national income has fallen from 60.1% in 2010 to 55.1% in 2013 - a major fall of 5% points in only three years. A fall in the wage share has crucial effects on growth, and hence tax revenues, public borrowing, public debt/GDP ratio, and thereby the sustainability of debt.

Using the methodology developed in a report for the ILO<sup>21</sup>, we estimate the effects of a 1% fall in the wage share on consumption, private investment, domestic prices, export prices, exports, and imports in Greece<sup>22</sup>. A 1% fall in the wage share leads to a fall in GDP by 0.92%. Using this finding, we estimate the loss in tax revenues, and the rise in interest payments and public debt as a consequence of the fall in the wage share in Greece. As can be seen in Table 5.1 below, our estimates show that the fall in the wage share has led to a 7.80% increase in the public debt/GDP ratio. The fall in wages alone explains more than a quarter (27%) of the rise in the public debt/GDP in this period.

The policy package attached to the MoUs has not only increased inequality, but also contributed to lower GDP as well as higher public borrowing, and a higher public debt/GDP. This has made the Greece's debt more unsustainable. The conditionalities of the MoUs have been counterproductive in terms of their aims regarding debt sustainability, whilst simultaneously engineering dramatic changes in the society.

### 6. The current scenarios of the IMF and the EC are still based on unrealistic assumptions

The current baseline scenarios of the IMF and the European Commission<sup>23</sup> unfortunately only replicate their past aberrations. They postulate that the debt/GDP ratio should decrease from 177.1% in 2014 to 139.4% by 2019, i.e. by 37.5%. Growth is supposed to contribute for 27.3% and primary surpluses for 19.9%. Inflation and privatizations are expected to have a positive contribution to this decrease. Overall, this is expected to guarantee interest payments, which will cumulatively reach 25% points of GDP in 5 years. How-

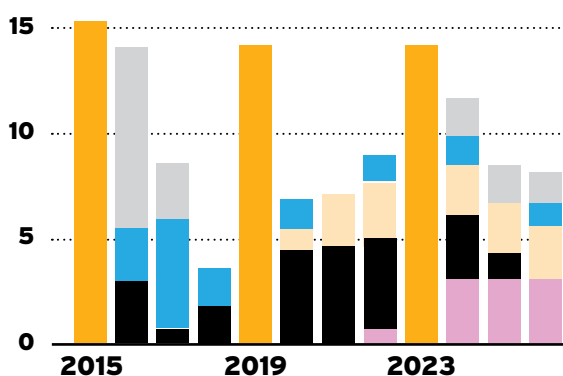
ever, this scenario is not consistent, as is shown by the economists from the French OFCE, who failed to replicate this scenario<sup>24</sup>, because it is based on four unrealistic assumptions<sup>25</sup>: 1. the output gap would be closed within the next five years; 2. the recovery would be led by domestic demand despite high unemployment and low wages; 3. the contribution of public demand to growth would be positive although no actual increase in the share of government expenditures in GDP is foreseen; 4. the recovery would have a negative impact on imports (as a ratio to GDP).

Another striking fact is the concentration of repayments in 2015 and 2016 and - in a seemingly systematic way - in the next elections years, 2019 and 2023 (Figure 5.2).

FIGURE 5.2

### Greece's Debt Repayment Calendar

Billion euros.



SOURCE: THE ECONOMIST, [HTTP://GOO.GL/50330Q](http://goo.gl/50330Q)

### 7. Radical change of economic circumstances

Adjustment policies led to a radical change of economic circumstances. They had detrimental impact on GDP, investment, labour productivity, output/capital ratio and employment. An ecologically and socially

TABLE 5.2

## Effects of a 1%-point fall in the wage share in Greece on private demand and growth

Consumption/ GDP*	Investment/ GDP*	Export/GDP*	Imports/GDP*	Net exports/ GDP*	Total Private Demand/GDP before multiplier effects	Multiplier	% change in GDP after mul- tiplier effects
A	B	C	D	E=(C-D)	F=A+B+E	G	H=F*G
-0.564	0	0.099	0	0.099	-0.465	1.984	-0.923

SOURCE: ONARAN AND OBST 2015. ESTIMATIONS ARE BASED ON THE METHODOLOGY IN ONARAN AND GALANIS 2012.

sustainable economic development presupposes, *inter alia*, a substantial increase of public spending (including public investment). It is incompatible with the existing austerity policies, because there is no room for any budget primary surplus. For this reason, we consider the public debt as totally unsustainable at present.

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CHAPTER 6

# The impact of the “bailout programme” on human rights



**T**he Troika's bailout programme enforced government measures that directly impacted living conditions, thereby violating human rights legally protected at the domestic, European and international levels<sup>1</sup>. According to the Greek Ombudsman, "the drastic adjustments imposed on the Greek economy and society as a whole, have had dramatic consequences on citizens, while vulnerable groups multiply"<sup>2</sup>. Similarly, the National Human Rights Commission observed a "rapid deterioration of living standards coupled with the dismantling of the Welfare State and the adoption of measures incompatible with social justice which are undermining social cohesion and democracy"<sup>3</sup>. The burden of adjustment is shared unfairly<sup>4</sup>, its impact being particularly severe for the most vulnerable: the poor, pensioners, women, children, people with disabilities, and immigrants.

## 1. Measures affecting the Right to Work

Post-2010 reforms compress labour costs, repeal allowances and benefits, shorten notice periods for dismissals, repeal or weaken collective bargaining, flexibilize employment, and steeply reduce minimum wages. Private sector legislation diminished job protection, facilitated extension of work time, and cut remuneration. In the public sector, legislation compressed wage costs and numbers of employees<sup>5</sup>. Government-decreed compulsory work hit both sectors<sup>6</sup>.

### Impact of the measures

Labour market reforms imposed by the Memoranda severely undermine the realization of the right to work, causing grave institutional breakdown. Destroying the system of collective bargaining agreements and labour arbitration resurrected the individual employment agreement as prime determining factor of employment conditions<sup>7</sup>. Successive wage cuts and tax hikes brought massive lay-offs, erosion of labour standards, increased job insecurity, and widespread precariousness, with over-flexible, lowly-paid jobs where women and young predominate. The minimum wage was pushed below poverty thresholds<sup>8</sup>.

Unemployment exploded from 7.3% to 27.9% (2008-2013)<sup>9</sup>. Public sector employment decreased from 942,625 to 675,530 between 2009-2013<sup>10</sup>, with pay shrinking by over 25%. Private sector wages fell at least 15% till 2013. Youth unemployment reached 64.9% in May 2013<sup>11</sup>, decimating prospects of accessing the job market.

The crisis hit disproportionately women and migrants, increasing involuntary part-time work<sup>12</sup> and unfair dismissals due to pregnancy<sup>13</sup>. Tensions rose

in the informal sector employing, in exploitative and unprotected labour conditions, many of the estimated 470,000 irregular migrants<sup>14</sup>.

## Violation of the Right to Work

The right to work is recognized in regional and international instruments to which Greece is a party<sup>15</sup>, as well as in the Constitution<sup>16</sup> and is arguably the fundamental right most affected by recent legislative and administrative changes. The right implies that the State must guarantee equal access to employment, and protect workers from being unfairly deprived of their employment. The State must not destroy a person's opportunity to earn their living (obligation to respect); prevent this opportunity from being destroyed by third parties (obligation to protect); and provide opportunity to earn one's living to anyone who lacks this opportunity (obligation to fulfil). The two Economic Adjustment Programmes however imposed "an intensive policy of internal devaluation, aimed at reducing wage and non-wage costs"<sup>17</sup>, with the help of "labour and wage reforms [that] will help to curb undue wage pressures"<sup>18</sup>. Post-2010 reforms violate standards set out in treaties to which Greece is a party<sup>19</sup>.

## 2. Measures affecting the Right to Health

The first Economic Adjustment Program (May 2010) limited public health expenditure at 6% of GDP<sup>20</sup>; the second (March 2012) demanded reducing hospital operating costs by 8% in 2012, and shrinking average public spending on outpatient pharmaceuticals to about 1% of GDP<sup>21</sup>.

Greek healthcare spending, falling significantly below EU average since 2010<sup>22</sup>, restricted health care<sup>23</sup>. Drastic measures "were adopted within a very short time and under extreme pressure to secure the next tranche"<sup>24</sup>. Naturally they "focused primarily on the structural, financial and managerial aspects of the NHS, and not much on patient's needs"<sup>25</sup>.

### Impact of the measures

The availability of and access to quality health care were undermined, particularly for the poorest, by cuts to healthcare spending, lay-offs in the public health sector, increased fees and co-payments, closures and mergers of hospitals and healthcare facilities, decimation of hospital beds, and increasingly restricted public health insurance<sup>26</sup>. In 2015 more than 2.5 million persons, or one fourth of the total population, were without health insurance<sup>27</sup>. Hospitals and pharmacies experienced widespread shortages while trying to reduce pharmaceutical expenditure from €4.37 billion in 2010

to €2 billion by 2014<sup>28</sup>. Diseases such as tuberculosis, malaria and HIV increased; mental health problems ballooned, including suicides, which to a large extent are attributed to strains imposed by the crisis.

### Violation of the Right to Health

This right is enshrined in Article 25 of UDHR, Article 12 of ICESCR, Article 12 of CEDAW, Article 5 of CERD, Article 25 of CRPD, Article 24 of CRC, and Article 11 of both the ESC and the RESC. The ECHR contains provisions related to health, and also the Constitution (Articles 21(2) and 21(3)). The right to health includes the entitlement to a system of health protection providing equal opportunity to enjoy the highest attainable standard of health, and also the right to access health services. The measures implemented to satisfy the conditionalities of the adjustment programs violate this right.

### 3. Measures affecting the Right to Education

Memoranda conditionalities directly targeted the education system. Specific measures outlined include reductions in teachers' recruitment, forced transference of teachers in the labour reserve and labour mobility schemes, reduction in teachers' pay, merging/closure of schools, more students per classroom and weekly teaching hours<sup>29</sup>. In order to reach 2012 deficit targets the Ministry of Education reduced staff allocations and operational spending for secondary schools<sup>30</sup>. As a result of the combined measures, teachers' salaries averaged a 40% reduction<sup>31</sup>, reaching 60% of the EU21 average<sup>32</sup>.

#### Impact of the measures

"These reductions have created difficulties in ensuring that the basic needs of students are met"<sup>33</sup>. Gaps in teaching posts are left uncovered (12,000 in primary and secondary schools for 2014-5). 1,053 schools closed and 1,933 merged between 2008 and 2012<sup>34</sup>. Reduction in operational costs left numerous schools without heating<sup>35</sup>. Inadequate framework for free student transportation discriminates against children in isolated areas, Roma children and children with disabilities<sup>36</sup>. Some children were excluded from accessing education altogether<sup>37</sup>.

#### Violation of right to Education

The conditionalities mentioned above, violate the right to education, a fundamental human right guaranteed by European and international legal instruments, including the EU Charter (Article 14), ECHR, ESC, RESC, UDHR (Article 26), ICESCR (Articles 13, 14), CEDAW (Articles 10, 14), CRC (Articles 28, 29, 40), CERD (Arti-

cle 5), CRPD, and the Constitution Article 16(2).

### 4. Measures affecting the Right to Social Security

The Memoranda-imposed spending cuts diminished social benefits, including pensions, unemployment benefits, and family benefits. The character of the pensions system was changed; pension funds were devastated by the PSI, losing around €14.5 billion<sup>38</sup>; pensions were cut<sup>39</sup>; state funding and guarantees restricted; several family benefits were replaced by a single means-tested family benefit related to family income; contributions and age limits raised. Unemployment benefits, disbursed only to a tiny fraction of the unemployed, were likewise slashed<sup>40</sup>. Strict eligibility criteria exclude most immigrants and young.

#### Impact of the measures

The adjustment programme eviscerated existing social protection measures, placing many at risk of poverty<sup>41</sup>. Pensions were reduced on average by 40%, falling below the poverty line for 45% of pensioners<sup>42</sup>. In 2015 8.14% of workers were found to work undeclared and uninsured<sup>43</sup>.

#### Violation of the right to social security

The right to social security affords protection to the most vulnerable members of society, guaranteeing to all the minimum goods and services required for a life in dignity. The right is guaranteed in the Constitution (Article 22§5), UDHR (Articles 22, 25), ICESCR (Articles 9, 10), CEDAW (Articles 11, 13, 14), CRC (Articles 18, 23, 26), CERD (Articles 2, 5), and ESC (Articles 8(1), 12, 14, 16, 17). It is violated by pension cuts that entail "a significant degradation of the standard of living and the living conditions of many of the pensioners concerned"<sup>44</sup>.

### 5. Measures affecting the Right to Housing

Programme conditionalities and Greek government implementation laws violated the right to housing. Social housing was abolished in 2012, as a 'prior action' to disbursement<sup>45</sup>; a rental subsidy to 120,000 households, and housing benefits for elders<sup>46</sup>. New laws and regulations facilitate express eviction procedures, without judicial trial<sup>47</sup>. Attica homelessness from negligible shot to 17,700<sup>48</sup>.

#### Impact of measures

In 2014 over 500,000 people lived in conditions of homelessness, insecure or inadequate housing<sup>49</sup>. Non-performing housing loans rose to 26.1% in 2013<sup>50</sup>;

foreclosures and evictions increased<sup>51</sup>. Despite the dramatic fall in house prices<sup>52</sup>, tax increases make housing unaffordable<sup>53</sup>; rates of overcrowding for poor households reached 42% in 2013, 60% for non-EU nationals<sup>54</sup>. In 2012, 73.3% of young people of 20-29 years lived with parents<sup>55</sup>, 18,902 individuals lacked plumbing and 142,000 any form of heating<sup>56</sup>.

#### Violation of the Right to Housing

Housing is indispensable for human dignity. The conditionalities of the programme mentioned above violated the right to housing as recognized in various instruments including the UDHR (Article 25[1]), ICESCR (Article 11[1]), CERD, CEDAW, and CRC. The ESC and the ECHR both contain express provisions and references to the right to adequate housing, as does the Constitution, Articles 4 and 21(4).

### 6. Measures affecting the Right to Self-determination

The wholesale privatisation of state property through TAIPED<sup>57</sup>, especially through the ‘fast-track’ procedures, violates constitutional rights and provisions, namely Articles 1.2 and 1.3 guaranteeing the principle of popular sovereignty. No government can legitimately proceed to such an extended alienation of public property, constituting a direct violation of the general interest and undermining economic growth<sup>58</sup>. The Greek Conseil d’Etat decided that common goods (water, energy, communications, etc.) should strictly remain under state ownership<sup>59</sup>. TAIPED also violates the constitutional rights to property (Art. 18 Const.) and protection of the environment (Art. 24 Const.)<sup>60</sup>.

#### Violation of the Right to Self-determination

This right is enshrined in various human rights instruments, notably the ICESCR (Article 1), ICCPR (Article 1), UN Declaration of Principles of International Law Concerning on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970), and the UNHRC, GC No. 12.

### 7. Measures affecting the Right to Justice

The creditor-imposed measures specify commitments to reform the juridical system<sup>61</sup>, including a substantial increase in fees<sup>62</sup>. The Government legislated dismissing contractual staff to fulfil targets specified in the Memoranda<sup>63</sup>. Legal aid and public accountability bodies are inadequately funded<sup>64</sup>.

#### Impact of measures

Recourse to Courts became financially unbearable for citizens after successive drastic cuts to salaries and pensions. Lengthy proceedings before deteriorating and overburdened civil and administrative courts border on denial of justice. Dealing with the judicial system’s inherent weaknesses, such as understaffing and lack of infrastructure, is rendered impossible due to the cuts.

#### Violation of the Right to justice

Access to justice is meant to provide for fast and effective judicial redress, enshrined, *inter alia*, in the

Constitution (Art. 20. 1). This right is violated by the drastic cuts to funding, resulting from suffocating mandated austerity.

Another repercussion of the draconian austerity measures has been a strong movement of opposition and resistance to the changes imposed. The government’s effort to quell it led to a series of violations of human rights examined below. A consequence of the crisis was widespread decrease in living standards.

### 8. Poverty and social exclusion

Conditionalities produced widespread impoverishment, destitution, and social exclusion. The measures imposed by the creditors negated their stated commitment that the programme would protect vulnerable social groups and the poor. Yet, after five years of detrimental impacts, the creditors insist on further measures.

Currently 23.1% of the population live below the poverty line<sup>65</sup>, with relative poverty rate almost doubling in 2009-2012<sup>66</sup>, and 63.3% are impoverished as a consequence of austerity policies alone<sup>67</sup>. Severe material deprivation increased from 11% to 21.5% of the population in 2009-2014<sup>68</sup>. Over 34% of children are at risk of poverty or social exclusion in 2013<sup>69</sup>. The unequal impact of the measures dramatically worsened inequality<sup>70</sup>, with the poorest 10% of the population losing an alarming 56.5% of their income<sup>71</sup>.

### 9. Measures affecting Freedom of Expression and Assembly

Since 2010 legislative and administrative measures restricted the freedoms of expression and assembly<sup>72</sup>; the right to free expression was “systematically and effectively challenged”<sup>73</sup>; the freedom of assembly was violated. Authorities prevented legitimate protest against Memoranda-driven policies by prohibiting public meetings, repressing with excessive force peaceful demonstrations, making pre-emptive arrests, questioning minors, and torturing antifascist protesters, often in collaboration with Golden Dawn<sup>74</sup>.

#### Impact of the measures

The disproportionate response of the authorities to public protest against austerity severely undermined the freedoms of expression and assembly. Between 2009 and 2015 Greece slid from 35<sup>th</sup> to 91<sup>st</sup> place on the World Press Freedom Index<sup>75</sup>. Repression against memoranda-driven protests prohibited the peaceful exercise of constitutional rights. Freedoms were further undermined by the impunity enjoyed by Golden Dawn until September 2013. These developments constituted a real threat for democratic institutions.

#### Violation of the Freedoms of Expression and Assembly

The freedoms of expression and assembly, guaranteed by international treaties and human rights conventions (UDHR, Arts. 20, 23; ICCPR, Arts. 21, 22; ICESCR, Art. 8; ECHR, Arts. 10, 11; Revised ESC, Art. 5; EU Charter, Arts. 11, 12; and others), are also protected by the Greek Constitution (Articles 11, 14). They were violated in order to quell the waves of legitimate mass protest against Memoranda-imposed policies.

## 10. Measures affecting Protection against Discrimination

The creditor-imposed laws implementing the Memoranda discriminate against large sections of the population, e.g. employees and pensioners<sup>76</sup>. Workers under 25 years were excluded from the legally protected minimum salary<sup>77</sup>. Employees lost the right to freely negotiate collective or individual agreements<sup>78</sup>. Discrimination against Roma, HIV-positive, and the elderly<sup>79</sup> grew; as did police harassment<sup>80</sup>, and the systematic detaining of all irregular migrants became official policy<sup>81</sup>. Hate crime rose; as did xenophobia against migrants, often targeted as scapegoats for the crisis<sup>82</sup>. The UNHCR recorded a spike in excessively violent crimes arising from discrimination based on gender and sexual orientation<sup>83</sup>. The police fails to protect victims, respond to such attacks, or investigate them diligently<sup>84</sup>. Maximum Security Prisons allow “extremely discriminatory [and] unequal penal treatment of similar cases”<sup>85</sup>.

### Gendered impact of the crisis

Cutbacks to social services due to Memoranda-imposed austerity policies have “detrimental effects on women in all spheres of life”<sup>86</sup>, impacting particularly on discrimination in work, economic autonomy, sexual and reproductive rights<sup>87</sup>, and protection from violence. Attacks increased 47%<sup>88</sup>, whilst available protection falls short of demand and women lack adequate access to justice<sup>89</sup>.

### Violation of Protection against discrimination

The all-encompassing impact of the Memoranda on social life resulted to violations of the Constitution, Articles 4 and 21(1). The right to participate in and access information relating to key decision-making processes that affect one’s life and well-being is a key principle of human rights law, reflected in international instruments including the ICESCR, ICCPR (Article 25), CRC (Article 12), and CEDAW (Article 7).

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6. Truck drivers (2010), municipal workers (2011), underground railway employees (2013), sailors (2013), teachers (2013), and electricity workers (2014).

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12. 61% of part-timers did not choose this status, an increase of 16%: ETUI, 2013. Benchmarking Working Europe 2013. Available at: <https://goo.gl/2QgkeU> [Accessed June 15, 2015]. pp.12, 65.

13. Indicating heavy pressure on women to prefer unpaid work or the informal economy, thereby compounding inequalities. See Ombudsman 2011.

14. See A/HRC/23/46/Add.5, para. 4.

15. ICESCR (Article 6) guarantees opportunity of everyone to gain their living by freely choosing or accepting work; the EU Charter guarantees free placement service for everyone (Article 29), protection from unjustified dismissal (Article 30), and the right to fair and just conditions of work (Article 31).

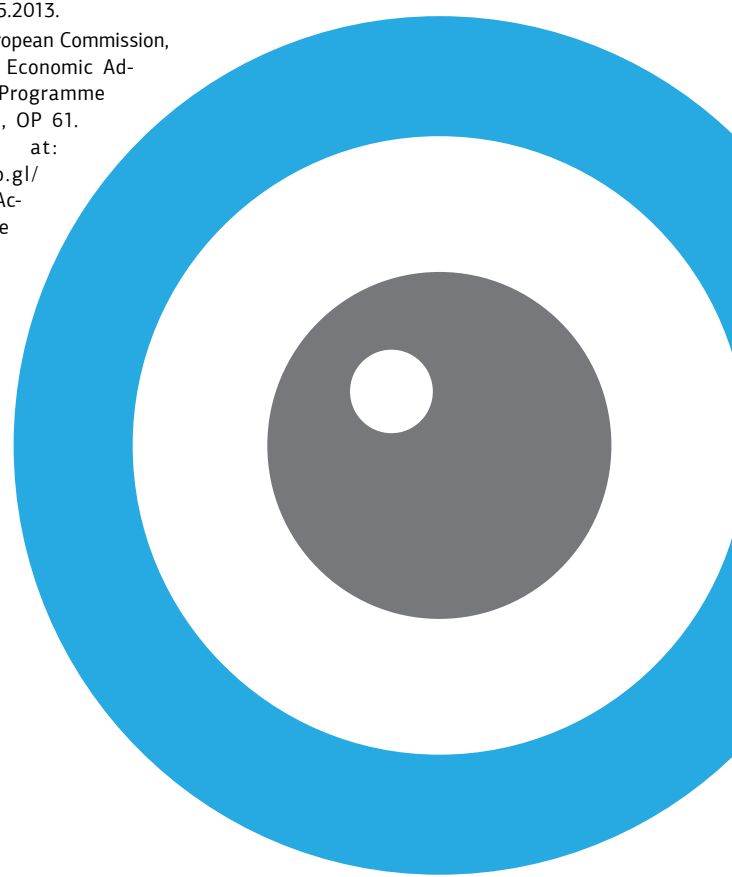
16. Under Article 22(1) the State protects the right to work and creates conditions of employment for all citizens.

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18. European Commission, 2010. The Economic Adjustment Programme for Greece, OP 61. Available at: <http://goo.gl/kNR4oQ> [Accessed June 16, 2015]. p.22. The same demands were regularly repeated and specified as appropriate in the successive reviews of the Programmes.

19. E.g. the right to fair remuneration in Article 4(1) of the ESC. See Complaint No. 66/2011, Decision on Merits, 23.5.2013.

20. European Commission, 2010. The Economic Adjustment Programme for Greece, OP 61. Available at: <http://goo.gl/kNR4oQ> [Accessed June 16, 2015].





21. EC, SEAPG, March 2012, pp.60, 139.
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24. *Ibid*, Table 15 at p.52.
25. *Ibid*, p.54.
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27. Efsyn.gr, 2015. Declarations of the competent Minister, 5.5.2015. Available at: <http://www.efsyn.gr/arthro/vivliario-ygeias-gia-25-ekat-anasfalistoys> [Accessed June 16, 2015].
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44. EUROPEAN COMMITTEE OF SOCIAL RIGHTS, 2013. Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012. Available at: <https://goo.gl/Np5n1x> [Accessed June 16, 2015]. Decision on merits, 7 December 2012, para. 78.
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57. Hellenic Republic Asset Development Fund (TAIPED) was established under the Troika-imposed mid-term fiscal strategy, by Law 3986/2011.



58. KAI DATZIS A., Who is the holder of the public property?, in MARANGOPOULOS FOUNDATION FOR HUMAN RIGHTS (MFHR), TAIPED: An instrument for the “sell-off” of public property and for the abolition of the national sovereignty of Greece, pp.87-92.

59. Decision 1906/2014, on the privatization of EYDAP.

60. Twenty eight properties belonging to the State were transferred by TAIPED S.A. to private hands, whereas their use has been retained by the State as lessee (lease back method). These buildings are the following: General Government Services in several places, Ministry of Justice, Ministry for Administrative Reform and Electronic Governance, Ministry of Education, Ministry of Culture, Athens Police Headquarters, Thessaloniki Police Headquarters, Serres Police Headquarters, Secretariat General of Information Systems, Secretariat General of Mass Media, General Chemical State Laboratory, Hellenic Police Forensic Science Division, Hellenic Statistical Authority, Immigration Attica, Xanthi Chemical Laboratory, Athens A' Tax Office, Athens XVII Tax Office, Athens XIX Tax Office, Alexandroupoli Tax Office, Ag. Anargyroi Tax Office, Glyfada Tax Office, Kifissia Tax Office, Corinth II Tax Office, Pallini Tax Office, Chalkida II Tax Office, Holargos Tax Office, Xanthi Tax Office. The competition for the sale and leasing of the above properties was completed in October 2013 against a total consideration amounting to 261.31 m. euro, while the companies making the highest bids in the competition were National Pangaia AEEAP and Eurobank Properties AEEAP. After the transaction was completed, it was made known that the Greek state will lease back the above buildings for 20 years paying for that reason a total amount of nearly 600 m. euros (25.590.240,00 m. euros per year plus maintenance and insurance cost), i.e. approximately three times the price of the sale. A lawsuit has already been filed regarding this transaction.

It should be noted that the above contract was not initially approved by reason of the decision No 275/2013 of the 7th Division of the Court of Audit, which declared the selection procedure partial and non-transparent (the bidders having a conflict of interest with the financial consultants of the transaction), and found that the transaction did not seem to satisfy the requirements of general interest. Nevertheless, following an application for revocation of TAIPED SA, the contract was signed by virtue of Decision No. 1204/2014 of the 6th Section of the Court of Audit.

61. EC, SEAPG, July 2013, p.41; see a general overview of commitments relevant to the juridical system at EC, EAPG, October 2011.

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63. EC, SEAPG, July 2013, p.109.

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65. TVXS, 2015. ELSTAT news release 4th June 2015. TVXS.org. Available at: <http://goo.gl/7Tnv1y> [Accessed June 16, 2015].

66. Leventi, C. & Matsaganis, M., 2013. Distributional implications of the crisis in Greece in 2009-2012. EUROMOD Working Papers. Available at: <http://goo.gl/NISEDi> [Accessed June 16, 2015]. See also EUROSTAT (2012) News release 171/2012, 3.12.2012.

67. *Ibid*, p.35.

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77. European Social Charter, 2014. European Committee of Social Rights Conclusions XX-2 (GREECE). Available at: <http://goo.gl/cP8LN1> [Accessed June 16, 2015]. p.31.

78. Violating the Constitution that guarantees the rights to free collective negotiations (Art. 22§2) and the freedom of contracts (Art. 5§1); also the International Labour Conventions 151/1978 and 154/1981, and the European Social Charter (Articles 6, 12).

79. HELLENIC LEAGUE FOR HUMAN RIGHTS (2012) Brutal and Humiliating Treatment of Persons: The Responsibility of the State, 25.5.2012; GREEK OMBUDSMAN (2012) Publicising Data and Photographs of HIV-AIDS Positive Persons Insults Human Dignity and Violates Patient’s Rights [10.5.2012]; EUROPEAN COMMITTEE OF SOCIAL RIGHTS (2014) Conclusions XX-2 (GREECE), November 2014, p.31; HRW (2012) World Report 2012: European Union.

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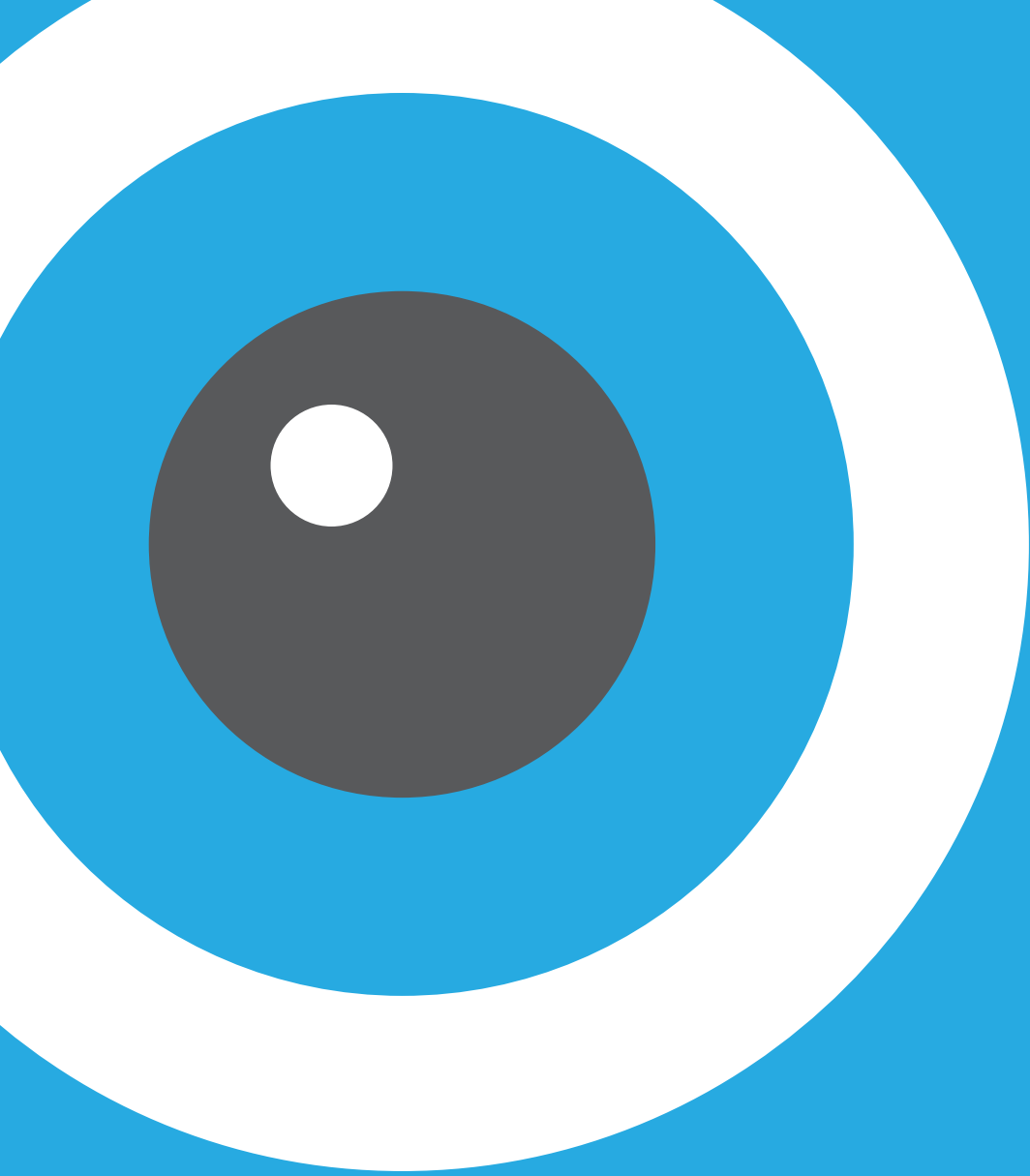
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86. UN CEDAW, 2013. Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session, CEDAW/C/GRC/CO/7. Available at: <http://goo.gl/2CN4IN>.

87. Law N. 90380/5383/738/2012 (ΦΕΚ 1233/Β/11.4.2012).

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## CHAPTER 7

# Legal issues surrounding the MOU and Loan Agreements

## SUMMARY

Greece bears primary responsibility for violations exposed in Chapter 6, but such violations also constitute a breach of human rights obligations of the different Lenders since they imposed such measures to Greece. This is the case of each Euro Area (Lender) Member State party to several instruments protecting human rights such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the European Social Charter (ESC). European Institutions (the European Commission and the European Central Bank) must also have acted by taking into account the requirements of the Charter of Fundamental Rights (CFR), the Treaty of the European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU). Finally IMF and its members have to respect human rights and fundamental freedoms when imposing adjustment programmes.

All these actors have also failed to meet the most basic of requirements to prevent human rights harms in the policies they pursue. Neither *ex ante* nor *ex post* human rights impact assessments were conducted, although the preparation of such assessments forms a basic expectation of international human rights law and EU law and policy. This includes guarantees of consultation by persons likely to be affected by the policies, and access to information and transparency regarding public access to the results of the assessments.

As regards the procedure provided for by the Greek Constitution, both the Memoranda and the loan agreements which effectively stripped Greece of most of its sovereign rights are international agreements and, therefore, had to be ratified by the Parliament. As such, the Greek Constitution has been violated. Moreover, the two most important delegation clauses to the Ministry of Finance providing for the issuing of presidential decrees, in order to take proper measures of fiscal policy for the achievement of the goals of the programme, are clearly unconstitutional.

Finally, it has to be noted that some of the clauses in the agreements between Greece and its creditors are clearly abusive, and demonstrate that Greece had effectively been coerced to surrender significant aspects of its sovereignty. By choosing the English law as the governing law for those agreements, the implicit objective of the creditors in their choice of law clause was to bypass the Greek Constitution and Greece's international human rights obligations. And thus, to the extent that English law does not incorporate, or conflicts with, Greece's human rights treaty and customary obligations, it is invalid and merits no obligation to be honoured. Moreover, the bad faith of the parties with which they intended to bypass the Greek constitution and the country's international law obligations, as well as the unconscionable character of the agreements, render them invalid under English law.

### 1. Violation of human rights by Greece

As demonstrated in Chapter 6, the measures adopted and implemented by the Greek government under the "bailout" programme have led to a range of human rights violations. Since Greece bears primary responsibility for the protection and promotion of human rights for all subject to its jurisdiction, it can be argued that it bears primary responsibility for such violations.

The claim that such measures were imposed by the creditors of Greece through loan agreements cannot be invoked to justify measures that result in such violations. This follows from Article 103 of the UN Charter, which affirms the primacy of obligations under the Charter of the United Nations over any other conflicting international obligations. With specific reference to Greece, the European Committee of Social Rights (ECSR) has observed that Greece could not invoke obligations such as the ones emanating from international agreements, including the loan agreements and the MoU in order to justify measures that result in human rights violations<sup>1</sup>.

## 2. Human rights violations by the creditors

### ■ The Euro Area Member States

The Euro Area Member States approving the signature of the Loan Agreement and MoU<sup>2</sup>, remain subject to the law on state responsibility and the legal consequences that flow from any breach of their international obligations.

All EU member states are parties to the ICESCR. The duties imposed under the Covenant extend to the enjoyment of economic, social and cultural rights outside the national territory, as confirmed by the Committee on Economic, Social and Cultural Rights. Other UN human rights treaty bodies have reached the same conclusion. It is also the view of human rights bodies that states cannot do together through an intergovernmental framework<sup>3</sup> that which they are prohibited from doing when acting alone, a position which is consistent with general international law<sup>4</sup>.

The conditionalities imposed on Greece and the subsequent denial of socio-economic rights as detailed in Chapter 6 constitute a breach of human rights obligations of each Euro Area (Lender) Member State party to the Covenant and to the CRC, and defeat the object and purpose of its obligations under the UN Charter. Each Euro Area (Lender) Member State is also required to ensure that non-state actors whose conduct the state is in a position to influence is prohibited from impairing the enjoyment of such rights. This is relevant, in particular, to understanding the responsibility of the Euro Area Member States as lenders of bailout funds provided through the European Financial Stability Facility.

### ■ The EU institutions

It is true that in the controversial Pringle case, in which the validity of the establishment of the European Stability Mechanism (ESM) was challenged<sup>7</sup>, the CJEU stated that the EU Member States were not bound to comply with the CFR when they were acting outside EU Law. The Court took the view that the Member States are not implementing EU law, within the meaning of Article 51(1) of the Charter, when they established the ESM. Whether or not one agrees with this position insofar as it concerns the EU Member States, it is clear that this extends to the situation where institutions established by the EU Treaties take action, such as the European Commission and the European Central Bank.

Article 51 para. 1 of the EU Charter of Fundamental Rights states:

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

The phrase «when they are implementing Union law» applies to the Member States, who may act either in the field of application of EU law, or in situations that are not covered by EU law. EU institutions per definition are bound to comply with the requirements of the Charter, since that distinction does not apply to them: they owe their very existence to EU law, and the Charter should therefore apply to any conduct they adopt. The Explanations relating to the Charter of Fundamental Rights<sup>8</sup>

strongly support this reading, since the explanations to Article 51 clearly distinguish EU institutions, bodies, offices, and agencies, on the one hand, and the EU Member States on the other hand, referring to the expression “implementing Union law” only with regard to the latter. Indeed, this is the view of legal doctrine<sup>9</sup>. It was also the view expressed by Advocate General J. Kokott in the Pringle case itself, where she noted, in the view she delivered on 26 October 2012, that “The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights”<sup>10</sup>.

Thus, the European Commission, in discharging the role assigned to it under the Intercreditor Agreement of 8 May 2010, and the Council of the EU, acting under Articles 126(9) and 136 of the TFEU, to require Greece to take certain measures for the deficit reduction deemed necessary to remedy the situation of excessive deficit, should have acted taking into account the requirements of the CFR.

As regards the second rescue plan presented to Greece, which was launched after the establishment of both the EFSF and the EFSM, insofar as it assumes a role in the EFSF -in particular in the negotiation of the MoU with the borrowing Member State- the European Commission cannot ignore the fact that, as an institution of the European Union, it is bound to ensure that all its actions comply with the Charter of Fundamental Rights.

### Adoption of the Regulation (EU) No. 472/2013

This Regulation<sup>11</sup> adopted on 21 May 2013 defines the conditions applying to countries of the eurozone placed under “enhanced surveillance”.

Two implications follow. First, after the date of 30 May 2013, even the financial mechanisms originally established outside EU law were provided with a framework based in EU law, under Article 136 of the TFEU (the legal basis of the Regulation) and the Regulation itself. The measures adopted under the framework of the Regulation are clearly “implementing EU law”, and therefore are subject to the requirements of the CFR: the Regulation confirms this, by highlighting in particular the requirement that such measures comply with Article 28 of the Charter, which concerns the right of collective bargaining and action.

Second, the Regulation establishes certain requirements of its own. These include in particular a requirement imposed on the European Commission to evaluate the sustainability of sovereign debt (Article 6), as well as a requirement imposed on the Member State placed under enhanced surveillance to ensure that macroeconomic adjustment measures are adopted with the participation of unions and other civil society actors (Article 8).

### ■ Conclusion as regards EU Member States and the EU Commission

It follows from the developments above that the MoU negotiated respectively in 2010 and in 2012 should have taken into account the requirements of the CFR. For the 2010 agreement, this follows from the roles ful-

filled by the European Commission, tasked with certain responsibilities under the Intercreditor Agreement, and by the Council of the EU, acting under Articles 126(9) and 136 of the TFEU. For the 2012 agreement with the EFSF, this follows from the role assigned to the European Commission in the Framework Agreement and the Consolidated Articles of Association establishing the Facility. Any doubts as to whether the CFR applies to the implementation of the MoU are removed by the adoption of the Regulation No. 472/2013. In addition, as noted above, the 1961 European Social Charter continued to apply to Greece throughout the process. This was explicitly confirmed by the ECSR in the above mentioned case concerning the implementation by Greece of austerity measures<sup>12</sup>.

Furthermore, we must remind that European Lenders (States and Institutions) must respect the TEU, particularly Articles 2 and 3.

According to the Article 2, “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Article 3 states that “it shall promote economic, social and territorial cohesion, and solidarity among Member States”.

Finally, Article 9 of the TFEU provides that “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.

Thus, it was a breach of both EU law and of international law to sideline human rights in the design of the macroeconomic programmes that were negotiated between Greece and its creditors, both in 2010 and in 2012.

While some doubts may exist as to the applicability of the CFR to EU member states as regards the adoption and implementation of such programmes at least until the date of 30 May 2013, and while the protection of social rights under the CFR is in any case relatively weak, it is uncontroversial that the European Social Charter should have been taken into account. The impacts on the rights protected by provisions of the European Social Charter accepted by Greece should have been assessed, and any incompatibility, once identified, should have led to amendments of the adjustment programmes in order to remove the risk of incompatibility.

By not doing so, Greece, as well as the EU Member States who are bound to respect international human rights law, engage their international responsibility.

#### ■ The IMF

The ECtHR has repeatedly held that while obligations under the ECHR do not preclude States cooperating in certain fields of activity, the obligations of Contracting Parties continue even after a State has transferred certain competences to international organisations<sup>13</sup>. IMF

Member States are thus required to comply with their existing human rights obligations including when acting under the auspices of the IMF.

As for the IMF qua the IMF, as any other subject of international law, international organizations are ‘bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’<sup>14</sup>. The IMF is required to refrain from steps that would undermine the possibility of a borrowing State complying with its own national and international human rights obligations<sup>15</sup>. The IMF, moreover, is bound by the general principles and purposes of the UN Charter as a specialised agency of the UN<sup>16</sup>. These general principles and purposes include respect for human rights and fundamental freedoms.

While the traditional view has wrongly been that the IMF was prohibited from considering human rights because of a prohibition, derived per analogy from Article IV, section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development (‘Political Activity Prohibited’, it is to be noted that the Articles of Agreement of the IMF do not include a similar clause), it is implausible to justify a refusal to consider the human rights implications of its recommendations to States, particularly when compliance with such recommendations is a condition for the receipt of funds, given the deeply interventionist nature of such policy prescriptions addressed to the States concerned.

### 3. Breaches of the procedures

#### 3.1 Transparency, social and human rights impact assessment (HRIA)

Under international human rights law, States, whether acting singly or jointly, are under an obligation to inform themselves about the potential impact of their conduct on the enjoyment of socio-economic rights including outside of their national territories prior to undertaking such conduct. Many international guidelines<sup>17 18</sup> as well as observations from treaty bodies<sup>19</sup>, underscore the need carry out HRIAs.

And thus, the European Commission has committed, through a set of guidelines<sup>20</sup>, to systematically undertake impact assessments, including a fundamental rights dimension, in its legislative proposals. The Court of Justice of the European Union emphasized the importance of impact assessments in the adoption of legislative measures<sup>21</sup>. The Council of the EU committed to further strengthen the human rights component of impact assessments in external policies<sup>22</sup>. Building in part on this commitment and on resolutions of the European Parliament on the same topic, the European Ombudsman took the view in a case related to the Free Trade Agreement with Vietnam, that the refusal of the European Commission to prepare a human rights impact assessment was an instance of maladministration<sup>23</sup>.

It is striking that no assessment of the human rights impact was prepared when the macroeconomic adjustment programmes concerning Greece were designed. Moreover, a range of procedural deficiencies were raised and denounced in the 2014 EP Report<sup>24</sup>, and as it has been pointed out by the scientific Commission of the



Hellenic Parliament: “All phases of the adjustment programme-drafting were indeed lacking in transparency and democratic oversight. From the preparatory phase of negotiation, to the development of the mandates and the formulation of specific measures the European Parliament was until 2013 completely marginalized”<sup>25</sup>.

Neither in 2010, nor in 2012, was there any attempt to assess the human rights impacts of the macroeconomic adjustment and fiscal consolidation that were the conditions for the loans. In the case of the 2012 MoU, the absence of any kind of human rights impact assessment is especially troubling, since the harms were widely known by then.

The Euro Area Member States, the EU Member States acting within the Council, the European Commission and ECB as EU institutions, and the IMF and IMF Member States have failed to meet the most basic of requirements to prevent human rights harms in the policies they pursue. Neither *ex ante* nor *ex post* human rights impact assessments were conducted, although the preparation of such assessments forms a basic expectation of international human rights law and EU law and policy, including guarantees of consultation by persons likely to be affected by the policies and access to information and transparency regarding public access to the results of assessments<sup>26</sup>.

### **3.2 The unconstitutionality of the loan agreements and MoU**

#### **3.2.1 Violation of the ratification procedure as provided by the Greek Constitution**

The negotiation and signing of lending agreements took place through a complete absence of transparency, and breach the procedure as foreseen by the Greek Constitution.

Both the Memoranda and the loan agreements which effectively stripped Greece of most of its sovereign rights are international agreements and, therefore, had to be ratified by the Parliament. Indeed, according to article 36(2) of the Hellenic Constitution, international agreements must be ratified by an implementing law by the plenary of Parliament<sup>27</sup>. They should have been voted by a qualified majority of three fifths of the deputies, as Art. 28 par. 2 prescribes and as several members of the Conseil d’Etat insisted on (see decision 668/20120, par. 29).

However, the Loan Agreement of 8 May 2010 was even not distributed in the Parliament, nor was it publicly discussed. Similarly, the austerity measures were adopted without having ever been discussed in the Parliament. In fact, in a document entitled “Statement on the support to Greece by Euro area Members States” of 11 April 2010 (Annex II, Law no 3845/2010), it was announced that the Euro Area Member States, together with the ECB and the IMF, were prepared to provide a loan to Greece and that the terms of the loan had ‘already been agreed’. This demonstrates that none of the parties involved had any intention of respecting the procedures of the Hellenic Constitution or to comply with even elementary requirements of transparency.

European States which are parties to the Loan Agreements are all democratic States and thereby fully aware of the typical national constitutional rule requir-

ing the ratification of any international treaty. *A fortiori* such an obligation applies for the international agreements like the Loan Agreements which determine the future of a State and its citizens for decades. Therefore, both European States and the “institutions” - especially European Union and European Central Bank - knew or should have known that the non-ratification of the Loan Agreements by the Greek parliament entailed their unconstitutionality.

Article 1(4) of Law 3845/2010 granted the Finance Minister authority to negotiate and sign the texts of all pertinent loan and financing agreements (including treaties, contracts and MoU). These agreements, however, had to be brought to parliament for ratification, something which never occurred. Five days later, Article 1(9) of Law 3847/2010 modified Article 1(4) of Law 3845 by stipulating that the term “ratification” [by parliament] is replaced by ‘discussion and information’.

Moreover, all pertinent agreements (irrespective of their legal nature) were declared as producing legal effect upon their signature by the Finance Minister. Hence, Articles 28 and 36 of the Constitution were effectively abolished by a mere legislative amendment. What is more, Law 3845 included two of the three MoU as mere annexes, branding them as a ‘programme plan’.

Even so, on 3 June 2010 a bill was presented to Parliament for the ratification of all loan agreements, stipulating that their entry into force commences from the date the bill is tabled (Article 3). It would appear that, realising that Law 3847 was unconstitutional, the then government submitted this bill to Parliament in order to provide the measures adopted with a legal sanction.

#### **3.2.2 The delegation clause to the Minister of Finance is unconstitutional**

The two most important delegation clauses to the Ministry of Finance are<sup>28</sup>: a) the clause of Art. 1 par. 4 and b) the clause of Article 2 par. 1a (of the law 3845/2010), providing for the issuing of presidential decrees, in order to take proper measures of fiscal policy for the achievement of the goals of the programme. These two delegation clauses are clearly unconstitutional.

The clause contained in Art. 1 par. 4 is unconstitutional because it violates Art. 36 par. 2 of the Greek Constitution<sup>29</sup>. This argument is further reinforced by Art. 36 par. 4 that explicitly forbids any delegation in view of the ratification of an international treaty<sup>30</sup>. The Conseil d’Etat, in its leading case 668/2012, refused to examine the constitutionality of this delegation clause (par. 30). However, according to the dissenting opinion of two judges, the clause in question violated Art. 36 par. 2 and 28 par. 1 of the Constitution (par. 31).

Article 2 par. 1a contravenes Art. 43 par. 4 of the Hellenic Constitution<sup>31</sup>. Taking into account that Law 3845/2010 itself does not provide for a broad framework within which the delegated powers should be exercised, it does not offer any “general principles and directives of the regulation to be followed”. Therefore, the delegation is vague and not specific, hence unconstitutional according to the Hellenic Council of State (see decisions 3051/2014 and 1210/2010).



## 4. Abusive clauses in the agreements between Greece and its creditors

Since 2010, the governing law for the loan agreements between Greece and its public creditors is English law. This also governs new bonds received by private creditors under terms of the 2012 PSI.

The implicit objective of the creditors (in a much stronger negotiating position) in their choice of law clause was to bypass the Greek Constitution and Greece's international human rights obligations. Indeed, a tribunal mandated to apply only English law, the parties assumed, would restrict itself to a strict interpretation of the law of contract which is more in favour of the creditors. Although English law encompasses, among others, the Human Rights Act, it was clear to the parties that this Act would be inapplicable since it is subject to territorial limitations under Article 22 thereof. Given that the majority of the financing was undertaken through inter-governmental organisations, it was also known that these do not possess treaty-based human rights obligations and enjoy wide-ranging immunities.

Some of the clauses in the contracts are moreover clearly abusive, and demonstrate that Greece had effectively been coerced to surrender significant aspects of its sovereignty. By way of illustration: "The Borrower hereby irrevocably and unconditionally waives all immunity to which it is or may become entitled, in respect of itself or its assets, from legal proceedings in relation to this Agreement, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest or injunction prior to judgment, and from execution and enforcement against its assets to the extent not prohibited by mandatory law"<sup>32</sup>.

As if this surrender of sovereignty was not enough, Greece's creditors envisaging that the abusive and odious nature of their agreement might be viewed as such by a competent court, inserted a clause that rendered the borrower's obligations intact despite the invalidity of the agreement.

"If any one or more of the provisions contained in this Agreement should be or become fully or in part invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not be affected or impaired thereby. Provisions which are fully or in part invalid, illegal or unenforceable shall be interpreted and thus implemented according to the spirit and purpose of this Agreement"<sup>33</sup>.

Even if English law were to be applied, the terms of the agreement would be deemed largely repugnant. For one thing, it has been held that as far as possible, the common law must be developed in a way that gives effect to the ECHR or, as it has been put, to 'weave the Convention rights into the principles of the common law and of equity'<sup>34</sup>. Fundamental provisions of the ECHR have evidently been breached here. Secondly, under the common law, credit agreements that are highly prejudicial in favour of the lender, further imposing unconscionable conditions that interfere with the borrower's personal sphere and life choices are contrary to public policy<sup>35</sup>. Finally English courts have in practice accepted that good faith is part of English law through EU law

and principles<sup>36</sup>. As already explained, the absence of good faith has been a distinct feature of Greece's lending agreements.

States are under no obligation to enforce contracts or clauses that violate their constitution or which restrict the three branches of government, as this effectively signals the termination of sovereignty. As a result, the doctrine of executive necessity, originally formulated by western liberal democracies, posits the idea that contracts or promises made by the government are unenforceable in the public interest if they fetter the future competence and powers of the executive<sup>37</sup>.

To conclude, to the extent that English law does not incorporate, or conflicts with, Greece's human rights treaty and customary obligations, it is invalid and merits no obligation to be honoured. Moreover, the bad faith of the parties with which they intended to bypass the Greek constitution and the country's international law obligations, as well as the unconscionable character of the agreements, render them invalid under English law.

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1. E.g. European Committee of Social Rights, Complaint No. 80/2012, Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece, 16 January 2012, para. 48. See also ECtHR, Appl. No. 5809/08, Al-Dulimi and Montana Management Inc. v Switzerland, Judgment of 26 November 2013, para. 111; ECtHR, Appl. No. 5809/08, Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland, Grand Chamber Judgment of 30 June 2005, para.153; ECtHR, Appl. No. 19392/92, United Communist Party of Turkey and Others v. Turkey, 30 January 1998, § 29.

2. Intercreditor Agreement (2010), Art. 2(1); Loan Facility Agreement (2010), preambular para. 6.

3. Intercreditor Agreement (2010), preambular para. 2.

4. Under general international law, it is agreed that "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation" (Art. 61, Draft Articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), and welcomed by the UN General Assembly in Res. 66/100 of 9 December 2011).

5. Intercreditor Agreement (2010), preambular para. 6; Loan Facility Agreement (2010), preambular para. 6.; Loan Facility Agreement (2010), preambular para. 8. 'The release of Loans subsequent to the first one shall be conditional upon the Euro Area Member States (except Greece) deciding favourably after consultation with the European Central Bank (hereinafter the "ECB") on the basis of the findings of verification by the Commission that the implementation of the economic policy of the Borrower accords with the adjustment programme or any other conditions laid down in the Council decision on the basis of Article 126(9) and 136 TFEU and the MoU.

6. "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers".

7. The ESM was established by European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1). The decision inserted a new para. 3 in Art. 136 TFEU, in order to allow the establishment of a new stability mechanism to safeguard the stability of the euro area. The Treaty establishing

the ESM was thereafter signed in Brussels on 2 February 2012, between all the eurozone member States.

8. OJ C 303/17 of 14.12.2007.

9. PEERS S. (2013), 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' European Constitutional Law Review.

10. At para. 176 of her View.

11. Regulation (EU) No. 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability OJ L 140/1 of 27.5.2013. This Regulation, together with Regulation (EU) No. 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L140/11, form the "Two-Pack" combination of measures placing the eurozone Member States under surveillance in order to safeguard its overall stability.

12. European Committee of Social Rights, Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012, decision on the merits of 7 December 2012.

13. ECtHR, Appl. No. 24833/94, Mathews v United Kingdom, Grand Chamber Judgment of 18 Feb. 1999, paras. 29, 32 and 34; ECtHR, Appl. No. 26083/94, Waite and Kennedy v Germany, Grand Chamber Judgment of 18 Feb. 1999, para. 67; ECtHR, Appl. No. 45036/98, Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland, Grand Chamber Judgment of 30 June 2005, paras. 152-156.

14. ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion 20 December 1980, I.C.J. Reports 1980, 73 at 89-90 (para. 37).

15. SANDS P. & KLEIN P. (2001) *Bowett's Law of International Institutions*, 5th edn, Sweet & Maxwell Ltd.

16. UN Charter, Arts. 57 and 63.

17. Guiding Principles on Foreign Debt and Human Rights, endorsed by the UN Human Right Council in 2012, HRC Res. A/HRC/RES/20/10. The Guiding Principles on Extreme Poverty and Human Rights, endorsed by the Human Rights Council at its 21st session with the support of the EU Member States (September 2011) state in para. 61:

"States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies. The international community's commitments to poverty reduction cannot be seen in isolation from international and national policies and decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations".

18. Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, U.N. ESCOR, Comm'n. on Hum. Rts., 19th Sess., Agenda Item 3, add., U.N. Doc. A/HRC/19/59/Add.5 (2011).

19. UN Committee on the Elimination of Discrimination against Women, Concluding Observations: Greece, UN Doc. CEDAW/C/GRC/CO/7, para. 40.

20. Communication on a strategy for the effective implementation of the charter of fundamental rights by the European Union, com (2010) 573/4; Commission staff working paper operational

guidance on taking account of Fundamental rights in Commission impact assessments sec(2011) 567 final.

21. ECJ, Joined Cases C-92/09 and C-93/09, Schecke and Eifert, Judgement of 9 November 2010, §81 and 83.

22. Human Rights and Democracy: EU Strategic Framework and EU Action Plan, 25 June 2012.

23. Ombudsman's recommendation related to complaint 1409/2014/JN against the European Commission, 26 March 2015.

24. European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28.2.2014, para. L. §39 and 48 [Hereinafter EP Report A7-0149/2014].

25. PLIAKOS A., "Memoranda of Understanding and the requirements of the EU Values".

26. UN Committee on the Elimination of Discrimination against Women, Concluding Observations: Greece, UN Doc. CEDAW/C/GRC/CO/7, paras. 13(c), 33(b), 40.

27. Since the Loan Agreements were signed by subjects of international law, i.e. States and international organizations, and their signatories have expressed a common will to be legally bound by their provisions, they should be considered as international agreements both under international and Greek law.

28. Other than the two clauses developed above, further clauses provide for the issuing of presidential decrees (after proposition by the MoF and other ministers) that take urgent measures for the protection of vulnerable groups of society and the diminishing of social inequalities during the implementation of the programme (art. 2 par. 2), as well as for the support of real economy, small businesses and the consumers (Art. 2 par. 3). Through decisions signed by the Minister of Finance and the Minister of Employment and Social Security, measures are taken regarding any issue concerning Christmas, Easter allowances and leaves of absence (Art. 3 par. 15).

29. "Conventions on trade, taxation, economic cooperation and participation in international organizations or unions and all others containing concessions for which, according to other provisions of this Constitution, no provision can be made without a statute or which may burden the Greeks individually, shall not be operative without ratification by a statute voted by the Parliament".

30. "The ratification of international treaties may not be the object of delegation of legislative power as specified in Article 43 paragraphs 2 and 4."

31. "By virtue of statutes passed by the Plenum of the Parliament, delegation may be given for the issuance of general regulatory decrees for the regulation of matters specified by such statutes in a broad framework. These statutes shall set out the general principles and directives of the regulation to be followed and shall set time-limits within which the delegation must be used."

32. Loan Facility Agreement, Article 14 (5); EFSF Framework Agreement, Article 15 (2); MFAFA Article 15 (4).

33. Intercreditor Agreement, Article 13 (1); Loan Facility Agreement, Article 12 (1); EFSF Framework Agreement, Article 15, MFAFA Article 15 (1), (2) and (3).

34. *Versloot Dredging BV v HDI Gerling Industries* [2014] EWCA Civ 1349, paras 140-41.

35. *Horwood v. Millar's Timber and Trading Co Ltd* [1917] 1 KB 305.

36. *Yam Seng Pte v International Trade Corp Ltd* [2013] EWHC 111 (QB), paras 119-54, but especially para 124.

37. *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* [1919] 27 CLR 268, 277; *Redericktiebolaget Amphitrite v King* [1921] 2 KB 500, 503.

## CHAPTER 8

# Assessment of the debt as regards illegitimacy, odiousness, illegality and unsustainability

**B**ased on the findings of the previous chapters, we assess in this chapter the types of debt (by creditors) with respect to the definitions of illegal, illegitimate and odious debts. Our assessment of unsustainability concerns the entire current Greek public debt as of June 2015.

### A. ASSESSMENT OF THE UNSUSTAINABILITY OF THE CURRENT GREEK PUBLIC DEBT

From an economic standpoint, as it is shown in Chapter 5, the adjustment policies had detrimental impact on GDP, investment, labour productivity, output/capital ratio and employment. An ecologically and socially sustainable economic development presupposes, *inter alia*, a substantial increase of public spending (including public investment). It is incompatible with the existing austerity policies, because there is no room for any budget primary surplus.

Moreover, taking into account the definition given in this report, it is clear that Greece's debt is unsustainable. Considering that a debt is unsustainable if it cannot be serviced without seriously impairing the ability or capacity of the Government of the borrower State to fulfill its basic human rights obligations, such as those relating to healthcare, education, water and sanitation and adequate housing, or to invest in public infrastructure and programmes necessary for economic and social development, or without harmful consequences for the population of the borrower State (including a deterioration in the living standards), the current Greek debt is indeed unsustainable, since:

Greece is currently unable to service its debt without seriously impairing its capacity to fulfill its basic human rights obligation. As it has been shown in Chap-

ter 6, many basic human rights are currently violated in Greece due to a lack of public expenditures in social spending, thus preventing such violations would necessarily imply an increase of public spending. And yet, as highlighted in this report, the current financial situation does not enable Greece to increase public spending since the situation leads to no room for any budget primary surplus, while reimbursing its debt. This situation has been well illustrated by many official statements stressing that without the final disbursement of the 2012 loan, Greece would be currently unable to reimburse its creditors and satisfy some social needs which are yet underfinanced. In this context, the Greek government is clearly in a position where it can either reimburse its loan while continuing to violate basic human rights, or suspend the reimbursement and dedicate the money that would have been used to such reimbursement to fulfill its human rights obligation.

### B. ASSESSMENT OF THE DEBT TO THE IMF

#### 1. Is the debt to the IMF legal?

Considering the debt which had conditions that contravened the law or public policy are illegal, debts to the IMF should be considered as illegal since the measures attached to the IMF loans to Greece breached fundamental laws as protected under the country's Constitution, customary law and international treaties to which Greece is a party. Conditionality dramatically deteriorated Greece's economic problems and forced the country to choose between repayment to the Fund and key social expenditures for maintaining adequate standard of living and safeguarding its people's fundamental rights. Given the direct imposition and monitoring of

the conditionalities by the IMF<sup>1</sup>, it bears responsibility for their attendant illegal consequences.

Considering the debts which involved clear misconduct are illegal, debts to the IMF should be considered as illegal since IMF acted in bad faith (which is illegal) :

■ Warnings were issued by several EDs in May 2010 that “Greece might end up worse off after implementing this program” and that the attempted fiscal reduction is “a mammoth burden that the economy could hardly bear”<sup>2</sup>.

■ The IMF Staff Appraisal in May 2010 recognised that: “the adjustment that lies ahead will be socially painful”, a point repeated in 2012<sup>3</sup>. The IMF did not take effectively into account the objections of one third of its board members in regard to the distribution of benefits and burdens resulting from the first Greek programme<sup>4</sup>. Instead, the programme was presented to the public via the Executive Board Press release on the SBA by the MD DSK as a: “commitment to doing what it can to help Greece and its people”<sup>5</sup>.

■ Large discrepancies between the confidential DSA of February 2012 in which “internal devaluation needed to restore Greece competitiveness will inevitably lead to a higher debt to GDP ratio in the near term”, concluding that the likelihood is “a much higher debt trajectory” of 160 percent of GDP in 2020<sup>6</sup> and the March 9th 2012 public version which replaces this assessment with a baseline scenario of 116.5% in 2020<sup>7</sup>.

Considering that debt which breach established legal procedures is illegal, the debt to IMF should be considered as illegal, since:

■ the IMF breached its own Articles of Agreement. As we have shown in Chapter 5, the IMF operations in Greece clearly and intentionally breached the Fund’s objectives. Under its Articles of Agreement the Fund is bound to “respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members”<sup>8</sup>.

■ the IMF’s own Guidelines necessitating national ownership of the programme<sup>9</sup> were grossly ignored in favor of a non-representative government which was effectively commanded by the Troika under conditions of fiscal occupation.

■ the Fund’s system risk detection is inadequate<sup>10</sup>, its economic project for the sustainability of the Greek debt was ill-founded<sup>11</sup>, and if the Fund did not undertake a detailed systemic risk assessment, beyond the evidence of the large exposure of the European banks<sup>12</sup> then the Board’s decision was in breach of the Fund’s internal laws.

## 2. Is the debt to the IMF legitimate?

Considering that a debt is illegitimate when the conditions attached to the loan included policy prescriptions that violate national laws or human rights standards, IMF loans are illegitimate for the same reasons that they are illegal since the conditions included policy prescriptions that infringed human rights obligations (see above).

The debt is also illegitimate because it was converted from private (commercial) to public debt under

pressure of the creditors.

■ The prepared statement to the IMF Board for the May 9 2010 meeting stated that: “The risks of the programme are immense... As it stands, the programme risks substituting private for official financing. In other and starker words, it may be seen not as a rescue of Greece, which will have to undergo a wrenching adjustment, but as a bailout of Greece’s private debt holders, mainly European financial institutions<sup>13</sup>.”

■ The risk that the programme would undermine the ability of Greece to repay the Fund is stressed and repeated in the Programme Reviews<sup>14</sup>. The IMF unduly delayed a restructuring that was acknowledged as inevitable from the outset and several EDs strongly warned that restructuring should have been on the table in 2010<sup>15</sup>. Its exclusion was deemed a political motive of pandering to powerful European interests in the IMF and to safeguard the European financial sector. This is confirmed by the statement made by the IMF Managing Director on 28th April 2010: “... the situation is serious, not only for Greece but for all the Euro-zone now. And the stability of the Euro-zone is really the point which is at stake”<sup>16</sup>. This clearly demonstrates that the IMF intervention was solely aimed at protecting the interests of private creditors.

## 3. Is the debt to the IMF odious?

Considering that debt is odious if the lender knew or ought to have known that the loan is unconscionable and whose effect is to deny people their fundamental civil, political, economic, social and cultural rights, debts to the IMF is odious, since the IMF knew that measures were ineffective and lead to serious violations of socio-economic rights. Indeed:

■ The IMF was aware that its loans and the conditionalities were unconscionable as we have shown above.

■ Furthermore, as decades of structural adjustment led by the IMF and the World Bank in the developing world has amply demonstrated, it was more than foreseeable that the measures imposed by the Troika on Greece will have had some substantial impact on human rights. It was thus unreasonable for the creditors to impose such conditionalities on Greece, hence the economic and social crisis could be seen as the direct result of unreasonable conditionalities.

## C. ASSESSMENT OF THE DEBT TO THE ECB

### 1. Is the debt to the ECB legal?

Considering that debt, which breach established legal procedures are illegal, the debt to the ECB should be considered as illegal, since:

■ The ECB over-stepped its mandate by imposing, via its participation to the Troika, the application of macroeconomic adjustment programs (i.g. the deregulation of the labour market).

■ According to Article 130 TFEU: “(...) neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, (...) from any government of a Member State or from any



other body. (...) The Union institutions, bodies, offices or agencies and the governments of the member states undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.” ECB has established a conditionality that links its SMP purchases to the policies of the members states, in particular the rigorous application of fiscal measures (see chapter 3), which is illegal regarding the requirement of central bank independence. Nonetheless, the ECB announced in 2012 that it would undertake outright transactions in secondary sovereign bond markets, namely, Outright Monetary Transactions (OMT), adding that “a necessary condition for OMTs is strict and effective conditionality attached to an appropriate EFSF/ESM programme.”

Considering that debt involving clear misconduct by the lender, or debt whose attendant conditions contravene the law or public policy should be considered as illegal, debt to the ECB are illegal, because:

- The measures laid down in the MoUs, which are de facto conditions attached to the SMP Program, breach the rights protected by the Greek Constitution and international human rights treaties. The ECB, as part of the Troika, is co-responsible for violation of human rights.

- The ECB acted in bad faith (which is illegal) within the SMP programme because it bought Greek bonds on the secondary market but demanded the full reimbursement of both capital (nominal value) and accrued interest.

- The ECB decided to return the profit made on capital and interest to Greece but only under the condition that Greece agrees to implement the reforms imposed within the programme period. The decision to withhold the interest which accrued to Greek bonds and thus refuse to give it to its legal recipient (namely Greece) constitutes a clear case of coercion by which to force the government to accept the conditions imposed by its creditors.

- The ECB placed illegal pressure upon the Greek government. On February 4, 2015 the European Central Bank announced that from February 11 it would cease to accept Greek Government bonds as collateral, stating that “it is currently not possible to assume a successful conclusion of the programme review.” By pressuring the Greek Government which was then engaged in negotiations with its creditors, the ECB contravened Article 130 TFEU<sup>17</sup>. Consequently, the ECB aggravated the crisis and increased the financial instability of the euro and the Eurozone, which is grossly contradictory of its mandate.

## 2. Is the debt to the ECB legitimate?

Considering that a debt is illegitimate if its attendant conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, the debt to the ECB are illegitimate for the same reasons that they are illegal (see above: debt to the ECB involving a clear misconduct

by the ECB and the conditions laid down in the MoUs contravene the law and public policy).

Considering that a debt is illegitimate if the loan, security or guarantee was not used for the benefit of the population, debt to the ECB are illegitimate, since the principal reason of the SMP programme was to serve the interests of the private financial sector, allowing the major European private banks to dispose their Greek bonds.

## 3. Is the debts to the ECB odious?

Considering that debts are odious if the lender knew or ought to have known that those debts are unconscionable and whose effect is to deny people their fundamental civil, political, economic, social and cultural rights, the debts to the ECB are odious, given its decision to connect its buyback of the bonds with the SMP, which required Greece’s implementation of the MoU. The ECB knew or ought to have known (as a European Institution it has failed to meet the most basic of requirements to prevent human rights violations in the policies they pursue) that the conditions encompassed in the MoU are illegal and evidently against the interests of the Greek people and the Greek State, chiefly because of the abusive clauses in the agreements between Greece and its creditors. The effect of those clauses was to deny the Greek people their fundamental civil, political, economic, social and cultural rights, as well as restrict or even dissolve the sovereignty of the Greek state.

## D. ASSESSMENT OF THE DEBT TO THE EFSF

### 1. Is the debt to the EFSF legal?

Considering that debt which do not respect the proper legal procedures are illegal, it follows that the debt to the EFSF should be considered as illegal, because:

- Article 122(2) TFEU was violated. The Commission and the Council’s legal justification for the EU loan to Greece was predicated on Article 122(2) which allows the financing of another member state when these are: “severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. However it was not the case for Greece, since its situation was comparable to other EU states, only deteriorating after the implementation of the conditionalities stipulated in the pertinent MoU. Furthermore, the manipulations of statistics were used to increase dramatically the fiscal deficit (see chapter 2) so as to justify the bail out programme (MoU).

Considering that debts, which involve clear misconduct by the lender or which suffer from conditions that contravene the law or public policy, should be considered as illegal, debt to the EFSF is illegal, because:

- the measures laid down in the MoU, which in turn constitute conditions imposed by the EFSF, breach several socio-economic rights and civil liberties protected by the Greek Constitution, as well as the European and international human rights treaties.

- The EFSF Framework Agreement 2010 and the Master Financial Assistance Agreement of 2012 con-

tain several abusive clauses (revealing clear misconduct on the part of the lender). For example, it is stipulated that the agreement has to be implemented even if it is found to be illegal. If pertinent clauses were applied, it implies that states participating in the EFSF pursue illegal activities.

## 2. Is the debt to the EFSF legitimate?

Considering that a debt is illegitimate if the terms and conditions attached to the loan, security or guarantee (from which it originates) infringed the law (both national and international) or public policy, or if such terms or conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, it follows that the debt to the EFSF are illegitimate for the same reasons that they are illegal (see above: the EFSF Framework Agreement 2010 and the Master Financial Assistance Agreement of 2012 contain several abusive clauses and the MoU breach the Greek Constitution and several human rights Covenants). Furthermore, the EFSF bailout was channeled through an escrow account. This account is controlled by an external “commissioner” of the Troika<sup>18</sup>. The majority of the second bailout funds have not gone through the government’s budget. The EFSF did not respect the sovereign rights of the Hellenic Republic to manage its own money.

Considering that a debt is illegitimate if the loan, security or guarantee was not intended, or indeed used, for the benefit of the population, it follows that the debts to EFSF are illegitimate because:

- As it is shown in the Chapter 4: the 2012 agreement objective of the EFSF is explicitly the “recapitalization of financial institutions”;<sup>19</sup> the PSI programme recycles “other” unspecific obligations into debt towards the EFSF without any benefit for Greece; the EFSF impose Greece abusive costs, even if the disbursement does not take place.

- The EFSF financial regulatory status benefits banks. International regulatory frameworks Basel II and III and the European regulation frameworks categorize the EFSF assets as 0% risk weighting assets, which by no means corresponds to its credit ratings. Banks benefit from public guarantees and favourable regulations to increase profits, while maintaining capital ratios untouched<sup>20</sup>.

## 3. Is the debt to the EFSF odious?

Considering that debt is odious if the lender knew or ought to have known that those debts were incurred in violation of democratic principles (including consent, participation, transparency and accountability), and used against the best interests of the population of the borrower State, or are otherwise unconscionable, the effect of which is to deny people their fundamental civil, political, economic, social and cultural rights, it follows that the debt to the EFSF is odious, because:

- The EFSF knew or should have known that the conditionalities incorporated in the MoU were breaching human rights. As we have shown in Chapter 7, each

Euro Area (Lender) Member State is required to ensure that non-state actors (such as the EFSF), whose conduct the state is in a position to influence, are prohibited from impairing the enjoyment of such rights.

- The EFSF knew that the abusive clauses in the agreements were against the interest of the Greek people and the Greek State. The effect of those clauses is to deny Greek people their fundamental civil, political, economic, social and cultural rights but also to deny the Greek State its sovereignty.

Furtherore, we must keep in mind that the EFSF suffers from a serious democratic legitimacy deficit. The EFSF, managing the EU public funds, was constituted as a private firm outside the ambit of the EU law, in the form of a Special Purpose Vehicle (SPV) similar to a hedge fund and incorporated in Luxembourg, one of the world’s major tax havens. Therefore, it is not an institution predicated on democratic principles, particularly openness and accountability, representative of and committed to the protection of fundamental rights.

## D. ASSESSMENT OF THE BILATERAL LOANS

### 1. Are bilateral loans legal?

Considering that debt which do not respect the proper legal procedures provided for by the domestic law of the parties are illegal, the bilateral loans should be considered as illegal, since:

- As it has been seen, the procedure provided for by the Greek constitution has not been respected.

- The Commission (composed by States) was meant to verify Greece’s obedience to the MoU before each disbursement. The Commission had also powers such as to coordinate and manage; negotiate; open the account in the ECB to process all payments. And yet, neither the EU commission nor any other State has taken or implemented either any impact assessment or applied any other mechanism that could have assessed the impact of the conditionalities on the exercise of human rights by the people in Greece.

Considering that debts, which involved clear misconduct by the lender or had conditions that contravened the law or public policy are illegal, the bilateral loans should be considered as illegal since there was a breach of both EU law and of international law to sideline human rights in the design of the macroeconomic programmes:

- The conditions attached to these loans breached human rights obligations provided for by the Greek constitution and several European and International human rights instruments to which the lenders states are parties and from which stemmed some extraterritorial obligations.

- As it is underlined in Chapter 7, the European Lenders (States and Institutions) have also breached several articles of the TEU (articles 2 and 3) and the TFUE (article 9).

- The Loan Facility Agreement contains abusive clauses (revealing a clear misconduct of the lender) such as stating that provisions of the agreement have to be implemented even if they were found illegal and those



stating that Greece hereby irrevocably and unconditionally waives all immunity.

## 2. Are bilateral loans legitimate?

Considering that a debt is illegitimate if the conditions attached to the loan included policy prescriptions that violate national laws or human rights standards, bilateral loans are illegitimate for the same reasons that they are illegal, since the conditions included policy prescriptions that infringed human rights obligations (see above).

Considering that a debt is illegitimate if the loan was not used for the benefit of the population, bilateral loans are illegitimate since:

- They have not been used for the benefit of the population of Greece, they have merely enabled the private creditors of Greece to be bailed out.

- The interest rates were too high compared to the interest rates lender countries were paying the market, so much so that they were reduced later.

## 3. Are bilateral loans odious?

Considering that debt is odious if the lender knew or ought to have known that this debt was incurred in violation of democratic principles (including consent, participation, transparency, and accountability), and used against the best interests of the population of the borrower State, or is unconscionable and its effect is to deny people their fundamental civil, political, economic, social and cultural rights, bilateral debts are odious since:

- The lender states could not argue that they were not aware of such potential violations. We must remind that neither in 2010, nor in 2012, was there any attempt to assess the human rights impacts of the macroeconomic adjustment and fiscal consolidation that were the conditions for the loans. In the case of the 2012 MoU, the harms were widely known by then.

- They also knew that conditions attached to the loans have clearly been imposed on Greece, and that participation, transparency, and accountability principles have not been respected in this respect.

- Furthermore, European States (which are also members of the IMF) knew since 2010 that the loans will serve merely some private interest and the austerity measures lead to serious violations of socio-economic rights. See the above, "Assessment of the debts to the IMF".

## E. ASSESSMENT OF THE DEBT TO THE PRIVATE CREDITORS

Private creditors fall into three main groups: banks, hedge funds, and small holders. Auditing the public debt should make it possible to find a way to compensate small holders and treat them differently as compared to others. Less informed than banks and hedge funds, small holders are victims of the banks' actions. One should remember that the Greek government encouraged its citizens to buy bonds that were presented as secure and profitable investments at a

time when the same government paid laid-off workers in sovereign bonds<sup>21</sup>. One should also keep in mind that some private creditors whose loans were not contracted under Greek law could decline the credit-swapping operation, or "hold out" which demonstrates that creditors were not, in fact, treated equally.

## 1. Is debt to the private creditors legal?

Considering that debts which involved a clear misconduct by the lender should be considered as illegal, it follows that part of the debt to private creditors is equally illegal because:

- Private banks conducted themselves irresponsibly before the Troika came into being. For example, in the report they submitted after their inquiry into the role of the Troika concerning the Eurozone countries involved in bailout programmes<sup>22</sup>, MEPs Othmar Karas and Liem Hoang Ngoc emphasized the dual responsibility of banks and States. They regretted "that the burden has not been shared among all who acted irresponsibly and that the protection of bondholders was seen as an EU necessity in the interests of financial stability"<sup>23</sup>. Private banks failed to observe their due diligence obligations and yet still received significant profits from the Greek State. In its 2013 report, the Bank of Greece identified several elements explaining changes in Greece's debt-to-GDP ratio and measuring their respective contributions to these changes. For the years 2009, 2010, 2011 and 2012, the portion that can be attributed to the snowball effect was respectively 6.2%, 11.2%, 16.9% and 18%<sup>24</sup>.

- Some private creditors such as hedge funds acted in bad faith. Bad faith may be found in the speculation on public debts by private investors, particularly hedge funds, through financial instruments such as credit default swaps.

Considering that debts contracted in violation of domestic law are illegal, some local debts to private creditors should be considered as illegal. For instance, the municipality of Zografou was granted a €25 million loan by the Austrian bank KommunalKredit, a subsidiary of Dexia, for a project which did not get approval from state auditors as required by law<sup>25</sup>.

## 2. Is debt to the private creditors legitimate?

Considering that a debt is illegitimate if the terms and conditions attached to that loan, security or guarantee infringed the law, or if such terms or conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable (such as bearing excessively high interest rate), some parts of the debts to private banks and hedge funds are illegitimate for the same reasons that they are illegal (see above).

Furthermore, Greek banks have been abundantly recapitalized by tax-payers since the second programme, adopted by the Eurogroup on 21 February 2012, committed €48 billion for recapitalization. Such assistance, which mainly benefits bank shareholders, may rightly be considered illegitimate.

### 3. Is debt to the private creditors odious?

Considering that a debt is odious if the lender knew or ought to have known that it was incurred in violation of democratic principles and used against the best interests of the population of the borrower State, debts to private banks and hedge funds are odious.

Indeed, the private sector was insulated from a great part of Greek debt because of pressure exerted by the Troika, which suffers from a serious democratic legitimacy deficit. Since major private creditors (banks, hedge funds) were aware that these debts were not incurred in the best interests of the population but rather for their own benefit, it is beyond doubt that a large part of this debt is of an odious nature.

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15. WSJ, 2013. IMF Document Excerpts: Disagreements Revealed. Wall Street Journal. Available at: <http://goo.gl/gyHqdi> [Accessed June 13, 2015].

16. IMF, 2010. Transcript of Statements to the Media by Angela Merkel and Strauss-Kahn in Berlin. Available at: <https://goo.gl/ZLG4Qv> [Accessed June 13, 2015].

17. According to Article 130 TFEU: "(...) neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, (...) from any government of a Member State or from any other body. (...) The Union institutions, bodies, offices or agencies and the governments of the member states undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks."

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20. Because EFSF assets are categorized as riskless by regulators, banks can buy as much EFSF assets as they want without having any regulatory restriction, because it doesn't affect their Basel capital ratios. Hence, they can leverage themselves and take risk without regulatory limits. This riskless category doesn't correspond to the credit ratings of the EFSF.

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CHAPTER 9

# Legal foundations for repudiation and suspension of Greek sovereign debt



## ABSTRACT:

Several legal mechanisms enable States to unilaterally repudiate or suspend debts that are illegitimate, odious, illegal or unsustainable.

A first range of mechanisms are dedicated to the repudiation of illegitimate, odious and illegal debt since they integrate subjective elements that take into account the behavior of the creditors. Unilateral repudiation is justified by peremptory considerations of justice and equity, but is also founded on sovereignty and self-determination. This is the case where there is an absence of good faith based on Article 26 of the Vienna Convention on the Law of Treaties (VCLT) which provides that treaties are binding and must be performed in good faith. Bad faith in the case at hand was to be achieved by rendering Greece financially subservient and by imposing measures violating fundamental socio-economic and civil and political rights of the Greek people as well as domestic legislation. Moreover, the sustained pressure on Greece to bypass its constitution and violate its human rights obligations, as well as the creditors' interference in the country's political and economic affairs constitutes a form of coercion. Such coercion is in itself a ground of invalidity under Article 52 VCLT. The VCLT's reference to "force" in Article 52 may be construed as including forms of economic coercion. It is then to be noted that, in the case at hand, statements made by creditors, even speculative ones which were known to culminate, or which would have knowingly had the effect of deteriorating/harming the Greek economy and the livelihood of the Greek people constitute a species of unilateral coercive measures. These are prohibited under international law and violate the UN Charter. It is well accepted that when a country becomes the target of actions that are known to harm its economy (especially to the benefit of its lenders) and the livelihood of its people, it may resort to lawful countermeasures. Indeed, under customary international law and Articles 49ff of the ILC's Articles on State Responsibility (ASR) an injured state may violate an otherwise international obligation against another (responsible) state if that other state has committed an internationally wrongful act. The violation committed by the injured state has the purpose of inducing the responsible state to comply with its obligations.

Finally, one should highlight the fact that the Greek people have not received an unjust advantage or any other benefit from the accrued debt, and thus Greece is under no obligation to repay that part of the initial capital (deemed odious, illegal or illegitimate) as a form of unjust enrichment.

A second range of mechanisms apply in respect of unsustainable debt. Contrary to the ones listed above, these are mechanisms that apply objectively, irrespective of the creditor's behavior. In such situations, the debt cannot be repudiated but merely suspended. In this respect, Greece may lawfully have recourse to two grounds that render its debt obligations invalid. The first concerns the state of necessity. In accordance with Article 25 of ILC's ASR, the term "necessity" is used to denote those exceptional cases where the only way a

state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. In the case at hand, due to the economic and social crisis in Greece, the conditions required for the defence of necessity are satisfied. The second ground concerns the right to unilateral insolvency. Although creditors are generally opposed to such possibility as it precludes them from being paid, sovereign insolvency is a reality in international affairs, acknowledged in both theory and practice. If a state then enjoys the right to become insolvent, it is clear that unilateral insolvency constitutes a circumstance precluding wrongfulness of the borrower's international obligations, namely its borrowing obligations.

## SECTION I: THE RIGHT TO UNILATERAL REPUDIATION OF ODOUS, ILLEGAL AND ILLEGITIMATE DEBT UNDER INTERNATIONAL LAW

The existence of odious, illegal or illegitimate debt may justify its unilateral repudiation by the debtor state if such repudiation is not arbitrary, discriminatory and does not give rise to unjust enrichment. The absence of significant case law or a large body of unilateral denunciations is due to the fact that in most cases debtor states (and their lenders) find it more appropriate, politically and financially, to come to other negotiated terms. Such negotiated settlements, however, do not diminish the rule against odious debt and the entitlement of states to unilaterally repudiate it. Indeed, unilateral repudiation is justified by peremptory considerations of justice and equity<sup>1</sup>, but is also founded on sovereignty and self-determination. In the present report, the legal basis of a Greek unilateral repudiation of that part of its debt which is odious, illegal and illegitimate is predicated on the following considerations:

### 1. Absence of good faith

Under Article 26 of the Vienna Convention on the Law of Treaties (VCLT) treaties are binding and must be performed in good faith<sup>2</sup>. The ILC Commentary stresses that good faith is a legal principle and forms an integral part of *pacta sunt servanda*. The principle whereby agreements are to be honored applies only where both parties act in good faith. In fact, Article 69(2) VCLT is adamant that "acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty"; thus implicitly accepting that acts performed in bad faith are always unlawful. Although the absence of good faith does not automatically always lead to the invalidity of an agreement, it justifies in exceptional circumstances denunciation of the treaty under Article 56 (1) (b) VCLT (a right of denunciation implicit in the nature of the treaty). In the case at hand, the agreements entered into between Greece and its creditors were known to all parties to violate the Greek constitution. In addition,

it was known to all parties that they violated Greece's treaty obligations under pertinent human rights treaties and customary international law. In the situation at hand, bad faith is additionally manifested through the ultimate aim of the creditors, which was not to secure Greece's liquidity (so-called bail out), but rather, among others, to transform private debt into public debt and thus salvage big private banks and their shareholders.

This was to be achieved by rendering Greece financially subservient and by imposing measures violating fundamental socio-economic, civil and political rights of the Greek people. Equally, lender states and financial institutions with excellent credit rating and thus access to low interest were able to lend to Greece with a much higher interest under the guise of a 'bailout', such as the ECB's purchase of sovereign bonds from secondary markets at half their nominal value but later demanding an extortionate rate of interest from Greece while all the time claiming to have bought Greek sovereign bonds in order to contribute to the Greek economy and bailout. In addition, Greece's need for liquidity was met with a set of measures whose aim was to extinguish its economic and political sovereignty.

## 2. The legal effect of creditors violating domestic laws

Bad faith was further manifested in the blatant violation of Greek law, particularly the Constitution. A characteristic example was the promulgation of Article 1(9) of Law 3847/2010, which effectively bypassed Articles 28 and 36 of the Greek constitution as regards the requirement of parliamentary approval in respect of foreign agreements. Such constitutional violations were clearly engineered by both parties as they paved the way for legislation recommended by the creditors (or agreements dictated by creditors) to be adopted as law without parliamentary approval. While generally obligations under international law supersede contrary obligations under domestic law, this principle is inapplicable where the parties' agreement knowingly and purposely violates fundamental provisions of domestic law (particularly of a constitutional nature). This is because such an agreement violates the principle of legality, fails to satisfy good faith and breaches other parties' legitimate expectations. Article 46(1) VCLT expressly states that the violation of domestic law regarding competence to conclude treaties is a ground invalidating that state's consent if the violation, as in the case at hand, was 'manifest and concerned a rule of law of its internal law of a fundamental importance'.

## 3. Precedence of human rights over other contractual obligations

As the present report has shown, Greece was effectively coerced into violating fundamental human rights obligations through a series of agreements, such as the 2010 Intercreditor Agreement and Loan Facility Agreement and MoUs whereas sovereign creditors have an obligation not to frustrate or force another party to

violate its obligations. The violation of human rights through conditionalities affects the validity of the debt contracts<sup>3</sup>.

Such an obligation for creditors to respect human rights is first and foremost an ethical one, for no state can legitimately claim to be discharging its own human rights obligations territorially while at the same time actively pressuring another state to violate its own obligations. Secondly, convincing a state to effectively and totally suspend or contract out of its human rights obligations constitutes a clear interference in its domestic affairs, irrespective if the latter formally consents. To the extent that Greece's agreements with creditors are in conflict with *jus cogens* norms (e.g. economic self-determination) these are void under Article 53 VCLT.

The primacy of human rights has been clearly enshrined in Article 103 of the UN Charter but also in many reports and statements made by UN institutions. According to Article 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". These obligations include the promotion of universal respect for, and observance of, human rights for all.

The UN Guiding Principles on foreign debt and human rights, which although not binding as such but reflecting customary law where it iterates the human rights obligations of states, emphasizes that:

"All States have the obligation to respect, protect and fulfil human rights. In this regard, they should ensure that any or all of their activities concerning their lending and borrowing decisions, those of international, national public or private institutions to which they belong or in which they have an interest, the negotiation and implementation of loan agreements or other debt instruments, the utilization of loan funds, debt repayments, the renegotiation and restructuring of external debt, and the provision of debt relief when appropriate, do not derogate from these obligations" (para. 6).

"International organizations have an obligation to respect human rights. This implies a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights" (para. 9).

"States should ensure that their rights and obligations arising from external debt agreements or arrangements do not hinder the progressive realization of economic, social and cultural rights" (para. 16).

## 4. Coercion in debt restructuring

The majority of the debt instruments encompassed a degree of coercion. Indeed, where a state is coerced into violating its constitutional, treaty and customary obligations in order to secure credit and liquidity, especially where it is forced to forego a significant part of its legislative and socio-economic sovereignty, it is deemed as having consented under a high degree of coercion. In the case at hand this was further manifested



through reprehensible conditionalities, combined with interference in constitutional processes (such as severe opposition to a proposed referendum in 2011 and unveiled threats to the Greek electorate in all elections since 2010). Coercion as a ground of invalidity under Article 52 VCLT refers to the threat or use of force. The VCLT's reference to "force" may be construed as including forms of economic coercion and should not necessarily be limited to "armed force". Indeed, a number of international instruments refer to economic pressure as a form of aggression<sup>4</sup>.

This type of economic coercion also qualifies as unlawful intervention in the domestic affairs of a state which, although does not invalidate consent, may nonetheless offer a basis for denouncing a treaty under Article 56 (1) (b) VCLT.

The employment of coercion in the negotiation and signing of an instrument, whether a treaty or contract, gives rise to severe implications for the instrument in question as well as the parties' relationship<sup>5</sup>. Although Articles 51 and 52 of the VCLT refer to the coercion of individual state negotiators or coercion through the threat or use of force, it is clear that in situations where a government as a whole is forced to accept significantly unbalanced terms, lest be sanctioned with an acute (real or speculative) financial crisis (especially when its origin and effects are controlled by the other parties)<sup>6</sup> with unforeseen consequences, that the level of coercion is tantamount to that envisaged in Article 52 VCLT.

## 5. Unilateral coercive measures by creditors

The creditors' bad faith and illegitimate pressure (coercion or duress) on Greece to accept the terms of the various agreements and instruments, as well as the financial consequences of unilateral acts, ultimately culminated into a situation whose legal effects are tantamount to unilateral coercive measures. In the case at hand, statements made by creditors, even speculative ones which were known to culminate, or which would have knowingly had the effect of deteriorating/harming the Greek economy and the livelihood of the Greek people constitute a species of unilateral coercive measures. Unilateral coercive measures are prohibited under international law, violate the UN Charter and are not considered lawful countermeasures<sup>7</sup>.

## 6. Lawful countermeasures

As has been demonstrated in the present report, the creditors have committed internationally wrongful acts by imposing upon the Greek government several measures that violate rights enjoyed by the Greek people.

Furthermore, in the run-up to the Greek debt crisis, EU member states and the IMF, among others, entered into negative statements about the Greek economy that had a direct adverse impact on the country's capacity to borrow with lower interest rates. Further speculation through other statements about the country's exit from the Eurozone had an analogous impact and among other effects induced a significant number of Greek deposits to flee abroad. The same is true of similar measures and statements following the election to power of a

new government in 2015.

The outcome of these observations is that when a country becomes the target of actions that are known to harm its economy (especially to the benefit of its lenders) and the livelihood of its people, it may resort to lawful countermeasures. Greece is therefore entitled to pertinent countermeasures, especially by repudiating debts attached to, or arising from, the MoUs, the 2010 Intercreditor Agreement and Loan Facility Agreement.

Indeed, under customary international law and Articles 49ff of the ILC's Articles on State Responsibility (ASR) an injured state may violate an otherwise international obligation against another (responsible) state if that other state has committed an internationally wrongful act. The violation committed by the injured state has the purpose of inducing the responsible state to comply with its obligations.

## 7. The absence of unjust enrichment

Bad faith, the satisfaction of self-interests, the absence of legality and the detrimental effects of the conditions imposed on Greece to its economy and the livelihood of its people render the pertinent part of the debt odious, illegal or illegitimate. The Greek people have not received an unjust advantage or any other benefit – quite the contrary – from the accrued debt, therefore Greece, is under no obligation to repay that part of the initial capital (deemed odious, illegal or illegitimate) as a form of unjust enrichment<sup>8</sup>. The same is true in respect of interest (simple or compound) which arises as a result of odious, illegal or illegitimate capital in the form of loans, assurances or other. The case against unjust enrichment is further reinforced by the fact that while Greece has made a surplus and has dramatically slashed public spending its debt continues to grow.

## SECTION II: THE RIGHT TO UNILATERAL SUSPENSION OF UNSUSTAINABLE DEBTS UNDER INTERNATIONAL LAW

### 1. Unilateral debt suspension based on the state of necessity

The definition of necessity is provided by Article 25 of the ILC Articles on State Responsibility which has been widely used and recognized by international courts and tribunals<sup>9</sup>. As explained in the commentary to Article 25, the term "necessity" is used to denote those exceptional cases where the only way a state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency<sup>10</sup>. Pursuant to Article 25, four conditions are required for a lawful invocation of necessity. The Greek case satisfies them all. Greece can therefore suspend the unsustainable part of its debt.

#### a) The measure shall safeguard an essential interest of the State against a grave and imminent peril

In the Socobel case<sup>11</sup>, counsel for the Greek Government rightly stated that "doctrine recognizes in this matter that the duty of a Government to ensure the



proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration, the Government is, in the opinion of authors, authorized to suspend or even to reduce the service of debt<sup>12</sup>. The Counsel for the Belgian government replied that: “a learned survey . . . Mr. Youpis [the counsel for the Greek government] stated yesterday that a State is not obliged to pay its debt if in order to pay it would have to jeopardize its essential public services. So far as the principle is concerned, the Belgian Government would no doubt be in agreement.”

An ICSID tribunal in the LG&E case has followed this view in finding that economic and financial interests can also be considered as essential interests.<sup>13</sup> In this respect, the tribunal pointed out several socio-economic indicia which allowed Argentina to lawfully invoke a state of necessity<sup>14</sup>. These included:

- Unemployment rate of 25%;
- Almost half of the Argentine population living below the poverty line;
- “Health care system teetered on the brink of collapse”;
- Government forced to decrease its per capita spending on social services by 74%.

In the Continental case, an ICSID tribunal shared this view and also set out a set of concrete factors:

“It is impossible to deny, in the Tribunal’s view, that a crisis that brought about the sudden and chaotic abandonment of the cardinal tenet of the country’s economic life, such as:

- the near collapse of the domestic economy;
- the social hardships bringing down more than half of the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population....that all this taken together does not qualify as a situation where the maintenance of public order and the protection of essential security interest of Argentina as a state and as a country was vitally at stake<sup>15</sup>.

As it has been demonstrated in chapters 5, 6 and 7 of the present report, it is clear that essential interests of Greece are equally under imminent peril.

#### **b) The measure must be the only way to safeguard the essential interest in question**

It is clear from the ILC Articles commentary that the state can take several measures, and thus the expression “only way” shall not be construed literally. In the LG&E case the tribunal stated that a state may have several responses at its disposal to maintain public order or protect its essential security interests. As these austerity measures have directly culminated in serious and flagrant human rights violations and have, as such, jeopardized essential interests of Greece, it is evident that the suspension of that part of the debt which is odious, illegal or illegitimate is now the only solution for Greece in order to safeguard the interests at stake. As has been well demonstrated, the violation

of human rights is closely linked to the economic and social environment, which is the result of a debt crisis. During the past five years, measures implemented were seen by most of the international economic actors as the only way to prevent Greece from defaulting, and this continues to be the case. This means that in the eyes of Greece’s creditors there exist merely two options: implementing austerity measures or defaulting. A default would have harmed the banks’ interests.

#### **c) The measure shall not impair an essential interest of the State or states towards which the obligation exists, or of the international community as a whole**

This condition means that the interest of the other states threatened by the non-fulfillment of the obligation has to be inferior to the essential interest of the first state. In the case of Greece, as we have shown in the present report, the consequences to be borne by the creditors of Greece are substantially low, and cannot, in any case, be seen as essential interests.

#### **d) The state shall not have contributed to the situation of necessity and the international obligation in question shall not exclude the possibility of invoking necessity**

The commentary to Article 25 makes it clear that the contribution to the situation of necessity must be “sufficiently substantial and not merely incidental or peripheral<sup>16</sup>”. In the case of Greece, it is clear that the Troika is responsible for the economic and social disaster that has engulfed the country. As we have shown, the margin of appreciation at the disposal of Greece was very narrow and did not enable it to freely implement any meaningful economic and social program. We have shown that Greece was effectively forced to accept such conditionality through political and economic pressure, mainly undertaken by two of the more powerful countries in the EU (France and Germany). In this context, Greece cannot be seen as having substantially contributed to the situation.

## **2. The right to unilateral sovereign insolvency**

There is no rule under international law that prevents states from becoming insolvent by unilateral means. This is especially true when a state becomes factually insolvent, whether because its debt is unsustainable, because it is unable to meet the fundamental needs of its people, or because of other circumstances. The practice of states that have actually defaulted constitutes some practice regarding the unilateral nature of such an entitlement. Sovereign insolvency has received minimal attention in international law and practice, although it is well documented and was in fact rather prevalent in the early part of the twentieth century<sup>17</sup>. This right to unilateral insolvency is further corroborated by the ILA’s Sovereign Insolvency Study Group whose 2010 report proposed four policy options for debt restructuring, one of which was in fact full bankruptcy. In 2013 two working groups were established, one of which analysed the possibility of treaty-based solutions to debt restructuring<sup>18</sup>. As a result, sovereign insolvency is a reality in international affairs that is acknowledged in both theory

and practice, albeit fiercely resisted because the assets of insolvent states are protected by immunities and sovereign privileges against their creditors. Debt-restructuring, short of insolvency, therefore, is an artificial mechanism which effectively allows creditors to exploit the income-generating sources of states, namely taxes, customs/tariffs, natural resources royalties, forced privatisations and others. The idea that Greece could somehow become unilaterally insolvent was resisted by its creditors through unilateral coercive measures. Even though it would have been beneficial for Greece to become insolvent, especially in the wake of the crisis, its creditors continued to sustain her unsustainable debt, effectively prolonging an unsustainable debt.

If a state then enjoys the right to become insolvent, it is clear that unilateral insolvency constitutes a circumstance precluding wrongfulness of the borrower's international obligations, namely its borrowing obligations. This is clearly the case when a state of necessity may be demonstrated under Article 25 of the ILC's Articles on State Responsibility, as already explained. It would be inconceivable for a domestic court to compel a person to service his or her debt if his or her earnings did not suffice for the basic sustenance needs of his or her family. These observations are consistent with a recent award issue by an investment tribunal in *Postova Banka AS and Istrokapital SE v Greece*, where it noted that there is no guarantee for the repayment of sovereign debt, adding further that: "In sum, sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State. It cannot, thus, be equated to private indebtedness or corporate debt"<sup>19</sup>.

1. R Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD Paper 185 (July 2007).

2. The agreements between Greece and its creditors are not treaties, so the VCLT does not formally apply. It is used here because the majority of its provisions reflect general principles governing agreements between state entities.

3. Among the many sources, Bedjaoui, who was the ILC's rapporteur on the Vienna Convention on the Succession of States in respect of state property, archives and debts, and hence his opinion is decisive, noted that a debt is considered odious if the debtor state contracted it "with an aim and for a purpose not in conformity with international law". M Bedjaoui, Ninth Report on Succession of States in respect of matters other than treaties, UN Doc A/CN.4/301 (1977), reprinted in YB ILC, at 70.

4. Art. 32 of the Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX) (12 Dec. 1974), Declaration of the Principles of International Law Concerning Friendly Relations and Co-operation among States, GA Res. 2625 (XXV) (24 Oct. 1970); Declaration on the Inadmissibility of Intervention in Domestic

Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131 (XX) (21 Dec. 1965); Moreover, the Final Act of the Vienna Convention on the Law of Treaties includes a declaration, initially tabled by The Netherlands (in reaction to a request by developing countries that consent to a treaty under economic pressure be considered as "coercion"), stating that: "The United Nations Conference on the Law of Treaties ... condemns the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent" (Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, adopted by the Conference without a formal vote (Draft Report of the Committee of the Whole on Its Work at the First Session of the Conference, U.N. Doc. A/Conf. 39/C. 1/L. 370/Rev. 1/Vol. II (1969), at 251-252)).

5. The same is also true as a general principle of contract law. In the common law, for example, duress renders the contract voidable if the pressure is illegitimate, which depends on the nature of the threat and the demand. *Universe Tankships Inc of Monrovia v International Transport Workers Federation*, [1983] 1 AC 366.

6. One minor dimension, for example, is the ability of creditor states and institutions to instill fear in the markets and hence force credit ratings down as well as people to withdraw their savings and deposit them in foreign banks (typically in the creditors' territory) or otherwise invest it in real estate in creditor territories.

7. See Arts 49-50 ILC Articles on State Responsibility.

8. UNCTAD (2007), *op. cit.* p. 22.

9. ICJ, 25 September 1997, *Gabcíkovo-Nagymaros Project*, BVerfG, 2 BvR 120/03 of 4/5/2006; French Supreme Court, 23 October 1987, *Nachfolger navigation company*; Decision on Annulment *Enron v. Argentina*, 30 July 2010, ICSID Case No. ARB/01/3 §356; Decision on Annulment *Enron v. Argentina*, 30 July 2010, ICSID Case No. ARB/01/3; Decision on Annulment *Sempra v. Argentina*, 29 June 2010, ICSID Case No. ARB/02/16; LG&E v. Argentina, 3 October 2006, ICSID Case No. ARB/02/1; *Continental v. Argentina*, 5 September 2008, ICSID Case No. ARB 03/9.

10. ILC Articles on Responsibility of States for Internationally Wrongful Acts: Commentary, available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), at 80.

11. *Societe Commerciale de Belgique*, (1939) PCIJ Ser A/B, No 78.

12. Cited by R Ago, Addendum to 8th Report on State Responsibility, UN Doc A/CN.4/318/ADD.5-7.

13. *LG&E Energy Corp and Others v Argentina*, ICSID Award (25 July 2007), para 251.

14. *Ibid.*, para 234.

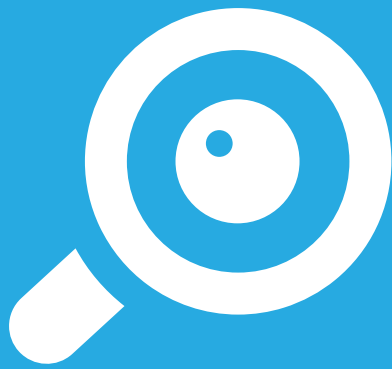
15. *Continental Casualty Company v Argentina*, ICSID Award (5 September 2008), para 180.

16. ILC Commentary, above note 10, at 84.

17. M Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press, 2011), at 3-19.

18. RM Lastra, L Buchheit (eds), *Sovereign Debt Management* (Oxford University Press, 2014), at xx-xxiii.

19. *Postova Banka AS and Istrokapital SE v Greece*, ICSID Award (9 April 2015), paras 324.



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