# Legal Aspects of the Memoranda of Understanding in the Greek Debt Crisis

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## A. Introduction: The way to the Memoranda of Understanding for the financial assistance to Greece

### I. The framework

Almost five years after the eruption of the Greek crisis, the public media focus again much on the possibilities of a final rescue of Greece and its remaining in the Eurozone. In the beginning of 2015 the discussion about the future of Greece vis-a-vis the international financial community is open again, since the duration of the agreement under which Greece is receiving the second financial assistance from its European creditors, technically known as the "Second Economic Adjustment Programme", will soon[1] expire. The international financial assistance granted to Greece consisted of two joint Euro Area and IMF financing packages of respectively 110 billion Euro in 2010 and of 130 billion Euro in 2012. The international financial assistance has been granted

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1 The Board of Directors of the European Financial Stability Facility (EFSF) decided on 19 December 2014 to grant Greece a two-month technical extension of its Second Economic Adjustment Programme, which was ending on 31 December 2014, www.esm.europa.eu/press/releases/extension-of-the-efsf-programme-and-efsf-bonds-for-greece.htm (1/2/2015).

to Greece under conditionality, which was described in the Memoranda of Understanding attached to the letters of intent that Greece has addressed to its respective lenders in 2010[2] and 2012.[3] The term "Memorandum of Understanding" became a synonym to austerity and to personal distress for the Greek people being affected by the crisis.[4] Since the beginning of the crisis, the fear of the consequences of the financial catastrophe for which the Greeks were not prepared and the stigma linked to receiving assistance under conditionality made the political debate and almost all of the political personnel of the Greek Parliament sceptical about the efficiency of the measures included in the Memorandum of Understanding.[5] As a result, the implementation of the measures of the Memoranda of Understanding is never without any hindrance in Greece. Some of the Greek political elite continue to be hostile to the Memoranda of Understanding and declare that they will not accept them.[6] While this article is under publication, the declarations of the new elected government of Greece concerning its refusal to pursue the requirements of the Memoranda of Understanding[7] could not make the subject of our analysis more accurate. It is thereby necessary to examine the legal nature of the IMF Memoranda of Understanding and the Memoranda of Understanding with the European creditors assumed by Greece and whether they are legally binding. The outcome of this analysis is important not only for the continuation of the attribution of the financial assistance to Greece in the active phase of the Memoranda of Understanding[8] but also – that remains to be seen – for the execution in the repayment phase at the end of the term of the financial assistance to Greece. This analysis will make clear whether Greece could declare unilaterally not to fulfil any more the conditions and could free itself of its obligations resulting from the financial assistance provided, particularly whether and to which extent Greece will still be obliged by the conditions of the repayment of the European and the international assistance. Moreover, the results of the article may also be productive in future cases, if other member states would receive financial assistance under conditionality.

2 Annex 2 to the Economic Adjustment Programme for Greece of 26/5/1010, www.ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf and www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf (1/2/2015).

3 Annex 3 to the Second Economic Adjustment Programme for Greece of March 2012, www.ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf and www.imf.org/external/np/loi/2012/grc/030912.pdf (1/2/2015).

4 Cf. IMF, First and second reviews under the Extended Fund Facility, January 2013, p. 41 where is noted that "the mounting sense of social unfairness was undermining support for the programme".

5 Cf. *Pisani-Ferry/Sapir/Wolff*, EU-IMF assistance to euro-area countries: an early assessment, Bruegel blueprint 19/2013, p. 75.

6 In October 2014, *Alexis Tsipras*, the then leader of the party of the opposition – SYRIZA – and the actual new elected Prime-Minister of Greece has declared that "that Memorandum of Understanding and SYRIZA do not go together", see www.stokokkino.gr on 15/10/2014.

7 See www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_30/01/2015_546717 and www.bbc.com/news/world-europe-31055069 (1/2/2015).

8 See below pp. 23 and 24.

The present article neither specifies the mechanisms of assistance[9] devised by the European Union (EU) and the member states in order to avoid future economic crisis nor does it enter in the discussion of their legality under the EU law.[10] It is not dealing with the suitability or the actual effectiveness of the measures applied to fight the crisis. Moreover, the deficiencies of Greece[11] as well as the questions about the measures to forecast and to avert[12] destabilizing situations for a member state of the eurozone are outside the scope of the investigation of the present article. Our analysis however will not be limited to the sphere of the rules of the (national) Greek legal order.[13] Since the Memoranda of Understanding contain the conditions of the European/IMF financial assistance, they are governed by the rules of the international and the European legal order.

9 The response of the European Union and of the member states to the sovereign debt crisis was the creation of instruments of assistance, i.e. the Greek Loan Facility Agreement, the European Financial Stability Mechanism, the European Financial Stability Facility, the European Stability Mechanism, and the reinforcement of economic governance. See *De Gregorio Merino*, Legal developments in the economic and monetary Union during the debt crisis: the mechanisms of financial assistance, CML Rev. 2012, p. 1613; *Ruffert*, The European debt crisis and European Union law, CML Rev. 2011, p. 1777; *Fassbender*, Der Europäische "Stabilisierungsmechanismus" im Lichte von Unionsrecht und deutschem Verfassungsrecht, NVwZ 2010, p. 800. Moreover, the European Central Bank (ECB) had adopted measures of intervention, such as the ECB's securities market programme on the basis of which it has acquired huge amounts of debt issued by some member states. See Decision 2010/5 of the ECB of 14/3/2010 establishing a securities market programme, OJ L 124 of 20/5/2010, p. 8.

10 Our research is concentrated on the financial assistance which was originally established in 2010 for supporting Greece and does not refer to the recent established European Stability Mechanism (ESM), which has undergone the scrutiny of the ECJ – ECJ, case C-370/12, *Pringle*, ECLI:EU:C:2012:756.

11 Cf. *von Bogdandy/Ioannidis*, Systemic deficiency in the rule of law: what it is, what has been done, what can be done, CML Rev. 2014, pp. 59, 77-81. Greece was additionally plagued by a chronic deterioration of its fiscal and external imbalance due to structural problems into its economic growth. See, *inter alia*, The Economic Adjustment Program for Greece, Introduction and background, D-G for Economic and Financial Affairs, May 2010, ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf (1/2/2015); Greece: Staff Report on Request for Stand-By Arrangement, pp. 6, 14-15; IMF Country Report No. 10/110, May 2010; Statement by the Alternate Executive Director for Greece of 9/5/2010.

12 IMF, Lessons of the financial crisis for future Regulation of Financial Institutions and Markets and for Liquidity Management, Prepared by the Monetary and Capital Markets Department of 4/2/2009; *Glinavos*, Regulation and the role of law in economic crisis, EBLR 2010, p. 539; *Adamski*, National power games and structural failures in the European macroeconomic governance, CML Rev. 2012, p. 1319.

13 In spite of the interest of the analysis of the impact of the Memoranda of Understanding to the national legal order, the Memoranda of Understanding represent primarily an international aspect whose importance was rightly underlined by the Greek Council of State (668/2012) where the laws that were adopted for the implementation of the Memoranda of Understanding, were challenged.

## II. The first set of Memoranda of Understanding

In early 2010 Greece was facing one of the most[14] devastating financial situations of its modern history. The then newly elected Greek government announced an upward revision of the public deficit of Greece to an alarming 12.7 % of Gross Domestic Product (GDP)[15] and of its debt level to 299 billion Euro or 129.3 % of GDP[16] which practically deprived Greece from the private capital market and led it to ask for international financial assistance in order to cover its financial needs.

Being a member state of the EU and the eurozone, it was evident that at the distress time in 2010 Greece would ask for financial assistance from the family of the Euro Area Member States (EAMS). Since the EU did not have the framework nor the technique for the resolution of such situations, it started with the possibility of contributing coordinated bilateral loans by other member states and also financial assistance by the International Monetary Fund (IMF) to Greece as part of a package involving "substantial IMF financing and a majority of European financing"[17] which would be "subject to strong conditionality".[18]

1. On 3 May 2010[19] the Greek Minister of Finance and the Governor of the Bank of Greece (who were legally authorized under the Greek law 3845/2010) addressed a letter of intent to the President of the Eurogroup, to the Commissioner for Economic and Monetary Affairs and the Euro of the European Commission and to the President of the European Central Bank requesting for financial assistance from the EAMS for a total amount of 80 billion Euro. To this letter of intent which was signed in three originals, in the English language, by the European Commission, acting on behalf of the EAMS, and the Hellenic Republic, was attached a Memorandum of Understanding, consisting of three parts: a Memorandum of Understanding of economic and financial policies (MEFP), a Memorandum of Understanding on specific economic policy conditionality (MoU) and a Technical Memorandum of Understanding (TMU).[20] The letter of intent as well as the three-part Memorandum of Understanding

14 Sovereign debt defaults are not unknown to the modern history of Greece, c.f. *Kostis*, The spoiled children of history: on the formation and evolution of the state in Greece, 18th-21st century, 2013.
15 On 22 April 2010 the public deficit of Greece of 2009 was estimated to be 13.6 % of GDP and finally in November 2010 to 15.4 %. See *Jolly*, 2009 Greek Deficit Revised Higher at www.nytimes.com/2010/11/16/business/global/16deficit.html?_r=0 (1/2/2015).
16 See, the report of the Greek law 3833/2010, Protection of the national economy – Measures of emergency for dealing the financial crisis.
17 See the Statement by the Heads of state and government of the euro area of 25/3/2010, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf (1/2/2015).
18 Ibid.
19 On 2 May 2010 a joint EC/IMF/ECB mission which has visited Athens from 21 April to 3 May 2010 following a request for international financial assistance from Greece, has concluded a staff level agreement for a joint euro area/IMF three-year financing package of 110 billion Euro and supporting economic policies. On the same day the Eurogroup agreed to activate stability support to Greece via bilateral loans centrally pooled by the European Commission, www.ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-05-03-statement-commissioner-rehn-imf-on-greece_en.htm (1/2/2015).
20 See above in fn. 2.

constituted the conditionality of the Loan facility Agreement provided to Greece in the form of a pooling of 80 billion bilateral loans[21] by the EAMS on 8 May 2010.

2. On 3 May 2010 the Greek Minister of Finance and the Governor of the Bank of Greece additionally addressed a letter of intent to which was attached a MEFP and a TMU to the General Director of the IMF asking for extra financial assistance under the form of a Stand-By Arrangement of 30 billion Euro.[22] The letter of intent and the MEFP and the TMU described the conditionality supported by the financial assistance of the requested arrangement. The MoU (as well as the letter of intent) that Greece has addressed to the European addressees was also submitted to the IMF.[23]

On 9 May 2010 the Executive Board of the International Monetary Fund (IMF) approved a three-year SDR 26.4 billion (30 billion Euro) Stand-By Arrangement for Greece.[24]

The anticipated goals of the above Economic Adjustment Programme (with the EAMS and the IMF) having not been realized,[25] – in 2010 the public debt of Greece has already mounted to 329 billion Euro or 144.9 % of GDP and at the end of 2011 the figures recorded a further worsening to 368 billion Euro or 169 % of GDP[26] – it has then[27] been decided that the restructuring of the Greek debt was urgent in order to restore a structural balance and to build the foundation for the debt-to-GDP ratio to decline back to sustainable levels.

Therefore in early 2012, Greece had succeeded in restructuring her debt by the conclusion of a Private Sector Involvement (PSI) exchange offer (a so-called "haircut"). The PSI arrangement was based on a common Understanding, between Greece and the Steering Committee of the Private Creditor-Investor Committee for Greece (which represented Allianz, Alpha Bank, Axa, BNP Paribas, CNP Assurances, Commerzbank, Deutsche Bank, EFG Eurobank Ergasias, Greylock Capital Management, ING, Intesa San Paolo, Landesbank Baden-Württemberg, National Bank of Greece)[28] on the terms and conditions of a debt exchange package on 21 February

21 Preamble no. 8 of the Council Decision 2010/320/EU of 10/5/2010, OJ L 145 of 11/6/2010, p. 6.

22 See above in fn. 2.

23 Ibid.

24 See www.imf.org/external/np/sec/pr/2010/pr10187.htm (1/2/2015).

25 According to the (First) Economic Adjustment Programme, Greece had precisely to reduce its fiscal deficit to below 3 % in 2014, to achieve a downward trajectory in the public debt-GDP ratio beginning in 2013, to safeguard the stability of its financial system, and to implement structural reforms to boost competitiveness and the economy's capacity to produce, save, and export. See the letters of intent addressed by Greece to the European lenders and the IMF, (fn. 2).

26 See the explanatory report to the Greek law 4046/2012.

27 See the Statement by the heads of state or government of the euro area and the EU institutions of 21/7/2011 and Euro Summit Statement of 26/10/2011, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf and www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf (1/2/2015).

28 See the Statement by the Steering Committee of the Private Creditor-Investor Committee for Greece, Common Understanding reached on key terms of a voluntary exchange of privately held Greek Government Bonds (GGB's), Press release of May 2012, www.iif.org (1/2/2015).

2012. The PSI agreement included an offer for a reduction of the nominal value of the Greek bonds as well as an exchange of the existing Greek bonds into new ones, i.e. new Greek government bonds and GDP-linked securities issued in exchange for privately held Greek government bonds. By that, Greece converted high rate bonds with short maturity to low rate bonds with long maturity as well as introduced a direct 53.5 % haircut to the nominal value of the privately held sovereign debt.[29] Furthermore, the new bonds are covered by English law, giving the creditors more security against a future attempt of another haircut for private creditors.

The success of the above Private Sector Involvement operation, which finally reached 83.5 % of Greek bond holders (172 billion Euro out of the total 206 billion Euro PSI eligible bonds),[30] was one of the *sine qua non* conditions[31] for the granting of new financial assistance to Greece by the conclusion of the Second Economic Adjustment Programme, which is the successor to the (first) Economic Adjustment Programme. In March 2012 Greece was, indeed, requesting additional financing assistance to the European Financial Stabilization Facility (EFSF)[32] and to the IMF in order to attain the sustainability of its debt. The new financial assistance was provided under conditionality laid down in a new set of Memoranda of Understanding.

29 The main features of the PSI operation were the following: for each eligible privately held Greek government bond 53.5 % of the principal amount was forgiven, 31.5 % of the principal amount was exchanged into 20 new Greek government bonds with maturities of 11 to 30 years replicating an amortization of 5 % per annum commencing in 2023, and the remaining 15 % was in short-dated securities issued by the European Financial Stability Facility (EFSF). The coupon on the new Greek government bonds was structured so that it was 2 % for the three year period from February 2012 to February 2015; then 3 % for the following five years 2015 to February 2020; and 4.3 % for the period from February 2020 to February 2042. The weighted average coupon based on the weighted average interest payments on the outstanding new Greek government bonds for the first eight years is 2.63 %; and it is 3.65 % over the full 30-year period. See the Statement by the Steering Committee of the Private Creditor-Investor Committee for Greece, (fn. 27).

30 Statement by *Dallara/Lemierre*, co-chairs of the Steering Committee of the Private Creditor-Investor Committee for Greece, Press of 9/3/2012, www.iif.com (1/2/2015).

31 The two other conditions were the Agreement by Greece with EC, ECB and IMF, at staff level, on the terms and conditions of the Second Adjustment Programme and the implementation of the prior acts included in the MoU of the Second Program by end of February 2012. See MoU between the EC acting on behalf of the EAMS and Greece of 1/3/2012, www.ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf (1/2/2015).

32 The EFSF is a Luxemburgish public limited company incorporated by the 16 countries sharing the euro in 2010. See Council of the EU, Press release 9596/10, Press 108; Council Regulation 407/2010/EU establishing the EFSM, whose main purpose is to facilitate or provide financing to member states of the EU in the form of loan facility agreements or loans if a) their currency is the euro, b) they are in financial difficulties, and, c) have entered an MoU with the EC – acting on behalf of the EAMS – regarding budgetary discipline and policy conditionality.

## III. The second set of Memoranda of Understanding

The second international financial assistance is based on the commitment of the Eurozone member states and the IMF to the disbursement of the undisbursed amounts of the first financial assistance to Greece[33] plus additional 130 billion Euro.[34]

The duration of the European financial assistance which ended at the end of 2014 and has been extended till the end of February 2015,[35] can be extended additionally till 2016,[36] if, for instance, Greece would not have implemented the totality of the conditionality of the Programme[37] by the end of February 2015. For being granted the new financial assistance from the EAMS, on 11 March 2012, Greece submitted a letter of intent and new MEFP, MoU and TMU setting the economic policy conditionality.[38]

On 14 March 2012 the euro area finance ministers approved financing of the Second Economic Adjustment Programme for Greece under conditionality.[39] The Second European financial assistance amounts to 109.1 billion Euro[40] granted by the EFSF.

Additionally, on 9 March 2012 Greece has requested the cancellation of the existing Stand-By Arrangement of 2010 and a four-year arrangement under the Extended Fund Facility (EFF) of 28 billion Euro by addressing to the IMF a letter of intent, a MEFP and a TMU in which were described the conditionality of the new financing of the IMF.[41] The letter of intent and the MoU that were addressed to the European organs by Greece were additionally included to the documents addressed to the IMF.[42]

On 15 March 2012 the Executive Board of the IMF approved a four-year SDR 23.8 billion (about 28 billion Euro) Arrangement under the EFF for Greece.[43]

33 See below in fn. 40 and 63.
34 Including the necessary financing for recapitalization of Greek banks for their financial stability, see Eurogroup Statement of 21/2/2012, www.crisisobs.gr/wp-content/uploads/2012/02/Eurogroup-statement_on_greece_21_february_2012.pdf (1/2/2015).
35 See above in fn. 1.
36 Cf. Article 1 of the Council Decision 2011/734/EU, as amended by the Council Decision 2013/6/EU of 24/12/2012, OJ L 4 of 9/1/2013, p. 40.
37 Ekathimerini of 9/11/2014.
38 See above in fn. 3.
39 See www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/128941.pdf (1/2/2015).
40 The aggregate amounts of the second European financial assistance were 61.7 billion Euro increased by an amount of 24.4 billion Euro, equal to cancelled and non-utilised principal amount of the first European Loan Facility Agreement and an amount of 23 billion Euro, equal to non-utilised principal amount of the then existing Bank recapitalization facility.
41 See above in fn. 3.
42 Ibid.
43 See www.imf.org/external/pubs/ft/survey/so/2012/car031512b.htm (1/2/2015).

## B. The function of the Memoranda of Understanding of Greece

The conclusion of a Memorandum of Understanding containing the conditionality of the financial assistance is traditionally determining the assistance of IMF.[44] Established in 1944 the IMF is not only a bank, which is providing credit to member countries with deficits and debts (Article I(v) of the Articles of the IMF Agreement), but the central institution of consultation and cooperation of the international financial system.[45] For being entitled to use the General Resources of the IMF, a member of the IMF should purchase the currencies of other members from the Fund in exchange for an equivalent amount of its own currency up to the limit of its first credit tranche[46] (Article V(3)(b) of the Articles of Agreement).[47] The use of resources of the upper credit tranches,[48] via Stand-By Arrangements, Extended Facilities and other facilities proposed to highly indebted member countries, are available to the members of the IMF only under conditionality[49] (Article V(3) of the Articles of Agreement). For an Extended Facility arrangement a member country should explain the reasons that make necessary the financial assistance of the IMF and present:

> (i) a program, setting forth the objectives and policies for the whole period of the extended arrangement, and adequate for the solution of the member's problem; and

44 *Meng*, Internationaler Währungsfond und Weltbank als Gläubiger: Vormundschaft über souveräne Staaten, in: Institut für Wissenschaften der Polnischen Akademie (ed.), Status der Abgeordneten, Internationale Kredite, Achtes Kolloquium der Öffentlichrechtler aus der Bundesrepublik Deutschland und Poland, 1992, pp. 114-172; *Garcia*, Understanding IMF stand-by arrangements from the perspective of international and domestic law: the experience of Venezuela in the 1990, Society of International Economic Law – Third Biennal Global Conference (July 12-14, 2012), University of Wollongong research online, Faculty of Law-Papers (Archive), 2012.

45 *Gortsos*, Fundamentals of Public International Financial Law, 2012, p. 150. According to Article I(i-ii) of the Articles of Agreement of the IMF, the IMF intends "to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy".

46 Greece became member of the IMF on 27/12/1945, and has an IMF quota of SDR 823.0 million.

47 Financial Organization and Operations of the IMF, Treasurer's Departement of the IMF, 1998, p. 60.

48 See Decision No. 14064-(08/18) of 22/2/2008, as amended by Decision Nos. 14184-(08/93) of 29/10/2008; 4284-(09/29) of 24/3/2009; BUFF/10/56 of 9/5/2010; 14716-(10/83) of 30/8/2010; and 15017-(11/112) of 21/11/2011 on access policy and limits in the credit tranches and under the Extended Fund Facility and on overall access to the Fund's General Resources, and exceptional access policy-review and modification.

49 *Stone*, The scope of IMF conditionality, International organization 2008, pp. 589-620; *Eldar*, Reform of IMF conditionality, A proposal for self-imposed conditionality, Journal of international economic law 2005, pp. 509-549; *Buira*, An analysis of IMF conditionality, 2003, www.unctad.org/en/docs/gdsmdpbg2420033.pdf (1/2/2015); *Drazen*, Conditionality and ownership in IMF lending, A political economy approach, 2002, www.imf.org/external/pubs/ft/staffp/2001/00-00/pdf/ad.pdf (1/2/2015); *Denters*, Law and policy of IMF conditionality, 1996; *Meng*, Conditionality of IMF and World Bank Loans, Tutelage over Sovereign States, Verfassung und Recht in Übersee 1988, pp. 263-277.

> (ii) a detailed statement of the policies and measures for the first 12 months constituting an initiation of the program referred to in (i) considered substantial in the member's circumstances, with the understanding that, for each subsequent 12-month period, the member will present to the Fund a detailed statement of the progress made, and the policies and measures as in (ii) that will be followed, to further the realization of the objectives of the program referred to in (i) with such modifications in the member's policies as might reasonably be considered necessary to assist it to achieve its objectives in changing circumstances.[50]

After that, the IMF reviews the application of the member and decides whether the assistance is required to address its problems in a manner consistent with the Articles of Agreement.

In the beginning of 2010 the EU did not have a particular procedure analogous to the above mentioned one applied for giving a member country of IMF access to the financial assistance of the Fund. The modalities of the international financial assistance to Greece involving EAMS as well as IMF financing have been described in the Council Decision 2010/320/EU of 10 May 2010.[51] It detailed[52] that the disbursement of the European financial assistance would be decided by the EAMS by unanimity, subject to strong conditionality, and based on an assessment by the European Commission and the European Central Bank. It is worth noting that in spite of the difference of the provenance (i.e. EAMS and IMF) of the financial assistance to Greece, the conditions of financing that Greece had to fulfil had been coordinated.

The discussions about the conditionality of the financial assistance to Greece were conducted on a quadrilateral basis between the Greek authorities and the representatives of the European Commission, the ECB and the IMF resulting in a set of macroeconomic and structural policy parameters. These were set out in the three-fold Memoranda of Understanding (i.e. the MEFP, the MoU and the TMU) undertaken by Greece for obtaining the international financial assistance provided by the EAMS/ EFSF and the IMF. Within this framework, as was already described above, Greece has respectively submitted to the European authorities and the IMF a letter of intent and the above mentioned Memoranda of Understanding laying down the conditionality of the financing.

The MEFP focuses on macroeconomic policies and selected structural measures and comprises the supporting policies that Greece should implement during originally 2010-2013 (first Economic Adjustment Programme) and then during 2012-2014[53] (duration of the second European financial assistance)/2012-2016 (duration of the IMF second financial assistance) (Second Economic Adjustment Programme), in order to strengthen market confidence and its fiscal and financial position. The MoU

50 Decision No. 4377-(74/114) of 13/9/1974, as amended by Decision Nos. 6339-(79/179) of 3/12/1979; 6830-(81/65) of 22/4/1981; 8885-(88/89) of 6/6/1988; 10182-(92/132) of 3/11/1999; 10186-(92/132) of 3/11/1992; 12343-(00/117) of 28/11/2000; and 14287-(09/29) of 24/3/2009, Section II para. 2 on Extended Arrangements conditionality.

51 OJ L 145 of 11/6/2010, p. 6.

52 As it was already agreed by the Heads of state and government of the euro area on 25/3/2010, (fn. 17).

53 See nevertheless above in fn. 1.

covers the full structural reform agenda agreed between Greece and the European Commission[54] specifying detailed economic policy measures that serve as benchmarks for assessing policy performance in the context of the quarterly reviews under the financial assistance Programmes.[55] The TMU finally formulates the definitions of the indicators subject to quantitative targets (performance criteria and indicative targets) specified in the letter of intent as well the methods for the assessment of the Programme performance and the information requirements to ensure adequate monitoring of the targets.[56]

The implementation of the conditionality of the Memoranda of Understanding with the EAMS/EFSF and the IMF leading consecutively to the fulfillment of goals of the two Economic Adjustment Programmes for Greece, is monitored during the duration of the respective Programmes by quarterly reviews led by a tripartite body, the troika, composed by a representative of the European Commission, one of the ECB and one of the IMF.[57] The assessment of the progress in implementing the policies of the two Economic Adjustment Programmes with respectively the EAMS/EFSF and the IMF does not exclude to reach understandings on any additional measures that may be needed to achieve their objectives.[58] In that respect, the first Economic Adjustment Programme of Greece with the EAMS as well as the Programme of Greece under the Stand-By Arrangement with the IMF have been updated five times[59] according to the development of the economy and of the debt of Greece. The Second Economic Adjustment Programme of Greece with EFSF as well as the Adjustment Program of Greece under the EFF with the IMF have been, till the end of 2014, updated four times.[60]

The release of the disbursements of the financial assistance to Greece is based on observance of quantitative performance criteria and a positive evaluation of progress made with respect to policy criteria, detailed in the each time revised Memorandum of Understanding.[61] The international financial assistance disbursed till end of August

54 IMF Country Report No. 10/110, Box 1. Framework for cooperation between the Fund, the EC and the ECB.

55 See, the letter of intent of Greece to the Eurogroup, the European Commission and the ECB, as well as the letter of intent of Greece to the IMF, see above in fn. 2 and 3. As noted by the Bruegel Institute, the EU conditionality contained in the MoU being more detailed than the parsimonious IMF conditionality contained in the MEFP, some of the specific conditions of a structural nature are a source of potential conflict with the notion of no cross-conditionality (Section A.8 of the Guidelines on Conditionality, www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf (1/2/2015)), under which the use of the IMF's resources would be directly subject to the rules or decisions of other organisations, see *Pisani-Ferry/Sapir/Wolff*, (fn. 5), p. 114.

56 The Technical Memorandum of Understanding of 3/5/2010, (fn. 2).

57 The Statement by the Heads of state and government of the euro area of 25/3/2010, (fn. 17).

58 See Council Decision 2010/320/EU, (fn. 21); IMF, Guidelines on Conditionality, Decision No I, B11(c)(i).

59 In August 2010, in December 2010, in February 2011, in July 2011 and in December 2011.

60 In December 2012, in May 2013, in July 2013 and in April 2014.

61 Cf. www.courtofaudit.nl/english/Publications/Topics/EU_governance_to_combat_the_economic_and_financial_crisis (1/2/2015), on the schemes of decision-making on the disbursement of the European assistance to Greece.

2014 to Greece amounts to 224.88 billion Euro.[62] Of this amount, 73 billion Euro were disbursed within the first Adjustment Programme (52.9 billion Euro have been paid by the EAMS and 20.1 billion Euro by the IMF).[63]

Given the magnitude of the funds that were mobilized for Greece, one would have expected that the financial assistance would have been welcome to the beneficiary state. In fact, since the crisis was felt as a national and personal catastrophe, the discussions about the reasons of the crisis and the decisions for the adoption of both the sets of the Memoranda of Understanding gave place to turbulent reactions in Greece. The austerity plans which signals the implementation of the conditionality of the Memoranda of Understanding as well as the domestic feeling of a lack of ownership of the Memoranda of Understanding[64] rendered the two Economic Adjustment Programmes very unpopular in Greece. A series of demonstrations and general strikes broke out after the announcement of their conclusion as well as each time that it was question for adoption of new austerity measures after almost each review of the Economic Adjustment Programmes.[65] The Memoranda of Understanding became – and still are – a tool of antagonism between the political parties in Greece. This is due to the fact that the political forces have basically been concentrated on the implications

62 Within the Second Adjustment Programme, the EFSF and the IMF have disbursed 75.6 billion Euro as a part of the first disbursement of the Second Adjustment Programme (including 25 billion Euro for bank recapitalisation) between March and June 2012. The sum of 52.34 billion Euro of the second disbursement of the Second Adjustment Programme was made in several tranches between December 2012 and May 2013 (i.e. 34.3 billion Euro disbursed by the EFSF in December 2012; 12.44 billion Euro disbursed (including 7.2 billion Euro for bank recapitalization) by the IMF and the EFSF in January 2013; 2.8 billion Euro was paid in February 2013 by the EFSF). The third disbursement amounted to 9.24 billion Euro of the Second Adjustment Programme was made in May 2013 (i.e. 4.2 billion Euro by the EFSF and 1.74 billion Euro by the IMF) and in June 2013 (i.e. 3.3 billion Euro by the EFSF). The fourth instalment of the Second Adjustment Programme amounted to 4.8 billion Euro in total was disbursed in two tranches: the first one of 4.3 billion Euro (i.e. 2.5 billion Euro by the EFSF and 1.8 billion Euro by the IMF) in July 2013 and the second of 0.5 billion Euro by the EFSF in December 2013. At the same time, 1.5 and 0.5 billion Euro of income of the SMP portfolio accruing to euro area national central banks – not counted in the financial assistance to Greece – was respectively transferred to Greece in July 2013 and December 2013. Till the end of August 2014, the fifth instalment was made in three tranches in April 2014 (6.3 billion Euro by EFSF and 3.6 billion Euro by the IMF), July 2014 (1 billion Euro by EFSF) and August 2014 (1 billion Euro by EFSF), see www.ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm (1/2/2015).

63 See The Second Economic Adjustment Programme for Greece, (fn. 3), p. 4.

64 Cf. *Pisani-Ferry/Sapir/Wolff*, (fn. 5), p. 75.

65 Cf. 2010-2012 Greek protests in en.wikipedia.org (1/2/2015).

of the adoption of the Memoranda of Understanding seen mostly through the optic of the national sovereignty.[66]

It is worth noting that the question concerning the compatibility of the first Memorandum of Understanding with the Greek Constitution was raised before the Greek Supreme Administrative Court. In fact, the case that was brought in front of the Greek Council of State was about a petition made by a number of legal and natural persons[67] for annulment of acts of the administrative authorities issued upon authorization of the Greek law 3845/2010[68] which introduced the first Memoranda of Understanding and the first Economic Adjustment Programme[69] in the national legal order. The petition for the annulment was *inter alia* based on the grounds of the unconstitutionality of the above mentioned Greek statute. Without making any difference between the two (of the first set of) Memoranda of Understanding, i.e. the one that Greece has assumed with the European creditors and the other with the IMF in

66 The broadening of the concept of the principle of non-intervention, by integrating not only the prohibition of direct military force but also the indirect interference through economic, political, and diplomatic means, makes it difficult to distinguish between pure intervention and interference that does not fall under the non-intervention principle. See *Kunig*, Intervention, Prohibition of, Max Planck Encyclopedia of Public International Law, 2008. Some of the Greek legal literature is reflecting this problematic propensity: see namely, *Chrysogonos*, The lost honor of the Hellenic Republic, The mechanism of support of the Greek economy seen through the optic of the national sovereignty and of the principle of democracy, Legal Tribune 2010, p. 1354, in Greek; *Katrougalos*, The economic Constitution and the 'para-constitution' of the Memorandum of Economic and Financial Adjustment, Europeans Republic 2010, p. 295, in Greek; *Katrougalos*, Memoranda sunt servanda?, The constitutionality of the law 3548/2010 and of the Memorandum concerning the measures for the implementation of the agreements with the IMF, the EU and the ECB, Journal of Administrative Law 2011, p. 113, in Greek.

67 The Athens Bar Association, the Union of Public sector employees, the Union of the journalists, to name some.

68 The actions that were foreseen in the Memoranda of Understanding of Greece were implemented by the adoption of laws mostly by the Greek Parliament. The extraordinary social uneasiness that was provoked at the times of the parliamentary debates for the vote of laws enacting the measures foreseen by the Memoranda of Understanding gave place to the adoption of legal acts under the form of Presidential decrees according to Article 44 para. 1 of the Hellenic Constitution: "Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 para. 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force".

69 The Greek law 3845/2010 has furthermore introduced the first international assistance of Greece in the national legal order and gave the powers to the Greek Minister of Finance as well as to the Governor of the Bank of Greece to conclude the acts that are comprised to the Economic Adjustment Programme.

2010,[70] in its decision 668/2012 the Greek Council of State has *inter alia* ruled[71] that the Memorandum of Understanding of the first financial assistance from the EU and the IMF is not an international agreement, since the parties that undersigned it have not assumed any mutual commitment and that the Memorandum of Understanding does not comprise any legal enforcement or any other sanction against the Greek authorities concerning its implementation.[72] The Greek Highest Administrative Court has also underlined[73] that the conclusion of the Memorandum of Understanding does not contravene the Hellenic Constitution (Article 28 para. 2 of the Hellenic Constitution) since the Memorandum of Understanding (of the first Economic Adjustment Programme) comprises neither any transfer of power relating to economic and financial policy of Greece to agencies of international organizations nor any authorities limiting the exercise of national sovereignty are vested into such agencies.

It is remarkable that what is coming out of the above mentioned ruling of the Council of State is that the question of the constitutionality of the Memoranda of Understanding as well as of the Greek statutes that were adopted for the implementation of the measures that were described in the Memoranda of Understanding, was intertwined with the legal nature of the Memoranda of Understanding.

## C. Is there any binding force in the Memoranda of Understanding of Greece?

### I. Two sets of Memoranda of Understanding – Two regimes

The source of the financial assistance to Greece being not unique, Greece has formally assumed in 2010 as well as in 2012 two sets of Memoranda of Understanding – one with the EAMS/EFSF on one side, and on the other side with the IMF. Nevertheless, irrespective of the source of the financial assistance the conditionality contained in each of the above mentioned sets of Memoranda of Understanding is basically in substance not distinct from the other, although the conditionality laid down in the MoU

70 The decision of the Greek State of Council reflects the dominant legal position concerning the legal nature of the Memorandum of Understanding containing the conditionality of an IMF Stand-By Arrangement.

71 The points No 28-33 of the reasoning of the decision of the Council of State contain the dissenting opinions.

72 The decision 668/2012 of the Greek Supreme Administrative Court provoked prolific commentaries in the Greek legal literature, see inter alios *Argyros*, The 'privileges' of the State and the 'law of necessity' to the rule of law, Legal Tribune 2012, p. 2792, in Greek; *Chrysogonos/Kaidatsis*, The vain sacrifice of Iphigenia. Setting introductory thoughts for the unconstitutionality of the law 4093/2012 for the Medium Term (Fiscal) Programme and its measures of implementation, Legal Tribune 2012, p. 2682, in Greek; *Glavinis*, The limits of the constitutional patriotism and the international reading of the Memorandum, Legal Tribune 2012, p. 2725, in Greek; *Kasimatis*, The unconstitutional measures of the loan agreements, The basic points of the decision 668/2012 of the plenary session of the Council of State, Legal Tribune 2012, p. 2648, in Greek; *Spyropoulos*, The popular sovereignty mainly during the time of the economic crisis, Legal Tribune 2012, p. 2679, in Greek.

73 Greek Council of State 668/2012, No. 28.

of the (European) Economic Adjustment Programme is more detailed.[74] The language as well as the goals[75] of each of the MEFP/MTU with the IFM and MEFP/MoU with the European lenders are identical. It could evidently not be else since the content of all the sets of Memoranda of Understanding, also as they are each time updated, consist of a set of macroeconomic and structural policy parameters agreed between the same parties, i.e. the Greek authorities and the troika members.[76]

From the similarity of the form and the content of the Memoranda of Understanding, we nevertheless cannot conclude that the legal nature, as well as the legally binding force of the Memoranda of Understanding with EAMS/EFSF and with the IMF is identical. As we will analyse the creditors of Greece do not have the same concept: the EAMS/EFSF want the conditionality of the Memoranda of Understanding having legally binding force and the IMF not. There is no formal definition of the content of the term "Memorandum of Understanding" in international law. It may be understood as a treaty or it may only refer to a "gentlemen's agreement" with no legally binding force.[77] In order to establish its nature, however, reference must be made to the intention of the parties, its content and the provision for penalties in the event of non-compliance. A positive sign that parties are opining that their Memorandum of Understanding is binding is that it is submitted to the ratification procedure under national law as required for the conclusion of public international law treaties by the national constitutions. But neither of the Memoranda of Understanding for the European or international financial assistance to Greece were submitted to the Greek Parliament for approval and ratification.[78]

On the other hand a clearly negative sign concerning a legally binding nature would be if at least one of the parties would openly and clearly reject it. It will have to be shown that in this respect the practice of the IMF and of the EU are completely different.

74 As noted by the Bruegel Institute, the reasons for a more extensive conditionality in the MoU than the parsimonious approach of the IMF, (see Guidelines on conditionality for the use of the Fund's Resources Decision No. 12864-(02/102) of 25/9/2002, as amended by Decision No. 13814-(06/98) of 15/11/2006, para. 7 and Decision No. 14280-(09/29)) result from the nature of the EU policy system. In the macroeconomic area, EU institutions – i.e. the Commission and the ECB – are bound by EU fiscal policy, while the IMF is free to set the macroeconomic targets it considers appropriate. In the structural area, the Commission should ensure the compliance of each member state with EU treaty provisions and legislation in fields like financial services, energy or transport. See *Pisani-Ferry/Sapir/Wolff*, (fn. 5), p. 114; see also above in fn. 55.

75 See above in fn. 25.

76 See above p. 12.

77 *Aust*, Modern Treaty Law and Practice, 2013, pp. 21-25, 28.

78 According to Article 1(9) of the Greek Law 3847/2010, the Memorandum of Understanding, the Stand-By Agreement with the IMF as well as the bilateral Agreements with the member states of the eurozone have been submitted to the Parliament for discussion and informative purposes only. They are effective and in force from the date they are signed.

## II. The nature of the Memoranda of Understanding of Greece with IMF

The IMF is a lender of last resort for sovereign states. Although in its Articles of Agreement the legal form of the financial assistance of the IMF is not defined, the IMF has developed various loan instruments that are tailored to address the specific circumstances of its diverse membership (Article V(3)(a) of the IMF Articles of Agreement).[79] According to Article V(2)(b) of the Articles of Agreement, the IMF is not providing financial assistance in the form of an ordinary loan to its members. The IMF resources are usually made available under a lending "arrangement".[80] The bulk of non-concessional IMF assistance is provided through Stand-By Arrangements.[81] As it has above been analyzed the first IMF financial assistance to Greece was under the form of a Stand-By Arrangement and the second under the form of an Extended Fund Facility (EFF).

Stand-By Arrangements appeared for the first time in 1952.[82] The Stand-By Arrangement is "a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount",[83] which is governed by the principle of conditionality.[84] The financial assistance under this form is given to a member of the IMF when it has committed itself to the implementation of an Economic Adjustment Programme,[85] which ensures that the country in question will overcome problems that led it to seek financial aid from the international community and restitute the economic equilibrium.

In contrast to a Stand-By Arrangement which supports a short-term (12 to 36 months at the most) relief[86] and repayment period of three and a quarter to five years, the EFF, established in 1974, gives medium-term (three to four years) assistance to a country in strong need of structural reform which needs time to implement, and

79 They are *inter alia* the Stand-By Arrangements, the Flexible Credit Line, the Precautionary and Liquidity Line and the Extended Fund Facility. For the low-income countries are the Extended Credit Facility, the Standby Credit Facility and the Rapid Credit Facility, which are provided on concessional terms and till the end of 2014 carried zero interest rates.

80 IMF Lending, www.imf.org (1/2/2015); *Leckow*, The Stand-by Arrangement, its legal nature and principal features, in: IMF, Current developments in Monetary and Financial law, 2003, p. 33.

81 *Hagan*, Reforming the IMF, in: Giovanoli/Devos (eds.), International Monetary and Financial Law – The global crisis, 2010, no. 2.49.

82 IMF, Decision 155-(52/57) of 1/10/1952.

83 Article XXX(b) of the IMF Articles of Agreement.

84 Article V(3)(a) of the IMF Articles of Agreement.

85 Cf. IMF Executive Board approves 28 billion Euro Arrangement under Extended Fund Facility for Greece, Press Release No. 12/85 of 15/3/2012, www.imf.org/external/np/sec/pr/2012/pr1285.htm (1/2/2015).

86 Decision No. 12865-(02/102) of 25/9/2002, as amended by Decision No. 14283-(09/29) of 24/3/2009, in: Selected Decisions and Selected Documents of the IMF, Thirty-Sixth Issue-Guidelines On Conditionality-Stand-By Arrangements, Prepared by the Legal Department of the IMF and as updated as of 31/12/2011, www.imf.org/external/pubs/ft/sd/index.asp?decision=12865-(02/102) (1/2/2015).

features longer period of repayment (4 and a half to 10 years).[87] The EFF is also provided under conditionality.

The conditionality is described in the Memorandum on Economic and Financial Policies (MEFP) that may be accompanied by a Technical Memorandum of Understanding (TMU).[88] The principles and rules of the conditionality are described in the 2002 Guidelines on Conditionality[89] as they are modified by the 2009 Operational Guidance to Staff: GRA Lending Toolkit and Conditionality: Reform Proposals.[90] It is worth noting that according to Section A3 of the 2002 Guidelines of Conditionality

> "national ownership of sound economic and financial policies and an adequate administrative capacity are crucial for successful implementation of Fund-supported programs. In responding to members' requests to use Fund resources and in setting program-related conditions, the Fund will be guided by the principle that the member has primary responsibility for the selection, design, and implementation of its economic and financial policies. The Fund will encourage members to seek to broaden and deepen the base of support for sound policies in order to enhance the likelihood of successful implementation".

In this context, the conditionality defines the targets that are economically attainable, but the ownership – the concretization – of the measures as well as what is not feasible lies with the member, which will take part in the elaboration of the Memorandum of Understanding. That being so, and as far as the conditionality is for securing the repayment of the financing and improves the financial situation of the recipient, the member asking for the IMF financial assistance and having no other less burdensome alternative than to accept the financing under the often hard measures of the letter of intent or Memorandum of Understanding, does not act under coercion, in the meaning of Article 52 of the Vienna Convention on the Law of Treaties.[91] Although it is difficult in the modern international world to draw a line between permitted economic pressure and prohibited intervention, because the states are economically linked with each other in such a way that almost every economic act of a state affects other states and

87 Decision No. 4377-(74/114) of 13/9/1974, as amended by Decision Nos. 6339-(79/179) of 3/12/1979; 6830-(81/65) of 22/4/1981, effective of 1/5/1981; 8885-(88/89) of 6/6/1988; 10182-(92/132) of 3/11/1992; 10186-(92/132) of 3/11/1992; 12343-(00/117) of 28/11/2000; and 14287-(09/29) of 24/3/2009, effective of 1/4/2009, in: Selected Decisions and Selected Documents of the IMF, Thirty-Sixth Issue-Guidelines On Conditionality-Extended Fund Facility, Prepared by the Legal Department of the IMF and as updated as of 31/12/2011, www.imf.org/external/pubs/ft/sd/index.asp?decision=4377-(74/114) (1/2/2015).

88 Section B(10) of the 2002 Guidelines of Conditionality, www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.htm (1/2/2015).

89 According to the Guidelines of Conditionality, the IMF-supported conditions related programmes are based primarily on the principles of national ownership of reform programmes, parsimony in the application of programme-related conditions, tailoring of programmes to the member's circumstances, effective coordination with other multilateral institutions, and clarity in the specification of conditions, see Section A(3) of the 2002 Guidelines of Conditionality; see criticisms against conditionality; *Eldar*, (fn. 49), p. 509.

90 See www.imf.org/external/np/pp/eng/2009/031309a.pdf (1/2/2015).

91 "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

may thereby put them under pressure, it has to be admitted that states are free to decide which other states they want to give economic support to.[92] When such an obligation does not exist, the granting of financial assistance under conditionality which may be not welcome to the borrower, should not be considered, especially in the case of the IMF, a breach of the prohibition of intervention in the internal affairs of the state borrower,[93] since as a banking institution it should take care of its creditworthiness and therefore has to secure that financial helps will be repaid to it.

The arrangements of the IMF do not constitute international agreements, since "language having a contractual connotation will be avoided in arrangements and in program documents".[94] In the light of this language, the lack of intention of IMF to contract[95] excludes the contractual form of IMF arrangements.[96] The IMF does not want to have a legal contract with a member and be legally bound, in order to be able to set the conditions of an arrangement and to determine whether these conditions are met.[97] The Stand-by Arrangement is[98] a unilateral decision of the Fund's Executive Board which sets the conditions of the financial assistance, and the Extended Arrangements are basically[99] subject to the Fund's decisions and policies on Stand-by Arrangements.

Hence, the Memoranda of Understanding, which are the documents setting the policies and the conditions of an IMF supporting program, do not have any legally binding force. The IMF recognizes that it seeks

> "to avoid subjecting a country member to contractual obligations to implement their programs and putting the country member in the unenviable position of being in breach of a legal obligation if it failed to meet a condition. To provide incentives to members, IMF seeks to minimize the legal consequences attached to failure. A member is free to walk away from its program and the arrangement at any time".[100]

In this context, when a member assumes to respect the conditionality, the IMF unilaterally asserts the disbursement of the amount of the financial assistance. A member receiving financial assistance from the IMF remains free to decide for the continuation of the implementation of the conditionality and eventually to assume the conse-

92 Cf. *Kunig*, (fn. 66), para. 19 and the relative jurisprudence; *Meng*, Souveränität und Solidarität in der EU-Finanzkrise – der Fall Griechenland, in Dimitropoulos/Gromitsaris/Schulte (eds.), Staatsreform für ein besseres Europa, forthcoming.
93 For a thorough analysis of the relation between sovereignty and prohibition of intervention in the public international law, see ibid.
94 Section B(10) of the 2002 Guidelines of Conditionality, (fn. 88).
95 *Leckow*, (fn. 80), p. 38.
96 *Meng*, (fn. 92); *Leckow*, (fn. 80), and the references mentioned; see contra *Garcia*, (fn. 44), p. 6 cons.
97 *Eldar*, (fn. 49), p. 547.
98 Article XXX(b) of the Articles of Agreement.
99 Decision No. 4377-(74/114) of 13/9/2013, as amended by Decision Nos. 6339-(79/179) of 3/12/1979; 6830-(81/65) of 22/4/1981 of 6/6/1988; 10182-(92/132) of 3/11/1992 of 3/11/1992; 12343-(00/117) of 28/11/2000; and 14287-(09/29) of 24/3/2009, in: Selected Decisions and Selected Documents of the IMF, (fn. 87).
100 *Leckow*, Conditionality in the International Monetary Fund, 2002, www.imf.org/external/np/leg/leg/sem/2002/cdmfl/eng/leckow.pdf (1/2/2015), para. 22.

quences for declaring it impossible and opting out of getting more financing.[101] However, it is worth noting that if a member fails to fulfil any of its obligations under the Arrangement, it risks losing important rights from its membership to the IMF, namely by being declared ineligible to use the general resources of the Fund.[102]

Being it so for the Memoranda of Understanding assumed by Greece in the context of the Stand-By Arrangement in 2010 and the EFF in 2012 with the IMF, is this analysis also valid for the Memoranda of Understanding of Greece with the EAMS/EFSF? In case of a positive answer, is it conceivable that Greece could decide not to comply with the conditionality of the EAMS/EFSF financing? Should the rules of breach of a contract be predominant to this analysis or should the special aims of the Memoranda of Understanding accompanying the financial assistance of the EAMS/EFSF be taken into consideration?

## III. The nature of the Memoranda of Understanding of Greece with the EAMS/EFSF

Before the serious financial crisis in 2008-2009, the EU had not faced the need to provide financial assistance to any of its member states on the grounds of their budgetary position and their government debt. Besides, the "no bailout-principle" of Article 125 TFEU[103] precludes the sharing of liability for government debt across member states. The financial crisis of 2009 has magnified the problems of the unfinished construction of the Economic and Monetary Union (EMU). Not having any institutional means for providing financial assistance to an EAMS fighting against the dangers threatening the financial stability of the eurozone,[104] the EU has devised a procedure from scratch[105] for granting financial and stability support to an EAMS.

101 Cf. *Meng*, (fn. 92).

102 Article XXVI Section 2(a) of the Articles of the Agreement of the IMF.

103 *Hahn/Häde*, Währungsrecht, 2010, pp. 312-314; *Louis*, in: Mégret et al. (eds.), Le droit de la Communauté Européenne et de l'Union Européenne, 1990–2005, t. 6, p. 39; *Häde*, in: Calliess/Ruffert (eds.), EUV/AEUV, 4th ed. 2011, Article 125 AEUV, para. 2.

104 It is nevertheless worth noting that although Greece represents only 2.5 % of the eurozone economy, it was facing a severe sovereign debt which turned to a financial crisis that following the reports of eminent economists (see, inter alios, *de Santis*, The euro area sovereign debt crisis, safe haven credit rating agencies and the spread of the fever from Greece, Ireland and Portugal, European Central Bank/Eurosystem-working paper series n. 1419/February 2012) and politicians (cf. A cold heart for Europe: Merkel's dispassionate approach to the Euro crisis, www.spiegel.de/international/europe/analysis-of-chancellor-merkel-euro-crisis-approach-a-872195.html (1/2/2015)), would have had negative effects on the stability of the eurozone.

105 See *de Gregorio Merino*, (fn. 9).

Concerning Greece,[106] the Union decided to provide the necessary first financial aid[107] by means of bilateral agreements and the second financial aid by the EFSF.

The European financial support to Greece has been finalized in the Decision of the Council 2010/320/EU, adopted on 10 May 2010.[108] After each one of the periodical reviews of the implementation of the measures[109] required by the Decision and for rendering the conditionality more flexible, the Decision was revised[110] and in the interest of clarity finally recast by the Council Decision 2011/734/EU of 12 July 2011.[111] All the above mentioned Council Decisions are based on Articles 126(9) and 136 TFEU. Article 126(9) TFEU defines the measures of coercion of the Council against member states which have not been successful in adopting sound measures in order to regain their budgetary position and to lower the stock of their government debt. Article 136 TFEU refers only to EAMS and tends "to ensure the proper functioning of economic and monetary union". It is worth noting that even before the amendment of Article 136 TFEU[112] founding the financial assistance of the EU on "strict conditionality", the combination of Article 126(9) and 136 TFEU served for the basis of the conditionality of the financial assistance to Greece.

The conditionality of the European financial aid to Greece is based on the above mentioned decisions of the Council. The agreement of the EAMS for granting financial assistance to Greece is materialized only under conditionality, which is described in detail in the decisions of the Council for the financial assistance. The conditionality

106 The Union has also decided to grant financial aid to Ireland, Portugal and Cyprus; Spain received financial assistance for the recapitalization of financial institutions.

107 On 27/4/2009, the European Council adopted a Decision according to Article 126 TFEU on the existence of an excessive deficit in Greece and issued a Recommendation under Article 126 para. 7 TFEU on measures to correct its excessive deficit – Council Decision of 27/4/2009 on the existence of an excessive deficit in Greece (2009/415/EC). In December 2009, the European Council stated that Greece had failed to comply with its above mentioned Recommendation (2891st ECOFIN meeting held on 2/12/2009, Press release no. 16838/09 (Press 352), p. 11; Council Decision of 19/1/2010 establishing whether effective action has been taken by Greece in response to the Council Recommendation of 27/4/2009). In February 2010 and in March 2010, the Heads of State of the Government of the EU Member States stated the support for the Greek government efforts and commitment to do whatever is necessary to safeguard financial stability in the euro area as a whole.

108 The first milestones of the first European financial assistance to Greece are laid down in the Statements by the Heads of State and Government of 25/3/2010 and the follow-up Statement by the Eurogroup of 11/4/2010. Greece has asked for the activation of the (first) financial support mechanism on 23/4/2010, see IP/10/446 on 23/4/2010 of the Joint Statement by EC, ECB and Presidency of the Eurogroup on Greece, http://europa.eu/rapid/press-release_IP-10-446_en.htm?locale=en (1/2/2015).

109 See above under B.

110 By the Council Decision 2010/486/EU of 7/9/2010, the Council Decision 2011/57/EU of 20/10/2010 and the Council Decision 2011/257/EU of 7/3/2011.

111 The Council Decision 2011/734/EU of 12/7/2011 is also amended by the Council Decision 2011/791/EU of 8/11/2011, by the Council Decision 2012/211/EU of 13/3/2012 and by the Council Decision 2013/6/EU of 4/12/2012.

112 Since 1/5/2013 Article 136 TFEU has been amended, based on the Council Decision 2011/119/EU.

of the European financial assistance is consecutively laid down in the MoU.[113] The addressee of the Council Decision 2010/320/EU is Greece (Article 6) and it is bound to comply with the content of it (Article 288 TFEU). In the letter of intent on 3 May 2010 addressed by Greece to the designated European authorities,[114] Greece assumes to implement the policies laid out in the Decision and Recommendation addressed by the EU on 16 February 2010[115] and constituting basically the precursor of the Decision 2010/320/EU. It follows that the conditionality, which constitute the content of the Council's decisions, is binding on Greece. By implementing a long list of measures set out in the Council Decision 2011/734/EU as amended, "Greece shall", according to Article 1 of the Decision,

> "put an end to the present excessive deficit situation as rapidly as possible and, at the latest, by the deadline of 2016".

It is however worth noting that any failure to fulfil this assertive expression is not subject to the jurisdiction of the European Court (Article 126(10) TFEU), but, according to Article 126(11) TFEU, to a specific system of remedies consisting, namely, of a non-interest-bearing deposit or severe fines. Indeed, the Lisbon Treaty does not foresee any other sanctions against a recalcitrant EAMS failing to comply with its obligations deriving from the Council Decision based on Articles 126(9) and 136 TFEU and, in particular, it does not foresee the exclusion of the member state in question from the EMU.[116] It seems clear that the member states have intentionally opted for not providing for the exclusion of a member state from the Union as a sanction and they have left the resolution of problematic situations to be arranged politically. Moreover, if the exclusion from the Union in case of breach of one member's obligations is difficult to accept, it is even more difficult to accept the exclusion of a member state from the EMU, on grounds of the stability of the euro. Eventually, the withdrawal of one member state from the EMU could be conceivable only with its parallel withdrawal from the EU, according to Article 50 TEU.[117]

The Council Decision 2010/320/EU, as amended,[118] is also the legal basis for the financial assistance to Greece, which was materialised through two Loan Facility

113 It is worth noting that the MoU is basically attached to the Economic Adjustement Programme with the European lenders and it is addressed to the IMF attached to the letter of intent to the European authorities only for information.

114 Annex 2 to the Economic Adjustment Programme for Greece, www.ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf (1/2/2015).

115 The letter of intent on 3/5/2010 could not evidently refer to the Council Decision 2010/320/EU adopted on 10/5/2010.

116 For an in depth analysis of the issues of the secession and expulsion from the EU and EMU, see *Athanasiou*, Withdrawal and expulsion from the EU and EMU – Some reflections, ECB Legal Working Paper Series No. 10/Dec. 2009, www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf (1/2/2015).

117 As noted in the above analysis, a unilateral withdrawal from the EMU is open to more difficulties than the withdrawal from the EU.

118 The first loan facility to Greece is based on the Council Decision 2010/320/EU and the second one is based on the Council Decision 2011/734/EU, which recasts the Council Decision 2010/320/EU, as amended.

Agreements. Both the Loan Facility Agreements are contracts and include the obligations of the parties. The Memoranda of Understanding, as revised, containing the conditionality of the Loan Facility Agreements constitute the contractual obligations that Greece should fulfil for ensuring the payment of the financial assistance, on the one hand, during the active phase of the Loan Facility Agreements, and on the other hand its repayment (non-active or posterior phase of the Loan Facility Agreements). Governing law for any issue arising out of or in connection with both the European financial assistance Agreements is the English law.[119] The European Court of Justice (ECJ) is empowered to rule on any dispute concerning the legality, validity, interpretation or performance of the First Loan Facility Agreement,[120] whereas the Court of Luxembourg is exclusively competent to rule on any dispute concerning the Second Loan Facility Agreement.[121]

The first Loan Facility to Greece was founded on two agreements.[122] First, on an Inter-Creditors Agreement among the lenders – i.e. all the EAMS except Slovakia, Ireland and Portugal[123] – laying down certain arrangements on their mutual relationship, notably the total amount of the loans, their respective contribution to the pool of loans and the procedure to authorize the disbursement of the different installments of the loans, to be agreed by unanimity of all the lenders after having determined that Greece has complied with the conditionality measures agreed. Second, on a Loan Facility Agreement (LFA) between the lender member states[124] and Greece containing the terms and conditions of the 80 billion Euro[125] pooled loans, notably the procedure for drawdown and net disbursement, the calculation of the interest rate,[126] costs and expenses (active phase of the LFA) and the repayments by the borrower (non-active or posterior phase of the LFA). The European Commission was not acting as a lender in the LFA but was entrusted by the EAMS with the coordination and administration

119 See clauses 14.1 of the (first) Loan Facility Agreement and the Inter-creditors agreement respectively and 15.1 of the Master financial assistance facility agreement.

120 See clause 14.2 of the Inter-creditors agreement and the (first) Loan Facility Agreement respectively.

121 See clause 15.2 of the Master financial assistance facility agreement.

122 See www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/30/2d/05/302d058d2ca156bc35b0e268f9446a71c92782b9/application/pdf/sn_kyrwtikoimf_2010_06_04_A.pdf (1/2/2015).

123 Slovakia has decided not to participate in the financial assistance to Greece; Ireland and Portugal have not participated as they have asked for financial assistance themselves.

124 The bank Kreditanstalt für Wiederaufbau (KfW) had signed the LFA on behalf of the Republic of Germany.

125 This amount was eventually reduced by 2.7 billion Euro, because Slovakia decided not to participate in the LFA while Ireland and Portugal stepped down from the facility as they requested financial assistance themselves.

126 It was agreed that in order to avoid moral hasard the EAMS loans would be granted on non-concessional interest rates, using the pricing formula of the IMF, see Statement by the Heads of State and Government of the Euro Area of 25/3/2010 and Statement on the support to Greece by Euro area Members States of 11/4/2010, www.eurozone.europa.eu/media/368751/statement_on_support_to_greece_11_april_2010.pdf (1/2/2015).

of the pooled bilateral loans, including their disbursement to Greece.[127] The term of the LFA has originally been for five years (Article 3(3)(d) of the LFA). The LFA was amended in December 2012 for lowering the interest rate of the repayment and exceeding its term to thirty years.

The Second European financial assistance granted by the EFSF has been provided[128] under the form of loan disbursements. The Second European financial assistance was mainly[129] based on the Master financial assistance facility agreement (MFAFA) signed by Greece, the Bank of Greece, the Hellenic Financial Stability Fund (as guarantor) and the EFSF containing the terms and conditions of the up to 109.1 billion Euro loan facility (LF), notably the procedure for disbursement, the calculation of the interest rate, costs and expenses,[130] the events of default, the undertakings relating to inspections, fraud prevention and audits (active phase of the LF of the MFAFA) and the repayments by the borrower (non-active or posterior phase of the LF of the MFAFA). In order to ease Greece's debt burden and bring its debt back on a sustainable path, the MFAFA (along, as we have mentioned before, with the LFA) was amended in December 2012 by mainly[131] lowering the interest rate and extending the maturity of the loan. The average maturity of the financial assistance under the LF of

127 Statement by the Eurogroup on 2/5/2010, www.consilium.europa.eu/media/6977/100502-eurogroup_statementgreece.pdf (1/2/2015).

128 The purposes of the second European financial assistance to Greece were agreed by the Eurogroup on 21/2/2012 and served for the provision of (i) a buy back scheme for Greek marketable debt instruments for Eurosystem monetary policy operations, (ii) the euro area's contribution to the PSI exercise, (iii) the repayment of accrued interest on Greek government bonds, and (iv) the residual (post PSI) financing for the second Greek adjustment programme, including the necessary financing for recapitalisation of Greek banks in case of financial stability concerns, www.consilium.europa.eu/media/1440478/statement_on_greece_21_february_2012.pdf (1/2/2015).

129 Three other special agreements were additionally signed by Greece and the EFSF, which were for the financing of the above mentioned voluntary liability management transaction. These agreements were the following. First, the PSI LM facility agreement, signed by Greece, the Bank of Greece and the EFSF, of 30 billion Euro, see www.efsf.europa.eu/attachments/efsf_financial_assistance_facility_agreement_greece_psi_lm.pdf (1/2/2015). Second, a facility for the purchase of bonds in the markets, i.e. the Bond interest facility, signed by Greece, the Bank of Greece and the EFSF – of 5.5 million Euro, for payments of the accrued interests of the outstanding sovereign bonds that were participating to the voluntary liability management transaction and were exchanged for new Greek bonds, see ibid. Third, the ECB credit enhancement facility agreement signed by Greece, the Bank of Greece and the EFSF (of 35 billion Euro) for the financing of the buy-back bonds issued or guaranteed by Greece and held by the National Central Banks of member states (as collateral for eurosystem monetary policy operations and in respect of which a monetary policy counterparty defaults). Greece received one-year EFSF bonds, which were returned to the EFSF in July 2012 and cancelled, because they were not used for buy-back.

130 For the maturity and amortization of the LF, see www.efsf.europa.eu/about/operations/index.htm (1/2/2015).

131 There was also question of a conditional cancellation of the EFSF guarantee commitment fee, a deferral of EFSF interest rate payments, postponing part of the Treasury cash buffer build-up, return to Greece the income of member states on the ECB's Securities Markets Programme (SMP) portfolio accruing to their national central banks.

the MFAFA, as amended, is 32.5 years (Article 2(d) of the Loan Facility Specific Terms of the MFAFA).

As long as Greece is under Articles 129(9) and 136(3) TFEU, and fulfils the conditionality set out in the each time updated Memorandum of Understanding,[132] the disbursement of the amounts of the financial assistance foreseen in the LFA and MFAFA is guaranteed.[133] In case that Greece does not comply with the conditionality of the Memorandum of Understanding, as each time updated, it risks the non-disbursement of funds under the above facilities, during their active phase and also the extension of the term of the Second Economic Adjustment Programme after the end of February 2015[134] to ensure the implementation of the lacking conditionality.[135] The non-compliance to the conditionality does – however – not constitute an event of default allowing the declaration of the whole debt of Greece (i.e. the whole amount of any or all financial assistance made and outstanding under the LFA and MFAFA together with accrued interest and all other amounts due in respect thereof) to be immediately due and payable. An event of default consists only, *inter alia*, in the non-application of the funds of the European (as well as the IMF) financial assistance according to the terms of the LFA and MFAFA and the MoU,[136] and the termination of the IMF Arrangement with Greece.[137] The conditionality of the Memorandum of Understanding, as each time updated, is drastic only during the active phase of the LFA and the LF of the MFAFA. After the non-active phase of the above mentioned Agreements, Greece will be under post-programme surveillance as long as a minimum of 75 % of the above mentioned European financial assistance remains to be paid.[138] The post-programme economic and budgetary surveillance over Greece will namely aim at the avoidance of any circumvention of the measures that have been implemented under the Memorandum of Understanding, as each time reviewed, supported by the LFA and the LF of the MFAFA.

132 It is worth noting that, till late August 2014, Greece has succeeded on receiving the disbursement of the promised tranches of the financial assistance, although it is reported that until at least autumn 2012, the troika repeatedly expressed dissatisfaction with the implementation of the Economic Adjustment Programme, especially about structural reform, (see *Pisani-Ferry/Sapir/Wolff*, (fn. 5), p. 65), that the disbursement of the instalments were divided in multiple sub-tranches, (see, *inter alia*, Statement of the President of the Eurogroup on Greece of 17/12/2013), and that the fifth and last review of the Second Economic Adjustment Programme will mainly be about the implementation of about 600 still lacking structural reforms (see ekathimerini of 23/8/2014).

133 Articles 3.1 of the LFA and 4.1, 4.3.b of the LF of the MFAFA.

134 See above in fn. 1 and p. 9.

135 It is to be noted that this last consequence would be seen when it is realised beyond the initial two-month technical extension of the 2nd Economic Adjustment Programme (see above fn. 1), as a punishment by the Greek political elite and population, for the reasons, see above pp. 4, 13 and 14.

136 Clauses 8.1.b of the LFA and 9.1.b of the MFAFA.

137 Clauses 8.1.f of the LFA and 9.1.i of the MFAFA.

138 Article 14 of Regulation No 472/2013, OJ L 140 of 27/5/2013, p. 1.

## D. Conclusions

Each European and international financial assistance to Greece in 2010 and 2012 was granted under conditionality contained in the respective Memorandum of Understanding. The legal nature of the Memoranda of Understanding with IMF on one side and on the other side with the EAMS/EFSF, conditioning the disbursement of the financial assistance to Greece, depends on the form and the legal basis of the Facility in respect. The financial facilities of the IMF granted by Arrangements do not give any legal claim to disbursement to the receiving state. The respect of the conditionality set out in the Memorandum of Understanding, under which the financial assistance in the form of an Arrangement was granted, is secured by the unilateral payment by the Fund. If Greece decides not to comply with the conditionality of the IMF Arrangement, the consequences resulting from its decision will primarily be the release of IMF of its unilateral commitment. Secondly, Greece may also face the risk of being declared ineligible for using the General Resources of the Fund.

The Memoranda of Understanding containing the conditionality of the European financial assistance agreements with Greece are binding Greece, because they are based on a Council Decision. In case that Greece is not complying with the conditionality of the financial assistance Agreements, it does not receive, during the active phase of the financial facility agreement, any next disbursement of the instalments of the financial assistance. But its decision not to comply with the conditionality of the updated Memorandum of Understanding constitutes neither an event of default nor is it conclusive for the exclusion of Greece from the EMU or the EU.

It remains to be seen whether the extraordinary international financial assistance provided under the analysed legal consequences will bring the promised fruits, namely bringing back to the track the Greek economy by helping for the modernization of the Greek state.