

## EU Bailout Conditionality as a De Facto Mode of Government

– a neo-liberal ‘black hole’ for the Greek Collective Labour Law system? –

### Résumé

*Les trous noirs, invisibles, sont des zones de l'univers exerçant une force irrésistible et d'une puissance incroyable sur tout ce qui les entoure. L'article soutient que la conditionnalité de l'UE, telle que définie dans le mémorandum UE-FMI et dans les décisions du Conseil de l'UE joints aux récents programmes de sauvetage, représente un « trou noir » pour le droit du travail collectif grec (hypothèse du trou noir). Aux fins de prouver l'hypothèse du trou noir, nous la reformulons en deux sous-hypothèses : (1) l'hypothèse du mode de gouvernement de facto (« hypothèse du gouvernement ») et (2) l'hypothèse du trou noir néo-libéral (« hypothèse néo-libérale »). L'hypothèse du gouvernement selon laquelle la conditionnalité relative au renflouement doit être perçue comme un « mode de gouvernement de facto » correspond au côté « puissant » de l'analogie du trou noir (partie 1). En se fondant sur l'examen du statut de « point noir » de la conditionnalité au sein de la législation de l'UE et des droits fondamentaux de l'UE, ainsi que sur l'identification de ses principales caractéristiques institutionnelles, procédurales et fondamentales, l'hypothèse néo-libérale est finalement affirmée (partie 2), démontrant sa nature de « trou noir » à l'égard du droit du travail collectif grec sur lequel elle relâche sa dynamique destructrice.*

### Zusammenfassung

*Schwarze Löcher sind Bereiche im Universum, die ausgesprochen starke und unwiderstehliche Kräfte auf alles um sie herum ausüben, aber nicht sichtbar sind. Der Artikel erörtert, dass die EU-Auflagen, wie sie in EU/IWF-Memoranden und in EU-Ratsbeschlüssen in Verbindung mit den neuesten Rettungsprogrammen für Griechenland vorgeschrieben sind, ein solches „schwarzes Loch“ für das griechische Tarifvertragssystem darstellen (Hypothese des Schwarzen Loches). Um die Hypothese des Schwarzen Loches zu belegen, formulieren wir sie in zwei Sub-Hypothesen neu: die (1) Hypothese der De-facto-Regierungsmethode („Regierungshypothese“) und die (2) Hypothese des neoliberalen schwarzen Loches („Neoliberale Hypothese“). Die Regierungshypothese steht mit ihrem Standpunkt, dass Auflagen aus Rettungsprogrammen als eine „De-facto-Regierungsmethode“ betrachtet werden sollten, für die „starke“ Seite der Analogie zum schwarzen Loch (Teil I). Auf der Grundlage von Untersuchungen des Status der Auflagen als eines „dunklen Flecks“ innerhalb des EU-Rechts und der EU-Grundrechte sowie der Identifikation ihrer wichtigsten institutionellen, verfahrensrechtlichen und inhaltlichen Merkmale wird die neoliberale Hypothese schließlich bestätigt (Teil II).*

womit ihre Eigenschaft als „schwarzes Loch“ für das griechische Tarifvertragssystem gezeigt wird, auf das sie ihre destruktive Dynamik ausüben.

‘Transcendence constitutes selfhood’  
Martin Heidegger, *On the Essence of Ground* (1928)

*Black holes* are areas of the universe exerting immensely powerful and irresistible forces on everything around them yet being invisible. The article argues that EU conditionality, as prescribed in EU/IMF memoranda and Council of EU Decisions attached to recent Greek bailout programmes (*bailout conditionality*), represents such a ‘black hole’ for the Greek collective labour law (CLL) system (*Black Hole Hypothesis*). Indeed, in the universe of an *ideal-type* formalist legal scholar who is genetically constrained to perceive only the ‘light’ emitted by legal rules and principles, loan conditionality fails entirely to shine as it lacks the conventional legal texture. Our unfortunate scholar would observe a cataclysm of new laws enacted by the Greek Parliament that fundamentally alter the very nature and identity of the long-established CLL system, *though* he would be tragically incapable of transcending his limited vision and apprehend the gigantic pragmatic force of conditionality emanating from its economic characteristics as the dominant causal factor.

In essence, the article is an intellectual exercise in unifying the ‘legal/formalist’ and ‘real-economic’ univers-*es* under a single *integrated* conceptual-analytical univers-*e* required for grasping the complex nature of bailout conditionality. For proving the Black Hole Hypothesis, we reformulate it into two sub-hypotheses: *the (1) De Facto Mode of Government Hypothesis* (*‘Government Hypothesis’*) and *(2) Neo-Liberal Black Hole Hypothesis* (*‘Neo-Liberal Hypothesis’*).

The *Government Hypothesis*, contending that conditionality should be conceived as a ‘de facto mode of Government’, corresponds to the ‘*powerful*’ side of the Black Hole Analogy (Part I). Based on the examination of conditionality’s ‘dark spot’ status within EU law and EU Fundamental rights and the identification of its principal institutional, procedural and substantive features, the Neo-Liberal Hypothesis is ultimately affirmed (*Part II*) thus demonstrating its ‘Black Hole’ nature for the Greek CLL system upon which it releases its destructive dynamic.

Prior to embarking on our inquiry, a brief note on EU’s encounter with bailout conditionality and certain preliminary clarifications seem necessary. Despite not being wholly absent from EU lexicon (conditionality is a standard EU practice in lending programs, trade agreements, foreign aid, accession), bailout conditionality is the first to be applied vis-a-vis an *existing* EU Member State in the context of a complex IMF/EU/ECB program of financial assistance targeted at preventing a potential Greek default with uncertain implications for the Eurozone and global economy. Whereas the merit and legality of bailout under EU law received extensive scrutiny and debate, strict conditionality was considered an uncontroversial natural corollary to the financial assistance. In this context, two Memoranda (concluded with IMF, EU and ECB representa-

tives)<sup>1</sup> along with their regular reviews and updates and the respective Council Decisions on Excessive Deficit Procedure (EDP)<sup>2</sup> contain the main *conditionality* attached to two programs of financial assistance. In the first bailout program, the EU part of the funding assumed the form of bilateral loan commitments of Eurozone Members pooled and coordinated by the European Commission (the latest tranches of the first bailout were subsequently transferred to EFSF), whilst in the second came through the Eurozone-financed temporary special purpose vehicle *European Facility Stability Fund* (EFSF).<sup>3</sup> In this environment, bailout conditionality evolves within a wider terrain of mixed, incremental and often confusing responses by European (primarily eurozone) governments and EU institutions that at times resemble more a balancing exercise on moving sand.

At this point, four preliminary clarifications should be made. *First*, the article aims at developing a *descriptive* account of bailout conditionality and does not engage with what could be termed as a *normative discourse* of conditionality. Subjecting conditionality on a moral or economic test for concluding whether is right or wrong, justified or non-justified according to principles of social justice, sovereignty, economic efficiency, fiscal discipline or on other grounds lies outside our inquiry's scope. *Second*, an inherent problem for any analysis of EU involvement in bailout conditionality relates to the inability of discerning its exact views in the internal process of condition-crafting as it primarily acts within a *tripartite* consortium (so-called Troika) without public records of its deliberations. For addressing such conundrum, the Hypothesis that conditionality contained in Memoranda is at least *accepted* by EU is assumed.<sup>4</sup>

Third, the reader should be informed about the intimate relationship between *form* and *substance* that underpins our inquiry. Although the article's purpose consists in exploring conditionality within the regulatory field of CLL, engaging with conditionality *qua* general method or *qua* technique is necessary thus rendering herein observations capable of generalization to other conditionality regulatory areas as well. Fourth, the article consciously adopts the narrower term 'Mode of Government' in lieu of the broader 'Mode of Governance' for stressing the *hierarchical-vertical* feature of bailout conditionality which is not a *necessary* condition for its qualification as a 'mode of

1 Greece, Memorandum of Economic and Financial Policies (May 2010) [Memorandum I] <<http://www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf>>; Greece, Memorandum of Economic and Financial Policies (March 2012) [Memorandum II] <<http://www.imf.org/external/np/loi/2012/grc/030912.pdf>>. Memoranda pages cited in this article, unless otherwise indicated, refer to these documents.

2 Council of the European Union, Decision 2010/320/EU with all subsequent amendments (Council Decisions 2011/734/EU and 2012/211/EU).

3 EFSF is a *societe anonyme (public company)* chartered in Luxemburg and governed by the EFSF framework agreement concluded by the Eurozone Members.

4 For this argument see Chris Rogers, *The IMF and European Economies: Crisis and Conditionality* (Palgrave Macmillan 2012) 182 {On these grounds it is difficult to argue that policies associated with IMF lending in the Eurozone were not felt appropriate by officials of the Eurozone; To make this argument is to propose that policy-makers [in IMF] have acted counter-intuitively by recommending policy changes that they felt were *against the best interests of their own currency union*}.

*governance*'.<sup>5</sup> To the extent that one does not adhere to the thesis excluding hierarchical forms of power from *governance* definition, demonstrating that conditionality is a 'mode of government' *a fortiori* proves its status as a 'mode of governance'.

## I. The 'Government sub-hypothesis'

### 1. Definition of Conditionality: Conceptual Dimensions

Let us start our inquiry with the familiar Socrates-like device of defining our concept. *What is conditionality?*

Within IMF context, it is defined as an '*explicit link* between the approval or continuation of the IMF's financing and the implementation of certain specific aspects of the government's policy program',<sup>6</sup> 'a means by which a party offers support and attempts to influence the policies of another in order to secure compliance with a program of measures',<sup>7</sup> 'policies that the Fund wishes to see a member follow in order that it can use the Fund's resources in accordance with the purposes and provisions of the articles',<sup>8</sup> 'a complex covenant written into the loan agreement'<sup>9</sup> or in more political economy-friendly terms 'the use of incentives to alter a state's behaviour or policies'.<sup>10</sup>

In broad terms, conditionality could be defined as the practice of making an economic relationship of transfer of financial resources (usually, but not always, loans) conditional upon actions to be undertaken by the transferee that are not *inherently constitutive* of this economic relationship (e.g the action of repayment is not conceived as conditionality due to its *constitutive* function for the loan relationship). The transferee is typically a state and the transferor may be (a) a state(s), (b) an international organization(s), (c) an international financial institution(s) created and/or financed by state(s) or any combination of (a)-(c).

Our definition captures (what also inheres in preceding definitions) the property of coupling or attaching two ontologically distinct relationships, an economic relationship (ER) and a conditionality relationship (CR), so that the latter becomes a condition of the former, as the Fundamental Conceptual Basis for any theoretical inquiry on conditionality. CR's tension between its '*constitutive nexus*' with an ER (an existential ne-

5 For the debate about the relationship of *governance* and *government* see Claus Offe, 'Governance: An Empty Signifier' (2009) 16(4) Constellations 550 and Andrew Jordan, Rudiger Wurzel, Anthony Zito, 'The Rise of New Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?' (2005) 53(3) Political Studies 477.

6 IMF, Policy Development and Review Department 'Conditionality in Fund-Supported Programs: Policy Issues' (International Monetary Fund 2001) 7. (emphasis added).

7 Ariel Buira, 'An Analysis of IMF Conditionality' in Ariel Buira (ed), *Challenges to the World Bank and IMF: Developing Country Perspectives* (Anthem Press 2003) 58.

8 Joseph Gold, *Conditionality* (International Monetary Fund 1979) 2.

9 Moshin Khan and Sunil Sharma, 'IMF Conditionality and Country Ownership of Adjustment Programs' 2003 18(2) The World Bank Research Observer 227, 231.

10 Jeffrey Checkel, 'Compliance and Conditionality' (2000) Arena Working Paper 18(2000) <[http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2000/wp00\\_18.htm](http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2000/wp00_18.htm)> accessed 05 September 2013.

cessity per definitionem) and its independence in terms of substance from the ER generates a remarkable conceptual complexity.

If these two relationships are closer inspected, four features stand out. *First*, it is the ontological priority of the ER over the CR. ER can exist without the CR (as was indeed the practice of early IMF loans until 1980 s) but not vice-versa. *Ontological priority*, though, does not necessarily entail *value-priority* as the transferor may be more interested in the CR than the ER. Krasner refers to such a priority when stating that ‘in the latter part of the twentieth century international financial institutions, which have embodied the values of the more advanced capitalist states, have been more concerned with promoting particular domestic changes in borrowing countries than with being repaid’.<sup>11</sup>

*Second*, whereas the *transferee* and the *condition-receiver* (the party to implement the conditions) are usually identical, an identity differentiation could arise between the *transferor* and the *condition-setter* when the CR's crafting and monitoring are delegated to a third party, absent from the ER. This party becomes then the ‘*effective condition-setter*’. For example, in the first Greek bailout program the ‘transferors’ (for the European side) were the individual eurozone Member States whilst the *effective condition-setters* were the IMF, EU and ECB. Obviously, the parties in these relationships may themselves be composed of multiple parties and processes thus designating an extremely complex geometry (as is actually the case with EU bailout conditionality).

Third, the concept of conditionality is essentially *content-independant* due to its fundamental quality as a *method* necessitating only the aforementioned ‘nexus’ with an ER for being brought to existence (conditions may vary from human rights to opening up military bases at the condition-implementing country). Certainly, there are arguments about the desirability of including those policies that enhance the possibility of debt repayment but, besides the subjective nature of which policies function as *possibility enhancers*, absolutely nothing in the conception of conditionality prevents irrelevant policies from a *substantive point of view* from being vested with a ‘condition’ status. Hence is the *material scope of a specific condition* that eventually determines the *substantial area of conditionality* (e.g CLL conditionality constitutes a sub-part of Labour Market conditionality, the latter been a sub-part of structural reforms, itself a sub-part of conditionality *in toto*). Should the *object* be a *regulatory area*, conditionality effectively turns into a rule-transfer mechanism.<sup>12</sup>

Fourth, the ‘coupling’ of conditionality with ER under its ‘constitutive nexus’ functions as a transmission belt from which it *prima facie* borrows its *conceptual lens* for being grasped. Nonetheless, the problem resides in the fact that the ER, as typically operating in international debt relations, possesses *multiple conceptual bases* and evades a single clear-cut categorisation. Its substance (e.g loan) attracts categories and con-

11 Stephen Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999) 149.

12 For discussion on conditionality as an external governance mechanism of rule-transfer in the context of EU accession conditionality see Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe’ (2004) 11(4) *Journal of European Public Policy* 661.

ceptual lens from the *private loan relationship*,<sup>13</sup> the *public* identity of the party (or parties) may invoke analogies from public law domain and the *international or transnational identity* of the established relationships renders conceptual analogies to a 'treaty' appealing.<sup>14</sup>

To conclude, the distinction between ER and CR acquires focal importance insofar as shown below- CR's characterisation depends on the underlying power asymmetries in ER. Prior of this, though, there is need to open our conceptual inquiry to power considerations and dismiss a formalist view of CR as a requisite intermediate step.

## 2. Conditionality and 'Reading' of Power Asymmetries: Disentangling a Formal and a Pragmatic Conception

The 'reading' of *power asymmetries* into CR, dictating an incorporation of *pragmatic* observations and considerations into its conceptual-analytical plane, is *determinative* for its final conceptualization. Depending on whether they perform the 'reading' exercise, two conceptions of conditionality may be disentangled: a (1) *formal-horizontal that fails to 'read' real power asymmetries* and (2) *pragmatic-vertical that 'reads' them*. Such a distinction is of paramount value for our analytical route since only the pragmatic conception allows the metamorphosis of conditionality into a 'de facto mode of Government', thus affirming our Government sub-Hypothesis.

### a) Formal Conception

The *Formal* conception views CR as *part* of a free exchange between voluntary parties enjoying full contractual freedom. Hence power asymmetries are treated as irrelevant, if not inexistent. 'After all, a country may simply decline what is offered and thereby make irrelevant the condition on which the offer is made'.<sup>15</sup>

Premised on a *horizontal construction* of CR, the *formal conception* advances a fully integrated to the ER reading of CR's '*constitutive nexus*' that results in the *full incorporation* of CR in ER's contractual lens under a seemingly overarching *archetypical* attachment to an underlying *freedom of contract (FoC)* rationale (*freedom of contract analogy*). As long as the doctrine of FoC 'means the freedom to decide on the terms of the contract, not just the freedom to enter or refuse to enter into a contract, and that the free contract legitimates any treatment of one by another that the parties agree to ac-

13 See Khan and Sharma (n 9) 230 [IMF lending and its associated conditionality follow broadly the same principles as private financial contracts, though several additional dimensions make IMF lending qualitatively different].

14 On the status of Memorandums (though between states) see Commentary on Draft Article 2 on the Law of Treaties (Vol II, Yearbook of the International Law Commission 1966) 188 {A general convention on the law of treaties must cover all such agreements [Memorandum of Understandings] and the question whether, for the purpose of describing them, the expression 'treaties' should be employed rather than 'international agreements is a question of terminology rather than of substance}.

15 Hans Agne, 'European Conditionality: Coercion or Voluntary Adaptation' 2009 8(1) Turkish Journal of International Relations 1, 2.

cept',<sup>16</sup> CR conception is respectively informed by the *horizontality* (*arm's length*) embraced by FoC. If parties' contracting of *interest rates* or *repayment dates* is *horizontal*, then by logical extension the same applies for *whatever* other conditions they wish to create.

In pure terms, an ideal-type FoC (faithful to its libertarian genealogy) rests upon the formal availability of what could be termed as *bilateral trilogy of contractual choices* (*trilogy*): the option of 'accepting', 'negotiating' (counter-proposing) and 'rejecting' (exiting) contractual terms. As soon as the *trilogy* is ascertained to be *symmetrically* granted to *both* parties, their relationship is automatically perceived as *horizontal*.

Evidently, such conception becomes wholly purified from *factual* considerations regarding the potential non-availability of the *trilogy* on both sides owing to *power asymmetries*. It is directly linked with a libertarian view of freedom as only non-interference<sup>17</sup> and with a *formal* conception of voluntariness<sup>18</sup> that becomes tautological with the mere expression of *will*- without any kind of *pragmatic* engagement with the *factual* conditions under which such will is expressed. The fundamental governing premises are that 'within the bounds of public policy, the will of contractors is sovereign'<sup>19</sup> and that the "'pure'" contract is blind to details of subject-matter and person'.<sup>20</sup>

Interestingly, a mirror formal (power-insensitive) could be traced in international law where is argued that '*the concept of a treaty is premised on the concept of contractual freedom (or the inter-state concept: sovereignty)*'.<sup>21</sup> As Simpson characteristically observes:

*'[I]nequalities exist and are justified in international society for the same reasons they exist in domestic societies. Liberty, in this instance the liberty or sovereignty of states, is a powerful barrier to the imposition of egalitarian imperatives'*.<sup>22</sup>

Notably, coercion of a State (as distinct from coercion of a representative of a state) was excluded from Art. 51 of 1969 Vienna Treaty on the Law of Treaties and the doctrine of unequal treaties as a reason for *invalidity* has received yet no recognition. Like in contract theory, the *formal equality rationale* fertilizes the respective *formal* conception in international law.

At this point, a second, *distinct* version of *formalism* should be detected. It does not spring from *contractualising* the CR as the first, but from *formally* constructing the CR as devised and *owned* by the condition-receiver so that the latter is seen also as a con-

16 Philip Petit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 62.

17 For a the classic formulation of the negative conception of liberty see Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press 1958).

18 For a (critical) analysis of the implications of *libertarianism* on the conception of *voluntary exchange* see further Anthony Kronman, 'Contract Law and Distributive Justice' (1980) 89(3) *Yale Law Journal* 472, 475-478.

19 John Adams and Roger Brownsword, *Key Issues in Contract* (Butterworths 1995) 51.

20 Lawrence Friedman, *Contract Law in America* (University of Wisconsin Press 1965) 20.

21 Anne Peters, 'Unequal Treaties' in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (OUP 2008 online version) [www.mpepil.com] par. 73.

22 Gerry Simpson, *Great powers and outlaw states: unequal Sovereigns in the international legal order* (Cambridge University Press 2004) 57.

dition-setter.<sup>23</sup> As Boughton underlines, though, the concept of 'national ownership' amounts for the IMF to insist 'that the country must not only do what the Fund wants, it must also at least pretend to want to do so'.<sup>24</sup> The *linguistic formulation* of conditionality as 'Letter of *Intent*' from the condition-receiver provides additional ground for such a *formal* view by constructing a 'conceptual fiction of *will*' in total analytical reversal of the real power-dynamics within condition-crafting.

### b) *Pragmatic Conception*

In stark contrast, the *pragmatic* conception distinguishes itself from being *power-sensitive* and *cognitively-open* to power asymmetries thereby perceiving CR as akin to a 'relationship of power'.<sup>25</sup> The very act of incorporating the *power* dimension into the conceptual matrix inevitably transforms the insulated and stable facade of contractual *horizontality* into a more dynamic and (potentially) more *verticalized* framework. Taking Dahl's intuitive conception of power to be a relationship when 'he [A] can get B to do something that B would not otherwise do'<sup>26</sup> as a standard power definition, the *pragmatic* conception subjects the *trilogy* on *factual scrutiny* by undertaking the exercise of examining whether different options are *practically* available for either side in the presence or non-presence of alternatives. In this way, it unifies and transcends conceptual/real universes.

The *pragmatic* reading of CR draws apparent analogies with conceptual schemes advanced by respective theories and discourses within contract theory that mount attacks against freedom of contract's (FoC) horizontality through exposing the underlying power asymmetries within the contractual relationship. Characteristically, Atiyah labels the historical period of the fall of FoC (1870-1970) as 'Age of Pragmatism' in contradistinction with the preceding (1770-1870) age of Principles.<sup>27</sup>

If for the *formal conception* FoC serves as its *archetypical* source of inspiration, then for the *pragmatic* that role is played by the rationality perfectly reflected in the *pragmatic* treatment of the Employment Contract. Rather than a side-thought, *power-asymmetries* and *bargaining inequality* are foundational conceptual assumptions for the very emergence of labour law as a *distinct* area from contract law. What in the eyes of a *formalist* reads 'freedom', in the eyes of a *pragmatist* could read 'coercion' or 'imposition'.<sup>28</sup> For Kahn-Freund 'the relation between an employer and an isolated employee is typically a relation between a bearer and one who is not a bearer of power [which] in

23 National Ownership is defined as referring to a 'willing assumption of responsibility for a program of policies, by country officials who have the responsibility to formulate and carry out these policies, based on an understanding that the program is achievable and is in the country's best interest' IMF, *Guidelines on Conditionality* (Legal and Policy Development and Review Department 25 September 2002) 8.

24 James Boughton, *Who is in charge? Ownership and conditionality in IMF-supported programs* (IMF Working Paper 03/191 Policy Development and Review Department 2003) 4. Buira (n 7) 60.

26 Robert Dahl, 'The Concept of Power' (1957) 2(3) Behavioral Science 201, 203.

27 Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 649.

28 For freedom as non-domination see Petit (n 16); see also Amartya Sen, *Inequality Reexamined* (OUP 1995).



its inception it is an act of submission, in its operation it is a condition of subordination [but] the submission and the subordination may be concealed by that *indispensable figment of the legal mind known as the 'contract of employment'*<sup>29</sup> whilst for Webb's 'wherever the economic conditions of the parties concerned are unequal, legal freedom of contract merely enables the superior in strength party to dictate the terms'.<sup>30</sup> This is because 'the more powerful party- usually though not always the employer- will have the incentive to move outside it'.<sup>31</sup> Apparently, all these accounts draw on the *illusory* nature of 'negotiation' and 'exit' options.

The same *pragmatic* rationality puts flesh on the bones of contract theory's equity-based invalidation doctrines such as duress or undue influence 'where one part of the contract has *coerced the other or exercised such domination* that the other's independence of decision was substantially undermined'<sup>32</sup> or in the inequality of bargaining power doctrine (not recognized in common law) 'where the parties have not met on equal terms- when the one is so strong on bargaining power and the other so weak- that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall'.<sup>33</sup> Given our purposes, the reader should place particular emphasis on the *non-horizontal* designation of the contractual relationship espoused by these approaches built on the thesis that 'the law of the contract, in that it partakes the will of the parties, leans towards equality for the strong'<sup>34</sup> or otherwise formulated that the regime of contract 'ceases to exist when inequalities of power and knowledge accumulate to the point of turning a set of contractual relations into the outward form of a power order'<sup>35</sup> and that 'unchecked power in the bargaining context soon becomes indistinguishable from naked coercion'.<sup>36</sup>

In the context of international law, the power-sensitive conception of *unequal treaties* adopts a 'mirror' *pragmatic* reading of asymmetries in the 'trilogy' test. The main argument is that 'no genuine assent to a treaty is given if the parties are not "genuinely" equal, taking political and economic factors into account [so that] in the absence of a real consensus, no treaty exists'.<sup>37</sup> This conception grounds itself in the non-availability of

29 Otto Kahn-Freund, *Labour and the Law* (2<sup>nd</sup> ed Stevens & Sons 1977) 6.

30 Sidney Webb and Beatrice Webb, *Industrial Democracy* (first published in 1897, Augustus M. Keller 1965) 217. (emphasis in the original).

31 Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harvard Law Review* 561, 630; For the opposite thesis suggesting that no inherent inequality exists in the employment relationship against the employee see Richard Epstein, *Is There Unequal Bargaining Power in the Labour Market* (Lecture, New Zealand Roundtable 2005) <[http://nzinitiative.org.nz/site/nzbr/files/publications/publications-2005/unequal\\_power.pdf](http://nzinitiative.org.nz/site/nzbr/files/publications/publications-2005/unequal_power.pdf)> accessed at 5 September 2013.

32 Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (29<sup>th</sup> edition OUP 2010) 349 (emphasis added).

33 Lord Denning, *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 336-337.

34 Harold Havighurst, *The Nature of Private Contract* (Northwestern University Press 1961) 131.

35 Unger (n 31) 625-625.

36 David Barnhizer, 'Bargaining Power in Contract Theory', in: Larry DiMatteo and others(eds), *Visions of Contract Theory: Rationality, Bargaining and Interpretation* (Carolina Academic Press 2007) 86.

37 Peters (n 21) par.46 and see references there.

the 'exit' or 'negotiation' options as a result of *power inequalities*. As Craven highlights with reference to *formal* and *pragmatic* inequality:

*'the problem of inequality also concerns the way in which a flattening of power relations within the framework of formal treaty rules may itself serve an ideological purpose: by casting concessions procured by dint of power in an egalitarian light and obscuring existing asymmetrical relations by reference to a fictitious notion of inequality.'*<sup>38</sup>

Nonetheless, this doctrine is not accepted in international law as already mentioned since economic coercion of a state in treaty-making is not an official ground for treaty invalidity.<sup>39</sup>

### c) Adopting the Pragmatic Conception

No doubt that the two conceptions may represent ideal-types with varied conceptions in-between. Their disentangling, though, is central due to their designation of two radically different constructions of the CR originating from competing *genealogies* that subtly inform respective debates on the nature of conditionality, even as suppressed premisses: the *formal* accounts only for a *horizontal relationship between equal parties* whilst the *pragmatic* allows for a dynamic, *vertical relationship* if – and only if – pragmatic inequality between the parties is to be discerned.

The *formal* account of CR should be dismissed not only because of its *fictitious* and *reality-blind* claims, but principally because it lacks the 'transcending' *quality* required for examining whether conditionality is a *De Facto Mode of Government*, a *factual question* by its nature. Only the *pragmatic* conception possesses this *transcendent nature* which is *necessary* for capturing the multi-faceted and complex nature of CR as a *factum*.

Having adopted the pragmatic conception and dispelled the *descriptively deficient* nuisances of a restrained formal account, the next section makes the ultimate step towards affirming the *Government sub-hypothesis*.

### 3. Confirming the 'Government Hypothesis': From Power Asymmetries to Bailout Conditionality as a De Facto Mode of Government

Our inquiry proceeds to the ultimate stage in which the conception of bailout conditionality is to be finally transformed into a *De Facto Mode of Government* in light of 'power asymmetries', thus validating our Initial sub-Hypothesis.

38 Matthew Craven, 'What Happened to Unequal Treaties' (2005) 74 Nordic Journal of International Law 335, 340.

39 For a *pragmatic* conceptualization in international law see the non-Binding Declaration on the Prohibition of Military, Political or Economic Coercion in the conclusion of Treaties (annexed to the Final Act of the United Nations Conference on the Law of Treaties) which 'condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent'.

Which are the *power dynamics* in a CR, and more specifically within the Greek bailout conditionality? The fact that the *pragmatic* conception *allows* them does not mean that they necessarily *exist*. At first, it is true as a general statement that power has a ‘highly situational’<sup>40</sup> and over-dynamic nature so that the power relationship between two parties is context-specific (myriad of factors may weigh in) and may even vary over time. The CR, though, constitutes by its nature an inherently *asymmetrical* relationship as it primarily, if not exclusively, gives rise to obligations only for the one party (condition-receiver).

Due to the *constitutive nexus* of CR that binds together two *substantively* different relations, CR nature is dependent on power asymmetries in the ER. In principle, CR is a strong *prima facie* indicator of *asymmetries* in the ER against the condition-receiver/transferee given that otherwise the CR would not have emerged in the first place. A powerful or ‘equal’ transferee would probably not accept a CR.<sup>41</sup> Hence an *asymmetrical* CR is expected to correlate to an *asymmetrical* ER.

The precise level of asymmetry, though, stands as a crucial measure for the factual scrutiny on the ‘*bilateral trilogy of choices*’. As Buira emphasises, ‘other things been equal, the greater the asymmetry in power between the country and the Fund, and the greater the country’s need, the more likely it will need to accept fully Fund-prescribed conditionality’<sup>42</sup> whilst this ‘asymmetry of power (...) is largely determined by the country’s need and its alternative source of finance’.<sup>43</sup>

Considering the extreme need of Greek Government for financing its debts in order to prevent a catastrophic default coupled with the perceived danger of leaving the Eurozone and the non-existent alternative sources of funding, it is apparent that the ‘negotiation’ and ‘exit’ options were not *pragmatically* available. As Zachariadis notes ‘though nominally negotiating with its creditors, it is highly doubtful that the Greek government had any input into the bailout package given its dire economic condition [hence] It had to accept imposed measures from external creditors’.<sup>44</sup>

So, power asymmetries *transformed* in the Greek case the ‘trilogy of choices’ into a practically *essentially* single ‘option’: *acceptance*. Other options (negotiation, exit) were rather illusory and seemingly operated more at a theoretical-formal level like the ‘*option*’ of an employee to reject a condition from his employer when alternative option is starving.

40 Robert Adler and Elliot Silverstein, ‘When David Meets Goliath: Dealing with Power Differentials in Negotiations’ (2000) 5 Harvard Negotiation Law Review 1, 3.

41 As Paul Volcker (former chairman of the US Federal Reserve) stated ‘When Fund consults with a poor and weak country, the country gets in line. When it consults with a big and strong country, the Fund gets in line’ Paul Volcker and Toyoo Gyoten, *Changing Fortunes: The World’s Money and the Threat to American Leadership* (Times Books 1992) 143.

42 Buira (n 7) 59.

43 Ibid 60.

44 Nikolaos Zahariadis, ‘Complexity, coupling and policy effectiveness: the European response to the Greek sovereign debt crisis’ (2012) 32(2) Journal of Public Policy 99, 112.

But if A and B are in a relationship where:

- a) B only 'accepts' conditions imposed by A in relation to C and
- b) B (and not A) *de jure* governs C

then from (a) and (b) it follows that:

- (c) A *de facto* governs C.

Should  $A \Rightarrow EU$ ,  $B \Rightarrow \text{Greece}$ ,  $C \Rightarrow \text{CLL}$ , it becomes evident that EU *de facto* governs Greek CLL through 'bailout conditionality', the latter constituting the *instrument* of vertical interaction between A and B. If further considered that 'C' *qua* law 'governs' the actions of D (employers, employees and trade unions) the conclusion that EU *de facto* governs D's actions by conditionality emerges as the only plausible.

Of course the herein thesis could be potentially challenged on the grounds that, unlike the employment relationship, the condition-receiver party (Greece) *qua* its public identity as a democratic state was able to exercise a genuine free 'trilogy choice' through the traditional representative democratic mediums, namely Parliamentary and electoral processes. Insofar as the Greek parliament, construed by a formalistic/idealistic account of representative democracy to be a perfect representation of Greek demos, has deliberated and voted on successive conditionality laws, and given that in May/ June 2012 elections Greek citizens made their 'trilogy choice' by indirectly electing a respective pro-bailout Government promising to realize their preferred 'acceptance' choice among competing parties advocating also alternative 'negotiation'/ 'exit' options, the case about 'acceptance' as the sole option is hence undermined. In turn- should the 'trilogy' was at the full disposal of Greek demos, it entails that 'acceptance' was not the only pragmatic choice and thereby the characterization of conditionality as a *de facto* Government suffers immediate analytical collapse since deprived from its foundational premise.

The preceding thesis, in our view, would fail to adequately challenge the verticality of 'condition-setter' / condition-receiver' relations and thereby our 'Mode of Government' claim owing to three analytical deficiencies. First, it builds upon a *formalist* and *idealistic* view of representative democracy assuming a direct and undiluted translation of electorate choices into respective Government choices that bears considerable distance from reality. Many factors impinge on this 'translation'. The factor of power asymmetries is a crucial and predominant one. Indeed, besides Greek electorate system particularities that distorted an anti-bailout majority to a pro-bailout Government through assigning a 50-seat premium to the first party, as a point of fact, the Governing coalition was elected on a mandate of 're-negotiation' of conditionality but due to power asymmetries this 're-negotiation' never materialized. This very point exemplifies the impact of power asymmetries on this 'translation' of voter choices into Government choices thereby making the translation, at best, *elliptic*.

Second, it confines the scope of power asymmetries to the condition-setter/Government relationship thus erroneously assuming that MPs and the electorate are entirely unaffected by such power disequilibria, the latter having no impact on their voting behaviour. So, somehow the Government is subjected to power asymmetries but the public and MPs are entirely insulated from them and act as free choice-makers. In fact, though, power asymmetries, for instance as reflected in the threat of state default and/or the *perceived* power of Eurozone countries to force an exit of the country from the Eurozone

if the electorate exercises its ‘negotiation’ or ‘exit’ options (with such perception becoming magnified by media and various official statements) are channelled through public discourse and different forms of articulation into both MPs and electorate choices. As a result, the ‘curved space’ generated by extreme power asymmetries extends to and effectively influences various voting patterns as well. In this way, not only power asymmetries affect the ‘translation’ of choices but also the choices themselves as coded into electoral results. In turn- the ‘curved space’ thesis entails dismissal of the argument claiming ‘free trilogy’ availability to the electorate and MPs.

Third, and perhaps more importantly, even if the thesis that a kind of free choice at an electorate level existed is deemed valid, it was of a very indirect and general nature, filtered through many channels before being transposed into a government policy and thereby is not at all incompatible with the contention that the Government had to accept the *particular* conditions as prescribed in conditionality pursuant to the continuous operation of vertical asymmetrical relations. In the same way that the ‘choice’ made by citizens to elect a Government promising to enact an Administrative Code does not by itself render the administrative relation between Government and citizens horizontal, the supposed ‘free choice’ of the electorate does not invalidate the ‘vertical relation’ between Condition-Setter and Condition-Receiver. Therefore, a ‘broad’ and ‘non-formal’ comprehension of power asymmetries and of representative democracy rather illustrates the presence of *acceptance* as the *pragmatically* single choice.

So, what we have demonstrated so far is that A *governs* in relation to CLL. Nonetheless, is that sufficient for characterizing it as a *mode of government of CLL*? The answer is negative. It further depends on the width and depth of CLL-related conditions. The *conditions* must be intrusive, detailed and fundamental to the CLL nature in order to have a *degree* of systematic nature and comprehensiveness. In addition, there must be a sufficient degree of *time-continuity* so that the *hierarchical power* is exercised in a continuous and uninterrupted manner. As next part shows, *both* elements are present in Greek’s CLL bailout conditionality. Indeed, the latter is very extensive in scope and its periodic revision and review through a complex supervision mechanism linked to periodic instalments provides the ‘time-continuity’ dimension.

Therefore, our inquiry verified the ‘Government Hypothesis’ for bailout conditionality. Its non-legal recognition as a mode of *Government* makes it ‘de facto’. Its nature *qua* vertical ‘Government’ makes it immensely *powerful* like a ‘black hole’.

So, this eventually enables us to term bailout conditionality as *Conditionality Government (CG)*.

## II. The ‘Neo-Liberal Black Hole’ Sub-Hypothesis

This part tests the ‘Neoliberal Black Hole’ sub-hypothesis which argues for the neo-liberal ‘black hole’ construction of Conditionality Government (CG). In case that the herein testing succeeds, our central ‘Black Hole Hypothesis’ is also successful since the validity thereof was initially predicated on (the already confirmed) ‘Government’ and ‘Neoliberal Black Hole’ sub-hypotheses.

Under this aim, our inquiry is structured as follows. A closer look inside CG for expounding on its position within EU law (II-1), institutional geometry and procedural

features (II-2) and substantive construction with regards to CLL (II-3), produces the *descriptive findings* that are subsequently synthesized for demonstrating CG's neoliberal texture and 'black' nature (II-4).

### 1. Bailout Conditionality and EU Law

Bailout conditionality stands out by its remarkably ambivalent, marginal and unclear status within EU Law. This is primarily a result of its *double* dressing into (a) non-legal<sup>45</sup> Memoranda and political/technocratic decisions produced (as examined below) under a *sui generis* institutional *de facto* architecture governed by technocratic intergovernmentalism, informalism and institutional *hybridization* and (b) 'hard law' Council Decisions on Excessive Deficit Procedure (EDP).<sup>46</sup>

No doubt that EU Law itself falls short of clarity. Particularly following the granting of full legal effect to the European Charter of Fundamental Rights (ECFR), it resembles more a gigantic and confusing set of puzzle pieces of diverse sorts of economic and social aims, values, principles, rights and policies juxtaposed to each other that range from free market and open competition,<sup>47</sup> fiscal discipline,<sup>48</sup> common economic and monetary policy for EMU members to the respect of right to collective bargaining and industrial action<sup>49</sup> without any clear guidance about *how*, let alone *if*, they fit with each other.

#### a) Conditionality as a Legitimizing Instrument of Bailout Legality qua EU Law

Prior of examining *conditionality* in EU law, is imperative to stress its *instrumental function* in legitimizing *bailout qua* EU law. Given the prohibition of assumptions of debts of a Member State by the Union or another Member state (Article 125 TFEU), conditionality, by its very inception, was treated as a *condition* itself for surmounting the legal barrier and legitimizing the whole bailout (apart from its important use for the *political acceptability* of bailout decisions within the domestic public spheres of lending Member States).

In particular, it was reckoned as vital for the first Greek bailout survival of its 'thin' legal attachment to a broad interpretation of Article 125 of TFEU<sup>50</sup> due to the assumption

45 See Greek STE (Supreme Administrative Court) Decision 668/2012 'the Memorandum (...) does not enact other rules of law, but, for realizing its specified policies, there must be relevant acts by the competent, according to the Constitution, organs of the Greek State' par. 28.

46 Paragraph 8 of the Preamble of Council Decision 2010/320/EU reads 'The lenders have decided that their support shall be conditional on Greece respecting this decision'.

47 Art. 120 TFEU 'The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources'.

48 Protocol 12 on the Excessive Deficit Procedure (Consolidated Treaty on European Union).

49 Article 28 of ECFR.

50 For analysis on Bailout Legality under EU Treaty Rules see *Boris Rynkin*, 'Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency' (2012) 45(1) Cornell International Law Journal 228.

that it offers a counterweight for safeguarding loan repayment and hence may technically exclude financial assistance for being qualified as a prohibited grant or assumption of debts. As the German Finance Minister underlines ‘the loans are not transfers. And they are not gifts (...) and the conditionality is such that the country is compelled to enforce measures that would be unthinkable before the event’.<sup>51</sup> This connection is also recognized in ECJ statements that ‘Article 125 TFEU does not prohibit the granting of financial assistance (...) provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy’<sup>52</sup> and that ‘the [strict] conditionality is intended to ensure that the activities of the ESM are compatible with, *inter alia*, Article 125 TFEU and the coordinating measures adopted by the Union’.<sup>53</sup>

In this context, ‘strict’ conditionality (originally framed as ‘strong’ conditionality)<sup>54</sup> which is now explicit part of the Treaties through the *new* Article 136(3), is seemingly perceived not just *permissible* but a *requisite* for bailout legality *qua* EU law. It constitutes a fundamental principle of what could be termed as an embryonic EU *acquis* of financial assistance to Member states with debt-financing problems.

#### b) Conditionality’s Legality *qua* EU Law: Consistency Issues

Conditionality’s strict nature renders scrutiny for its compatibility with EU law and Fundamental rights even more compelling. This is so because Member States are expected to implement the conditions due to the *strict economic relationship/conditionality relationship ‘nexus’ (ER/CR nexus)*, the latter implying intrusion and close supervision in a manner expressed in the aforementioned statement by the German Finance Minister. In turn, this entails that EU and those European institutions acting as *effective condition-setters* are *de facto* placed in the driving seat for conditionality-related regulatory areas.

This is certainly the case with labour law which ‘as the traditional tool for delivering speedy growth- devaluation of the currency- is not available to Eurozone Member [is put] into the frontline’.<sup>55</sup> At least three set of *consistency issues* with EU law and EU Fundamental Rights are raised on (1) procedural, (2) competence and (3) substantive grounds.

The first relates to conditionality’s *consistency* as a *process* with principles of respect for diversity of national systems including the important role assigned to social part-

51 German Finance Minister *Wolfgang Schäuble*, Speech at the Walier Hallstein-Institution of the Humboldt-Universität in Berlin (26 Jan 2011) speech excerpt cited in *Ryvkin* (ibid) 242.

52 ECJ, C-370/12, *Thomas Pringle v Government of Ireland and the Attorney General* (27 November 2012) par. 137.

53 *Pringle* (ibid) par 111.

54 See *inter alia* Eurosummit, *Statement* (25 March 2010); Eurogroup, *Statement* (2 May 2010).

55 Catherine Barnard, *EU Employment Law* (4ed OUP 2012) 132.

ners<sup>56</sup> and the principle of democracy.<sup>57</sup> Second, as long as CLL constitutes an area traditionally left to Member States (Art 153(5) of TFEU excludes EU competence on pay, freedom of associations strike or lockouts), a direct issue arises with regards to whether *conditionality* represents a *de facto* alteration of these *competences*. For instance, does this competence exclusion apply also for the Council of EU (Ecofin) when dictating conditions under the EDP or for other condition-setting institutions (European Commission) when performing other condition-setting activities (e.g Memoranda)?

Third, from a *substantive compatibility* perspective, the inclusion of CLL rights of collective bargaining and industrial action in ECFR along with the need to respect the European Social Model having among its key values according to European Commission's own formulation the free collective bargaining, social welfare and solidarity<sup>58</sup> stands in obvious contrast with the *deregulatory* agenda adopted in conditionality. Such deregulation is difficult to be reconciled with the duty of all EU institutions under the ECFR to 'respect the rights, observe the principles and promote the application thereof in accordance with their powers' (Article 51).

As it goes beyond the scope of our inquiry to examine the complex question of *legality* of conditionality under EU law, is sufficient for our purposes to stress the multiple ways that CLL conditionality may *conflict* with established EU principles and rules.

### c) *Bailout Conditionality: The 'Dark Spot' of EU Law*

Our analysis located the *dual* status of conditionality in EU law. On the one hand, as an instrument *dependent* on bailout is thought to perform the legitimizing function of bailout under EU law and thus *required* to be strict. On the other hand, when viewed in *independence* from bailout relationship *qua* stand-alone process or in terms of individual conditions' compatibility with EU law, the same 'strict conditionality' may be argued to be inconsistent with EU law and Fundamental rights. In practice, though, potential *conflicting imperatives* deduced from these statuses hardly generate any pragmatic *policy dilemmas* for condition-setting institutions as they predominantly 'read' conditionality in its first status.

Nevertheless, any argument advancing conditionality's inconsistency with EU Law on previous or other grounds is contingent on its preliminary recognition as falling within the scope of EU law. In this regard, a formal understanding of conditionality's non-legal texture invoking its operation outside of traditional EU scope activity within a *sui generis* geometry (see section II below) may technically succeed in preventing inconsistencies with EU law from turning into illegalities. Judicial pronouncements of

56 Article 152 of the TFEU reads 'The Union recognises and promotes the role of social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy'.

57 For an account of the tension between EMU financial assistance policies and democracy see Ben Crum, 'Saving the Euro at the Cost of Democracy' (2013) 51(4) Journal of Common Market Studies 614.

58 *European Commission*, White Paper on European Social Policy: A Way forward for the Union Communication (1994) 333 2.



Memoranda as mere programmatic declarations, like the one made by the Greek Supreme Administrative Court, offer support to such formalism.<sup>59</sup>

It should be noted that the ECJ judgment in *Pringle* *prima facie* appears to deviate from such a formalist approach. Whilst the case concerned the European Stability Mechanism that enjoys a clear Treaty foundation, Court general observations on conditionality may be applicable to the previous Greek bailouts as well. In particular, when referring to the power of Eurozone Member States to create a stability mechanism, the Court held ‘that those Member states may not disregard their duty to comply with European Union law when exercising their competences in that area’.<sup>60</sup> In addition, the Court recalled Article 17(1) of the TEU pursuant to which EC ‘shall promote the general interests of the Union’ and ‘shall oversee the application of Union law’,<sup>61</sup> when examining EC role under the ESM *inter alia* for negotiating a MoU and monitoring compliance with conditionality attached to financial assistance.

At first sight, these statements indicate Court’s willingness to place conditionality under the overarching EU law. Truly, such an approach may find preliminary ground in the face of standards EU-conforming references contained in conditionality-related documents.<sup>62</sup>

So, does this entail dismissal of our ‘Dark Spot’ thesis? We argue in the negative based on at least four underlying caveats. First, a careful scrutiny of ECJ reasoning in *Pringle* exposes the fact that ECJ appears to ‘*beg the question*’ of conditionality’s legality in EU law. This fallacy is evident in Court’s holding that ‘strict conditionality (...) is in order to *ensure* that the mechanism will operate in a way that will comply with European Law’<sup>63</sup> and in its reference that the ‘tasks allocated to the Commission by the ESM Treaty enable it (...) to *ensure* that the memoranda of understanding concluded by the ESM are consistent with European Union law’.<sup>64</sup> The premise of perceiving strict conditionality and European Commission’s involvement as *par excellence* safeguarding consistency with EU law makes scrutiny for its compatibility with EU law *logically moot*, as the ‘consistency’ is already assumed by the very premise.

Second, an overwhelming (if not exclusive) focus on the budgetary/economic policy *puzzle piece* of EU law at the expense of social or Fundamental Rights pieces is discernible. In this regard, ECJ statements that the aim of strict conditionality is such as ‘to prompt the [condition-receiving] Member State to pursue a sound budgetary policy’<sup>65</sup>

59 See citation 45 above.

60 *Pringle* (n 52) par. 69.

61 *Ibid* 163.

62 See Preamble (paragraph 2) of EFSF Framework agreement [the conditions attached to the provision of financial assistance by EFSF as well as the rules which apply to monitoring compliance must be fully consistent with the Treaty on the Functioning of the European Union and the Acts of EU law]; Memorandum I (n 1) par.22 [Following consultation with social partners and *within the frame of EU law*, the government will reform the legal framework for wage bargaining in the private sector, including by eliminating asymmetry in arbitration] (emphasis added); (Updated) Memorandum of Economic and Financial Policies (30 November 2011) 4(1) p. 58 footnote [Reforms to collective bargaining do not concern health and safety conditions and are implemented in respect of core labour standards and EU law]].

63 *Pringle v Ireland* (n 52) 69 (emphasis added).

64 *Ibid* 164. (emphasis added).

65 *Ibid* 137.

and to ensure ESM's 'compliance with European Union law, *including the measures adopted by the Union in the context of the coordination of the Member States' economic policies*' (a.k.a EDP)<sup>66</sup> reflect this underlying *asymmetrical* privileging of certain aspects of EU law. In ESM Treaty, this asymmetry acquires clearer status as it is there provided that the 'MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, *in particular* with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM member concerned'.<sup>67</sup>

Third, even if the duty of EU institutions in their condition-setting activities to follow EU law is said to exist, it remains very unclear how is to be *practically* enforced. Conditionality instruments cannot be directly challenged by individual citizens. Even the 'hard law' EDP Council Decisions can be challenged only by a Member State, European Parliament, Council and the Commission according to Art 263 of TFEU since they are not addressed to or have a direct effect on individual citizens. This leaves only the *indirect* route of potentially invoking the 'domestic law' clothing of conditionality under the preliminary reference procedure for incompatibility with EU Law and Fundamental Rights. Nonetheless, States would then benefit from a degree of discretion pursuant to proportionality if the claim does not preliminary fail on non-applicability of the Charter or *non-competence* technical grounds (as would be probably the case with CLL reforms).

Fourth, and more significantly, no *meaningful or systematic* integration of conditionality with EU law *in toto* (e.g institutional checks by the European Parliament or Guidelines) that is commensurate with its immense effect on altering CLL domestic schemes is stipulated. Considered in relation to what we identify below as 'policy monism' of conditionality insofar as its institutional geometry ensures its operation on a narrow monetarist and economized plane, in practice such an absence militates against *social-oriented* parts of EU law.

Therefore, these caveats essentially *darken* conditionality's operation in EU law thus making its characterization as 'dark spot' appropriate. Indeed, it is hard to imagine other case where the divergence between *pragmatic relevance* and *formal irrelevance* is wider.

Upon locating the uneasy and blurred status of bailout conditionality within EU law, we shall now turn to identifying its main institutional, procedural and substantive characteristics.

## 2) Institutional Geometry and Procedural Characteristics of CG

An inquiry into the *institutional* and *procedural* construction of CG is central for capturing the nature of its complex dynamics. Given the close relationship between 'institutional' and 'procedural', as the choice of institutions could be reckoned as a choice of *processes*<sup>68</sup> while determining them in what appears to be a 'chicken-and-egg' dialectic,

66 Ibid 69.

67 Article 13(3) (emphasis added).

68 Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1994) 3.

they should be perceived as two sides of the same coin thus blurring the rigidity of any analytical distinction.

So, the central question posed relates to which institutions participate (or not), under which terms of interaction and according to which processes in bailout condition-setting (CS) and condition-monitoring (CM) on the EU Side?

Prior of addressing these questions, it is essential to note that the analysis undertaken here is Conditionality-Centric and Euro-Centric. The institutional and procedural make-up of the 'bailout' ER (role of ECB, various modes of financial interventions such as bank recapitalization, Private Sector Involvement e.t.c) and the non-European (IMF) side of CR feature at the periphery of our inquiry only insofar as related with EU's CG.

#### *a) The 'Janus-Headed' Institutional Geometry of Conditionality Government (CG)*

CG is principally embedded in a *fused* 'Janus-headed' institutional geometry comprised of two pillars of 'institutional couples' that mix pre-existing and crisis-borne structures around a diversified set of pre-established and novel synergies. Both condition-setting (CS) and condition-monitoring (CM) 'nest' becomes effectively weaved by intra- and inter-pillar interactions. Next to the prevailing (i) Eurogroup/Troika EMU 'Central Pillar' stands the (ii) Council/Commission 'Formal EU Pillar' operating under the Treaty-Based Excessive Deficit Procedure (EDP).

#### *(1) Central EMU Pillar: Eurogroup and Troika*

In this pillar, Eurogroup and the so-called 'Troika' occupy a central position. The former, (comprised of Eurozone Finance Ministers) is the dominant EMU institution which as Puetter notes (writing before the crisis), despite being an 'informal forum for discussions among euro area finance ministers, [it] plays a central role in the economic governance set-up, albeit one widely unnoticed in the literature on economic and Monetary Union'.<sup>69</sup> Initially established by the non-binding European instrument of a European Council Conclusion as a place where Eurozone Finance Ministers 'may meet informally among themselves to discuss issues connected with their shared specific responsibilities for the single currency',<sup>70</sup> it acquired a 'thin' Treaty Basis on the Protocol on Euro Group annexed to Lisbon Treaty. The Protocol failed to grant any formal decision-making power or prescribe any rules on its internal operation and merely provided for the (a) attendance by the European Commission (EC) and ECB of its Meetings, (b) a permanent President and (c) EC to prepare along with Eurozone Members its Meetings.

The second partner, the so-called 'Troika', constitutes an *ad hoc* informal *hybrid* of IMF, EC and ECB whose members are high-level staff appointed by each institution respectively but acts as a *consortium* without having a distinct legal personality. Its *basis*

69 Uwe Puetter, 'Governing informally: The role of the Eurogroup in EMU and the Stability and Growth Pact (2004) 11(5) Journal of European Public Policy) 854, 854.

70 *European Council*, Resolution of the European Council on Economic Policy Coordination in Stages 3 of EMU and on Treaty Articles 109 and 109B I:6, Annex 1 of European Council Conclusions (12-13 December 1997).

rests upon the strategic political decision of the coordination of the three institutions for conditionality purposes that is reflected in the various conditionality documents but its internal operations have received no formalization.

Within this *coupling*, Troika performs *two* roles, that of (1) effective *conditionality-setter* and (2) *Supervisor* of CR (conditionality relationship). In its first capacity, it undertakes the task of drafting and negotiating all relevant *conditionality documents* (e.g. Memoranda of Understandings with EC or with EFSF, Staff Agreements) with Greek Government. This occurs in the context of a first program-preparing Mission typically operating under extreme time-constraints owing to the condition-receiver's need of immediate default-preventing financing. However, CS resumes beyond the original program due to the standard practice of subsequently imposing *new* conditions through its Periodic Reviews.

For fulfilling its CS mandate, troika is vested with a virtually unlimited *de facto* power (backed by the Lenders' support) to conduct negotiations with the High-Level political personnel of the country (Prime Minister and Ministers) and perform all necessary inspections and reviews. Hence it possesses what could be termed as executive or agenda-setting authority, a reality masked by the fact that Troika-negotiated conditionality-creating documents are formally submitted by the Greek Government as their sole author to the relevant institutions according to their own procedures. In its *supervisory* capacity, Troika closely monitors the CR, reviews its implementation by Greek authorities through detailed (usually) three-month Reports that are submitted to the Eurogroup, with the latter linking positive evaluation with positive disbursement decisions.

Within the 'Central Pillar dialectic, Eurogroup emerges as the cardinal *Dramatis Personae* due to being the Critical *Guardian* of ER/CR nexus. It *decides* both on authorizing the initial financial assistance (based *inter alia* on initial Conditionality Documents) and on subsequent periodic disbursement of instalments of financial assistance pursuant to positive Troika reports. Taking into account the immense value of the ER for Greek economic solvency on which (at least to an extent) Eurozone Stability is also dependent, it comes as no surprise that Eurogroup meetings are placed at the centre of attention often taking on a *dramatic* nature.

At this point, Eurogroup's (at least in a rhetorical level) *deferential* attitude to Troika reports should receive proper attention. Such deference is expressed in two ways. First, the Report is treated as a *procedural requirement* for any discussion on Disbursement, meaning that Troika may *indirectly* invoke the instrument of non-compiling the Report (e.g. when Ministers disagree with certain conditions) for pressure-building on the Greek side. Second, in what could be termed as 'technocratic deference', the Report is vested with a de-facto 'evidentiary' status,<sup>71</sup> whose *substantive findings* and *condition-setting* recommendations are not in dispute.

Therefore, Eurogroup's power within 'Central Conditionality Pillar' stems more from the *control* of ER/CR nexus whilst CS/CM relationships have seemingly been delegated to Troika.

71 German Chancellor *Angela Merkel* has referred to Troika Report as reliable evidence ['What Greece can expect from Germany is that we will not make premature judgments but will await *reliable evidence*, which for me means the troika report'] statement quoted in Huffington Post (08/27/2012) < [http://www.huffingtonpost.com/2012/08/27/september-troika-report\\_n\\_1832510.html?>](http://www.huffingtonpost.com/2012/08/27/september-troika-report_n_1832510.html?>). (emphasis added).

## (2) 'Formal EU Pillar': European Commission and Ecofin Formation of the Council

The 'Formal EU Pillar' builds upon the Treaty-Based 'institutional coupling' of the EC with the ECOFIN formation of the Council. It assumes its condition-setting status in virtue of the *inclusion* of Article 126(9) TFEU Decisions on specific deficit-reduction actions to be taken within a specific time-limit by a Country that 'persists in failing to put in practice the Recommendation of the Council' into the bailout conditionality system.

Two techniques realize such inclusion. The first is the *external referencing* of Council EDP Decision-Making in bailout conditionality-related agreements. Both the Loan Facility Agreement concluded between the European Commission (acting on behalf of Eurozone lenders) and Greece in the context of first bailout<sup>72</sup> and the EFSF Framework Agreement laying down conditions for EFSF disbursement decisions<sup>73</sup> instantiate such references which find expression also in a self-referential fashion to Decisions themselves.<sup>74</sup> The second is the *internal anchoring* of Troika's conditionality mandate to Council EDP Decisions. For example, the Eurogroup defined Troika's original negotiation mandate in the first joint program with Greece as 'including amounts and *conditionality, building on the recommendation adopted by the Ecofin Council in February*'.<sup>75</sup>

Whereas the Council is the condition-setter in this pillar, the Commission plays an essential role since the Council acts only on its Recommendation.<sup>76</sup> Both institutions effectively share the *supervisory* role of monitoring Greece's compliance with Decisions. Nonetheless, there is need to stress that the CS and CM nature of this Pillar derived from the making of its Decisions conditional on Greek bailout should not result in overestimating its actual significance. In fact, *crucial* CS and CM reside within the 'Central Pillar'. Typically, Council Decisions incorporate *alterations* of the CR along with revised fiscal targets and deadline extensions that are *first* decided within the 'Central Pillar' dialectic. Therefore, the legally visible status of this pillar under the EU Formal Architecture contrasts with its *de facto* acquiescence to the Central Pillar.

In this scheme, the *double* role of EC that arguably *binds together* the two-pillar structure by ensuring and safeguarding its policy attachment to the EDP overarching fiscal policy goals becomes immediately apparent. EC operates *both* as an EDP 'constituent' within the Formal EU pillar *and* under the informal Central Pillar vis-a-vis its Troika membership. In addition to its multi-pillar activities, EC performs a third role by concluding the Memorandum with Greece on behalf of the Eurozone lenders.<sup>77</sup>

72 Preamble of Loan Facility Agreement between Greece and Eurozone Lenders (8 May 2010) para 8.

73 EFSF Framework Agreement Art. 3(1).

74 Council Decision 2010/320/EU Preamble (paragraph 8) [The lenders have decided that their support shall be conditional on Greece respective this decision. In particular, Greece is expected to carry out the measures in this Decision in accordance with the calendars set out herein].

75 Eurogroup Statement (12<sup>th</sup> April 2010) (emphasis added).

76 Article 126(13) of TFEU.

77 See Memorandum of Understanding Between the European Commission Acting on Behalf of the Euro Area Member States and the Hellenic Republic (February 2012).

Two implications of utmost analytical value directly flow from preceding observations. First, but for ‘Formal EU Pillar’ where EC represents EU as a whole under the EU Framework on principles and rules, EC operation may fall under the previously-identified ‘dark spot’ due to acting outside of its EU scope and representing the interest of *lenders* and not of all EU Member States. Second, the active CR involvement of EC which is the primordial *supranational* EU institution pronouncing EU policy and fulfilling ‘functions of a supranational executive’<sup>78</sup> invests Greek conditionality with a direct EU dimension thus making any claim of EU’s irrelevance for Greek CR implausible.

### (3) *EuroSummit and European Council Roles in CG (Conditionality Government)*

Having positioned the *two-pillar* structure as the main *locus* of CR (conditionality relationship) on the European side, there is need to emphasize that it would be wrong to assume CR *exclusive* confinement to these institutional structures. As space precludes a detailed analysis of the contribution of all relevant institutions, we should examine two other institutions that participate in the broader Framework-Setting for the CR, namely EuroSummit and the European Council.

The former, constituting a recent crisis-borne institution composed of the Heads of State or Government of Eurozone member (mirroring the European Council)<sup>79</sup> stands atop of the ‘Central Pillar’. Borne out of the need of an institution for responding to the debt crisis at the highest political level, it is influential in framing the wider template for the Greek bailout. In particular, the EuroSummit assumed a crucial *constitutive* function for filling the *normative vacuum* for EU financial assistance to Member States with debt-financing problems existing in the first Greek bailout by pronouncing four basic principles. These were that any disbursement should be (1) made by unanimity by Eurozone Members, (2) subject to strong conditionality, (3) based on an assessment by the European Commission and ECB and (4) declared the *ultima ratio* principle of the mechanism, meaning that is available when market financing is insufficient.<sup>80</sup> Similarly, in the second bailout program it reaffirmed the principle of close monitoring of program implementation based on regular assessments by the Troika.<sup>81</sup>

Nonetheless, its statements do not usually refer to specific conditions to be implemented. In essence, it functions more as an umbrella framework-setting body for either resolving serious fundamental disagreements among Eurozone Member States usually with regards to the economic side of bailout terms and/or for confirming at the highest

78 Susanne Schmidt and Arndt Wonka, ‘European Commission’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of European Union* (OUP 2012) 337.

79 The Eurosummit convened for the first time on 12 October 2008 to discuss concerted actions in response to the debt crisis among the Euro-area Heads of State of Government. Article 12 of Treaty on Stability, Coordination and Governance and Economic and Monetary Union (in force since 1 January 2013) granted formal recognition to the institution, affirmed the informality of its meetings, provided for at least two meetings per year and for a permanent President.

80 Eurosummit, *Statement* (25 March 2010).

81 EuroSummit, *Statement* (21 July 2011).

political level any substantial bailout revisions, in particular with regards to different forms of Financial Assistance (loan extensions, debt haircuts, new bailout programs).

The European Council, essentially being the institutional Eurosummit counterpart in the EU structure consisting of Heads of State or Government of *all* EU member states, possesses a central role not so much in the CR itself, but in the relevant *constitutional* process concerning the *institutionalization* of rules and principles on bailout assistance and (hence) on conditionality. Pursuant to its mandate of ‘providing the Union with the necessary impetus for its development’<sup>82</sup> and ‘defin[ing] the general political priorities and directions thereof’,<sup>83</sup> it interlinks at a macro-economic and strategic level the bailout mechanisms with broader EU policy goals. This consistency-checking function is overwhelmingly conducted with strict rules of Fiscal consolidation as the prevailing benchmark.<sup>84</sup> In addition, the European Council has overseen and provided a coordinated platform of the whole process of the EFSF creation and of the permanent bailout mechanism of European Stability Mechanism. Finally, and more crucially, it used its the Treaty-amending power provided by Article 48 of TEU for *revising* Art 136 of TFEU so as to enable the ESM operation subject to ‘strict conditionality’.

#### (4) *The Notable Absentee: European Parliament*

In this complicated and pluralistic institutional structure, the European Parliament (EP) is entirely side-lined. No role is provided for the EP either as an accountability institution for Troika or for other CS/CM institutions, or at least with regards to the *constitutive* process of the institutionalisation of rules and principles on financial assistance. The sporadic appearance of Troika Members in the Economic and Financial Committee of the EP is not made according to a *formalized information or consultation* procedure. Given EP status as the central democratic expression of European *demos* or *demoi*, its institutional irrelevance for bailout conditionality purposes gives rise to a serious democratic conundrum since it excludes a ‘democratic-checking mechanism’ for conditionality’s compatibility with EU law.

#### b. *Procedural Construction of Conditionality Government : Principal Characteristics*

If we slightly re-focus our analytical lens on CG as a distinct *process*, in both CS (condition-setting) and CM (condition-monitoring) manifestations, at least five main features could be traced. They all flow from the prevailing position of the ‘Central Pillar’. In no case, though, it is claimed that herein list is exhaustive given the complex and multi-faceted nature of CG.

82 Article 15(1) of TEU.

83 Ibid.

84 *The European Council* is the central coordinating institution in the emerging ‘fiscal constitution’ of EU. In the so-called ‘European Semester’, launched for coordination of fiscal and economic policies of EU Member through a greater scrutiny of budgets of Member States before their enactment to Parliament, the European Council ‘based on input from the Commission and the Council, identifies the main challenges facing the Union and the euro area and gives strategic guidance on policies’ (Preamble Paragraph 14 Regulation 1175/2011).

First, CG is predominantly *informal* as both ‘Central Pillar’ institutions have an informal mode of decision-making operation. Whilst Eurogroup’s informality, directly descended from its lack of formal decision-making powers, could be perceived to promote effectiveness and foster as Puetter argues an ‘interacting and deliberative nature of consensus formation,’<sup>85</sup> lack of formalization manifestly discords with the critical character of its decisions. On a similar fashion, Troika’s internal proceedings are fully informal.

In turn, such informality closely relates with the second feature: *non-transparency*. Key CG processes, namely Eurogroup and Troika meetings as well as Troika/Government negotiations take place in a secret and shadow background since conducted behind closed doors. The absence of written records renders public access of essential scrutiny-required information on deliberations, factual bases of condition-proposing, considered particular goals or policy objectives impossible. If such absence is comprehended in conjunction with CG’s regulatory effects as the dominant pragmatic *causal* force for respective subsequent legislative changes and assessed against EU’s own ‘transparency’ standard of ‘decisions taken as openly as possible’<sup>86</sup> to the citizen, the *transparency-deficient* nature of CG becomes profound.

*Non-accountability* unsurprisingly complements informality and non-transparency. It takes two forms. First, no special formal accountability mechanisms are built into the system with regards to ‘Troika’ or ‘Eurogroup’ conditionality functions that could potentially enable some sort of democratic or other social policy check. Second, given that accountability presupposes *actual* condition-setter identification, non-transparency removes the informational basis for the formation of a ‘public opinion’ accountability because it allows a blame-shifting game among CG’s institutional actors.

Fourth, the *exclusion of social stakeholders* in respective conditionality domains acquires particular relevance for labour law. Indeed, no meaningful consultation or information with social partners is provided within CG, a *deficiency* well-criticized by ILO which has expressed its expectation ‘that the social partners will be fully implicated in the determination of any further alterations within the frameworks of the agreements with the European Commission, the IMF and the ECB that touch upon matters core to the human rights of freedom of association and collective bargaining and which are fundamental to the very basis of democracy and social peace’.<sup>87</sup> Evidently, this means that CLL conditionality-driven regulatory changes stem from a technocratic-based input completely insulated from other sources.

Finally, *time-continuity* emerges as a central procedural feature. CS and CM occur within a closely-monitored, regularly reviewed and updated with new conditions process. The process is repeated in frequent Cycles (usually 3-month reviews) of ‘Central Pillar’ interactions that are fully synchronized with the periodic disbursements timetable for eventually allowing full deployment of the pressure of ‘ER/CR’ *nexus*.

85 Puetter (n 69) 867.

86 Article 1 of TEU.

87 ILO Committee of Freedom of Association, Conclusions on Case No. 2820 (Greece) in 365<sup>th</sup> Report on Committee of Freedom Association (1-6 November 2012) par. 1002.



c) *Institutional Pluralism and Policy Monism of Conditionality Government*

Vertically shaped on its condition-setter/condition-receiver configuration, CG (as evident from procedural and institutional features) instantiates a characteristic case of *institutional pluralism* where 'multiple institutions carry out the same functions in a single system',<sup>88</sup> of fragmented decision-making and of an informal *modus operandi* on the 'intra condition-setter' side. Snyder's depiction of EMU as the 'approndissement of legal pluralism, or multi-site governance characterized by (...) striking institutional and normative heterogeneity',<sup>89</sup> could be as well applied for CG.

In this context, the preceding qualities attract the 'Governance Network' category as a well-suited (albeit imperfect) candidate for its conceptualization. In shorthand, 'Network Governances' are distinguished by four constituting features: (1) horizontal articulation of interdependent, but operationally autonomous actors (2) interaction through 'ongoing negotiations' (3) facilitating self-regulation in the shadow of hierarchy (4) contributing to the production of public regulation in the broad sense of the term.<sup>90</sup> Assessed against this definitional benchmark, CG satisfies them to a significant extent.

First, it is based on a horizontal inter-dependence and coordination of different actors (EU, IMF, ECB, European Commission, Eurogroup, European Council, Eurosummit) who retain their institutional autonomy. Troika is an *institutionalized expression* of this inter-dependence as created by the specific EU (or better EMU) and IMF co-operation on bailout programs and conditionality, but then itself acts on the conditionality relationship with a degree of relative autonomy, as evidenced by Eurogroup's deferential treatment towards Troika. Second, *negotiations* constitute an essential part of its *proceedings* since the Eurogroup (along with European Council and Eurosummit) is an *intergovernmental* institution. As mentioned below, though, CR 'negotiations' are rather limited. Third, a large degree of self-regulation exists in CG, a fact well-comprehended when considering that its operation outside formal processes naturally entailed that the ensuing normative gap has to be filled through self-regulation. This aspect clearly manifests in the 'soft nature' of most of its decisions (in the form of Statement or Conclusions) deducing their *authoritative* status more by virtue of the acquired *political* legitimacy and status of the network. Fourth, the CG results in the production of public regulation on condition-related regulatory domains through the identified ER/CR nexus.

88 Daniel Halberstram, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance' Working Paper No. 229 Public Law and Legal Theory Working Paper Series (University of Michigan Law School, November 2011) 28; Institutional pluralism is employed here as referring to *multiple institutions* performing the same function and not in its second meaning as denoting the presence of more than one dominating logic in the environment generating multiple institutionally given identities of a *single* institution [see Matthew Kraatz and Emily Block, 'Organizational Implications of Institutional Pluralism' in Royston Greenwood et al (eds), *The Sage handbook of organizational institutionalism* (SAGE 2008) 244], which, though, could analytically capture the multiple institutional role of the European Commission within the conditionality system.

89 Francis Snyder, 'EMU-Integration and Differentiation: Metaphor for European Union' in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law* (OUP 2011) 688.

90 Jacob Torfing, 'Governance Networks' in David Levi-Faur(ed), *The Oxford Handbook of Governance* (OUP 2012) 101.

Therefore, it is possible to conceptualize CG as an ad hoc *quasi* ‘institutional network’ defined by its crisis-solving *purposive* nature of the bailout mechanism where is *attached*. Network partners pool their resources, expertise, legitimacy and capabilities in the *optimal* institutional interactions and constellations perceived to promote its purpose. Under this prism, the process of *formalization* of conditionality rules could be reckoned as a process of *network institutionalization* occurring when ‘regular patterns of interaction are sedimented into norms, rules, cognitive codes, and joint perceptions, and a particular distribution and deployment of resources becomes accepted as legitimate’.<sup>91</sup>

In these conditions of institutional diversity and pluralism it is not unreasonable to anticipate a concomitant degree of policy differentiation owing to the numerical multiplicity of institutional actors and input. Nonetheless, an extreme *policy consistency* arises in fact thus rendering the term ‘policy monism’ appropriate. How to account for this *prima facie* paradox?

The answer requires ascertaining *policy integration* processes. At first, CG configuration seems to lend empirical support to the ‘liberal intergovernmentalist’ camp positing States as the main driving forces of EU development<sup>92</sup> because Eurogroup is an inter-governmental political institution proceeding through *negotiations* in contrast with the *technocratic* ECB and IMF. Such an approach, though, would fail to capture the *technocratic* nature of Eurogroup’s intergovernmentalism resulting from its (1) EMU network ‘topology’ and (2) ‘deference’ to Troika, which function as central *policy* integration forces. In particular, its *location* within the monetarist-dominated EMU network whose primary objective is to ‘maintain price stability’<sup>93</sup> provides a clear narrow *technocratic* mandate. Second, as identified above, Eurogroup defers to troika for CR thus reducing the scope for meaningful negotiations over specific policy conditions (e.g. labour market reforms).

In turn, if this deference is associated with the fact that two of Troika’s institutions, ECB and IMF, are specialized economic institutions that both embrace a doctrinal monetarist approach as their *constitutive* goals, then their *policy consistency* becomes immediately discernible. The control of CG process by economically powerful Member States which leverage their bailout participation *qua* dominant lenders for setting policy conditions plays also a crucial role in *policy monism*. Their influence across each CG institution through various formal and informal channels (for example Germany exerts a dominant influence- through Bundesbank- on ECB along with its predominant role in the Eurogroup) produces a *policy monist* outcome reflecting the policy input of few, if not one, Member State(s).

Emanating from these *integration* processes, policy monism blocks major policy differentiation in the network and the –typical in pluralistic schemes- emergence of serious institutional conflicts or mixed multi-policy outcomes. Network participants either merely replicate *identical* policy frameworks in their decisions through the standard use of

91 *ibid* 102.

92 On liberal intergovernmentalism see Andrew Moravicz, ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’ (1993) 31(4) *Journal of Common Market Studies* 473 and by the same author *The Choice for Europe: social purpose and state power from Messina to Maastricht* (UCL Press 1999).

93 Art 119(2) TFEU.

cross-referencing<sup>94</sup> or, even in the absence thereof, their operation at the same policy plane prevents the occurrence of *consistency or compatibility* problems.

Having identified ‘policy monism’ in contradistinction with ‘institutional pluralism’, our inquiry moves now to examining the substance of this policy in the field of CLL.

### 3. Substantive Construction of Greek CLL Conditionality

CLL conditionality, insofar as highly capitalizing on its ER/CR ‘nexus’ for being fully incorporated into the domestic legal order,<sup>95</sup> exemplifies a characteristic case of *path departure* defined as ‘when a juncture is reached at which substantively different laws and policies began to be followed.’<sup>96</sup> Operating within the *constitutive* framework set by the overarching goals of ‘reduction in unit labour costs and improvements in competitiveness, through a combination of upfront nominal wage cuts and structural labour market reforms’<sup>97</sup> for ‘sending the message that the country has taken the firm decision to foster its competitiveness, to attract investments, and thus to promote employment and increase its development prospects in favour of weaker citizens’,<sup>98</sup> conditionality purports to neutralize the pro-worker identity of the long-established CLL scheme through promoting fast-track and multi-faceted deregulation. As Koukiadaki and Kretsos point out labour reforms ‘aim to liberalise further and to deregulate key parts of the labour market and industrial relations system, and reduce the size and influence of the welfare state’.<sup>99</sup>

Pre-conditionality CLL edifice was built upon a central *constitutive* foundation: the *protective* principle. The latter derives from the fundamental premise that ‘labour law

94 For cross-referencing instances see: Council Decision 2010/320/EU Preamble (paragraph 8) [The lenders have decided that their support shall be conditional on Greece respective this decision. In particular, Greece is expected to carry out the measures in this Decision in accordance with the calendars set out herein]; *Eurogroup, Statement (2 May 2010)* [The main elements of policy conditionality, as endorsed today, will be enshrined in a Council Decision under Article 126 and 136 TFEU to be formally adopted in the coming days and further detailed in a Memorandum of Understanding, to be concluded between the Greek authorities and the Commission on behalf of euro area Member States]; *Memorandum of Understanding on Specific Economic Policy Conditionality* [The release of the tranches will be based on observance of quantitative performance criteria and a positive evaluation of progress made with respect to policy criteria in Council Decision 2011/734/EU of July 2011 (as amended), the Memorandum of economic and financial policies (MEFP) and in this Memorandum] 51 in Memorandum II (n 1).

95 Conditionality is incorporated into the Greek legal order by multiple regulatory interventions. Law 3845/2010 annexed Memorandum I (n 1) and Law 4046/2012 annexed Memorandum II (n 1). 4046/2012 reforms were implemented by the Council of Ministers Act 6/28.2.2012. Apart from these fundamental Memorandum-incorporating Laws, other Labour Laws were passed for ensuring their implementation or pursuant to Troika Reviews.

96 Bob Hepple and Bruno Veneziani, ‘Introduction’ in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Hart Publishing 2009) 21.

97 Memorandum II (n 1) p.4.

98 *Greek Government*, Explanatory Statement on Law 3845/2010. (in Greek).

99 Aristeia Koukiadaki and Lefteris Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’ (2012) 41(3) *Industrial Law Journal* 276, 276.

cannot exist but as a law for the protection of dependent labour<sup>100</sup> and finds explicit recognition in Greek case-law.<sup>101</sup> In turn, the *protective principle* generates a *second* principle: principle of *asymmetry* or *partiality* of labour law towards the weaker party which ‘does not constitute legal contradiction but expression of a real legal culture.’<sup>102</sup>

With regards to regulatory *locus*, the *pro-worker* CLL identity emerged from the *protective* dialectic between constitutional labour rights provisions (safeguarding trade union activities by imposing a positive state obligation,<sup>103</sup> right of collective bargaining through granting collective agreements(CA) a complementary function to law<sup>104</sup> and a broad recognition of right to strike)<sup>105</sup> and the *protective* CLL laws affording wide protection to workers and trade unions, namely 1264/1982 on internal trade union operation and 1876/1990 on collective negotiations, collective agreements, collective bargaining and arbitration.

Radically departing from this environment, *conditionality* focuses on de-capacitating the *protective* character of the legislative side of the dialectic as thereof perceived to create ‘rigidities that prevent wages from adjusting to economic conditions’.<sup>106</sup> In this direction, reforms could be argued to fall into five broad areas: (1) Decentralization of collective bargaining (2) Elimination of *protective* aspects of CA derogating from contractualism (‘after-effect’, extension of CA) (3) State intervention in modification of the effect of *existing* CA (4) Elimination of *Protective* Asymmetry in Arbitration, and (5) State determination of minimum-wage (MW).

*Decentralization* is realized through the (a) erosion of ‘favourability’ principle and (b) promotion of enterprise-level bargaining. Within pre-conditionality scheme, *favourability* served as a cardinal *integration* principle of the multiple levels of collective agreements (enterprise, sectoral, local occupational, national occupational, national general)<sup>107</sup> into a *protective* pyramid due to stipulating that in case of *conflict* between

100 *Aris Kazakos*, *Collective Labour Law* (Sakkoulas Athina-Thessaloniki 2011) 50 (in Greek).

101 For a recent example of case-law recognition of *protective* principle see *Olomeleia Areiou Pagou* (Supreme Court for Civil and Criminal Law) 1/2007.

102 *Aris Kazakos*, *Collective Labour Law* (n 100) 3.

103 Article 23(1) reads ‘The State shall adopt due measures safeguarding the freedom to unionize and the unhindered exercise of related rights against any infringements thereon within the limits of the Law’ (official translation by the Greek Parliament).

104 Article 22(2) reads ‘General working conditions shall be determined by law, supplemented by collective labour agreements concluded through free negotiations and, in case of the failure of such, by rules determined by arbitration’ (official translation by the Greek Parliament).

105 Article 23(2) reads ‘Strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and general labour interests of working’ (official translation by the Greek parliament).

106 Memorandum II (n 1) par. 29.

107 Under Art. 3(1) of 1876/1990, enterprise-level CA coverage is extended to all employees in the enterprise regardless of their status as members of signatory trade unions and the same *comprehensive* effect was applicable for National General Collective Agreements that covered *all* employees, thus having effectively set absolute minimum standards (most notably, minimum wage).

their terms for a particular employee the more favourable applies.<sup>108</sup> In line with the inclusion of suspension of ‘favourability’ clause<sup>109</sup> into conditionality, the long-standing *pyramid* was rapidly deconstructed. In particular, Law 3845/2010 enabled enterprise-level agreements to derogate downwards from sectoral and occupational ones<sup>110</sup> during the period of Medium-Term Framework of Fiscal Strategy (2012–2015).<sup>111</sup>

This development should be considered in conjunction with (b) set of reforms facilitating enterprise-level CA that has two principal tenets: (i) easing of numerical procedural requirements for their conclusion by abolishing the minimum numerical requirement of 50 workers to be employed in the firm and (ii) the granting of CA powers to atypical ‘enterprise-level’ associations.<sup>112</sup> Whereas the ‘association of persons’ was in the pre-crisis regime provided as a *limited* entity with no CA powers formed by at least minimum 10 workers in enterprises employing no more than 40 workers and on the condition that no enterprise-level trade union existed with at least *half* of total employees as members,<sup>113</sup> conditionality reforms substantially reconfigured the institution by granting to it two new powers.

108 Article 10 of 1876/1990; The only exception to the pyramid was that occupational collective agreements *always* gave precedence to sectoral and enterprise-level collective agreements. (Article 7(3) of 1876/1990).

109 While Memorandum I (n 1) included a general clause stating that ‘in line with the lowering of public sector wages, private sector wages need to become more flexible to allow cost moderation for an extended period of time’ (par 22) and that the ‘Government ‘will reform the legal framework for wage bargaining in the private sector (par. 22), the November 2011 Update explicitly included the suspension of ‘favourability’ clause throughout the fiscal consolidation periods (2012–2015) in the list of prior actions, (Updated Memorandum) of Economic and Financial Policies (30 November 2011) 4(1) p. 58.

110 In fact, Article 2(7) of 3845/2010 allowed enterprise-level CA and sectoral CA to derogate downwards even from the National General Collective Agreement, thus potentially being below the CA-agreed minimum wage and terms of conditions, but in practice this possibility was never used. Eventually, Article 13 of Law 3899/2010 of ‘Special Enterprise-Level Agreements’ stipulated that these enterprise-level CA shall observe the minimum level set by the NGCA, and finally Law 37(5) of 4024/2011 made the same stipulation for the normal enterprise-level CA.

111 Law 3899/2010 introduced the short-lived ‘Special Enterprise-Level Agreements’ (SEA) with sub-minimum function in relation to sector-level agreements but not to the NGCA. SEA ‘shall take into account the need of the enterprise to adapt to market conditions with the aim of creating or preserving jobs, as well as increasing the productivity and competitiveness of firms’ [Art 13(1)] and their conclusion was subject to a non-binding opinion to be issued by the Hellenic Labour Inspection Body (SEPE) reviewing the substance of the reasons outlined in an explanatory note submitted by the enterprise [Art 13 (3)]. Whilst not altering the labour organizations competent of signing them, so that in the absence of an enterprise-level trade union, sectoral trade unions had the power of their conclusion, the SEA were the first to deviate from the minimum number of 50 employees required for typical firm-level agreements. Whereas the failure of SEA led to their abolition by Law 4024/2011, its ‘no-numerical’ requirement was regularized for typical enterprise-level agreements by the same law, so that in retrospect 3899/2010 seems as the first step of the *transition* towards the strengthening of the status of enterprise-level agreements.

112 Art 37(1) of 4024/2011.

113 Art 1(3) of 1264/1982.

In particular, 4024/2011 enabled these associations to conclude enterprise-level CA in the absence of an enterprise-level trade union *ahead* of sectoral unions if they represent 3/5 of workers irrespective of the total number employed in the enterprise.<sup>114</sup> In addition, 3986/2011 allowed the formation of ‘associations of persons’ with very low procedural formative requirements (representing 15 % of workers in enterprises with 20 workers or less and 25 % in enterprises with more than 20 workers) for the purpose of negotiating working-time arrangements. These working-time agreements enjoy full parity (no particular order is stipulated) with respective agreements concluded by employers with the most representative enterprise trade union or with the Works councils.<sup>115</sup>

Evidently, the granting of collective bargaining capacity to these non-trade union formations affords wide space for abuse in the form of employer-controlled associations formed for the *sole* aim of capitalizing on the sub-minimum function of firm-level in relation to sectoral agreements or for ensuring favourable to employers working-time arrangements. As ILO Committee notes ‘the granting of collective bargaining rights to such associations may seriously undermine the position of trade unions as the representative voice of workers in the collective bargaining process’.<sup>116</sup> Obviously, workers enjoy virtually in-existent bargaining powers in these *ad hoc* entities as a result of direct employer pressures, an asymmetry aggravated by their lack of a ‘permanent mandate to represent workers on collective issues of work’.<sup>117</sup>

Second, conditionality mandated the erosion of two principal *protective* privileges of CLL scheme derogating from a *strict* contractual effect of collective agreements: (1) suspension of the ‘extension’ of sectoral or occupational CA for non-covered parties<sup>118</sup> (2) and reduction of ‘after-effect’ of collective contracts to three months as prior actions for disbursement.<sup>119</sup>

Following these conditions, 37(6) of 4024/2011 suspended Art. 11 (2) of 1876/1990 previously giving the Minister of Labour the *power* to extend the *personal* scope of sectoral and occupational agreements to *all* employers and employees in a particular sector or occupation provided that the signatory employers or their respective organisations represent at least 51 % of employees in the said sector or occupation, for the duration of program of fiscal consolidation 2012-2015.<sup>120</sup> This extension has been held by domestic Courts to be a manifestation of public interest since it unifies the conditions of work in an occupation or sector and thus protecting collective regulation from unfair competition by non-covered parties.<sup>121</sup>

In addition, the Council of Ministers Act 6/28.2.2012 [CMA 6/2012] reduced the *temporal* scope of the so-called ‘after-effect’ of CA. Within pre-conditionality scheme,

114 Art 37(1).

115 Art 42(6).

116 CFA, Conclusions (n 87) 998.

117 GSEE (General Confederation of Labour for private sector employees) arguments in CFA, Conclusions (n 87) 826.

118 Updated Memorandum of Economic and Financial Policies (6 August 2010) par.20.

119 Memorandum II (n 1) par 29.

120 Article 37(6).

121 For the public interest justification of personal extension see Greek Supreme Administrative Court Decisions STE 3050/1984 and STE 4555/1996.

all provisions of a CA were *automatically* extended for a six-month period unless a new CA was concluded in-between. This scheme aimed at facilitating the *undisrupted* succession of collective regulation of the terms and conditions of employment during the transition phase from an old to a new collective agreement. The *automatic* ‘after-effect’ period is now shortened into three months whilst following this period only provisions on basic wage and four benefits (seniority, child, education and hazardous professions) will be still in force until being subject to a *new* regulation by an individual or collective agreement.<sup>122</sup> In contrast with previous stipulation, the absence of a provision for the ‘after-effect’ to cover employees hired *after* the expiration or renunciation of the collective agreement but within the ‘after-effect’ period leaves them unprotected and thus renders the regulation of their employment conditions subject to the *asymmetrical* individual negotiations.

In overall, the cumulative effect produced is the undermining of sectoral bargaining. This is because individual employers are expected to withdraw from sectoral organizations as long as they know that any potential agreement could not be binding on them through extension. Such undermining of sectoral agreements causing immediate pay cuts perfectly complements decentralization and is in full compliance with the government-stated need of building ‘a new collective bargaining based on enterprise-level bargaining and not just on national or sectoral collective agreements’.<sup>123</sup>

The *third* area relates to state intervention in suspending or modifying the effects of *existing* collective agreements at least in three ways. First, in conformity with conditionality, CMA 6/2012 modified the minimum wage (MW) effect of the 15.7.2010 NG-CA-agreed MW by reducing it by 22 %<sup>124</sup> whilst applying a blanket suspension on signed collective agreements or arbitration awards granting automatic wage increases until unemployment rate falls below 10 %.<sup>125</sup> Second, the provision of sub-minimum wages for young workers (reduced by 32 % from the NGCA) annulled for the first time the function of MW in setting non-derogable minima for *all* workers. It is worth noting that this sub-minimum provision for young workers (*expressly* mandated by both Council Decisions and Memoranda)<sup>126</sup> was declared by a (non-binding) Decision of the European Social Committee of the European Social Charter to be both *discriminatory* on basis of age and thus violating the non-discrimination clause in the Preamble of European Social Charter as well as violating the *right to fair remuneration* (Art 4) due to the new MW level for young workers falling below the poverty line.<sup>127</sup> A third instance of intervention consists in the *retroactive* application of the new rules on duration of CA

122 CMA 6/2012 Art 2(4),.

123 Greek Ministry of Finance reply *included* in ILO, Report on the High Level Mission in Greece (19-23 September 2011) 110.

124 Art 1(1).

125 Art. 4; Given the unemployment rate of 27,6 % (Eurostat, August 2013) with upwards trend, this condition is not expected to be satisfied in short-term thus making state *intervention of indefinite duration* in fact.

126 Memorandum I (n 1) p. 100 and Council of EU Decision on Greece (2010/320/EU) Article 3(d) called for sub-minimum wages for young workers and long-term unemployed.

127 European Committee of Social Rights, Decision on the Merits (23 May 2012) General Confederation of employees of the national electric power corporation (GENO-DEI) and Confederation of Greek Civil Servants’ Trade Unions(ADEDY) v Greece (Complaint 66/2011).

(*compulsorily* fixed-term and between one and three years) on *existing* ones so that their end was *legislatively* determined against their own terms.<sup>128</sup>

All interventions represent a multi-front violation of collective autonomy as expressed in the agreed terms and conditions of CA. In this context, it derogates from the well-established domestic law principle of subsidiarity pursuant to which ‘state legislator, after institutionally enacting a framework of general conditions, shall act subsidiary in cases where collective autonomy and arbitration cannot, for legal or factual reasons, operate’.<sup>129</sup>

Fourth, conditionality required elimination of *asymmetry* in arbitration, previously benefiting workers by reserving only for trade unions the right to recourse to compulsory arbitration in cases where they accepted the mediator’s proposal and the employer rejected it.<sup>130</sup> Law 3899/2010 extended such recourse to both sides<sup>131</sup> and eventually Article 3 of CMA 6/2012 abolished unilateral recourse to arbitration altogether. Hence workers need now the consent of their employers for initiating arbitration. Other changes were also enacted by 3899/2010 with regards to arbitration towards strengthening the employer’s side. First, the scope of arbitration awards is now confined only to basic monthly or daily wages and not, as was previously the case, to all aspects of a collective agreement<sup>132</sup> whilst a 10-day strike ban period commencing from the day of recourse to arbitration is stipulated.<sup>133</sup> Furthermore, a new set of macro-economic data to be considered by the arbitrator is added. These include *inter alia* the ‘economic conditions, progress in the reduction of competitiveness gap, reduction of labour costs per unit during the period of fiscal consolidation and the productive activity in the dispute-related sector’.<sup>134</sup>

Beyond any doubt, the most significant of the reforms is the radical transformation of MW-setting mechanism from a CA-based through NGCA to a statutory-based one. In effect, this change effectuated the displacement of the prime *bedrock* of pre-conditionality CLL and to a (large extent) of the Greek social and welfare model, namely the resting of MW-setting on collective autonomy as exercised by big confederations of employers and employees.

Pursuant to conditionality’s demand for the Government to initiate a consultation process with social partners under the (rather narrow-defined aim) of ‘replacing the wage rates set in the NGCA with a statutory minimum wage rate legislated by the government in consultation with social partners’<sup>135</sup> and ‘to prepare a timetable for the overhaul of

128 More specifically, Article 2(2) set a general fixed expiry date (14-2-13) for CA *already in force* for at least two years (since the enactment date of CMA 6/2012), while Art 2(3) mandated for the rest their expiry after three years of their entry into force.

129 Aris Kazakos, ‘Collective Agreements and Arbitration after the Council of Ministers Act 6/28.2.2012- The Destruction of the System of Production of Collective Regulations and the violent return to the individual employment contract’ 2012 9 Epitheorisi Ergatikou Dikaiou 593, 606. (in Greek).

130 Art 16(1 c) of 1876/1990.

131 Article 16 (2 a).

132 Article 16 (3).

133 Article 16(8).

134 Art 3(3) of CMA 6/2012.

135 Memorandum II (n 1) p. 75.



the national general collective agreement by end-2012',<sup>136</sup> Law 4093/2012 enacted a new statutory MW-setting scheme to be applicable by 1.4.2013 (date where the 'after-effect of the previous NGCA expired). This Law set the MW rates 'until the end of the period of fiscal consolidation provided in the Memoranda attached to 4046/2012 and to subsequent modifications'.<sup>137</sup>

In full conformity with conditionality, a timetable was also established by 4093/2012 according to which a Council of Ministers Act was to be enacted in the first trimester of 2013 for determining a permanent process of statutory MW mechanism that will take into account the macro-economic criteria of the 'situation and perspectives of Greek economy [and] labour market (in particular with regards to unemployment rates)'.<sup>138</sup> Article 103 of Law 4172/2013 (and not a CMA) finally provided for this exact mechanism of determination of minimum wage by the Government. After 2017 (the anticipated end of fiscal consolidation programmes), the minimum wage is to be set by a Council of Minister's Act with unions being relegated to a mere consultative status among various scientific, research and other bodies.

In this way, *conditionality* transferred the MW power from social partners to the Government thereby depriving MW setting from its collective autonomy pillar under a seemingly fast-track process with an outcome *substantively* predetermined by conditionality. In turn, since Government's regulatory autonomy is restrained in the face of 'strict' ER/CR nexus, the MW power is effectively transferred to condition-setters, primarily Eurogroup and Troika.

All reforms are manifestly directed towards *deconstructing* the *legislative side* of the protective dialectic thus restricting the constitution to a *defensive* operation against deregulation rather than to its pre-conditionality function of being a generator of *protective synergies* with legislation. Whereas analysis of domestic constitutional integration of conditionality lies beyond the scope of our inquiry, it is essential to make a brief reference to the *public interest* role in *de-capacitating* the 'constitutional' side of the *dialectic*. Such de-capacitation is principally realized through invoking a *derivative* conception of public interest. Rather than judging each measure's *direct* ability to foster the public interest even if the latter defined along economic growth lines, the public interest is blindly equated with securing the default-preventing financial resources and thus only *derivatively* justifying CLL measures merely *in virtue of their status* as conditionality attached to the external loan assistance program and not with regards to their substantial contribution or not to economic growth.

On the whole, conditionality-mandated CLL reforms move towards neutralization of its *previous* pro-worker identity 'in a manner which seems to be disconnected from Greek realities'.<sup>139</sup> Considering the immense impact of reforms on deconstructing a long-standing edifice, the lack of meaningful consultation with social partners beyond as a check-ticking pretentious process for pre-agreed decisions taken within *conditionality pillars*, stands as a notable feature. On a related note, Memorandum's observation

136 Ibid.

137 Art 1 (IA 11 par.1) 4093/2012. While the program of fiscal consolidation of the Memoranda attached to Law 4046/2012 expires in 2016, the reference to 'subsequent modifications' renders the end-date of this provision rather uncertain at the moment.

138 Ibid.

139 ILO, High Level Mission (n 123) par. 302.

that 'the outcome of social dialogue to promote employment and competitiveness fell short of *expectations*'<sup>140</sup> as a rationale for the CLL reforms is an additional manifestation of the perceived *marginal* role of social partners since it adopts a *substantive review thesis* for social dialogue outcomes in direct contravention with the free nature of collective negotiations and the concomitant principle of respect of their outcomes.

To conclude this part, our substantive inquiry has identified the *anti-protective* orientation of conditionality as the principal substantive force inside the 'Black Hole'.

#### 4. 'Neoliberal Hypothesis' Confirmed

This section undertakes the ultimate step of our analytical journey towards validating our central Hypothesis- the Black Hole Hypothesis- by affirming the second sub-hypothesis, the *Neo-Liberal Black Hole Hypothesis*. The later consists of two claims: the (1) first contending the 'neoliberal' texture of conditionality and the (2) second arguing about its 'black' or 'dark' status as a non-conventional regulatory medium. A critical synthesis of preceding findings is argued to substantiate both claims.

##### a) *The Neoliberal Texture of Conditionality: Confirming the First Claim*

Our inquiry has already identified the conflict-averse '*policy monist*' environment of CG that establishes a stark antithesis with the pluralistic 'network' nature of its institutional geometry. Should this *monism* receives scrutiny for its content, its neoliberal quality becomes rather manifest. For supporting this assumption, the preliminary task of *defining* neoliberalism is required.

Prior of this, the reader should be issued with a double definitional warning. First, one cannot but observe the almost exclusive usage of neoliberalism as a 'swearword' from its opponents in the course of political discourse rather than from its (supposedly) proponents which indeed frustrates a clarification of its precise analytical contours.<sup>141</sup> Second, rather than been a monolithic or single set of policy prescriptions, neo-liberalism is often argued to be an umbrella ideological term thus constituting more 'a heterogeneous set of institutions consisting of various ideas, social and economic policies, and ways of organizing political and economic activity that are quite different from others'.<sup>142</sup> Whilst the 'umbrella term' thesis is to a certain extent true, a core for neoliberalism could be delineated- a task that our inquiry now turns into.

140 Memorandum II (n 1) 4(1) p. 75. (emphasis added).

141 See *Oliver Hartwich and Razeen Sally*, *Neoliberalism: The Genesis of a Political Swearword* (Center for Independent Studies 2009).

142 *John Campbell and Ove Pedersen*, 'Introduction' in John Campbell and Ove Pedersen (eds), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2001) 5.

(1) *Setting the Benchmark: Delineating the Definitional Contours of Neo-Liberalism*

Neo-liberalism's coherence as a *distinct* ideological species derives from its one-sided *constitutionalisation*<sup>143</sup> of market rationality that poses a single and comprehensive *economized* 'litmus test' for all sorts of policies and laws. Social or labour minimum standards are held to fit this 'straitjacket' only insofar as been laid 'by means not inimical to initiative and functioning of the market'.<sup>144</sup> Discerning the centrality of the constitutive paradigm of neoliberalism structured around market imperatives is essential for any discourse on particular neoliberal policies in at least two respects.

First, in virtue of being a paradigm, it places 'broad cognitive constraints on the range of solutions that actors perceive and deem useful for solving problems'.<sup>145</sup> In this sense, it *frames* the cognitive perception of problems which regulatory choices aim to solve thus giving rise to a typical neo-liberal *paradigm-policy causation*. Portrayal of economic crisis as a 'competitiveness' problem requiring deregulation of labour laws with the latter comprehended as market rigidities forms a familiar example of such causation. Indeed, it is the *discursive separation* of causation's duality so that the *policy* side becomes analytically disconnected from the *paradigm* side that accounts for the appearance of neo-liberal policies as natural or self-evident. Ewing refers to such an *analytically disconnected* causation in his statement that the search for justification in economic efficiency or on economic grounds has put labour law in a blind alley that 'allows the debate to be fought on the territory of the neo-liberals, and for justifications to be sought which are implausible, unsubstantiated, and unconvincing'.<sup>146</sup>

Second, due to neo-liberalism been defined by its *paradigm-setting* market rationality, the concrete regulatory policy set remains open-ended and flexible. In principle, though, no restriction is placed upon the scope of application of the aforementioned *litmus test*. All policies or regulatory areas could potentially suffer de-legitimization simply by their perceived incompatibility with the *constitutionalised* economic rationality.

Pursuant to paradigm-policy *nexus*, neo-liberalism promotes 'strong individual property, the rule of law, and the institutions of freely functioning markets and free trade',<sup>147</sup> supports 'a legal freedom of freely negotiated contractual juridical individuals in the free market',<sup>148</sup> based on the protection of sanctity of contracts and of the individual right to freedom of action, expression and choice<sup>149</sup> whilst it regards 'freedom of businesses and corporations (legally regarded as individuals) to operate within this institutional framework of free markets and free trade as a fundamental good'.<sup>150</sup> Hence it endorses a *pure* market-enabling state with minimum social provision and adopts a

143 The term is employed here as referring to the *constitutionalisation* within the analytical-ideological system of neo-liberalism and not in its traditional legal/political usage.

144 *The Mont Pelerin Society*, Statement of Aims (1947).

145 John Campbell, 'Institutional Analysis and the Role of Ideas in Political Economy' in *The Rise of Neoliberalism and Institutional Analysis* (n 142) 170.

146 Keith Ewing, 'The Sense of Measure': Old Wine in New Bottles, or New Wine in Old Bottles or New Wine in New Bottles? (2010) 19(2) *Social & Legal Studies* 231, 231.

147 David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 64.

148 Ibid.

149 Ibid.

150 Ibid.

doctrinal adherence to monetarist or supply-side economic policy to be prioritized and realized at any cost, even at the expense of high unemployment and low growth.

Considering that the neo-liberal edifice is built on individualism and market wage-determination since resting upon the proposition that *both* parties benefit from a transaction if is bilaterally voluntary and informed,<sup>151</sup> CLL unsurprisingly becomes its prime target for deregulation as it perfectly epitomizes the diametrically *antithetical* ethos. In particular, collectivism forms a foundational presupposition of CLL whose very existence depends upon the recognition both of workers' collectivities as central institutional actors and of *collective relationships* between workers and employers as a permissible object of regulation outside the contractual frame. In addition, since CLL creates or at least normatively legitimizes a non-market wage-determination mechanism founded upon the *collective* will of employers and employees, its function directly contrasts with the neoliberal aim of *exclusive* market wage-determination. Therefore, even without adhering to a conception of neo-liberalism as a 'project to restore capitalist class power'<sup>152</sup> that presents an additional basis for CLL deregulation by perceiving the latter as a strategic instrument for undermining working class power through weakening trade unions' position, its inconsistency with CLL is well-established on previous grounds.

Besides its substantive goals, neo-liberalism is distinguished by the promotion of governance by elites or experts, the 'professional second hand-dealers of ideas' according to Hayek.<sup>153</sup> Within the overall framework of neoliberal argumentation for the 'redefinition of the political to construct a "protected domain" to secure individual freedom against encroachments of the power of the state and pressures of the "tyranny of the majority" in democratic system'<sup>154</sup> de-politicization occurs through a process of neoliberal institutionalization which Stephen Gill names *New Constitutionalism*. The latter 'seek[s] to separate economic policies from broad political accountability in order to make governments more responsive to the discipline of market forces and correspondingly less to popular-democratic forces and processes'.<sup>155</sup> In turn, this insulation of economics from politics is perceived to address the Hayekian threat of politicization of economics.<sup>156</sup>

De-politicization and insulation, though, are just linguistic metonyms for neo-liberalism's preference of rule by technocratic elites. Indeed, the purified technocratic input is considered to provide the *optimum* means for securing market rationality due to being non-diluted from socio-political considerations typically generated in the democratic process. Rather than possessing an *independent* meta-systemic value, the legitimacy of democracy is fully conditioned on its capacity to fit into the above-identified economi-

151 *Milton Friedman*, *Capitalism and Freedom* (University of Chicago Press 1962) 13.

152 For this view see *David Harvey* (n 147) and *Gerland Dumenil and Dominique Levy*, *Capital Resurgent: Roots of the Neoliberal Revolution* (Harvard University Press 2004).

153 *Friedrich Hayek*, 'The Intellectuals and Socialism' (1949) 16(3) *University of Chicago Law Review* 417, 417.

154 *Stephen Gill*, 'Constitutionalizing Inequality and the Clash of Globalization' (2002) 4(2) *International Studies Review* 47, 52.

155 *Stephen Gill*, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' (1998) 3(1) *New Political Economy* 5, 5.

156 See *Hayek* (n 153).

zed ‘straitjacket’. In turn, if democracy in total becomes *instrumentalised* then the same *a fortiori* applies for trade unions’ participation in policy making which typically fail the ‘neoliberal test’ owing to their prior conceptualization as representatives of privileged interests impeding the full deployment of the efficient market forces.

## (2) *Confirming CG’s Neoliberal Texture*

Unless one contests the herein account of neo-liberalism, the thesis positing CG (conditionality government) as predominantly (if not entirely) neoliberal is the only tenable in the face of its construction. Indeed, an analytical scanning of CG reveals *neo-liberal paradigm-condition causation* to be its central skeleton.

As already observed, the paradigm of CG is defined along the overarching goals of competitiveness and fiscal consolidation that place our familiar *economized* ‘straitjacket’ for the *legitimacy* of specific policy and legal schemes. In turn, these goals acquire their dominant status by their *framing* under the neo-liberal monetarist paradigm as no-alternative *rational* responses within an austerity-based crisis management and economic restructuring. This paradigm is consolidated, reproduced and cemented in at least three ways.

First, the anchoring of CG’s network to EDP both through internalizing its monetary fiscal consolidation aims and institutionally through the ‘Formal EU Pillar’ functions as a primary *paradigm transmission carrier*. Second, the *organic* composition of CG ensures the sustaining of the neo-liberal paradigm insofar as IMF generally operates under the latter and ECB embraces a monetarist paradigm. Third, in what merely constitutes the reverse side of our last point, exclusion of alternative-paradigm institutions (like the European Parliament or Social Partners) is essential for maintaining the undiluted *monist* role of neo-liberal paradigm in CG.

In this context, the paradigm produces an *economized* environment defined by competitiveness teleology and economic/technocratic language that subsequently fertilizes concrete neo-liberal ‘paradigm-condition’ causations. Moving to the *condition* side, both substantial and procedural/institutional features correspond perfectly to neo-liberal dictates. Let us examine them separately.

By being on the receiving side of a *hostile* causation, CLL deconstruction emerges as a natural outcome in affirmation of Wedderburn’s general comment that ‘the social can of course contribute to competitiveness, but when it conflicts with the economic, whatever the rhetoric it has few friends’.<sup>157</sup> As ILO characteristically observes there is ‘an overall context where imposed decentralization and weakening of the broader framework for collectively bargaining are likely to leave workers with no minimum safety net for their terms and conditions, even beyond the wage issue’.<sup>158</sup> The preceding remark captures a point of utmost significance. CLL conditionality reforms shall be viewed *holistically* in their establishing of concerted *synergies* that result in the weakening of workers’ power through the institutional undermining of collective bargaining. In essence, the neutralization of pro-worker CLL identity forms a conscious strategy of re-

157 Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence & Wishart 1995) 391.

158 CFA, Conclusions (n 87) 996.

moving non-market regulation of wages and terms and conditions of employment so as to be eventually left to the 'invisible hand' of market rationality.

The erosion or full eradication of contractualism-deviating *protective* aspects (after-effect, extension) of CA advances this target of individualization and contractualisation of employment relationships. It is under this prism that decentralization should be comprehended. Realized under the explicit aim of allowing 'wages to adjust faster and in line with the needs of firms and economic activity more broadly',<sup>159</sup> decentralization is directed towards *opening* CA scheme into market rationality as applied to each individual firm with the parallel undermining of market-insulated sector agreements.

Whilst a necessary nexus between decentralization and weakening of workers' power may be dismissed as a general thesis, the granting of collective bargaining power to the vulnerable to employer's pressure 'association of persons' ahead of sectoral trade unions along with the sub-minimum function of enterprise-level over sectoral CA, makes such a nexus discernible at least for the Greek CG case. This nexus becomes even more pristine when taken into account that enterprise-level agreements are anticipated to be worse for workers than sectoral agreements due to higher structural pressures exerted by an individual employer to employees, in particular during an economic crisis. In addition, the fundamental transformation of minimum wage-setting from CA-based to statutory-based has the effect of both diminishing workers power through minimizing the trade unions role, at best, to a consultative one as well as enabling the 'cognitive' integration of market rationality in Government's determination of the appropriate minimum-wage level by the respective consideration of macro-economic and market-based factors.

Therefore, as long as CLL conditionality is fundamentally oriented towards (1) *infusing* market rationality into CLL system and contractualising the employment relationships (2) undermining workers' power and (3) reducing trade unions' role, a perfect consistency with neo-liberalist aims arises thus demonstrating CG's neoliberal texture in terms of substance.

Besides substance, institutional and procedural aspects of CG are fully consistent with neo-liberal dictates. First, the cardinal role assigned to Troika operating under the 'technocratic intergovernmentalism' of the prevailing 'Central Pillar' exemplifies a clear case of expert-based Government. In essence, Troika is an institutionalized expression in CG of *de-politicization*. The latter becomes rigidified under the overall technocratic 'policy monism' of CG network. Second, on a related note, the *procedural* features of non-accountability, non-transparency and informality restrict democratic control thus generating a 'democratic deficit'. This deficit becomes more acute if the fast-track nature of procedures of domestic enactment of conditions under the ER/CR nexus undermining the effectiveness of normal domestic democratic procedures is con-

159 *European Commission*, The Second Adjustment Programme for Greece- Executive Summary of Commission/ECB/IMF mission in Greece Occasional Papers 94 (March 2012)par. 42.

sidered.<sup>160</sup> Arguably, it appears that what described as ‘crisis of democracy’<sup>161</sup> or ‘crisis of legality’,<sup>162</sup> is just the natural outcome of the failure of democracy and legality, since suffering instrumentalization under the neo-liberal paradigm, to pass the *economized* ‘litmus test’.

So, we established the (1) expert-based, (2) de-politicized, (3) non-democratic basis of CG along with the (4) *instrumentalisation* even of democracy and legality in the dominant *economized* paradigm. To the extent that these aspects match respective ones in our neo-liberal account, CG’s neoliberal institutional/procedural construction is said to have been ascertained.

Therefore, since its substantive neoliberal texture is also established, our first claim is confirmed.

#### *b) Identifying the ‘Black’ Status of CG: Confirming the Second Claim*

Following the validation of *Neo-liberal* in the ‘Neoliberal Black Hole Hypothesis’, our inquiry proceeds to expose its ‘Black’ status which becomes easily comprehended and straightforward. If we are allowed to return to our formalist legal scholar staring in the sky referred to in our introduction, he would certainly anticipate any CLL changes to come exclusively through ‘traditional’ and ‘legally visible’ regulatory means asserting their *supremacy* over domestic labour law system, such as Directives/Regulations or ECJ decisions. Indeed, since *formal* competence arrangements precluding EU’s regulation on domestic CLL schemes were perceived to ‘fence’ CLL from Directives/Regulation scope, the analytical emphasis on pre-crisis EU labour law literature was laid towards the *visible* route of potential ECJ-made ‘trespassing’ through judicial ‘spillovers’ from other regulatory areas, predominantly from freedom of movement and competition law areas.

In this universe, CG operates in legal darkness as it fails to produce rules on the EU side of EU/domestic law hierarchy but- more *pragmatically* powerfully- alters the *domestic* law part. Nonetheless, the fact that de-regulatory reforms in domestic CLL scheme spring *factually* from ER/CR ‘nexus’ of economic compulsion exercised by EU through a complex institutional geometry rather than through the legal principle of EU

160 Main memorandum-incorporating Laws 3845/2010 and 3847/2010 for Memorandum I (n 1) (216 pages) and 4046/2012 for Memorandum II (n 1) were introduced to the Parliament under the extraordinary *urgent* procedure (Article 76 (4) of the Greek Constitution) providing *limited* debate in only *one* session. The Government justified the *urgency* on the basis of the *urgent need* of securing default-preventing financial assistance that is decided on Eurogroup sessions scheduled immediately after the voting. It is indicative of the lack of meaningful deliberation that the (at the time) *Minister Michalis Chrysochoidis* stated in a public interview that he never read the Memorandum provisions before voting.

161 For crisis of democracy as the *third* phase of crisis see *Catherine Barnard*, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) 41(1) *Industrial Law Journal* 98, 99.

162 *Keith Ewing*, ‘Troika imposing illegal terms on Greece’ (29 May 2012) Institute of Employment Rights <<http://www.ier.org.uk/news/troika-imposing-illegal-terms-greece>> accessed on 5 September 2013.

law supremacy is that renders the ‘Black’ characterization of conditionality status appropriate.

Therefore, both claims on which the ‘Neoliberal Black Hole Hypothesis’ is initially predicated are substantiated thus confirming our entire sub-hypothesis.

### III. Confirming the ‘Black Hole’ Hypothesis: Summary of Inquiry

To summarize our inquiry, the article proposed the ‘Black Hole Hypothesis’ of bailout conditionality for Greek CLL system and structured a two-step logical path for testing its validity. In particular, our central Hypothesis was reformulated into two sub-Hypotheses examined in Part I and Part II respectively.

Part I confirmed the ‘De Facto Mode of Government’ sub-hypothesis through a *pragmatic* reading of power asymmetries in the ER/CR ‘nexus’ for the Greek bailout. It argued for an analytical conceptualization of Greek conditionality as a Vertical Mode of Government rather than as a horizontal economic relationship. Part II demonstrated the existence of the *final* condition set in Part I for CLL conditionality’s qualification as ‘Mode of Government’, namely its systematic and comprehensive nature (intrusive, detailed, time-continuous and fundamental to CLL’s nature conditions). The affirmation of this sub-hypothesis establishes the *powerful* quality of conditionality in the ‘Black Hole’ metaphor deduced from its De Facto Government status.

Part II verified the ‘Neoliberal Black Hole’ sub-hypothesis of CLL’s bailout conditionality. It ascertained its (1) Neoliberal Construction and (2) ‘Black’ status. In virtue of the content-free nature (*tabula rasa*) of the concept of conditionality (as theoretically could contain *protective* for CLL conditions), (1) is necessary for showing that conditionality is a ‘Black Hole’ for the Greek CLL system due to the *inherent* hostility of neoliberalism against means of collective labour regulation. (2) confirms the ‘Black’ in the ‘Neoliberal Black Hole’ sub-hypothesis and (hence) in the Central ‘Black Hole’ Hypothesis.

In this way, our central ‘Black Hole Hypothesis’ is confirmed.

### IV. Concluding Post-Inquiry Note

As a post-inquiry note, a reference to the value of our inquiry for the (1) conceptualization of conditionality and the (2) Neo-liberal narrative of EU evolution should be made.

First, the article suggested an *alternative* conceptual approach of EU CLL bailout conditionality as a *Mode of Government* to be considered in parity with other *traditional* modes of Government. Whilst not here addressed, such conceptualization may be of significance for academic research on the *legitimacy* of CLL conditionality as it enables its assessment against the standard *Mode of Government* benchmarks (e.g democratic deficit, non-accountability, non-transparency).

Second, our contention is that conditionality should be placed at the centre of labour law scholars’ spotlight as an integral part of EU labour law evolution. The exiling of conditionality to the academic wilderness due to its unconventional and non-legal texture risks missing its *immense* regulatory significance. In fact, pursuant to ER/CR ‘ne-



xus', the EU practically drafted the CLL system of a Member State and did it in the neo-liberal de-regulatory direction. Such *neoliberal construction* becomes even more analytically important when taken into account that similar conditionality schemes exist for other bailout countries and thus not confined to a single Member State.

In the broader template of EU law evolution, CLL conditionality appears to enhance the analytical currency of the neo-liberal narrative.<sup>163</sup> Truly, the 'Holy Grail' of EU law literature in 1990s and 2000s was to identify the *mode* of resolution of EU's fundamental 'genetic dualism'. Dualism constituents may be couched in different linguistic guises as between economic/social rationales,<sup>164</sup> neo-liberal/social-democratic project<sup>165</sup> or economic/social constitutions.<sup>166</sup> In essence, these accounts capture – in one form or another – the fundamental tension between *market* and *non-market (social)* rationality.

Three modes of resolution are possible. The first is to refute the incompatibility thesis of 'two genes' altogether so that are harmoniously integrated in a win-win fashion with both preserving their identity. Instead, the other two share the *incompatibility* thesis and merely pick different sides on which is to prevail. The second would argue that market-rationality naturally subverts social rationality insofar as 'since the EU began life as a common market, it is inevitable that justifications for EU activities in other areas- like labour law- will be framed in terms of their relationship with that market'.<sup>167</sup> In reverse, the third would contend that non-market rationality is to assume an overarching status potentially in some form of EU constitutionalisation related to a broad conception of social citizenship.

For not entirely invalid reasons, inclusion of social rights in the ECFR became a *cause celebre* for academic scholars as thought to indicate or at least pave the way towards the third mode of resolution. It is true, though, that labour law scholars approached it with a dose of scepticism promptly turning into pessimism in the aftermath of Viking and Laval ECJ decisions. Nonetheless, insufficient attention was paid to the *neo-liberal* processes running in parallel, with the monetarist-based EMU and fiscal consolidation regimes been prime examples. It is precisely these policies that, by been long-term culminated in the relative shadow of legal scholarship, now assert their *regulatory* effect on CLL through triggering a 'spillover' under the neo-liberal paradigm.

In this context, at least for Greek case, conditionality easily squares with neo-liberal narrative predicting the *second* mode of resolution of 'genetic duality'. Apeldoorn's narrative of EU evolution as of *embedded* neoliberalism with the latter seen as a *hege-*

163 For this narrative in the form of 'embedded neo-liberalism' see Bastian van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (Routledge 2002) 158-189 and Bastian Van Apeldoorn, Henk Overbeek and Magnus Ryner, 'Theories of European Integration: A Critique' in Alan Cafruny and Magnus Ryner(eds), *A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe* (Rowman & Littlefield 2003).

164 Phil Syrpis, EU Intervention in Domestic Labour Law (OUP 2007) 11-75. Syrpis adds a 'third' rationale, the 'integration rationale'.

165 Bastian van Apeldoorn, 'The Contradiction of "Embedded Neoliberalism" and Europe's Multi-Level Legitimacy Crisis: The European Project and its Limits' in Bastian van Apeldoorn, Jan Drahokoupil and Laura Horn(eds) *Contradictions and limits of neoliberal European governance: From Lisbon to Lisbon* (Palgrave Macmillan 2009) 23.

166 Brian Bercusson, *European Labour Law* (Cambridge University Press 2009) 5-11.

167 Anne Davies, *EU Labour Law* (Edward Elgar 2012) 14.

*monic* project seeking to advance neoliberalism through a strategy of incorporating, and ideologically neutralizing, rival projects- namely the social democratic and neo-mercantilist ones.<sup>168</sup> finds concrete application as explanatory narrative of Greek conditionality. Arguably, the Greek CG represents a *dynamic* evolution of this neoliberalism where the socially ‘embedded side’- assumed to be found primary at the national level- is eroded within an overall trajectory moving towards a *purer* version of neoliberalism. On a related note, the aggressive invocation of ER/CR ‘nexus’ for realizing the *neo-liberal* transformation of CLL renders EU conditionality close to been qualified as adopting ‘disciplinary neoliberalism’ defined by Gill as a ‘concrete form of structural and behavioural power’<sup>169</sup> aiming at ‘promot[ing] uniformity and obedience within parties, cadres, organizations’.<sup>170</sup>

For laying down the concluding stone in our article, there is no doubt that conditionality marks a *critical* juncture in EU evolution of labour law. In a sense, it encapsulated what seemed inevitable, namely the collision between market and social rationality within domestic CLL *but in unconventional clothing*. A closer inspection of the ‘stranger’ reveals its identity as the long-expected hostile ‘Guest’ that finally arrived to disrupt the domestic CLL dining table.

This conflict- at least for now- is settled on neo-liberal terms. Any *evaluative* judgment depends on one’s view of neo-liberalism. If you endorse neo-liberalism, conditionality is a cause for optimism. If not, a source of major concern.

168 *Apeldoorn*, ‘The Contradiction of “Embedded Neoliberalism” and Europe’s Multi-Level Legitimacy Crisis’ (n 165) 25.

169 *Stephen Gill*, ‘Globalisation, Market Civilisation and Disciplinary Neoliberalism’ (1995) 24(3) *Millennium-Journal of International Studies* 399, 411.

170 *Ibid.*