

# State Transformation and the European Integration Project

## Lessons from the financial crisis and the Greek paradigm

**Evangelos Venizelos**

**No. 130/February 2016**

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### Abstract

The financial crisis that erupted in the eurozone not only affected the EU's financial governance mechanisms, but also the very nature of state sovereignty and balances in the relations of member states; thus, the actual inequalities between the member states hidden behind their institutional equality have deteriorated. This transformation is recorded in the case law of the Court of Justice of the European Union and the member states' constitutional courts, particularly in those at the heart of the crisis, with Greece as the most prominent example.

It is the issue of public debt (sovereign debt) of the EU member states that particularly reflects the influence of the crisis on state sovereignty as well as the intensely transnational (intergovernmental) character of European integration, which under these circumstances takes the form of a continuous, tough negotiation. The historical connection between public debt (sovereign debt) and state sovereignty has re-emerged because of the financial crisis. This development has affected not only the European institutions, but also, at the member state level, the actual institutional content of the rule of law (especially judicial review) and the welfare state in its essence, as the great social and political acquis of 20<sup>th</sup> century Europe. From this perspective, the way that the Greek courts have dealt with the gradual waves of fiscal austerity measures and structural reforms from 2010 to 2015 is characteristic. The effect of the financial crisis on the sovereignty of the member states and on the pace of European integration also has an impact on European foreign and security policy, and the correlations between the political forces at both the national and European level, thus producing even more intense pressures on European social democracy. In light of the experience of the financial crisis, the final question is whether the nation state (given the large real inequalities among the EU member states) currently functions as a brake or as an engine for future European integration.

ISBN978-94-6138-503-1

The author would like to express his thanks to Panagiotis Doudonis for his contribution to the English version of this text and Adam Kyriakoulis for his technical support. He would also like to thank Christina Akrivopoulou, Charalampos Anthopoulos, Kyriakos Pierrakakis, Georgios Zaniias and Dimitris Kourkoulas for their remarks.

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### 1. Introduction: Institutional equality and the real inequalities among EU member states

The international financial crisis that erupted in 2007–08 has also been, beyond any other considerations, a further test of the relationship between the nation state and the European integration project. The picture is apparently simple. The historical, political and institutional foundations of European integration lie in the voluntary decision of the member states to accept the necessary – gradually increasing – limitations to their national sovereignty, and subsequently to carry out an increasing transfer of the competences of their own state institutions to those of the EU.

The EU's competences, therefore, always were and still are conferred and not inherent, regardless of the issue area they fall under, in accordance with the competence framework of the EU at this stage of European integration.<sup>2</sup> This scheme for the relations between the member states and the EU is reflected in the combination of paras. 2 and 3 of Art. 28 of the Greek constitution, which serves as the constitutional basis for Greece's participation in European integration, according to an explicit interpretative declaration that was added in the 2001 revision to the original constitutional text of 1975.<sup>3</sup> Similar provisions are now included in the constitutions of almost all EU member states.

The way that the constitutional courts or, where they do not exist, the supreme courts of the EU member states interpret their national constitutions in favour of European integration and, respectively, the manner in which the Court of Justice of the European Union (CJEU) interprets legislation of the EU and handles the principles of supremacy and direct effect is a very interesting and delicate process. The process of mutual respect between the national

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<sup>2</sup> See Arts. 4-5 of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and see 2.6. See also E. Sachpekidou, *European Law* (in Greek), 2<sup>nd</sup> Edition, Athens: Ant. N. Sakkoulas, 2013, p. 210 et seq., R.-E. Papadopoulou, "Article 5" in V. Christianos (ed.), *TEU and TFEU, Treaty interpretation*, Athens: Nomiki Vivliothiki, 2012, p. 25 et seq.

<sup>3</sup> See Ev. Venizelos, *The "acquis" of the Constitutional Revision: The constitutional phenomenon in the 21<sup>st</sup> century and the contribution of the Hellenic Constitution revision of 2001*, Athens: Ant. N. Sakkoulas, 2001, p. 232 et seq. and p. 234 et seq.

constitution and EU law gradually establishes a common European constitutional space.<sup>4</sup> It is a common space formed by the ultimately pro-European/integrative interpretation and application of the national constitutions of the member states and the interpretation (non-provocative with respect to the national constitutions of the member states) and application of EU law. This common ground is shaped by the continuous interaction between national courts and the CJEU. Both parties take precautions to avoid conflicts between the national and the EU legal order, through cultivating an interpretive and eventually regulatory and historical understanding, which constitutes the common European legal, institutional and political culture.

This dialectic procedure signifies, in fact, a double reading or rather a narrative of the institutional basis of European integration. On the one hand, the EU version is self-referential. It silences the transnational/intergovernmental foundations of European integration, reflected legally through the primary law of the EU, i.e. the founding treaties and the occasional amendments that require the agreement of the member states under the terms of the national constitution of each of them. It prefers to forget that the founding treaties, their occasional amendments and the legal effects of intergovernmental processes are multilateral international agreements governed by public international law and by the national constitutional law of the member states. Therefore, it treats them from the next 'instant' as the foundations of the EU legal order. It presents the primary law of the Union from the time of its implementation onwards, and the dynamics that it acquires through the production of secondary Union law, in order to form another realm, that of the EU legal order, which wants to appear self-referential. In order to achieve this, it highlights two fundamental principles: the supremacy and the direct effect of EU law and thus the autonomy of the entire European legal system.<sup>5</sup>

Nevertheless, all central developments of European integration are of a transnational/intergovernmental character; they require interventions and changes in the primary law of the Union. The principles of supremacy and direct effect of Union law acquire their fully normative content when they are accepted and applied by the national courts of the member states. Hence, it is crucial and supportive in terms of European integration that the respect for national constitutions and legal orders, identities and sensibilities be stated in the primary law of the Union and its competent bodies, as well as evident in practice.

The counterweight to the self-referential supremacy of EU law was initially the sovereign will of participation of the member states and stemming from this, their institutional equality as a

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<sup>4</sup> See Ev. Venizelos, *The Maastricht Treaty and the European constitutional space* (in Greek), Athens: Ant. N. Sakkoulas, 1994 and Ev. Venizelos, *The challenge of the European Constitution* (in Greek), Athens: Ant. N. Sakkoulas, 2003, p. 41 et seq. Special mention should be made of the great discussion about the relationship of the national (federal) constitution and developments in the EU Treaties, which was held in Germany on the occasion of the ratification and entry into force of the Treaty of Lisbon. See indicatively, F. Schorkopf, "The European Union as an association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon", *German Law Journal*, Vol. 10, No. 8, 2009, p. 1219 et seq. The debate resumed in relation to the European Stability Mechanism (ESM) – see indicatively, E. Vranes, "German constitutional foundations of, and limitations to, EU integration: A systematic analysis", *German Law Journal*, Vol. 14, No. 1, 2013, p. 75 et seq. and all the contributions in that special section: "The ESM before the courts", and also note 41. The judgment of the CJEU on the ESM was made through a decision on 17 November 2012 in the *Pringle* case (C-370/12).

<sup>5</sup> See the historical decisions of the then Court of Justice of the European Communities in the *Van Gend en Loos* (C-26/62) and *Costa v. ENEL* (C-6/64) cases; see also L. Papadopoulou, *National constitution and community law: The "supremacy" issue*, Athens: Ant. N. Sakkoulas, 2009.

principle on which European integration is built. Institutional equality manifests itself as the principle of unanimity, when the intergovernmental method is applied in all the crucial steps of European integration. This equality is, as an aspect of sovereignty, limited but always existing, manifested across the whole range of the EU legal order through the conferred character of the competences of the EU and especially the principles of subsidiarity and proportionality<sup>6</sup> governing the exercise of these competences.

In this framework, what occurred in reality was the gradual and profound change in the institutional equality of the member states, the dominance of harsh reality over legal provisions and declarations.

This process was accompanied by the institutional arrangement of the Community method and the political narrative of European integration towards a comprehensive model. From the unanimity that was the classic guarantee of institutional equality, we moved relatively quickly – by European historical standards – to various versions of majority, which under qualified majority vote negate the veto right of each individual member state, save for limited exceptions.<sup>7</sup>

Obviously, the biggest limitation to the principle of institutional equality of the member states always stems from real inequalities, i.e. the differences in economic size or the economic situation of the member states – differences that widened after the crisis erupted in 2007–08. Despite the long history of European integration, the traditional counterweights in federal states, such as a federal budget that works as a redistribution mechanism of the federal surplus among the federated entities,<sup>8</sup> have not been developed at the EU level. In institutional terms, all these are guaranteed by a federal constitution, through which a federal patriotism is gradually formed that in many cases can be considered a constitutional patriotism as well.<sup>9</sup> By definition, the EU budget, owing to its very small size compared to EU GDP,<sup>10</sup> not only lacks federal features, but also works as a mechanism that locks in the inequalities between member states, as discussed in section 8.

Instead, precisely because of the financial crisis, new institutions of economic governance and new support mechanisms for member states<sup>11</sup> have been formed, expressing European

<sup>6</sup> See Art. 5 TEU and Protocol No. 2 “On the application of the principles of subsidiarity and proportionality”.

<sup>7</sup> See Art. 16, para. 3-5 TEU and Art. 238, para. 2, TFEU.

<sup>8</sup> See note 43 below.

<sup>9</sup> The principle of ‘federal faith’ (*Bundestreue*) cited by the German Federal Constitutional Court as a test of the manner of exercising the powers of the Federation and the Länder is a typical expression of federalism and constitutional patriotism. In this regard, see D.P. Kommers and R.A. Miller, *The constitutional jurisprudence of the Federal Republic of Germany*, Durham, N.C.: Duke University Press, 2012, p. 90 et seq. and J.W. Müller, *Constitutional Patriotism*, Athens: Papazisis, 2012, with preface comments by C. Papastilianou, p. 53 et seq., along with “On constitutional patriotism in Germany”, p. 163 et seq. and “On the European constitutional patriotism” (translation of *Constitutional Patriotism*, Princeton, NJ: Princeton University Press, 2007). See also P. Glavinis, “The limits of constitutional patriotism and the international need of the Memorandum”, in Athens Bar Association, *Studies on the Memorandum*, Athens, 2013, p. 173 et seq. and J. Habermas, *Between facts and norms*, Cambridge, MA: MIT Press, 1998).

<sup>10</sup> In 2014, EU GDP was €13,931,719 million and the level of the EU budget was only 1.02% of GDP. In absolute numbers, this was €142,690 million.

<sup>11</sup> From the recent rich bibliography, see indicatively K. Tuori and K. Tuori, *The Eurozone Crisis: A constitutional analysis*, Cambridge, MA: Cambridge University Press, 2014, especially p. 77 et seq. and p. 119 et seq. From Greek bibliography, see M. Ioannides, “The Institution of financial support as an

solidarity not in the form of redistribution through the Union budget but in terms of loans to EU member states that have lost access to the bond markets and face problems with liquidity, debt service or banking system stability.

All these developments can lead to increased restrictions and reinforced forms of supervision that adversely affect the equality of the EU member states that resort to the support mechanisms within the institutional framework of the EU and the eurozone. Greece is definitely the most typical, but not the only example in this regard, as Portugal, Ireland, Cyprus and Spain (in relation to its banking system) have participated in similar mechanisms, not to mention Hungary, which is outside the eurozone, and Latvia, which was outside the eurozone when facing the crisis and IMF conditionality.

The submission of EU member states to European and international support mechanisms that are simultaneously mechanisms of increased supervision, accompanied by strict conditionality, reduces even more the margin of discretion in the exercise of various aspects of economic policy – from tax, fiscal and finance to growth and social policies.

The fiscal adjustment and strengthening of the competitiveness of member states in crisis proceeds through the application of policies and measures that, although successful in some member states, may not have the same success or may have huge side effects in others. This might be because of structural peculiarities or multiple adverse conditions recycling the basic elements of the crisis. It might also be because the support programmes may have design problems per se, stemming from a rapid limitation of the primary and budget deficit that worsens the cumulative recession and increases the unemployment rates. Another problem was the lack of a whole programme pillar, such as intervention in the size and structure of public debt by reducing the nominal and the net present value through parametric changes (interest rates, grace period, maturity schedule, etc.).

Such design problems were present, for example, in the first (May 2010) Greek programme, on both the part of Europe (the Greek Loan Facility, GLF) and the IMF. The fiscal adjustment was initially planned to be carried out over almost two years, with a total loan of about €110 billion and interest rates that still had much potential for reduction, and did not intervene in Greek public debt, primarily because of resistance by the ECB.<sup>12</sup> This caused an urgent need

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instrument for European economic governance: Challenge, development and codification of the Regulation 472/2013”, *Journal of Administrative Law*, 2, 2014, p. 146 et seq. and M. Ioannides, “Preventive credit support after the ‘Memorandum’: Mechanisms, conditions and supervision under the ESM and the IMF”, *Journal of Administrative Law*, 6, 2014, p. 705 et seq.

On the amendment of Art. 136 TFEU and the addition of para. 3, which worked as a legal basis for the Treaty establishing the ESM, see the CJEU decision of 27 November 2012 in the *Pringle* case (above, note 3). On the ECB intervention programmes in the bond market (in this case the Outright Monetary Transactions (OMT) programme prior to the last quantitative easing programme), see the CJEU decision of 16 June 2015 on the *Gauweiler* case (below, note 22). On a systematic presentation of the ECB’s legal apparatus, see ECB and Eurosystem, “Legal Framework of the Eurosystem and the European System of Central Banks”, ECB, Frankfurt, July 2014.

<sup>12</sup> On the negotiations of the first Memorandum and the legal nature, see P. Gklavinis, *The Memorandum of Greece on the European, international and national legal order* (in Greek), Athens: Ant. N. Sakkoulas, 2010, p. 91 et seq. Decision 668/2012 of the Plenary Session of the Council of State is the reply of Greek jurisprudence on the issue of the legal nature of the first Memorandum.

The first Greek programme funding amounted to a total of €110 billion. The European part of this financing total (€80 billion) concerned a loan from the other member states of the eurozone, through the GLF mechanism. The rest of the eurozone (except Slovakia) concluded, as a creditors’ group, the 11 May

for a second programme (agreed in general terms in October 2011 and specified in February 2012). The second programme included significant intervention in sovereign debt (a nominal ‘haircut’ and radical restructuring) and a significantly larger loan with much more favourable terms.<sup>13</sup>

Of course, all these programmes are based on the dominant political conception of fiscal adjustment and strengthening of competitiveness and therefore have a strong element of ‘political correctness’ and uniformity. In other words, any design problems are not really technical, but chiefly ideological and political. Certainly, a slower and smoother adjustment, with less impact on recession and unemployment, would have required a much larger loan and hence a much longer adjustment and support period. Certainly, this option may have provided significantly greater growth benefits and thus greater macroeconomic and finally financial yields, and may have additionally offered much more security to institutional lenders. That is an easy argument to make in retrospect, but a very difficult one to have made under pressure to immediately address the acute fiscal or financial problems, i.e. when facing an imminent credit event for an EU member state or the collapse of its banking institutions.

The biggest problem stems from the fact that the dimensions of the political and social costs, the impacts on political behaviour and the balance of political forces in a country that implements such a programme are not features of the analysis or in the mindset of decision-makers in the relevant EU bodies, or to a much greater extent the IMF, which does not have the statutory prerequisites to take such parameters into account. Instead, the political commitment of governments and of the ruling parties of countries that enter such a programme, and consequently their assumption of the political and electoral costs, becomes part of the ‘ownership’ and thus the reliability of such programmes. This, though, can gradually lead to major changes in the political behaviour of entire societies and possible changes in the European balance of power, too.

In this sense, there is excessive insistence on the uniformity of practices and on the technical aspects of the pertinent decisions that reaches the limits of a political ostrich syndrome, in relation to the possible social and political developments in certain member states, and the possible spillover effects on others. The risk of crisis escalation is analysed only from the fiscal and financial perspectives or the impact on the single currency, and not with regard to the

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2010 agreement among creditors, which is of a financial nature – since it is expressly governed by English law – and not in the nature of a multilateral, international agreement, governed by public international law and the Vienna Treaty. Moreover, Germany stated that it would participate in the scheme through the KfW investment bank. The group of creditors entrusted its representation to the Commission (and not to the bodies of international representation that are provided for by the national constitution of each member state). The IMF participated in the first Greek programme through the submission of Greece to a Stand-by Arrangement. For the various IMF programmes and the submission process to them by member states, see T. Reichmann and C. de Resende, “The IMF’s Lending Toolkit and the global financial crisis”, Background paper, Independent Evaluation Office of the IMF, Washington, D.C., 8 October 2014. Financing terms were originally formed at the level of financing terms by the IMF. Afterwards, the interest rate on the European loan decreased significantly.

<sup>13</sup> The framework of the second Greek programme was laid down by the European Council initially with its decisions of 21 July 2011 and 26 October 2011, and then was further analysed in the Eurogroup decision of 21 February 2012. For a systematic presentation of the developments from 2008 to 2013, see Bank of Greece, *The chronicle of the great crisis: The Bank of Greece 2008-2013 crisis*, Athens. For the second Greek programme, see p. 102 et seq. The second programme is based on a loan agreement (Principal Financial Facility Agreement) between the EFSF and the Hellenic Republic and – on part of the IMF – on moving Greece from a Stand-by Arrangement to an Extended Fund Facility programme.

political crisis or the acceptance and legitimacy of the European institutional setup as such. This, however, provokes Eurosceptic reactions and poses new challenges to the narrative of European integration.<sup>14</sup>

There are also problems of institutional equality of member states in the various general application programmes developed by the ECB, as the really crucial mechanism. As the ECB has at its disposal – similar to the Federal Reserve – unlimited liquidity, it also possesses the practical ability to support not only the liquidity of systemic banks operating in member states, but also that of the member states themselves in the international bond markets. So, these general application programmes are based on quotas that ultimately reflect the economic size of member states, i.e. an equality that can be considered proportionate and is reproduced as such. The reasoning is simple: each member state has its own particular circumstances, but economic size is used as an objective allocation key (as in the case of quantitative easing (QE)).<sup>15</sup>

## **2. The financial crisis and the institutional impact of the eurozone's construction**

The financial crisis showed the institutional impact of the creation of the eurozone on the ongoing process of European integration. The Eurogroup, the operating practices of which are very different from those of the Ecofin and from the European Council, and especially from the regulatory framework of the ECB and the Eurosystem, has decisively influenced the institutional edifice of the EU.<sup>16</sup> The ECB is run on the basis of the contribution of each member state to the Community GDP and not on the principle of institutional equivalence of member states. Let us also remember that the statutory objective of the ECB is price stability, i.e. an anti-inflation policy, without explicit reference to full employment, which is a statutory objective of the Federal Reserve.<sup>17</sup> This is especially crucial when a single currency/anti-inflation policy is implemented in a single currency area, the member states of which are at different levels of development, competitiveness, employment, taxation and investment attractiveness, money cost, financial security, etc., or are facing completely different economic cycles (e.g. depression or growth).

Relatively recent developments concerning economic governance in the eurozone and the EU, and in particular the Single Banking Market,<sup>18</sup> confirm the argument. The operation of the

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<sup>14</sup> See indicatively, S. Vasilopoulou, "European integration and the radical right: Three Patterns of Opposition", *Government and Opposition: An international Journal of Comparative Politics*, Vol. 46, No. 2, p. 223 et seq.

<sup>15</sup> See Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a Secondary Public Sector Asset Purchase Programme (ECB/2015/10).

<sup>16</sup> The institutional development towards economic and monetary union, the single currency and the establishment of the eurozone is presented by Tuori and Tuori (2014), op. cit. (note 11), p. 13, et seq. and p. 57 et seq.

<sup>17</sup> See V.G. Agrapidis and C. Gortsos, *The European Central Bank in the institutional system of the European Union*, Athens: Ant. N. Sakkoulas, 2006, p. 167 et seq. and p. 170 et seq.

<sup>18</sup> See T. Beukers, "The new ECB and its relationship with the eurozone member states between central bank independence and central bank intervention", *Common Market Law Review*, Vol. 50, No. 3, 2013, p. 1579 et seq. and E. Malaret, "La globalisation, la crise économique et les déséquilibres dans la structure des pouvoirs de décision. Pour un constitutionnalisme économique européen ouvert", *European Review of Public Law*, 1, 2013, p. 202 et seq. The financial and fiscal crisis that began in 2008 has made the

Eurogroup, under its permanent chairmanship, along with the Council (Ecofin) and even that of the Euro Summit and the European Council, does not constitute an integrated institutional system for the eurozone. In contrast, it highlights the institutional gap and especially the substantial absence of a parliamentary dimension at the eurozone level. The European Parliament can be informed and conduct discussions and deliberations, but it does not get involved in the decision-making mechanisms of the eurozone. National parliaments in the EU member states, where this is provided by the constitutional rules, play a role in the decisions of the Eurogroup, but their function is fragmentary. It concerns specific decisions and not the strategic framework or the entirety of the eurozone's functions.

The proposals made at times to set up a parliamentary institution to which only the member states of the Eurogroup participate, or the proposals to create the position of a finance minister of the eurozone modelled on the role of the high representative of the Union for foreign affairs, indicate the scale of the problem.

These are proposals that concern institutional arrangements and which, therefore, begin from the assumption that the current level of the monetary and to some extent the economic dimension of European integration is not balanced politically through the strongly intergovernmental dimension under which the eurozone operates. The large disparities that exist among member states and the constant risk of deviation from the rules of the Stability Pact do not allow for a genuine intergovernmental function or for shaping a genuine Community-based decision-making process. The limitation of the European Commission's role alters the Community dimension of the function of the eurozone. Hence, problems arise that necessitate an overall assessment in the eurozone, at both an institutional and a policy level, taking into account the economic yet also the social performance and impact of its operation.

### **3. The increase of mutual self-restraint between the national constitutional courts and the CJEU amid the financial crisis**

The transformation that has taken place structurally (because of the eurozone) and coincidentally (because of the crisis) is not only reflected in regulatory texts, but also in the case law of the courts, the CJEU and the constitutional or supreme courts of the member states, because of the increase of their mutual self-restraint, which we mentioned earlier (in section 1). The economic crisis itself, the entry of members of the eurozone and EU into support and adjustment programmes, the emerging economic governance institutions and the new forms of ECB intervention have raised very serious issues on the judicial review by the constitutional or supreme courts in the EU member states and by the CJEU as well.<sup>19</sup> The national courts that

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completion of the European banking system necessary. Thus, the creation of a banking union was promoted. The first pillar of the banking union put into effect is the Single Supervisory Mechanism, which has undertaken, since November 2014, the direct supervision of the 123 largest banking groups in the eurozone. The beginning of 2016 marks the full implementation of the Single Resolution Mechanism, which takes decisions on the reorganisation of problematic banks. A Single Resolution Fund is expected to be set up gradually over eight years, while the single deposit guarantee still remains at a national level, based on the relevant directive known as the BRRD (Bank Recovery and Resolution Directive). See Tuori and Tuori (2014), *op. cit.* (note 11), p. 85 et seq.

<sup>19</sup> On the constitutional effects of the crisis in various European states, see X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A comparative analysis*, Farnham: Ashgate, 2013. In the same work, see also the introductory text of X. Contiades and A. Fotiadou, p. 9 et seq. and the analyses of X. Contiades and I. Tassopoulos for Greece (p. 195 et seq.), D.G. Morgangia for Ireland (p. 63 et seq.), J.

have been active are certainly those of member states subjected to programmes and forced to take legislative measures affecting the social *acquis* that had been enacted prior to the crisis, or to change prevalent views on jurisprudence that had been formed on the basis of the status *quo ante*.<sup>20</sup> What is interesting, though, is that national courts were also active in economically powerful member states that participate in the support mechanisms or hold a historically consistent attitude mandating the submission to judicial review of all relevant steps towards European integration, having their national constitution as a norm of reference.<sup>21</sup> This concerns not just institutional developments of major significance, such as the Lisbon Treaty, but also intergovernmental agreements of a much smaller scale, or decisions of bodies that constitute secondary legislation, such as the decisions of the ECB on quantitative easing in order to support the sovereign bonds of the EU member states in the secondary market.<sup>22</sup>

Thus, if we take a closer look at the case law of the German Federal Constitutional Court on the crisis and the new economic governance and support institutions, such as the European Stability Mechanism (ESM) and the new ECB programmes,<sup>23</sup> we find judgments that constitute important political documents, reflecting thoughts, concerns and ultimately conclusions that are relevant to the management – economic and political – of the crisis from the perspective of German constitutional rules (which we might call the German fiscal constitution) as well as

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Machado for Portugal (p. 219 et seq.), as well as R. Balodis and J. Pleps for Latvia (p. 115 et seq.) and Z. Szente for Hungary (p. 245 et seq.), which are not eurozone countries, along with the analyses of T. Groppi, I. Spigno and N. Vizioli for Italy (p. 89 et seq.) and A. Ruiz Robledo for Spain (p. 141 et seq.), two member states of the eurozone that did not typically enter a support programme similar to those of Greece, Portugal, Ireland and Cyprus.

<sup>20</sup> See section 10 and note 19, *supra*. The discussion that took place in Greece is summarised in the monographs of P. Mantzoufas, *Economic Crisis and Constitution* (in Greek), Athens: Ant. N. Sakkoulas, 2014, p. 110 et seq. and G. Karavokyris, *Constitution and the crisis: From the law of necessity to the necessity of the law* (in Greek), Athens: Kritiki, 2014, p. 88 et seq. The jurisprudence of the Spanish constitutional court moves in the same direction. See M. Gonzales Pasqual, “Welfare Rights and Euro Crisis – The Spanish case”, in C. Kilpatrick and B. de Witte (eds), *Social rights in time of crisis in the eurozone: The role of fundamental rights challenges*, EUI Department of Law Research Paper, Florence, 22 April 2014. In principle, the same applies to the case of the Portuguese constitutional court. Concerning the first phase of the judicial review of the fiscal adjustment measures, see R. Cisotta and D. Gallo, “The Portuguese Constitutional Court Case Law on Austerity Measures: A reappraisal”, in Kilpatrick and de Witte (2014), *op. cit.*, p. 85 et seq. and C. Akrivopoulou, “The Portuguese ‘social’ Constitutionalism faced with the European fiscal crisis” (in Greek), *EfimDD*, 5/2012, p. 628 et seq.

<sup>21</sup> Like the German Federal Constitutional Court and the French Constitutional Council; see S. Ksefteris, “Constitutionality issues of the ESM in France and Germany: Political rationalisation or judicial self-restraint” (in Greek), *EfimDD*, 4/2014, p. 529 et seq.

<sup>22</sup> See, in order: the BVerG (German Federal Constitutional Court) decision of 7 September 2011 on financial aid to Greece, that of 28 February 2012 on the EFSF, that of 19 June 2012 on the Euro-Plus pact, that of 12 September 2012 and 18 March 2014 on the ESM and the fiscal compact, and the preliminary ruling of 14 February 2014 in relation to the CJEU and the OMT programme of the ECB. See also excerpts of the 7 September 2011 decision in *EfimDD*, 6/2011, commented upon by V. Christou. For the general direction of this case, see W. Kahl, “Addressing the European fiscal crisis in the light of the case law of the German Federal Constitutional Court – Does Karlsruhe prevent the European integration?”, *EfimDD*, 2/2013, p. 162 et seq. The answer of the CJEU as to the ECB’s OMT programme (successor of the Securities Markets Programme and predecessor of the QE programme) was given with its ruling of 16 June 2015 in the *Gauweiler* case, etc. (C-62/14) following a preliminary ruling of the German Federal Constitutional Court with its ruling of 14 January 2014.

<sup>23</sup> See W. Kahl, *supra*, pp. 165-166.

the German government's ideas and priorities on political economy. These decisions are not simple texts, typically juridical or abstract. They are texts based on a thorough political economy consideration of the distinctive phases of the crisis. The temporal contextual parameters are reflected in the case law, which attempts to accept and protect intergovernmental compromises at the eurozone level, and in the corresponding political decisions and legislative choices of the member states involved. But all this is done under the German constitutional framework, the German legal system and the German system of judicial review.

Therefore, judicial review may appear to be intensive, but what ultimately emerges is a judicial self-restraint on control of the management of the crisis, through recognition of the competence and responsibility of the German political institutions and primarily of the Bundestag.<sup>24</sup> Still, the framework in which this occurs entails a vast and explicit reservation that all European developments are and will be reviewed according to the German constitutional order by the German Federal Constitutional Court, which has been acclaimed the guardian of the dominant role and the special sensitivities and interests of Germany.<sup>25</sup>

Of course, nothing prevents all other member states and their national courts from following the same path. The difference is not institutional/legal, but deeply actual and practical, as the question lies with who has an interest in the immediate adoption and activation of these mechanisms and who has the margin to hesitate, delay and control. Even assuming that Germany has the greatest interest – due to size – in these mechanisms taking effect, its judicial system appears to do this as a concession, even in a reserved manner, for the sake of European integration, with the highest and final criterion being the protection of German national economic interests.

From the perspective of the member states in a support programme, the judicial review has concerned national legislative and administrative measures of a fiscal or of structural nature, including the so-called 'austerity' policies and the interventions to enhance the competitiveness of their economies.<sup>26</sup> In this respect, certain juridical parameters are crucial:

- the character of the national system of judicial review, whether that control is centralised and abstract or diffuse and concrete, and whether a national constitutional court exists. So, what is crucial is whether and to what extent the macroeconomic and strategic framework, within which the controlled legislative or administrative measure is placed, can be taken into consideration. In Greece, for example, there is no constitutional court and judicial review is diffused (exercised by all courts) and concrete (exercised within the frame of a specific case); and
- the time of the judicial review in relation to the development of similar policies, which are treated differently during the initial and the subsequent phases of such programmes. In Greece, there is no preventive judicial review.

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<sup>24</sup> In this respect, it is characteristic of the preliminary ruling of the German Federal Constitutional Court in relation to the CJEU, its judgment of 14 January 2014, in which the OMT programme of the ECB is treated as ultra vires, with the obvious purpose of pressuring the CJEU for a narrow interpretation of that programme. See I. Pernice, "A difficult partnership between courts: The first preliminary reference by the German Federal Constitutional Court to the CJEU", *Maastricht Journal*, Vol. 21, No. 1, 2014. For the CJEU's answer, see note 22, *supra*.

<sup>25</sup> See indicatively those referred to in note 19.

<sup>26</sup> See note 19, *supra*.

Based on these criteria, an assessment of the case law of national constitutional or supreme courts in countries such as Greece, Ireland and Portugal can be facilitated. In Portugal, for example, the constitutional court<sup>27</sup> that initially rejected relevant claims, at a later point viewed as unconstitutional some of the austerity measures, which mainly involved cuts in the salaries and pensions of civil servants and public sector workers, without challenging the overall framework and objectives of the financial support programme. The government and parliament could then adjust the internal balance of the financial support programme, offsetting the restoration of benefits with other fiscal measures.

We refer below (in section 10) to how Greek jurisprudence faced the corresponding challenges, within the framework of a legal order lacking a constitutional court, but based on the model of incidental and diffused judicial review of constitutionality. Yet, in such a judicial system, it is even more difficult for the strategic framework adopted, based on the relevant legislative decisions of the parliament, to be taken into account by the judge in a comprehensive manner, but also to be – ultimately – challenged.

#### **4. New state divisions within European integration**

The transformations in the very sovereignty of member states,<sup>28</sup> as well as in the foundation and the acceleration rate of European integration are evident in the new state divisions emerging within the Union enhancing both the member states' statehood and the transnational, intergovernmental character of the whole integration process. In this manner, however, the disparities between member states are reinforced and reproduced. In other words, the intergovernmental method, while typically ensuring in the utmost degree the institutional equality of member states, owing to the principle of unanimity that comes with it by default, highlights the substantial disparities in the real balance of power and status among member states.

So, while we talk in theory about the institutional equality of member states, the practical fundamental distinction between EU member states is always that between actual contributors and recipients.<sup>29</sup> It is the distinction between member states that contribute financially to the EU (taking everything into consideration: the Community budget, the structural funds, the National Strategic Reference Framework, the Common Agricultural Policy (CAP), etc.) and

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<sup>27</sup> See J. Miranda, "O Tribunal Constitucional em 2012", *European Review of Public Law*, Vol. 25, No. 2013, p. 819 et seq. and Machado (2013), op. cit. (note 19).

<sup>28</sup> See below, note 41. See also E. Venizelos, "National Constitution and sovereignty in conditions of global financial crisis – The problem was and remains political, not constitutional" (in Greek), *EfimDD*, 1/2011, p. 2 et seq., A. Manitakis, "The constitutional issues of the Memorandum in view of shared sovereignty and the surveillance of fiscal policy" (in Greek), in [www.constitutionalism.gr](http://www.constitutionalism.gr), and G. Napolitano, "'This time is different' for public law too: Shifts of sovereignty and power during and after the '2008-? Crisis'", *European Review of Public Law*, No. 1, 2013, p. 43 et seq. Also, see the collective volume edited by C. Schweiger and J. Magone, *The effects of the eurozone sovereign debt crisis: Differentiated integration between the EU*, London: Routledge, 2015.

<sup>29</sup> Typically, net contributors are member states that are richer (because the revenue of the Community budget is proportionate to GDP). Also, the smaller the agricultural sector of a member state, the smaller the gains from the Community budget, because of the CAP. Significant funds are redistributed by the Community budget through the Structural Funds. Indicatively, countries such as Germany, France, Italy, the Netherlands, the UK, Finland, Denmark and Austria are clearly payers. On the other side, countries such as Greece, Portugal and the member states of Central and Eastern Europe are clearly recipients. This classification can be altered mainly by CAP and structural policy changes.

member states that, as a whole, ultimately receive. This is a structural rift, a disparity that is catalytic, although not often mentioned explicitly in the relevant discussions.

This new rift, which is strongly evident in the function, priorities and decisions of the Eurogroup, is the rift between the fiscally 'virtuous' countries and the fiscally 'profligate'.<sup>30</sup> It is the rift between the countries with a high creditworthiness rating of AAA (according to international rating agencies, the estimates of which are taken into account legally by the ECB and the ESM), i.e. the EU member states that ensure the creditworthiness of the ESM, and the member states that undermine the creditworthiness of European financial institutions. It is obvious that in order for the ECB to be an institution with a triple-A rating in the assessment of rating agencies – something essential for European Financial Stability Facility (EFSF) and ESM bonds to be cash equivalents – there must be countries that instil this quality to European financial institutions, since there are other countries that detract from it. Therefore, there is a deep inequality underlying the relevant discussions.

We arrive, thus, at the simplest and yet the most decisive difference: the difference between countries that lend and countries that borrow. Either ad hoc support mechanisms are established, which are intergovernmental in nature and dependent on their legal form, or EU mechanisms are employed (such as the EFSF and subsequently the ESM).<sup>31</sup>

The first Greek support programme that was initiated in May 2010 was based on a joint loan (the GLF) concluded between Greece as the borrower and the other member states of the eurozone as the creditors (with the exception of Slovakia, while Germany was formally involved through the state investment bank KfW, with a loan guarantee by the German state). The creditors make up a team of lenders that regulates the relations of its members according to private law and on the basis of English law, under the coordination of the European Commission.<sup>32</sup> This scheme leaves no room for doubt as far as its nature and scope are concerned. It was an ad hoc intergovernmental scheme, formed with the highest legal flexibility to take care of a situation that obviously was not, up until then, anticipated and not explicitly regulated in the Treaties governing the EU and the eurozone. For this reason, Art. 122 of the Treaty on the Function of the European Union (TFEU) was used as a legal basis that tolerates rather than provides for such initiatives. It is indeed no coincidence that after the amendment of Art. 136 TFEU and the addition of para. 3 as the basis for establishing the ESM, a similar interpretive use of Art. 122 was explicitly excluded.<sup>33</sup>

At the time of the transition from this first Greek programme (the GLF) to the second, the final decision for which was taken by the Eurogroup of 21 February 2012,<sup>34</sup> the first relevant

<sup>30</sup> During the eurozone debt crisis, countries such as Germany, the Netherlands, Luxembourg, Finland and Austria have been considered financially virtuous. Another similar distinction has been the separation between AAA-rated countries and others. There is a systematic overlap between these two groups, although the number of AAA countries has decreased during the crisis. The AAA countries are important for another reason too: they are the ones that contribute substantially to the high creditworthiness of rescue mechanisms like the EFSF and ESM, and allow lending at low interest rates to countries under financial programmes.

<sup>31</sup> See the European Stability Mechanism (ESM), *Annual Report*, ESM, Luxembourg, 2014, in which the support programmes of member states of the eurozone are presented, which were originally financed by the EFSF and afterwards by the ESM. See in particular, p. 26 for Ireland, p. 27 for Portugal, pp. 28-30 for Greece, p. 31 for Spain and p. 32 for Cyprus.

<sup>32</sup> See note 12, *supra*.

<sup>33</sup> See the additional CJEU decision of 16 June 2015 on the *Gauweiler* case, *op. cit.* (note 22).

<sup>34</sup> See note 13, *supra*.

institutions, such as the EFSF, had already been formed.<sup>35</sup> This second programme is based on a much larger loan, on more favourable terms and, moreover, provides for a ‘haircut’ and a radical restructuring of the Greek public debt. Yet again, the intergovernmental element is prevalent, as the EU member states are shareholders and guarantors of the EFSF.<sup>36</sup> As we see below (section 13), the third support and adjustment programme that Greece eventually came under, according to the statement of the 12 July 2015 Euro Summit, is subject to the provisions of the Treaty establishing the European Stability Mechanism and includes financial facilitation (a loan) and a Memorandum of Understanding, while the continuation of the IMF programme has been set as a condition. Greece has used all the institutional variations: an ad hoc scheme in 2010, the EFSF in 2012 and the ESM in 2015.

## 5. The EU as a continuous transnational negotiation

It is therefore obvious that the EU, both as a function (that is, as a day-to-day state of affairs), and as an integration project (namely as a strategic dynamic) is a continuous negotiation. It is not a negotiation based on the deontology of the founding treaties, but a harshly transnational (intergovernmental) negotiation.

That is why, with relative ease, a Community body such as the European Council may be converted (according to Art. 48 of the Treaty on European Union (TEU)) into an intergovernmental body and decide primarily, concluding new treaties, which may have a limited array of subjects but legally form part of the primary law of the EU.<sup>37</sup>

The continuous negotiation within the Union is transnational. It does not coexist politically with the phenomenon of a rolling grand coalition, in which the political forces representing the two major groups in the European Parliament (the European People’s Party and the Progressive Alliance of Socialists and Democrats) and occasionally other smaller groups, participate at a national and eventually at the European level.<sup>38</sup> Furthermore, the ideological/political characteristics of the government of each country ‘hide’ behind the fact that electoral cycles are perpetual. Yet with a total of 28 EU member states (19 in the eurozone) there are almost always elections. Indeed, we always have a coexistence of political families – especially the two largest ones – at the European level.

This constant negotiation means that there is a corresponding trade-off. It means that the negotiation has a certain style, a certain depth, a continuity, and a context. To make any deal, ‘amenable’ or ‘hard’, i.e. communicatively moderate or communicatively exaggerated, one needs to have a complete feeling of the atmosphere, the framework, the contextual factors and the perspective. And especially when providing arguments, one must know that in the trade-off of a political negotiation between states, opposing arguments exist.

On the opposite side of a member state’s argument that ‘my people have spoken’ – when national elections have taken place – there is always the counterargument for the will of the people of any other member state, as expressed or is about to be expressed through elections. Moreover, this is how we are seeking, supposedly, for the people of Europe, the European

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<sup>35</sup> See Tuori and Tuori (2014), *op. cit.* (note 11).

<sup>36</sup> See note 33, *supra*.

<sup>37</sup> See Art. 48§6 TEU, which regulates the simplified revision procedures.

<sup>38</sup> In the European Parliament elected in May 2014, this refers to the relevant processes involving the parliamentary group of the European People’s Party, the Progressive Alliance of Socialists and Democrats, but often the Alliance of Liberals and Democrats for Europe.

demos.<sup>39</sup> For each member state argument that ‘my parliament has reservations or sensitivities’ there are always the counterarguments of other member states that ‘my own parliament has exactly the opposite reservations or sensitivities’. Parliamentary reservations<sup>40</sup> in the history of European integration have come from countries that are both small in size and net contributors, such as Denmark, and are used by countries such as Finland and of course, to a very large extent Germany, because of the federal character of the country.

When a member state claims that ‘my courts have decided to restore some wages or benefits or cancel some measures’, like the Portuguese constitutional court did, the answer of all the other member states may easily be that ‘our own constitutional or supreme courts bind us’ (see section 3). So, arguments are exchangeable and the balance of powers is unfavourable. And if one has not told the truth to the people, they are the ones who are going to pay the cost, because illusions are created that weaken the possible negotiation outcomes.

In this respect, the path followed by Greece is typical, i.e. the path from the 25 January 2015 elections up to the entry into a third rescue programme through the ESM, which as we said was agreed upon with the statement/decision of 12 July 2015 Euro Summit (see section 13).

The Greek government resulting from the January 2015 elections was formed by parties (Syriza/ANEL) that before the elections had promised a radical, anti-Memorandum policy and a generous plan for social provision. The pillar of this policy was initiatives concerning public debt, with the aim being its nominal reduction and its radical restructuring, even unilaterally. The final agreement of 12 July 2015 was preceded by a referendum (on 5 July), in which a document was presented to the electorate with the suggestions of the European institutions on the content of the third programme along with a debt sustainability analysis. It was rejected by 61.5% of the electorate who chose to vote ‘no’.

The agreement that was reached at the Euro Summit on 12 July 2015 was the result of a negotiation in which the fact that a referendum had occurred in Greece did not seem to play but a negative role, as a development that undermined the relationship of trust between Greece and the other member states.

## 6. Public debt and changes in the very concept of sovereignty

The most crucial change though, is one that has occurred at the core of the state phenomenon. It is the change that has occurred in the very concept of sovereignty.<sup>41</sup> Sovereignty is defined,

<sup>39</sup> See D. Tsatsos, *The concept of democracy in the European confederacy* (in Greek), Athens: Polis, 2007 and L. Papadopoulou, “Reflections on Demos and Democracy in the European Union”, in A. Manitakis (ed.), *The Republic between utopia and reality* (in Greek), Athens: Savvalas, 2011, p. 152 et seq.

<sup>40</sup> See Art. 12, TEU and Protocol no. 1 on the role of national parliaments in the EU.

<sup>41</sup> For the recent bibliography on the fundamental and always relevant concept of sovereignty, see T. Aalberts, *Constructing Sovereignty between Politics and Law*, London: Routledge, 2012, especially p. 11, p. 20 et seq., p. 37 et seq., p. 56 et seq., p. 79 et seq. and p. 142 et seq. Also S. Krasner, *Sovereignty – Organized Hypocrisy*, Princeton, NJ: Princeton University Press, 1999, especially p. 5 et seq., p. 152 et seq. and p. 184 et seq., with special references to the Greek historical experience regarding the Sovereign Lending, p. 127 et seq.

On the influence of the process of European integration on the sovereignty of member states of the EU, see the contribution of D.T. Tsatsos, *Politeia* (in Greek), Athens: Gavriilidis, 2010, p. 220 et seq. See also G. Koukoudakis, “European Integration and the Re-conceptualization of State Sovereignty: A Challenge for Neorealism”, *Spectrum Journal of Global Studies*, Vol. 4, No. 1, 2012, pp. 91-105. Of special interest is the comparison of European integration with the federal constitution of the United States. For a cautious

as we know, in many ways: as internal as external, as *kompetenz-kompetenz* and as the ability to exercise the primary or the constituent power. There is a theoretical approach that defines as sovereign someone who makes decisions in emergency situations.<sup>42</sup>

Fiscally, sovereignty is identified in practice with a state's ability to borrow without obstruction and have free access to the markets. A fiscally sovereign state is broadly a state with a serviceable debt that can be refinanced, a state that has access to the international bond market with acceptable interest rates. At the stage of the creation of a state, the ability to borrow internationally and thus the ability to generate public debt is a very important sign of recognition of its sovereignty or of its ability to become sovereign, i.e. to eventually exist.<sup>43</sup> Greece, immediately after the outbreak of the revolution of independence in 1821, contracted international loans with over-advantageous terms for the lenders and was 'born' as an independent state having a 'congenital' public debt.<sup>44</sup> The fact that it was able to borrow (in the English bond market of the time) the so-called 'independence' loans, even under those conditions, was an indication that the international community considered Greece to be marching towards its establishment as an independent state. Sovereign borrowing<sup>45</sup> has, through the ages, been an element inherent in the concept of the state as it evolved before and after the Peace of Westphalia. It is not a modern phenomenon developing alongside the contemporary, international financial institutions, such as the IMF and the World Bank, or the current forms of money and capital markets; rather it is a much older phenomenon, which always has tested state sovereignty, either because conditions are imposed on the borrower from the very beginning or because there is pressure that may also have military/ war features, to compel the debtor to fulfil the obligations. Mechanisms like the International Financial Control are the milder forms of restrictions on state sovereignty caused by borrowing, as there is always the alternative form of military pressure or intervention.

In this historical context, the treatment of the debtor state varies, based on many criteria other than the size of the debt and the ability to service and repay it, such as the state's size, its political and military power or its geopolitical importance. In this respect, the differential treatment of the small, new Greek state versus the large, declining Ottoman Empire in the 19<sup>th</sup>

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point of view on the course of European integration, see G. Morgan, *The idea of a European superstate – Public justification and European integration*, Princeton, NJ: Princeton University Press, 2005, especially p. 111 et seq. ("Sovereign Europe") and R. Adler Nissen, *Opting Out of the European Union Diplomacy, Sovereignty and European Integration*, Cambridge, MA: Cambridge University Press, 2014, especially ch. 6, "Late Sovereign Diplomacy", on the British and Danish exception. See also A. Cuyvers, "The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU", Doctoral Thesis, Leiden University, 2013.

<sup>42</sup> See C. Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (Greek translation), Leviathan, 1994 and G. Agamben, *State of exception – When "emergency" converts an exception into a rule*, Athens: Patakis, 2007 (Greek translation of the *Stato di eccezione*, Turin: Bollati Boringhieri Editore, 2003], p. 11 et seq.

<sup>43</sup> See the analysis of the concept of sovereign lending by Krasner (1999), op. cit. (note 41), p. 127 et seq. with special reference to the Greek case, p. 132 et seq.

<sup>44</sup> See G.V. Dertilis, *History of the Greek State 1830-1920*, 1<sup>st</sup> Volume, National Bank of Greece, Athens, 2005. From the relevant, recent bibliography see M. Waibel, "Echoes of History: The International Financial Commission in Greece, in C. Paulus (ed.), *A Debt Restructuring Mechanism for Sovereigns: Do We Need a Legal Procedure?*, Munich: C.H. Beck-Hart-Nomos, 2014, with many references.

<sup>45</sup> See Krasner (1999), op. cit. (notes 41 and 43). Additionally, see O. Lienau, "Who is the Sovereign in Sovereign Debt? Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century", *Yale Journal of International Law*, Vol. 33, pp. 63-64, 2008, p. 62 et seq.

century is a typical example.<sup>46</sup> Nowadays, things have become somewhat more refined, as the sustainability of public debt (also rightly called sovereign debt, i.e. the debt of a sovereign state) and state sovereignty have become synonymous concepts. Very often, this becomes obvious when it is already too late – that is, when the loss of access to the markets has affected the core of the state’s sovereignty.

This phenomenon, in our time, does not mainly concern transnational lending relationships, but rather the relationships between the state and the private sector, at the level of not only internal, but also external borrowing. The state, as the pre-eminent public entity, becomes subordinated to private entities worldwide; banks and the shadow financial sector lend to states and private rating agencies control the credit ratings, and thus the sustainability of public debt. Private platforms (such as the ISDA)<sup>47</sup> determine whether there is a credit event and trigger the risk premiums (credit default swaps). They decide whether a state is in default and whether it has banks accepted into the international interbank market.

Market entities related to states, and chiefly the banks and funds that lend to states, in effect limit the sovereignty of states. The phenomenon of public debt is in itself a global, significant limitation of state sovereignty. Once member states appeal to the markets to finance the public sector, i.e. their ‘sovereign’ debt, markets obtain sovereign attributes. This is a restriction that does not directly concern transnational economic, political and military relations, but it is one that certainly influences these relations. Market access is made impossible and is substituted by new forms of transnational lending or support from regional and international financial institutions (the EFSF, ECB and IMF), as demonstrated in the case of Greece and other support programmes to member states of the eurozone since the 2007–08 crisis.

The debts of states are certainly not settled in the manner that private debts are settled. The time will not come when the US repays its debt of about \$18 trillion. Debts are serviced by payment of interest and amortisations and are refinanced with favourable or at least acceptable terms. Debt reduction occurs thanks to growth of GDP, in either real or nominal terms due to inflation,<sup>48</sup> no matter whether one chooses the neoliberal version or the Keynesian version (‘let inflation run’), which increases nominal GDP and reduces the nominal debt. The fate of fiscal and financial sovereignty is therefore decided at the time a state is excluded from the markets.

Starting with the containment measures for the economic, fiscal and financial crisis of 2007–08, the opinion dominating case law and the relevant technical debate was that an ‘exceptional circumstance’ should be addressed, for the constitutional and generally the legal order of the member states forced to take similar measures.<sup>49</sup>

<sup>46</sup> See Krasner (1999), op. cit. (note 43), p. 135 et seq. and Waibel (2014), op. cit. (note 44), *supra*.

<sup>47</sup> ISDA refers to the International Swaps and Derivatives Association. The existence or not of a credit event is decided by the relevant Determinations Committee – see the By-Laws of the International Swaps and Derivatives Association, Inc. (as amended through 4 June 2014) (at [www.isdadocs.org/membership/bylaws.pdf](http://www.isdadocs.org/membership/bylaws.pdf)). See also the reservations of C. Yannacopoulos, “Un Etat devant le faillite: entre droit et non droit” ([www.constitutionalism.gr](http://www.constitutionalism.gr)).

<sup>48</sup> See T. Piketty, *Capital in the 21<sup>st</sup> Century*, Athens: Polis, 2014, p. 682 et seq. (Ch. IV.16) (translation in Greek of *Le Capital au XXI<sup>e</sup> siècle*, Paris: Edition du Seuil, 2013). See also J. Ostry, A. Gosh and R. Espinoza, “Do not sweat the debt if fiscal space is ample”, 22 June 2015 ([www.voxEU.org](http://www.voxEU.org)) and the Greek translation in *Kathimerini*, 23 June 2015.

<sup>49</sup> See P. Pikramenos, “Public law in emergency conditions from the point of the judicial review process”, *EErgD*, 2012, 385; and D. Emmanouilidis and M. Skandalis, *The fiscal public interest and the case law of the*

An 'exceptional circumstance' is of course the crisis itself, i.e. the uncontrolled fiscal deficit, the competitiveness crisis and uncontrolled current account deficit, the fact that the public debt ended up being non-refinanceable and non-serviceable, and that the banking system was overexposed to poor-quality portfolios and to high percentages of poor-quality loans compared to decreasing deposits. The various fiscal, tax and income measures used to tackle the crisis and the restoration of the fiscal, financial and productive balance measures do not constitute a circumstance of exception, but a national legislative option in the stifling situation of the crisis and within the institutional framework of the EU and the eurozone.

A crucial question is whether the need for treatment of similar situations in the economies of certain member states is something novel. Did similar problems exist before the establishment of the EU monetary union and the introduction of the euro as a single currency? Of course they did, even in countries like Germany, Sweden and Finland. How were they tackled? With structural changes strengthening the economic base and the competitiveness of the country, with wage restraints, with radical changes to the social security systems and with interventions to the national banking system. Additionally (when needed), they were also tackled by a devaluation of the national currency, with everything that implies in terms of facilitating exports and a reduction in real purchasing power. The devaluation of the national currency is, among other things, confirmation of the Keynesian theory of the illusion of money for every salary earner and consumer, who is under the impression that she has the same income but with reduced purchasing power.

From now on, because of the monetary union and single currency, the member state ceases to possess the mechanism of external devaluation, i.e. the nominal devaluation of the national currency, it seeks other means and instruments that are defined as the process of 'internal devaluation'.<sup>50</sup>

Adjustment programmes, transnational borrowing and resorting to the IMF (a transnational organisation) lead us to another interesting question, in our opinion: What is the best and most preferable creditor of a state under fiscal pressure? In addition, what is most preferable for the quality of democracy, the state, its institutions and respect of the remaining state sovereignty? Is it the institutions and the states or the markets? When, for instance, was the Greek public debt in better condition? Was it after the radical restructuring of 2012,<sup>51</sup> when about 85% of the debt was held by the member states of the eurozone and its institutions and only the rest by the market, or before? When could the market determine the fate of the country? It becomes obvious that, as creditors, the other member states of the eurozone, the EFSF/ESM and the IMF at least respect certain legal rules. On the other hand, the market, by its very nature tends to bypass every rule with its constant dynamism.

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*Council of State*, and also C. Avgerinos, "Public interest - Positions of the Greek government in recent landmark cases of the plenary of the Council of State and the SSC" in Athens Bar Association, *Studies on the Memorandum*, Athens, 2013, p. 13 et seq., p. 245 et seq. and p. 275 respectively. The relevant case law is summarised with very interesting reflections in Karavokyris (2014), op. cit. (note 20), p. 11 et seq. and in particular p. 13 et seq., p. 17 et seq. and p. 26 et seq.

<sup>50</sup> See D. John, "The inevitable 'internal devaluation'", in M. Vassilakis (ed.), "Imprudence and nemesis: Greek crisis 2001-2011", *Athens Review of Books*, 2012, pp. 50-59.

<sup>51</sup> See J. Zettelmeyer, C. Trebesch and M. Gulati, *The Greek debt restructuring: An autopsy*, Peterson Institute for International Economics, Washington, D.C., July 2013; see also M. Gulati and J. Zettelmeyer, "Engineering an Orderly Greek Debt Restructuring", in Paulus (2014), op. cit. (note 44), and in the same work, see A. Chiotellis, "Sovereign Debt Restructuring and the Internal Legal Framework: The Greek Experience".

The opinion is expressed, directly or indirectly, that the market and more specifically the international private sector as a lender is preferable to the 'official' sector, since a sovereign state/borrower has more freedom to impose unilateral measures in relation to debt on the international private sector. The state/borrower can unilaterally decide a suspension of payments, a decrease (haircut) in the debt or a deferral of the payment of its obligations. This approach could have some merit for developing countries that are not concerned about the consequences of their exclusion from the international markets, which do not belong to a strong regional economy (such as the European one) and which are not members of a monetary union (such as the eurozone) or for countries that are not interested in support of their banking system by a regional central bank (such as the ECB). The same applies when we talk about countries that do not wish to be subjected to lengthy litigations before the courts of other states, as in the case of Argentina.

When a country seeks to organise the reduction and restructuring of its debt under the patronage and with the financial coverage of the EU and for it to be of a voluntary nature, i.e. not opening litigation with creditors, then there is no doubt that the substitution of private creditors by institutional creditors serves as a protective function. This is especially so if preceded by i) a reduction of the nominal burden of the debt held by the private sector by a high percentage and ii) debt restructuring (a reduction through interest rates, lengthening the average duration, the period of grace, etc.), which constitutes an even greater debt reduction in net present value terms.

Even in the extreme case of shirking an overdue payment to institutional creditors, the implications are predetermined (e.g. under the statutory arrangements of the IMF or the EFSF/ESM) and do not evolve according to the virtually uncontrollable ways in which markets function. This was the case when Greece asked to pay the IMF all the instalments that should have been paid in June 2015 on the 30<sup>th</sup> of the month. Nevertheless, the day that Greece chose not to pay the instalments and let them become overdue, the relevant IMF statutory procedures were put into effect. Yet, before the impending expiry on 20 July 2015 of the Greek bonds held by the ECB, the agreement of 12 July 2015 for the third rescue plan was concluded at the Euro Summit (see section 13). On this basis, a bridge loan was granted immediately through the European Financial Stabilisation Mechanism (EFSM) to Greece, to enable it to fulfil its obligations towards the ECB and to inform the IMF and facilitate the Fund's participation in the new Greek programme.

In the Greek case, the 2012 debt intervention includes not only the known private sector involvement (PSI), but also, through the radical change in terms of the EFSF loan, a very serious, indirect, official sector involvement (OSI) for Greece (which also absorbed the rest of the first loan of the GLF) that is essentially a 'haircut' of part of the Greek public debt held by the official international sector (mainly the EU and the IMF).<sup>52</sup>

As we later discuss (in section 13), the statement/decision of the 12 July 2015 Euro Summit for the third Greek rescue programme (third loan, third Memorandum) through the ESM, with the participation of the IMF, expressly provides that in connection with the debt,

- there will not be a nominal reduction ('haircut');

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<sup>52</sup> See ESM (2014), op. cit., pp. 29-30; on the magnitude of the Greece's public debt reduction in terms of net present value, see P. Kazarian and T. Pelagidis "Greece's New Agreement with Europe: Is this time different?", *Intereconomics*, No. 5, Vol. 50, 2015, pp. 281-287 and also G. Serafeim "Greece's Debt: Sustainable?", N2-115-063, Harvard Business School, Boston, MA, 2015.

- Greece accepts that it will honour its obligations stemming from the public debt to all creditors; and
- there will be parametric changes and adjustments relating in particular to the extension of the grace period and the repayment period of the Greek public debt, in order to achieve a reduction of the net present value of the debt in the original statement of the Eurogroup of November 2012 (in continuation of the Decision of the Eurogroup of 21 February 2012). All these are dated after the completion of the first review of the new rescue programme.

Fiscal and financial stability also constitute a crucial component of national power, not only of fiscal sovereignty, but also of sovereignty as a whole. The relationship between sovereignty, on the one hand, and economic and social stability on the other, is particularly crucial. Economic and social stability are prerequisites and test grounds for political stability, in the sense of the ability to govern and therefore of the political legitimacy of the government and the state per se. If the element of stability is lost, rehabilitation measures are required in order to preserve the core of sovereignty.

These fiscal and financial stability measures involve European or international agreements that undoubtedly limit the fiscal sovereignty of a member state in the eurozone, by limiting the range of its economic and social policy options. But any economic destabilisation that would affect the banking system, the function of the state and social cohesion itself, would obviously jeopardise the state's sovereignty as a whole. It would actually strike at the core of a state's obligations, as well as the state's ability to ensure internal and external security in all versions of the term (police, political, social, institutional, external, etc.).

## 7. Institutional mutations: The EU's cooperation with the IMF and the example of the Troika

Another important transformation of the European edifice stemming from the crisis is the downgrading of the European Commission, as the guardian of the Treaties, since governments charge it with the inability to anticipate and halt the crisis that broke out internationally from 2007 onwards.

The IMF was installed at the heart of the eurozone by the governments of the member states and primarily by the German government, and not by Greek 'frivolity'. They also brought it in as a counterweight to the Commission; this counterweight (IMF) largely collaborated with the ECB within the context of the Troika. The IMF had previously played a key role in combating the economic crisis in member states outside the eurozone, but within the EU, such as Latvia (then) and Hungary.<sup>53</sup>

Hence, the cooperation of the three institutions took place in a way that was unbalanced, to the detriment of the Commission, which is under the scrutiny of the European Parliament<sup>54</sup>

<sup>53</sup> Common EU funding programmes alongside the IMF's were in force before the Greek crisis. This was the case of Hungary and Latvia - see the European Commission website ([ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/hungary/index\\_eu.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/hungary/index_eu.htm) and [ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/latvia/index\\_eu.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/latvia/index_eu.htm)).

<sup>54</sup> See mainly European Parliament, *Report on the Inquiry on the Role and Operation of the Troika (ECB, Commission and the IMF) with regard to euro-area programme countries (2013/2277 (INI))*, 28 February 2014, Committee on Economic and Monetary Affairs, Rapporteurs: Othman Karas and Liêm Hoang-Ngoc. The report was adopted by the plenary of the European Parliament during its meeting in March 2014.

and which coexists in the Union's institutional structure with the Council and the European Council and is obliged to respect the European legal order and Community acquis. The IMF is not subject to such constraints, as it follows its own regulatory framework, while the ECB is fortified behind its strictly defined role and its institutionally guaranteed independence.

The formation of the Troika constitutes a deviation from the provisions of the EU legal order. An institutional hybrid has been formed, that as such is not part of the institutional system of the EU and the eurozone, but practically operates within it. The IMF is involved in many crucial meetings of the Eurogroup, the Eurogroup Working Group, and as part of the Troika it aids in the preparation of reports and recommendations that influence the political decisions of the governments of the member states, the Council, the European Council, the ECB, the EFSM/ESM, etc. Therefore, it constitutes a substantial change in the institutional framework itself, within which the eurozone operates, and within which the individual EU institutions operate concerning a serious array of issues.

Now – as we have seen – permanent institutions have been formed to provide support to member states in financial crisis conditions, such as the various forms of preventive credit lines, and legislative texts in the outlines of the economic governance of the EU (and thus the eurozone) have been issued<sup>55</sup> that provided for the involvement of the IMF, which has lengthy experience and expertise in managing similar issues.

This situation can institutionally be considered the de facto formation of a direct relationship between the EU and the IMF, which overarches the relationship of the EU member states with the IMF, of which they were and remain members. But deep down, this is another expression of the intergovernmental character of crucial decisions on addressing the economic crisis within the eurozone. Member states take initiatives and utilise institutions and processes that transcend the institutional framework of the EU and affect the powers and function of the bodies of the European institutional structure.

As we discuss in more detail when we refer to the third Greek bailout programme according to the declaration/ decision of the 12 July 2015 Euro Summit (in section 13), the Troika was not only reorganised, but also strengthened with the participation of the ESM. It has consequently turned into a quartet.

## 8. Locking in the inequalities among member states

Of course behind all these institutional problems there are some very deep structural issues in the EU and especially in the eurozone. In fact, there is difficulty in applying a uniform economic policy when there are obvious economic disparities between the member states. This situation is a factor in the stall of European growth, as it locks in the inequalities among member states, institutionally through the EU's Stability Pact, yet primarily through the eurozone, i.e. because of the need for discipline and the dynamics of the monetary union, which require the support of the euro.

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See also the study prepared by the Brussels-based think tank Bruegel on behalf of the European Parliament's Economic and Monetary Affairs Committee in February 2014, entitled "The Troika and Financial Assistance in the Euro Area: Successes and failures", particularly p. 23 et seq. and 57 et seq.

<sup>55</sup> See M. Ioannides, "Preventive credit support after the Memorandum: Mechanisms, conditions and supervision under the ESM and the IMF" (in Greek), *EfimDD*, 6/2014, p. 705 et seq. and European Stability Mechanism (ESM), "Guideline on Precautionary Financial Assistance", ESM, Luxembourg.

This does not mean that member states have no margin for discretion and thus a range of options. The financial framework, however, is defined in a rather strict manner. This locking-in occurs not just or mainly institutionally, but primarily because of views that dominate the market with which they come into contact and from which the states are assessed, in case that they resort to it to finance their debt, to attract investment, and of course because of the operation of the banking system, etc.

The prevailing views on the fiscal prerequisites for growth in Europe are simple and one-dimensional. Their starting point is the financial stability and macroeconomic balance that is reflected in the Maastricht criteria with all their subsequent additions, amendments and clarifications. This is undoubtedly a major ideological and political defeat of governmental European social democracy, as it was not able to formulate – let alone impose – a comprehensive alternative policy at a European level. That is a particularly difficult objective, given the fixed national priorities and strategies, the transnational/intergovernmental balance of power in European affairs and the phenomenon of the rolling grand coalition, to which we referred above (section 5).

Yet we must remember that this happened through political voluntarism, i.e. a series of political decisions, and that monetary integration is the apotheosis of political voluntarism, as are all the major historical steps of European integration.<sup>56</sup> To achieve this step, deep economic inequalities have been locked into place between member states and the EU, but above all in the eurozone: the inequality in the current account balance in favour of Germany and in favour of competitive member states with powerful production infrastructures. Inequality in money has costs, i.e. the interest rates applied when a German or a Greek business take a loan. Inequality in energy costs is at the expense of medium and small member states that have a high degree of dependence on imported hydrocarbons and whose market size does not allow them to achieve a good deal with the suppliers.

On the other hand, it is also obvious that political voluntarism caused many of the fiscal and structural problems in member states, such as excessive debt and deficits or practices negatively affecting competitiveness. At the starting point lies the fact that the financial and macroeconomic averages of 1991 (notably the criteria of Maastricht were the 1991 statistical averages) have been converted into an economic doctrine.

It is very important to notice that behind all these aspects is a brutal competition among national production systems, of course where they are present. That is not, unfortunately, the case in Greece, but in Germany, France, Italy and of course the UK, which enjoys its monetary independence and its control of the City, also taking into account the fluctuation of currency exchange rates. All these features outline a regional picture, narrowly European, which does not include the Euro-Atlantic area, the World Trade Organisation, the G8, the G20 or the BRICS that play an important role on the board of the IMF.

It is therefore clear that in order to address such locked-in inequalities, interventions like the establishment of the ESM, various other programmes and eventually the ECB's quantitative easing, the institutions of the single banking market are insufficient. Interventions are needed that concern the Community budget itself, the surplus redistribution mechanisms, the core problem of the sustainability of the eurozone's total public debt and the borrowing costs of member states and the yields of their bonds, as well as the European energy market.

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<sup>56</sup> See, instead of others, Tuori and Tuori (2014), *op. cit.* (note 11), p. 13 et seq.

Thus, the problems cannot be addressed either coincidentally, fragmentarily or only in the financial sphere, without interventions being made at the level of the real economy and the national comparative advantages. Otherwise, there is always the risk of recycling the crisis, with Europe having lost in the meantime degrees in relation to the so-called European standard of living and the international competitiveness of the European economy, given acceptance of the European economy being assessed according to internationally uniform standards on these issues. Yet these standards hardly encapsulate the qualitative elements of European living standards or social, political and institutional culture.

It is obvious, though, that while many say that the solution lies in 'more Europe', in the strong promotion of European integration, not just at the level of the single market, the monetary union and economic governance, but also at a political level, this is not a main item on the agenda in the public life of the member states. In contrast, in those member states where the European issue dominates, it does so accompanied by a negative or even cautious stance. This concerns a whole range of issues, from the Community budget and the relationship between net contributors and recipients, to refugees and immigration, security and the Schengen Agreement.

The paradox is that, while European integration seemed to tend towards the abolition of politics, in the sense of great historical questioning and dilemmas – and this was expressed in the phenomenon of the grand rolling coalition previously discussed – it is now threatened by the return of politics in the form of Eurosceptic questioning of the linear or deterministic nature of European integration. Politics assumes the form of a return to basic questions.

The crisis, the current stage of development of European integration and the strengthening of Eurosceptic movements of every ideological orientation have brought things to a strategic stalemate – neither going forward, nor backward at the level of ideas – especially of major initiatives related to European integration. The interventions are continuous, but only of a partial and mostly technical character. Even when they have great political significance, they prefer to appear as techniques and mainly under the cloak of the banking system's needs and the ECB's independence. It is characteristic, from this point of view, that after the results of the last European elections in May 2014, the initiatives undertaken as a political response by the EU have mainly been initiatives of the ECB.

This means that the ideology of European integration has lost its hegemonic character, the self-confidence of the obvious and the self-evident. Consequently, robust reinforcement is required, a renewal and updating of the historical, economic, social, cultural and political narrative of European integration, which will not consider anything simple and obvious, but will substantiate it, compare it, project it to the future, within a context that is not just European, but also global. In this respect, the relationship between the nation state and the European phenomenon and the question of the appropriate level has once again become necessarily relevant to all related, classic dilemmas: national currency or the euro, national economic protectionism or the single market under the conditions of globalisation, and so on.

## **9. The crisis of the European welfare state**

The transformation of the European welfare state has a central position in the reflections on the transformations of the state and European integration. It is one of the most important elements of the European model of production, development, competitiveness and of the European way of life. Of course, the crisis of the welfare state did not start with the latest financial and fiscal crisis. It started with the much older demographic crisis of an ageing

Europe, a Europe that diminishes in population, thus disturbing the balance of redistributive social security systems based on solidarity between workers and pensioners.<sup>57</sup> Especially when the state acts as a guarantor of social security (pension and health) systems, the fundamental problem is the connection between social security and the fiscal problems of each state.

Since the crisis largely appeared as a fiscal one and the European welfare state, regardless of individual versions, is by definition an important part of public expenditure, it is inevitable that the fiscal crisis serves as an additional crisis of the European welfare state. This, though, concerns the part of public revenue and more specifically, the revenues of social security funds, if the effects of the crisis on the labour market and employment lead to higher unemployment rates and hence to a reduction in the revenues of social security funds and also to increased expenditure to support the unemployed. The same applies to the contributions of employers and the self-employed to the insurance system, which are reduced or delayed due to recession. But the deepest problem – as we noted – is always the demographic one, which exceeds the fluctuations of the financial and the overall economic circumstances.

This situation strongly affects views about the European production model itself, competitiveness, employment and growth and thus the European *acquis*, in relation to the specifications and standards of living. So it concerns the very stratification and collective self-consciousness of the societies of the member states, and finally the political attitudes of European citizens themselves.

Europe has yet to come to terms with the idea that it is neither the entire world, nor its centre, but that as a great regional economy it has to operate under conditions of globalisation. Therefore, it is called upon to operate in open competition with other national or regional economies with very different living conditions and demographic, social and value standards.

## **10. The judicial review of the bailout measures and the constitutional law of a disorderly default**

The preceding discussion allows us to more fully assess the jurisdiction of Greek courts, whose scope includes reviewing the constitutionality of the measures employed to address and overcome the crisis (the measures of the Memorandum). In this section, we also provide relevant theoretical reflections on the nature and intensity of the review.<sup>58</sup>

Greece is the country that experienced and is still experiencing the crisis in an extreme way, as in 2009, it had to face the imminent consequences of a triple crisis: a crisis of an uncontrollable fiscal deficit (-15.7% of GDP at the 2009 value) and primary deficit (-10% of GDP), a crisis of competitiveness of the Greek economy and a huge current account deficit (-15% of GDP), along with a crisis of refinancing and servicing its public debt. Since then, it has unfortunately been operating as a laboratory, where its economic, social and political strengths are tested. All these are codified in the best way in the case law reviewing the constitutionality of the relevant legislation and the corresponding technical discussion.

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<sup>57</sup> See from the recent bibliography, A. Hemerijck, *Changing Welfare States*, Oxford: Oxford University Press, 2012 and *idem*, “When Changing Welfare States and the Eurocrisis Meet”, *Sociologica*, No. 1, 2012; see also G. Bonoli and D. Natali, *The Politics of the New Welfare State*, Oxford: Oxford University Press, 2012.

<sup>58</sup> The relevant technical discussion is summarised with very interesting observations in Karavokyris (2014), *op. cit.* (note 20) where all the pertinent, rich bibliography is documented.

First, and as already noted, the subject of judicial review was not and still is not the crisis itself, its causes (some of which also took a legislative form in the past) but the measures to tackle it:

- legal measures limiting income (mainly wages and pensions);
- legal measures that impose tax burdens;
- legislative interventions concerning collective agreements and the relationship between collective agreements and the law;
- measures that limit the so-called 'social acquis' in certain sectors, starting with legislative changes on establishing pension rights and the calculation of pensions, in order to ensure the long-term viability of the insurance system; and
- additional legislative measures on public administration, the permanence of civil servants or employees in public entities or the labour relations of workers in the wider public sector.

The mere fact that the purpose of judicial review concerns the measures to tackle the crisis and not the overall economic situation creates an imbalance at the very beginning of the debate, as the data needed to be comprehensively addressed by the political power, i.e. the government and the parliament as legislator, cannot be evaluated by the judge. For procedural reasons concerning the organisation of the judicial review, an all-around approach corresponding to the gravity of the situations faced by the economy, the state and society, is by definition out of question.

The subject of this analysis is not a systematic presentation of all the relevant issues. But it is reasonable and historically necessary that the major and simple question be set out before any individual observations are made: If the choice of addressing the fiscal, financial and development crisis that reared its head in Greece in 2009-10 (after the elections of autumn 2009) by taking painful measures had not been made, what would the subject matter of judicial review and the relevant scientific debate be? If the state declared or declares in the future an inability to pay salaries and pensions, an inability to fulfil all of its obligations and subsequently ceases making payments – not even an international cessation related to instalments, but an internal cessation, while still remaining in the eurozone, with parallel effects on the banking system and business strength – what legal act would be subject to review? Which judge would conduct the review and what would she say if the actual situation and the relative political and legal statement of the state was that it 'does not have the cash needed to fulfil its responsibilities' as a simple, objective fact with whatever this entails concerning the national economy as a whole?

What we propose to call 'the constitutional law of a disorderly default' should be, in our opinion, the starting point of any legal reasoning for reviewing the constitutionality of measures to tackle and manage the crisis. We cannot consider reasonable the content-based or context-based fragmentation of the review of an economic policy that is formed in crisis conditions and is in the form of internationally agreed loans and other measures of international facilitation and support, such as debt restructuring and the support of Greek banks. More specifically, this concerns the deposits of Greek savers accompanied by a fiscal adjustment programme in order for Greece to become fiscally balanced and then independent, as well as a programme of structural changes that seek to make its national economy more productive and competitive.

The first two support programmes for the Greek economy that were approved by the European Council on 25 March 2010 (the first programme) and on 26 October 2011 (the second

programme), which had both a European part and a part financed by the IMF, regardless of individual problems or tensions, stem from an overall plan of fiscal adjustment and upgrading of the competitiveness of the Greek economy. The aim was and is the return of the country to the normalcy of a member state of the eurozone that has access to the international monetary and capital markets and achieves satisfactory growth rates. It is obvious that if there were no urgent need for the country to borrow from the other member states of the eurozone, the European institutions and the IMF, no political and legislative actions would have taken place that lead to a rapid fiscal adjustment and therefore to the implementation of austerity measures that reinforce the cumulative recession and unemployment. The choice was made in the context of the exceptional circumstances of the crisis and the negotiation game between lenders and borrowers, and of internationally prevalent views, in particular on the need for fiscal adjustment and on the relation between fiscal remediation and growth. Ultimately, however, and given that the other option was a disorderly default, these policies were adopted by the Greek parliament and enacted by the Hellenic Republic. All the individual legislative measures for fiscal adjustment and structural changes are integrated into this overall approach and serve an adjusted fiscal, macroeconomic and development objective. Perhaps never before have legislative actions that are headed for judicial review had so clear and detailed (in the relevant explanatory memoranda) reasoning behind them.

Against a ground of the law going back to the urgent need to tackle a deep fiscal, financial, credit and development crisis that has threatened the country with a disorderly default, the judge brings forth his own inevitably fragmentary control. Since procedurally, this control is incidental and specific, it concerns one or even more individual regulations, and not the entirety of the strategy for containing, addressing and overcoming the crisis. Even where the judges cite the lack of studies to document the suitability, the necessity and the proportionality of the individual measures, they take into consideration certain aspects of the reasoning of this law and not the reasoning of the comprehensive national strategy under conditions of extreme economic crisis. For example, when reviewing legislation that leads to wage cuts and these are the wages of specific categories of public servants (including judges, the military and university professors), the judges consider, in terms of constitutionality, just one aspect of an overall fiscal adjustment strategy: the effort by part of the country to cease depending on the loans of the EU and the IMF; the effort of the country to render its debt sustainable and make this acceptable by the markets; and the effort of the country to have a positive growth rate in order to augment the amount of public expenditure on wages.

The same applies when pension cuts are reviewed judicially, in a pension system where especially the small pensions are not of a contributory (pay as you go), but of a welfare character. As such, they do not correspond to the amount of contributions that have been accumulated during the working and insurance life of an employee who may have worked, e.g. for 40 years, but may have been insured for just 15. In the case of pensions, apart from the general macroeconomic and budgetary issues that the legislator (but not the judge) is called upon to synthesise, the question of the long-term sustainability of the pension system is raised. That problem in turn bifurcates into a problem of the sustainability of the social security funds, in the financing of which the state is involved, and a problem of the sustainability of the supplementary pension funds, in the financing of which it is not.

To articulate the same point somewhat differently: the overall strategy to halt the crisis and exit it, assuming that it took the technical form of codified legislation and belonged to the abstract and direct control of a constitutional court, could very awkwardly lead to a judgment of unconstitutionality, because the constitutional judge has to move marginally and in a negative manner, to identify any possible conflict with the constitution and not accordance

with it. The conflict has to be obvious and unable to be tackled through a constitution-compatible interpretation. Moreover, a possible judicial rejection of an overall strategy, i.e. of the loan agreements and the agreed economic policy, which is a legislative choice of the Greek parliament, within the framework of the EU, the eurozone and participation in the IMF, as a multilateral international organisation, would constitute a manifest excess of the powers of the judge, who would substitute the government and the parliament. Practically, where would such a judicial rejection lead? To a cancellation of the loan agreements of 2010 and 2012, a cancellation of the intervention in the debt and the country's disorderly default? The *argumentum ad absurdum* always gives a sense of the limits.

The targeted judicial review of one or another measure cannot be traced back to the needs, objectives and internal balances of a comprehensive programme that spreads over time up to the point of exit from this situation and to the return to normalcy of a member state that is truly equal among others within the eurozone and has access to the markets. This is a general weakness of the incidental review of the constitutionality of laws, of which this author was once a supporter.<sup>59</sup> But long experience on the frontline has shown that when the legislature makes macroeconomic and financial decisions in times of crisis, these cannot be subjected to judicial review, be it point, fragmentary or random. The procedural ability to conduct fragmentary judicial review exists not only in diffuse review systems lacking a special constitutional court, but also in centralised systems that have a constitutional court. What is usually questioned is the constitutionality of a certain legislative regulation and not an entire policy, which leads, for example to halting and overcoming of the economic crisis, preventing a disorderly default and returning to the markets. What is crucial, therefore, is that the judge who reviews the constitutionality hears and evaluates the overall rationale of the relevant political bodies, which constitutes the grounds for the respective laws.

Furthermore, at the foundation of this whole approach always lies the escalation of the concept of the general interest,<sup>60</sup> within a constitutional order designed under normal economic conditions, without explicitly providing for extreme conditions of economic, financial and fiscal crisis, but which must be able to provide solutions under those conditions, too. The constitutions belonging to the European constitutional tradition provide for exceptional and extreme political circumstances, but not for exceptional and extreme economic circumstances. In the past, however, economic phases of much lesser intensity and without the danger for Greece to be driven to a disorderly default led to the adoption of legislative measures on the wage treatment of workers in the public sector or the relations of collective bargaining agreements with the law, which were put under judicial review without the relevant laws being deemed as conflicting with the constitution or the European Convention on Human Rights.<sup>61</sup>

There were still some theoretical approaches that treated the legal measures taken to halt this economic crisis in Greece as being identical to the deprivation of civil rights, to the 'para-

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<sup>59</sup> But not anymore; see Ev. Venizelos, "The establishment of a Constitutional Court within the Greek system of judicial review" in Ev. Venizelos and K. Chrysogonos, *The Problem of Constitutional Justice in Greece* (in Greek), Athens: Ant. N. Sakkoulas, 2006, p. 11 et seq.

<sup>60</sup> See Ev. Venizelos, *The general interest and the restrictions on constitutional rights: Critical approach of the trends in jurisprudence* (in Greek), Athens: Paratiritis, 1990, especially pp. 13-22 and pp. 23-41.

<sup>61</sup> See Ev. Venizelos, "Union freedoms and restrictions" on Article 106 of the constitution, in *Constitution and labour relations* (in Greek), EDEKA, Athens, 1987, p. 39 et. seq.

constitution' of the civil war period and the post-civil war state (1946–74).<sup>62</sup> This was the long period during which the Greek constitution of 1952 (which came into effect three years after the end of the civil war, which was the inaugural act of the cold war in Europe after the Second World War), maintained a grid of emergency legislative measures that cancelled most of the rights and institutional guarantees of the constitution for the losers of the civil war. None have argued, to our knowledge, in Portugal or Spain<sup>63</sup> that the legislative intervention to counter the economic crisis is comparable to the constitutional situation during Salazar's or Franco's dictatorships. The removal of the guarantee of personal safety, the operation of military courts and the forced internal resettlements are being equated in this respect with measures concerning income restrictions or tax burdens of a temporary character, taken in order for the state to avoid being unable to fulfil its obligations and to avoid an international credit event.

We wonder: Were there not financial crises before 2008–09? Of course there were. In the 1980s, more specifically in 1984, in order to serve the objectives of economic policy and to achieve fiscal and macroeconomic balance, serious restrictions were imposed by law on collective autonomy, on the negotiation and conclusion of collective agreements – essentially income constraints for workers in the public sector and stricter rules for the process through which a strike was decided.<sup>64</sup> It is also useful to remember how many devaluations of the drachma it took to reach the fixed euro-drachma exchange rate, in view of the accession of Greece to the eurozone in 2000.<sup>65</sup> It is likewise useful to have a sense of the historical context in which we move, seeking solutions that are constitutional, i.e. regulatory and simultaneously political since they have practical fiscal implications.

The protection of certain salary levels in the public sector and of certain pensions, as well as the relation between law and collective agreements (regarding the remuneration of workers in the private and the wider public sector) is undoubtedly an important question of interpretation and application of the constitution. The national constitution – in the so-called Western world – is called upon, though, to face much deeper and wider challenges, such as the globalisation of the economy, the dynamics of European integration, new forms of terrorism and new threats to internal and external security, the developments in biotechnology and the new terms in which fundamental questions arise in relation to the value of human life and the meaning of family.

The challenge, in terms of constitutional interpretation, was and is to combine the constitution, as a document that attempts to organise institutionally a long historical timescale (at the level of economy as well) with fluctuations in the economic situation and whatever these mean in terms of the individual aspects of state policy: fiscal, tax, pensions and social security, social policies, and so on. In essence, it is the need to articulate an economic (financial, fiscal, social, developmental) policy in order to address the circumstance of a fiscal, financial and growth crisis, serving the contextual and long-term interests of the national economy (according to the assessments of the government, which defines the general policy of the country and finally according to the assessments of the parliament, which legislates) as a facet of the general good. To this end, aspects of the *acquis* that have been formed under better economic conditions are

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<sup>62</sup> See e.g. G. Katrougalos, "The Council of State and the second 'para-constitution'", *ToS*, No. 1, 2012, p. 171 et seq.

<sup>63</sup> See note 19, *supra*.

<sup>64</sup> See Katrougalos (2012), *op. cit.* (note 62).

<sup>65</sup> See K. Kostis, "The polity change and the devaluations of the drachma", *Huffington Post*, Greek edition, 18 June 2015 (<http://www.huffingtonpost.gr/kostas-kostis/- 577 b 7609980.html>).

placed under review at several levels: the tax burden, wage and pension levels, social benefits, etc. All these could take place, since they have happened in the past and they are happening in other countries in the form of establishing and implementing national adaptation policies, without any major European or international financial assistance through loans, the support of banks and so on, without an agreement on measures at a European or international level. The fact that there is European or international aid makes the necessary national interventions milder than in the case, for example, of a state's disorderly default.

The jurisprudence of Greek courts in relation to crisis measures through submission to both the 2010 and 2012 adjustment programmes that have a European part and a part assumed by the IMF, can be divided into two phases:

- During the first phase, the adaptation programmes and specific measures, as national legislative measures dictated by the critical state of the economy and the need to protect the public interest, were judged constitutional.<sup>66</sup> This includes the vast financial and fiscal operation of reducing (PSI in) the Greek public debt, with a simultaneous radical restructuring through an implicit, official sector involvement.<sup>67</sup>
- During the second phase, specific regulations pertaining to wage and pension reductions were considered unconstitutional based on reasoning related to
  - the need to protect the core of the state and hence the status of public servants who ensure its functioning, such as the military;<sup>68</sup> and
  - a transgression of the limits of the constitutional principle of proportionality, with further reductions in the pensions imposed by either the public sector on employees or by social security organisations on their members.<sup>69</sup> Furthermore, the reasoning involved the ground that the legislator did not cite a study affirming the macroeconomic and fiscal benefits of such cuts from a certain point onwards.<sup>70</sup>

Such a jurisprudential addressing of the legislative management of the crisis raises two serious issues, whatever the procedural context in which it is carried out and irrespective of the juridical coherence and factual security of individual reasonings. A main issue is the balancing that the judge makes between, on the one hand, the general interest of society, the national economy and the state as a whole, and on the other, the need for special protection of the core of the state and its servants, regardless of the economic situation and the general framework within which the wage and pension policies of the state operate.

This balancing by nature attempts to synthesise and evaluate many different parameters. Regarding the judges and their special salary treatment, the court relied on existing, explicit

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<sup>66</sup> See Council of State (CoS) (pl.) 668/2012, CoS (pl.) 2307/2014, CoS (pl.) 3177/2014, CoS (Section A) 3410/2014.

<sup>67</sup> See CoS (pl.) 1116/2014.

<sup>68</sup> See CoS (pl.) 2192/2014.

<sup>69</sup> See the Court of Audit (CoA) (pl.) 4327/2014 and CoS (pl.) 2287-2289/2015. With regard to CoA (pl.) 4327/2014, it should be noted that this concerns judges' pension cuts; however, in order for the Court to establish its jurisdiction, and not refer the case to the Special Court (as per Art. 88, para. 2 of the constitution), it decided the case as if it generally covers the pensions of the public sector and not specifically the judges' pensions, consistent with the special salary treatment of active judges provided by the constitution.

<sup>70</sup> See CoS (pl.) 2287-2289/2015.

constitutional provisions.<sup>71</sup> As for the salary treatment of members of the academic staff, the court relied on the constitutionally established self-government of universities.<sup>72</sup> As for the salary and pension treatment of military (and police) personnel, the court focused on the need to preserve the country's combat effectiveness.<sup>73</sup> In fact, the crucial question concerns the relationship between financial stability and economic recovery as a parameter of national power and thus the ability to protect territorial integrity with the salary treatment of the special group of military personnel. This weighing encompasses economic, political, geopolitical, psychological and other elements, and in any case must be done first by the legislator and then maybe by the court.

The court considered it necessary to have a reliable and factual technical study on the suitability of each legislative measure in relation to the desired overall, fiscal and macroeconomic objective. This weighing is first and foremost political and legislative, and only marginally, in extreme cases can it be reviewed judicially. All this also rekindles the original question: What would have happened in the case of a disorderly default and consequently the inability of the state to pay wages (including those of military personnel) and pensions?

All these theoretical and jurisprudential concerns about the judicial review of the regulations with which the two first adjustment (or bailout) programmes of the Greek economy have been implemented and promoted, now hit the harsh reality of the entry of Greece into a third programme (the third Memorandum) according to the statement/decision the 12 July 2015 Euro Summit. The rationale – i.e. the explanatory memorandum and hence the justification for the law under which the Greek parliament adopted the statement of the Euro Summit and launched the first package of measures necessary to start the negotiations for adopting the programme, in accordance with Art. 13 of the Treaty on the ESM (see section 13) – constitutes a full reproduction of the rationale of the laws that from a point onwards were found to be (as we saw above) unconstitutional by decisions mainly made by the Council of State (but also by the Supreme Court of Audit and the Supreme Court).

The Greek government that resulted from the elections of 25 January 2015 and saw its proposal for a 'no' vote amassing 61.2% in the 5 July 2015 referendum, brought into parliament the bill that integrates the third programme (third Memorandum) into Greek law, based on the argument that in this way, the exit of the country from the euro and a disorderly default, i.e. a complete economic disaster, is avoided. The same government was re-elected on 20 September 2015 with a mandate to implement this third programme.

These arguments (the reasoning of the respective law) were made in 2015, with the country having achieved in 2013 and 2014 (just before the elections) a primary surplus and positive growth rate after seven years of recession. We will not refer here to the deterioration of the economic figures of the country because of and after the January 2015 elections, nor to the extreme difficulties caused by the decision to hold the July 2015 referendum (bank closures, capital controls and consequently the dissolution of parliament and the premature elections of September 2015). But we should note that if the argument over the dilemma of 'the Memorandum with tough fiscal and structural measures or exit from the euro and disorderly default' had a degree of strength in July or September 2015, it had an incomparably greater

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<sup>71</sup> More specifically, the Special Court of Art. 88, para. 2 of the constitution (jurisdiction in disputes relating to judges' earnings), 88/2013.

<sup>72</sup> See CoS (pl.) 4741/2014.

<sup>73</sup> See CoS (pl.) 2192/2014.

degree of strength in 2010, 2011, 2012 and 2013, based on the financial and macroeconomic data of the country. The 12 July 2015 Euro Summit statement even includes an explicit reference to the decisions of the Greek courts in respect of salaries and pensions that burden the budget. These encumbrances have to be offset with equivalent measures, e.g. by increasing taxation, insurance contributions and other changes to the social security legislation that lead to lower expenditure costs.

The 12 July 2015 agreement that led to the entry into a third programme (Memorandum) and the arguments of the government – seemingly with an ‘anti-Memorandum’ agenda in the January 2015 elections, but nevertheless re-elected in the name of the third Memorandum in September – therefore constitute the most comprehensive and effective response to everything that the ‘anti-Memorandum’ technical and judicial rhetoric had stated before 12 July.

It is obvious that the agreement of 12 July 2015 and all that follows necessitate an answer to those who have technically supported the unconstitutionality of the two previous adjustment programmes. The judge expresses herself through her decisions, though, so we must expect the stance of the jurisprudence on the constitutional issues that it will face on the occasion of the third Greek programme. It is, however, certain that everyone now more fully appreciates the importance of what we stated about the constitutional law of a disorderly default, as well as the importance of judicial and technical self-restraint in relation to the evolution of the economic crisis affecting the status of a member state of the EU and the eurozone.

## 11. The ideological and political consequences of the crisis

The ideological and political consequences of the crisis are, of course, profound. We have already referred (in section 8) to the crisis of European social democracy within the grand rolling coalition (in section 5) that politically dominates governments at the member state level and eventually at the European level through the Council and the European Council, as well as through the balance of power in the European Parliament, which requires the cooperation of certainly the two largest European political parties and wider political families. This became clear after the European elections of May 2014, both in the election of the new president of the European Commission and the shaping of the Commission and in the election of the president of the European Parliament.

The most important problem is the rise of the European far right and the new forms of Euroscepticism that emerged strongly in the last European elections.<sup>74</sup> These new forms are questioning the great and classic values of European integration, such as social justice and cohesion, rule of law, the aspiration of a common European future as a counterweight to all kinds of nationalism within Europe and the active historical memory of the First and Second World Wars.

European integration is threatened, in this regard, with being identified with a prevailing linear perception currently proposing that it exists as a reality and is a prospect in the present state of affairs. In this manner though, the European phenomenon, the European institutions

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<sup>74</sup> See indicatively, V. Emanuele, N. Maggini and B. Marino, “Gaining votes in Europe against Europe? The electoral performance of anti-EU parties in the 2014 European elections”, European Consortium for Political Research, Colchester, 2015 (<https://ecpr.eu/Filestore/PaperProposal/98df836d-abef-4799-bc8a-3a560ecacd2f.pdf>). See also the article by the European Movement International, *European Election 2014: A first look pro-European perspective*, Brussels, 2014, with a record of the pro-European MEPs after the European elections of 2014.

and European integration as a historical process take the weight of all the negative experiences and all the social, developmental and political challenges at a European, national, regional and local level. European integration thus becomes the scapegoat of all political and social demagogies. The announcement in the UK of a referendum on its relationship with the EU maintains and sharpens the debate on the prerequisites and effects of the direct appeal to the people, in relation to the prospect of European integration. The history of referenda,<sup>75</sup> however, shows that they have halted or delayed almost all steps of European integration, from the Maastricht Treaty up to the Amsterdam, Nice, European Constitution and Lisbon Treaties.

Now we must additionally see how the new forms of political radicalism that either claim governmental power or take it into their hands, as happened in Greece with the formation of the Syriza/ANEL government, will operate. More specifically, we refer to governments that make use of radical rhetoric and invest heavily in a populist-nationalistic approach. This development tries to emphasise the political identity of some member states' governments, while at the governmental level prevalent in Europe these are not the ideological/political distinctions, but the result of electoral randomness: some happened to bear the burden of being in power during a crisis, while others happened to have the convenience of being in opposition. Once those who happened to be in opposition assumed the burden of becoming the government, they either retreated in light of their responsibilities or assumed the responsibilities and the relevant costs. There seems to be no other solution.

The 12 July 2015 agreement (see section 13) between the Hellenic Republic and the other member states of the Eurogroup for a third programme (third loan, third Memorandum) for the rescue, support and adjustment of the Greek economy works in this sense as a lesson. This is especially so after the referendum in Greece on 5 July 2015, which on paper involved – as we saw – two specific texts that had been drafted in the context of the negotiations up to that time, but which essentially concerned the stance of Greece in the negotiations with its European partners and the IMF. In light of this development, the actions and statements during the period from the elections of 25 January 2015 to 12 July 2015 attain their true meaning.

## **12. The financial crisis and new challenges to European foreign and security policy**

The financial crisis has not suspended the major challenges of the Common Foreign and Security Policy (CFSP) (Arts. 23 et seq., TEU). On the contrary, the period starting from 2008 has been very intense in this field and throughout the geographical range that predominantly concerns the EU, from Syria to Ukraine and from the Western Balkans to the Sahel and the Horn of Africa.

There has even been a qualitative upgrade of the challenges, since during this period<sup>76</sup> we have witnessed, among other things

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<sup>75</sup> See from the recent bibliography, F. Mendez, M. Mendez and V. Tsiga (ed.), *Referendums and the European Union: A Comparative Inquiry*, Cambridge Studies in European Law and Policy, Cambridge, MA: Cambridge University Press, 2014.

<sup>76</sup> The developments of this period have been recorded in the annual reports from the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament on the main aspects and basic choices of the CFSP for the years 2009 to 2014, which are available on the EEAS

- a challenging of 'statehood', i.e. the coherence and existence of the state in Syria and Libya, as well as in Ukraine due to the developments in Crimea and the eastern provinces;
- claims of 'statehood' by the so-called Islamic State, which seeks to transform itself from a terrorist organisation into an entity that has the territory, population and not only absolute, but also inhumane power, based on brute force;
- a crisis in the relations of the Euro-Atlantic area (and thus the EU and NATO) with Russia, which calls into question the strategic equilibria that evolved after 1990; and
- large immigrant and refugee flows, mainly from the Middle East and North Africa to the EU member states through Turkey, with the main gateway being the Greek Aegean islands.

The financial crisis, as a crisis of fiscal deficits and public debt, was mainly linked to the Common Security and Defence Policy (CSDP) (Arts. 42 et seq., TEU) through reductions or avoidance of increasing the defence budget of EU member states that had prioritised their fiscal stability.<sup>77</sup> In this respect, the gradual cuts in defence spending in Greece are typical: in Greece, defence spending has traditionally been over NATO's defence pledge of 2% of GDP for reasons related to the priorities of national security and defence policy. In terms of absolute numbers, however, the Greek case does not affect the overall picture of NATO, the European contribution to NATO, the CSDP, the European Defence Agency or the European defence industry. The same applies, a fortiori, to defence spending in Portugal and Ireland, and even Cyprus. It is of more significance when defence spending is controlled or reduced by those member states that, due to their size, play a decisive role in European security and defence policy, such as the UK and France – which were certainly not subjected to rescue programmes, but which implemented fiscal adjustment policies. The same also applies, more or less, to all the member states.

It has been estimated<sup>78</sup> that the financial crisis has promoted the CSDP through various EU initiatives (mainly through the European Defence Agency) for 'pooling and sharing' the military capabilities of member states and achieving economies of scale both within the EU and between NATO and the EU. Similar initiatives were also developed in NATO (smart defence), in the command structure and the structure of forces, to which significant changes were made during this period. Also during the same period, there were bilateral or regional initiatives on defence cooperation between member states, e.g. between the UK and France. Still, these developments do not constitute a substantial change in the balance between member states and the EU in the field of security and defence policy, even less in the field of

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(European External Action Service) website homepage. For the perspective of the European Parliament, see European Parliament, "Supporting European security and defence with existing EU measures and procedures", Directorate-General for External Policy, PE 534.993, 2015.

<sup>77</sup> From recent bibliography, see M.H.A. Larivé, *Debating European Security and Defence Policy: Understanding the Complexity*, Farnham: Ashgate Publishing, 2014, especially p. 87 et seq., where the question "Has the 2008 Financial Crisis been an Engine Fostering the Integration Process in Security and Defence Policies?" is posed. For the American perspective on the impact of the financial crisis, see the article by Z. Selden, "The European Debt Crisis and American Security Policy", *Parameters*, Spring, 2012, p. 17 et seq. An integrated approach to CSDP in light of the financial crisis is contained in *More Union in European Defence*, Report of a CEPS Task Force, Chair: J. Solana, Rapporteurs: S. Blockmans and G. Faleg, CEPS, Brussels, February 2015.

<sup>78</sup> See Larivé (2014), op. cit., *supra*.

foreign policy, as it had been formed before the financial crisis. It is significant, however, that amid the financial crisis the number of military operations and missions, along with EU civilian missions under the European Security and Defence Policy and the CSDP (in Somalia, Nigeria, Mali/Sahel, Libya, the Central African Republic, Ukraine, etc.)<sup>79</sup> has not decreased, but on the contrary, has increased. By late 2015, it was obvious that after the events of 13 November 2015 in Paris a trend of increased defence spending would occur again. Security issues are ultimately superior to financial targets.

The financial crisis has put into question the Kantian complacency prevailing in most European societies, in the sense of a linear perception towards financial development and living standards, but also towards the level of security, internal and external, enjoyed by European societies. The financial crisis has led to the challenging of several European standards – not only in countries that were put into rescue programmes, such as Greece, Portugal, Ireland and Cyprus, but also in countries that had to implement restrictive policies on public spending, to safeguard financial stability. The very sense of the *acquis* concerning the disposable income, employment levels and the guarantees of the welfare state has been put into question. The financial crisis in these circumstances has reinforced the different forms of Euroscepticism that were recorded, as we saw, in the European elections in May 2014 and in the national elections in several member states.

All this has not, however, led to a ‘renationalisation’ of the European foreign policy and security and defence policy, and thus to the questioning of the CFSP and the CSDP, for the simple reason that even before the financial crisis, the role of member states in this field was primary, and the nature of those common policies was and remains strongly intergovernmental. Nothing of essence seems to have changed in this field as a result of the financial crisis. France and the UK remain European nuclear forces and continue to have the status of permanent members of the UN Security Council. There continue to be EU member

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<sup>79</sup> During the 2009–15 period, this author had the opportunity to closely follow the evolution of the issues in this field, as Minister for National Defence (2009–11), Minister of Finance (2011–12) and Minister of Foreign Affairs (2013–15), in the context of both the EU and NATO. For the EU context, see indicatively the Council of the European Union’s conclusions on Military Capability Development (3055<sup>th</sup> Foreign Affairs (Defence) Council meeting, Brussels, 9 December 2010), on Civilian CSDP Capabilities (3078<sup>th</sup> Foreign Affairs Council meeting, Brussels, 21 March 2011) and on Pooling and Sharing of Military Capabilities (3091<sup>st</sup> Foreign Affairs Council meeting, Brussels, 23 May 2011). Also useful is the European Parliament’s study on “The impact of the Financial Crisis on European Defence” (Directorate-General for External Policies, PE 433.830, April 2011). On issues in the context of NATO, see the “Statement by the NATO Secretary General on Agency and command structure reform” of 8 June 2011 and the statements from the summits in Lisbon (“Strategic concept for the defence and security of the members of the North Atlantic Treaty Organization, adopted by Heads of State and Government in Lisbon”, 19 November 2010) and Wales (“The Wales Declaration on the Transatlantic Bond”, 5 September 2014). In the debate among academic circles, the assessment that the financial crisis has limited the initiatives of EU member states in the field of foreign and security policy is widespread. See R. Youngs, “European foreign policy and the economic crisis: What impact and how to respond?”, Working Paper No. 111, FRIDE, Madrid, November 2011. The analysis by H.B. Nicoletti, “Crisis upon decline: Foreign policy perspectives on the EU beyond the eurozone crisis” (No. 156, IPSI, Milan, February 2013), considers that the weaknesses of the European foreign policy have been exacerbated by the financial crisis. Interesting facts about the southern European countries are presented by P. Kurei, “The influence of economic crisis on foreign policy: An Analysis of foreign policy activities of the EU member states from Southern Europe 2011-2014”, University North, Croatia, 2015.

The Chinese view on the subject is interesting: see X. Longdi and S. Youjin, “The EU’s foreign policy under debt crisis”, China Institute of International Studies, 5 May 2013.

states that do not even participate in NATO. There continue to be strong regional identities and strong historical memories that determine, more or less, the priorities and sensitivities of all member states – not only those of the Baltic, Balkan or Central European states, but also those of the Scandinavian countries, and so on.

In Greece, for example, the Cyprus issue, Greek-Turkish relations, the delimitation of maritime areas in the eastern Mediterranean, the situation in the Balkans, the issue of the name of the Former Yugoslav Republic of Macedonia are always national priorities identified historically and geographically, as in any other country.<sup>80</sup>

The financial crisis, thus, seems to have neither restricted the sovereignty of member states in its fundamental content, pertaining to foreign policy and security and defence policy, nor to have ‘renationalised’ the common foreign policy or security and defence policy.

The financial crisis and the intense developments in the field of economic governance in the EU and the eurozone have not halted the application of the provisions of the Treaty of Lisbon regarding the CFSP and the CSDP, the institutional role of the High Representative/Vice President/head of the European Defence Agency and the establishment and operation of the European External Action Service. Nor have they changed the framework of the European Security Strategy.<sup>81</sup> The high representative played, for example, a very important role in achieving an agreement on Iran’s nuclear programme. However, the involvement of the EU as a political entity in the processes related to international politics and open crises follows the rules stemming from the UN Charter, the institutional framework of NATO and mainly the practices resulting from the actual balance of power, the actual military and international strength in general and the willingness for risk-taking international politics that exists in different countries, whether they are EU members or not. In this respect, the German stance is not affected by the country’s hegemonic role in the eurozone, but by the constitutional and historical limits concerning the international military presence of Germany.<sup>82</sup> British self-limitation on participation in international military activities is linked to the retroactive influence of the experience of the UK’s participation in the intervention in Iraq, and only secondarily to the need to reduce defence spending. The interest of France and its preparedness for an intervention in countries like Mali and the Central African Republic persists for historical reasons, regardless of the fluctuations of the financial crisis and the evolution of fiscal aggregates.

The financial crisis thus has not changed the European balance and practices in foreign and security policy and defence issues. Even the oscillation of the Greek government that emerged from the elections of January 2015 about European sanctions against Russia or the European

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<sup>80</sup> See T. Dokos, “Greek foreign policy under the Damocles sword of the economic crisis”, No. 2, Konrad Adenauer Stiftung, Berlin, 3 April 2015 and T. Dokos, “Who Lost Greece? The Geopolitical Consequences of the Greek Crisis”, No. 18, Hellenic Foundation for European and Foreign Policy, Athens, February 2012.

<sup>81</sup> This is now under review. See S. Biscop, “Global and Operational: A New Strategy for EU Foreign and Security Policy”, Working Paper No. 15, IAI, Rome, 27 July 2015, A. Bendiek and M. Kaim, “New European Security Strategy – The Transatlantic Factor”, SWP Comments, No. 34, German Institute for international and Security Affairs, Berlin, June 2015, and European Parliament, “Towards a new European security strategy? Assessing the impact of changes in the global security environment”, Directorate-General for External Policies, PE 534.989, 2015.

<sup>82</sup> See for example, J. Janning, “German foreign policy and the EU: Leader by default?”, Commentary, European Council on Foreign Relations, 5 February 2015 and A. Moller, “German foreign policy after Paris”, European Council on Foreign Relations, 20 November 2015.

position in the spectrum of crises from Syria to Ukraine, was really short-lived. Since the referendum of July 2015 and the second elections in September 2015, the Syriza/ANEL government has become fully aligned with the European and Euro-Atlantic stance on foreign policy issues.<sup>83</sup> Of particular interest in this regard are the political processes in Portugal after the elections of October 2015, which led to the formation of the coalition government of the Socialist Party, the Communist Party and other parties that are opposed to the fiscal adjustment programme. The president of Portugal made it clear that in order to grant a mandate for the formation of a government to the leader of the Socialist Party, the acceptance of the commitments resulting from the participation of Portugal in NATO, and of course in the EU and the eurozone, was particularly important.

The financial crisis has highlighted the role of Germany and the fiscally 'virtuous' member states in the field of economic governance of the eurozone and the functioning of the Eurogroup and has brought forth the new types of inequalities that we have seen among member states. The traditional inequalities among member states in the field of foreign policy and security and defence policy have remained intact though. This is reflected in the way that EU-US relations are practically organised, first on economic policy, international trade relations and negotiation for the Transatlantic Trade and Investment Partnership (TTIP), and second with regard to the open issues of international politics. The pace and the political importance of the contacts between Washington and Berlin and between Washington and London or Paris in these two fields is different. The role of Berlin is obviously reinforced in the purely political field, however, as shown by its participation in the negotiations on Iran's nuclear programme or initiatives related to the situation in Ukraine.

The growing refugee flows from the Middle East and North Africa to Europe, mainly through Turkey, with the gateway being the Greek islands of the Aegean Sea, link foreign policy and external security policy with the internal security of the member states and the EU as a political entity, and put the Schengen Agreement and the rules of Dublin III to the test. Namely, they put to the test one of the most advanced achievements of European integration and activate intense national reflexes in many member states, from Hungary to Germany.

The tragic events of November 2015 in Paris and the sudden upgrade of the terrorist threat in EU territory alter the geographical sense of European societies in relation to the so-called Islamic State, which moved much closer, in Paris and Brussels. The governments of member states act within the frames of the core of their sovereignty, which requires that states ensure internal security for their citizens. The terrorist acts and threats of Islamic State on European territory connect the fields of external and internal sovereignty, strengthen by definition the role of national governments and remind us that the solidarity clause (Art. 42, para. 7, TEU) cited by France after the events of November, lies at the base of any serious alliance such as NATO (North Atlantic Treaty, Art. 5), but also at the historical starting point of the project of European integration. This requires the cooperation of the EU (and thus the cooperation of Greece, as an EU member state) with Turkey, provided of course that the international law on sovereignty, sovereign rights and responsibilities conferred by international conventions or international organisations is respected.

The management of refugee and immigration flows and the simultaneous addressing of the danger that terrorists posing as refugees enter the EU impose fiscal costs that are disproportionately large for entry countries like Greece, which is still under conditions of

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<sup>83</sup> See for example, H. Conley and J. Mina, "Understanding the European Consequences of a modern Greek Odyssey", Center for Strategic and International Studies, Washington, D.C., October 2015.

financial crisis. The proportional distribution of burdens is the current European norm. The economic and financial aspect does not change the priorities, though.

These issues are primarily internal and external security ones that need to be addressed in conditions of democracy and under the guarantees of the rule of law, but also according to the rules of international law, which provide for the potential use of force, according to the UN Charter, for the protection of European democracies and the European concept of freedom, rights and rule of law – that is of the historical, political and cultural foundations of European integration themselves.

### **13. The evidentiary importance of the 12 July 2015 agreement on the entry of Greece into a third programme**

In the elections held in Greece on 25 January 2015, which were mandatory according to the constitution, because of the failure of the parliament to elect a president of the republic, the coalition government arose, with the major partner being a party of the radical left (Syriza) and the second one being a party of the nationalist-populist right (ANEL). As noted earlier, the ruling majority used, before the elections and reiterated after them, a clear and strong anti-Memorandum rhetoric:<sup>84</sup>

- They promised to end the ‘memoranda’, i.e. the fiscal and structural adjustment policies resulting from the bailout programme, the European part of which was extended until 28 February 2015 and the IMF part due expire on 31 March 2016.
- They announced a generous programme of benefits and restoration of the reductions to wages and pensions. The programme provided for the overthrow of major structural changes made during the 2010–14 period.
- They made the need for radical intervention to the public debt a central issue. Without recognising at all – quite the contrary – the intervention to the debt made in 2012, they set as their goal to convene the pertinent international conference and promised unilateral moves aimed at a drastic nominal reduction and deep restructuring of the debt, in order to make it sustainable. The main argument was that austerity policies had been imposed because of the excessively high and unsustainable debt, and not in order to reduce the excessive primary deficit that, in 2009, had reached 13.3% of the current GDP. This argument completely disregarded the drastic reduction (60%) of the annual debt servicing costs after the 2012 intervention, and the controlled (under 10% of GDP, according to international standards) amount of annual funding requirements for interest and amortisation.<sup>85</sup> At the same time, the then president of the Greek parliament (who was a key member of the parliamentary majority) set up a committee that characterised the Greek public debt, even after the reduction and restructuring of 2012

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<sup>84</sup> See the speech and rejoinder by Prime Minister Alexis Tsipras during the debate on the vote of confidence on the government resulting from the 25 January 2015 elections in the Greek parliament minutes, from the sessions on 8 February 2015 and 10 February 2015 (also at [primeminister.gov.gr](http://primeminister.gov.gr)).

<sup>85</sup> See European Commission, “Greece – Request for stability support in the form of ESM Loan”, Directorate-General Economic and Financial Affairs, Brussels, 10 July 2015 and IMF, *An Update of IMF Staff’s Preliminary Public Debt Sustainability Analysis*, Country Report No. 15/176, IMF, Washington, D.C., 14 July 2015. The preliminary debt sustainability analysis was released on 2 July 2015.

(even that owed to eurozone member states, the EFSF and the IMF) as odious and subject to cancellation.<sup>86</sup>

- They rejected the negotiating framework of the previous government, which sought, according to the decision made in the Eurogroup of November 2014, the entry of Greece into an enhanced-conditions, preventive credit-line programme<sup>87</sup> under terms that – concerning the Greek side – were included in the electronic correspondence of the finance minister, Gikas Hardouvelis, with the European Commission, the ECB and the IMF.<sup>88</sup>

Despite the fact that at the 20 February 2015 meeting of the Eurogroup,<sup>89</sup> the Greek government had accepted the extension of the European programme then expiring on 30 June 2015 and the then finance minister signed the relevant agreement with the EFSF, this agreement was never approved by the Greek parliament and never led to a further extension of the expiring programme or to a supplementary programme. Instead, on 26 June 2015, the relevant negotiations came to a stalemate and the Greek government proposed to parliament – which accepted the proposal – the referendum concerning a crucial national issue, in accordance with Art. 44(2)(a) of the constitution.<sup>90</sup> The rejection (no) or approval (yes) of two texts that had been drafted by the European institutions up to 25 June 2015 for the purposes of the negotiation were treated as such an issue: a text of fiscal and structural measures proposed by the European institutions and a brief analysis on the sustainability of the Greek public debt using the data at hand before the referendum, the bank closures and the capital controls. The result of the referendum on 5 July 2015 overwhelmingly (61.3%) leaned in favour of ‘no’ even with the prime minister stressing that the objective would in any way be concluding an agreement within a few days. This was confirmed at a meeting of party leaders on the day after the referendum.<sup>91</sup> The pro-European opposition parties were in favour of ‘yes’, not in the sense of the acceptance of those texts, but in the sense of the European orientation of the country and the need to conclude an agreement in order for Greece to remain in the eurozone.

<sup>86</sup> See the *Truth Commission on Public Debt* (established by decision of the president of the Greek parliament), preliminary report, June 2015 (in Greek).

<sup>87</sup> See the Eurogroup statement of 7 November 2014.

<sup>88</sup> In Greek public debate, this is referred as the ‘Hardouvelis’ email’.

<sup>89</sup> See the Eurogroup statement of 20 February 2015. On the basis of this statement, the loan agreement between the Hellenic Republic and the EFSM that had been extended until 28 February 2015, was extended again until 30 June 2015.

<sup>90</sup> According to Art. 44(2)(a) of the Greek constitution, upon a proposal of the cabinet, the parliament may decide, by an absolute majority of the total number of its members (151 of 300), to proclaim a referendum concerning a crucial national matter. According to subparagraph b of that paragraph, the parliament may, by a decision adopted on the proposal of 2 out of 5 of the total number of its members, by a special majority of 3 out of 5 (180 of 300) of the total number of members, proclaim a referendum concerning a specific bill passed by parliament, which regulates a serious social issue. But this is prohibited for a bill concerning fiscal matters. Consequently, there was an issue as to whether a subject that is mainly fiscal (such as a rescue programme) can be put to a referendum under subsection a, as a national matter – a matter that could not be put to a referendum if it had taken the form of a bill voted upon by parliament. See more on this in C.M. Akrivopoulou and N. Garypidi, “Referenda as an institution of direct (?) democracy – Referenda from the perspective of international and national law – Rethinking the immediacy of the referendum in theory” (in Greek), July 2015 (www.lawspot.gr).

<sup>91</sup> See the joint 6 July 2015 statement by the leaders of the political parties (except Golden Dawn, which did not participate and KKE, which did not agree).

The government's narrative<sup>92</sup> until the 12 July 2015 agreement involved the following considerations:

- that after the January 2015 elections, a serious and tough negotiation was being conducted for the first time;
- that the European institutions, the IMF, Germany and the governments of many other member states of the eurozone under German influence, operate as opponents that want to subjugate and humiliate the Greek people;
- that, despite everything, there are critical disparities between the 'friendlier' chancellor and the more 'hostile' German finance minister; and
- that the interventions of the US administration are in support of the Greek positions.

There were three pillars of the government's perception:

- First, that after the clear expression of the will of the Greek people in the January 2015 elections and in a direct manner, the referendum of July 2015, the acceptance of this will or at least a serious consideration of it by the other member states of the eurozone, the European institutions and the IMF, was a matter of democracy and thus an issue of European values. This obviously did not take into account the fact that it raised a matter of equal democratic legitimacy for the governments and parliaments of all member states, in several of which it seemed as fresh as that of the Greek government. The electoral cycles of EU member states that seek aid from the IMF play an even smaller role in an international organisation with such a large number of member states.
- Second, the threat of exiting the eurozone functioned as an instrument of pressure by Greece on other member states, who would prefer to avoid the consequences of such a development, to protect the credibility of the single currency, but also to the US, which is interested in the unity of NATO and the single security strategy of the Euro-Atlantic area. The showy contacts with the Russian Federation, even with President Vladimir Putin, were supposedly made in this sense, in response to initiatives in the field of energy policy and rhetorically friendly attitudes in relation to the issue of sanctions imposed by the EU on Russia, about the matter of Crimea and eastern Ukraine.
- Third, the Greek case could have served as a starting point and an instrument for an overall change of the political balance within the EU and the eurozone in a progressive and radical direction, in view of the forthcoming elections in Spain and Portugal, and the friendly disposition of the leaders belonging to the Party of European Socialists.

These considerations led to a back-and-forth and prolonged negotiation that included the referendum of July 2015, the decision for Greece to let payments to the IMF become overdue and the decision to leave the extended programme to expire on 30 June 2015 and consequently to repeal the basis on which the ECB supports Greek banks.<sup>93</sup> This resulted in the final phase

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<sup>92</sup> See the speech by Prime Minister Alexis Tsipras in the discussion on giving authorisation to the government to negotiate an agreement after the 5 July 2015 referendum, in the Greek parliament minutes from the 11 July 2015 session (and at [primeminister.gov.gr](http://primeminister.gov.gr)). See also Law 4333/2015 (*Government Gazette*, A78/11.7.2015) "On the negotiation and conclusion of a loan agreement with the European Stability Mechanism (ESM)".

<sup>93</sup> See the 28 June 2015 Act of Legislative Content (AoLC) (*Official Gazette*, A65) "Short-duration bank closure", which imposed a bank holiday until 6 July 2015 and limitations on capital movements. This

of the negotiations being held with the Greek banks closed and under a regime of capital controls in order to avoid what seemed an inevitable bank run. In addition, during the final phase of the negotiation, a key issue was the inclusion in the text of the Eurogroup, introduced for further consultation in the Euro Summit, of the German proposal to suspend Greece from the eurozone and the return to it when it would again meet the necessary conditions.<sup>94</sup>

These developments refuted in practice all the assumptions of the Greek side. In practice, it painfully turned out that

- the crucial correlations in European developments are often rather intergovernmental or, better, transnational. They concern the national strategies of the member states and not the political profile of the government concerned;
- the matter of the so-called Grexit, was not a Greek threat, even a ‘suicidal’ one, but a German proposal at a Eurogroup level;
- the referendum and the expiry of the previous programme resulted in bank closures and capital controls, i.e. the exercise of strong pressure on the Greek side, whose negotiating power was weakened; and
- the public debate on the possibility of a strategic Greek–Russian approach outside the EU and NATO framework would trigger the US administration to assume a friendly attitude towards Greece, obviously only if the Greek government would previously tone down any such concern in its contacts with the American side.

The result was the conclusion of the 12 July 2015 agreement reflected in the statement of the Euro Summit, which has already been adopted by the Greek parliament as part of the explanatory memorandum of the 4334/2015 law and published in the official gazette as a frontispiece of this law.<sup>95</sup> The Greek side has already fulfilled the preliminary requirements of the July 2015 agreement in order to begin the negotiations for the inclusion of Greece in the ESM programme according to Art. 13 of the relevant Treaty,<sup>96</sup> while the Greek request was submitted to the IMF.<sup>97</sup>

In all the crucial votes concerning the third programme that took place in the Greek parliament in July and August 2015, a large number of the Syriza MPs refused to vote in favour of the government’s legislative proposals. The July 2015 agreement and the related legislation were accepted by the parliament thanks to the votes of the three opposition parties that support the European course of the country (Nea Dimokratia, To Potami and PASOK). This caused an

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operation has since then been supplemented and renewed. Listed in the preamble of the AoLC as an extraordinary circumstance of extremely urgent and unforeseeable need is the need to protect the Greek financial system and the Greek economy in general from the lack of liquidity caused by the 27 June 2015 Eurogroup decision to refuse the extension of the loan agreement to Greece, expiring on 30 June 2015 (but in the meantime the decision to hold a referendum on 5 July 2015 had been reached).

<sup>94</sup> See the document of the 12 July 2015 Eurogroup, which was introduced for discussion in the Euro Summit on the same day.

<sup>95</sup> See Law 4334/2015 (*Government Gazette*, A80/16.07.2015), “Urgent arrangements for the negotiation and conclusion of an agreement with the European Support Mechanism (ESM)”, followed by Law 4335/2015 (*Government Gazette*, 87/23.07.2015), “Urgent implementation measures of Law 4333/2015 (A80)”.

<sup>96</sup> See Venizelos (2001), *op. cit.* (note 3); see also note 10; and also Hemerijck (2012), *op. cit.* along with Bonoli and Natali (2012), *op. cit.* (note 57), *supra*.

<sup>97</sup> See the letter dated 23 July 2015 by the Greek minister of finance to the managing director of the IMF.

internal existential crisis in Syriza and changed the character of the government, which, despite typically appearing as a majority government, had de facto and up until 20 September 2015, become a minority government, basing the axis of its policy on the positive votes of the opposition and not just on its tolerance. It was therefore reasonable for political developments to take place, since a contradictory and fragile parliamentary situation had occurred. The dissolution of parliament and the conduct of elections in September 2015 resulted again in a coalition government between Syriza (35.5%) and ANEL (3.7%), with a parliamentary majority of 155 out of 300 MPs. The dissident MPs of Syriza, who founded another party, did not manage to pass the 3% limit and ended up with no parliamentary representation.

Greece has thus entered a third bailout programme (third Memorandum) six months after the emergence of an 'anti-Memorandum' government and a few weeks after the victory of 'no' in the referendum of July 2015. The argumentation of the government for this radical shift was – in 2015 – absolutely identical to the argumentation about the inclusion in the first Memorandum of May 2010. Submission to a bailout programme was necessary to avoid exiting the eurozone, a disorderly default and the total destruction of the country.<sup>98</sup> Only, on 25 January 2015, the day of the first elections, it was neither a matter of fate nor inevitable that Greece would enter a third Memorandum, of a three-year duration, with a new loan of about €85 billion taken and with harsh terms concerning fiscal measures and structural changes. This was necessitated by the dramatic deterioration of the situation during the next six months.

The two differentiating elements that had been highlighted by the government before the July 2015 agreement in relation to the previous programmes, was the resolution of the issue of the public debt and the provision for additional European funding boosting growth.<sup>99</sup> The relevant references of the July 2015 agreement are, however, clear. The funding for growth provided for in the agreement is that which has already been allocated to Greece by the Structural Funds, the European Social Fund and the Common Agricultural Policy. A part of these funds has been withheld as collateral for the immediate financing of Greece with €7 billion by the EFSM, in order for the payments to the IMF to cease being overdue and to fulfil its obligations towards the ECB.

The paragraph on the sovereign debt in the Euro Summit statement of 12 July 2015 is in the same spirit as the commitments of the February and November 2012 sessions of the Eurogroup. Where there are more detailed wordings, they refute the expectations for other types of intervention to the debt: everything depends on the successful implementation of the new programme and the completion of the first assessment. A nominal reduction (haircut) is expressly ruled out. The reduction in net present value will come from parametric changes, such as the extension of the grace and repayment period (oddly without an explicit reference made to any future interest rate decrease or conversion of floating interest rates to fixed rates). Greece, for its part, has committed to honour all its obligations towards all its creditors. The importance of the 2012 intervention (a nominal haircut through PSI and radical restructuring of the debt through implicit OSI) is thus recognised by the current Greek government. Greece also recognises in this manner the legitimate nature of its debt, refuting older claims about an odious, illegal and illegitimate debt and abandoning all scenarios of a unilateral movement.

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<sup>98</sup> See note 86, *supra* and the explanatory Memorandum of Law 4333/2015 with which the parliament granted approval to the government to negotiate an agreement.

<sup>99</sup> See note 86, *supra*.

Clearly, with the July 2015 agreement, the IMF remains at the heart of the eurozone and the institutional hybrid of the Troika returns stronger, as a quartet, because of the involvement of the ESM.

Therefore, with regard to the above analysis (sections 3-11), the agreement for a third Greek bailout programme (Memorandum) on 12 July 2015 by the 'anti-Memorandum' government that resulted from the January 2015 elections and was re-elected in September, is a very important 'lab' proof. But at the same time, it is a very important reminder of the limits of European policy and the prevailing view in Europe concerning economic policy that can lead to a recovery and an increase in the competitiveness of the economies of the member states. No member state of the EU and the eurozone can obviously recover and ensure its essential equality within the European framework and much more, to develop its comparative advantages and promote a national growth model, if it only relies on bailout programmes, on ESF and ESM assistance, even if it abides by the relevant terms consistently and completely. Additional national initiatives are needed, which mobilise the productive forces of each member state and – in this sense – protect the elements of its sovereignty within the framework of European integration.

#### **14. Concluding question: Is the state a brake or an engine in the future of Europe?**

We can now put forward an overall and final question: What is the nation state in relation to European integration, after the experience of the financial crisis that erupted in 2007-08? Is it a brake or an engine for the future of Europe? The final question, in other words, is, if the nation state did not exist, who could address the locked-in inequalities within Europe, to which we referred earlier? The region? The city? The people? The demos? Civil society? The market?

National political systems and national political balances are refracted at a European level in a manner that is extremely interesting, because the coexistence of Community and intergovernmental characteristics does not allow the formation of a clear and simple picture. In the European Council and the Council there are apparently some ideological and value-based cleavages and balances, as there are conservative, social democratic or liberal, single party or coalition governments. But eventually – as the issues are becoming crucial – national strategies are often emerging. Everything else usually subsides. The European Parliament is obviously dominated by pro-European political parties. Even there, though, the transnational balances are apparent, when important issues of national interest are put forward, concerning one or more EU member states. Then it becomes clear that the MEPs – apart from some exceptions – are subject to the perception of national strategies and priorities.

Let us revisit the core of our concerns. The above analysis has shown the triptych of challenges faced by the modern state:

- internationalisation, through the participation of states in the international community and especially for member states of the EU, through European integration;
- privatisation, through the interconnection between states and markets and through the very existence and function of public debt; and
- de-politicisation, through the stability of national strategies and the dynamics of transnational correlations, but also through the political neutralisation brought about

by the de facto existence in the EU of a grand rolling coalition among the main political forces.

These are thus three different aspects of the single phenomenon of the reduction of state sovereignty. The question is how are these aspects that now determine the state reflected in the balance of the member states' relations with the EU? Is the EU, as an institutional, economic and political entity, affected by these aspects or does it turn them over to the EU member states? More specifically,

- the nation state is being internationalised. Will the EU remain stubbornly and guardedly European? Or will it bow to a broader globalisation?
- the nation state is being privatised. What is the EU? Is it a supranational, but public entity? Or is it being privatised at its own pace?
- the nation state is being depoliticised. What does the EU do? Is it being politicised? Or does it keep the profound, perhaps insurmountable political – and not just democratic – deficit that it possesses as an institutional system?

The EU seems – as shown in the above analysis – to already possess the structural problems of the nation state to a great degree, before it has even been set up as a comprehensive political entity:

- European integration and more specifically the function of the single European market and the euro as the single currency are obviously affected by developments in the global economy, the economic relations of the EU with the US (the negotiation for the TTIP is not at all an easy one) and Canada. They are also affected by relations with Russia, China, the Arab world, the international energy map, the flows of world trade, the international capital market, decisions at the level of the WTO, along with the balance of power at the level of the G8 and the G20. In addition are the effects of new crisis points in the Middle East and in North Africa, in Central and Eastern Europe, in the Mediterranean, the plans of NATO, Euro-Atlantic political and military relations, etc. The EU is not a large, enclosed European fortress based on the substitution of national protectionism by a European protectionism, but is a strongly internationalised entity.
- The EU is a very large bureaucratic mechanism that continually seeks to find an equilibrium with the member states, but it is completely exposed as an institutional entity to the international market. The need to refinance the public debt of member states and the functions of the ECB, the ESM, the European Investment Bank, etc., are based on the relationship with the market, with the international banking system, capital flows, the rating agencies and so on. This is true despite the steps taken regarding those economic governance institutions that are European and not international, and despite the rhetoric about a global economic governance developed at the level of the G8 and G20. The initiatives in relation to the tax on financial transactions managed to gain the support and participation of only 11 member states and are a prime example of the relationship between the Union as an institutional entity and the market as a major, international private entity.<sup>100</sup>

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<sup>100</sup> See website of the European Commission, “Taxation of the Financial Sector – The Financial Transaction Tax (FTT)”. Also allow the author to refer to the speech given as Deputy Prime Minister and Minister of Foreign Affairs of the Greek Republic and President of the Council during the Greek

- Institutional Europe, as seen after the results of the last European elections in May 2014, seeks political answers to the objections, anxieties and demands of European citizens, but these answers must be found within the same framework of the great rolling coalition, as discussed earlier. The margin for substantial political initiatives is always very tight, as it is determined by the economic and monetary framework. So, the problem of the political deficit is always present, although all the major steps of European integration have been the result of political voluntarism, which is strong in intensity but limited in its range of options. Hence, European integration is not a counterweight to the transformations of the nation state, but a higher level at which the same problems are documented and the same transformations are taking place. That is why the political and technical concern should be of another level. The crisis signalled, among other things, the end of the period of older, easy European banalities. We think that as the period of lies and illusions at a political level came to an end, so did the period of optimism and beautification of issues at a theoretical level. Therefore, a new narrative must be articulated, both theoretically and politically; a narrative that nevertheless stems from experience, history, the balance of forces and genuine concern for the future at both national and European level; one that can substantially affect the balance of power at a national and European level and the relevant political decision-making processes.

Such a debate, profoundly political, brings us once more to the original and always open question as to the relation between the nation state and European integration, after the experience of the economic crisis and in an extremely insecure world that constitutes an international risk society. Practically, the question of European integration always relates to the size of the EU budget and its own resources, the distribution of surpluses, the expansion of solidarity and reciprocity in issues like public debt and the guarantee of bank deposits. Historically, this question has been answered in a way that is reflected in the current level of European integration, including its challenges. Yet the benefit of each choice (national or European, conservative or reformist) is judged on a different historical timescale. Political decisions – even the most voluntaristic ones – need democratic legitimacy and this is primarily judged at the national level, within the flow of the national electoral cycles and the national economic and political circumstances. The great historical initiatives – such as those related to European integration – are judged on a long historical timescale, but then legitimisation takes the form of a retrospective vindication or challenge, and that is not an institutionally organised and transparent process.

Thus, continuous and persistent effort is needed at the level of technical debate, ideas, civil society, European institutions, national political systems and European political parties. In the meantime, however, each member state should protect its position within the European balances and the fluctuations in international circumstances, both economic and political. There is no margin for operating as a testing ground, e.g. as a result of financial derailment, in order for European affairs to be tested and possibly become more rational, progressive and sensitive.



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