

**LEGAL BRIEF PREPARED FOR
THE SPECIAL COMMITTEE OF THE HELLENIC PARLIAMENT ON THE AUDIT OF THE
GREEK DEBT (DEBT TRUTH COMMITTEE)**

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**ECONOMIC POLICY CONDITIONALITY, SOCIO-ECONOMIC RIGHTS
AND INTERNATIONAL LEGAL RESPONSIBILITY:
THE CASE OF GREECE 2010-2015**

by

Olivier De Schutter, PhD
Centre for Philosophy of Law and Institute for Interdisciplinary Research in Legal Sciences
University of Louvain

and

Margot E. Salomon, PhD
Centre for the Study of Human Rights and Law Department
London School of Economics and Political Science

1. Introduction

This brief was prepared by the authors at the request of the Debt Truth Committee established by the Hellenic Parliament, in support of its work. It highlights some key legal issues raised by the Memoranda of Understanding concluded by Greece in 2010 and 2012, which made the conditions for access to loans contingent upon the implementation of a range of measures aimed at fiscal consolidation.

The background is this. There is extensive data from a range of sources detailing the negative impact on the exercise of socio-economic rights of people in Greece as a result of the macroeconomic adjustment conditions imposed for the provision of financial assistance since 2010. The human rights that have been, and continue to be, impacted include a range of labour rights, the right to social security, the right to health and healthcare, the right to an adequate standard of living, the right to housing, and gender equality, among others.¹ Findings also indicate that particular groups were disproportionately affected, including women, the young and pensioners.

The economic arrangements that brought to bear this human catastrophe involved States, international organizations and other actors functioning in various formations. This legal brief unpacks the actors and vehicles through which the conditionalities were imposed with the aim of determining legal responsibility in the area of human rights for the harms that have come to pass. It covers the period 2010 to date and addresses the breach of human rights obligations and the questions of international responsibility involved. In addition to Greece, which has undertaken to uphold a range of human rights vis-à-vis the people under its

¹ See, e.g., European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28.2.2014; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mission to Greece (22-26 Apr. 2013), U.N. doc. A/HRC/50/15/Add.1 (27 Mar. 2014); Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, U.N. doc. CEDAW/C/GRC/CO/7 (1 Mar. 2013) ('The Committee notes with concern that the current financial and economic crisis and measures taken by the State party to address it within the framework of the policies designed in cooperation with the European Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life' (para. 6)); Committee on the Rights of the Child, Concluding Observations on the combined second and third periodic reports of Greece, U.N. doc. CRC/C/GRC/CO/2-3 (13 Aug. 2012) ('The Committee notes that the recession and the current financial and economic crisis are taking their toll on families and on public social investment, including on the prospects of implementing the Convention, especially with regard to article 4 of the Convention' (para. 6)).

jurisdiction and may not ignore those obligations in the negotiation and conclusion of agreements with its creditors, this brief examines the responsibility of the following actors: the Euro Area Member States, the European Commission, the European Central Bank (ECB), the Council of the European Union, the EU Member States, the International Monetary Fund (IMF), and the members States of the IMF. The conclusion offers a summary of the legal findings.

2. The Factual Background

The First Rescue Plan (2010)

Following a request from Greece for financial assistance, officially filed on 23 April 2010, the representatives of the Euro Area Member States other than Greece decided on 2 May 2010 to provide stability support to Greece through a Loan Facility Agreement: in effect, an intergovernmental framework allowing the pooling of bilateral loans in the form of an international contract.² The Euro Area Member States other than Greece concluded to this effect an Intercreditor Agreement, allowing them to pool their bilateral loans to Greece,³ and agreed to provide a total of 80 billion euros in loans through this channel with the understanding that the International Monetary Fund, to which Greece had also turned for assistance, would provide another 30 billion euros. This was formalized under the Loan Facility Agreement concluded with Greece which provided that ‘the [pooled] loans are granted in conjunction with the funding from the International Monetary Fund under a standby-arrangement’.⁴ Under the Agreement, the European Commission was tasked by the representatives of the Member States of the European Union with the coordination and management of the pooled bilateral loans⁵ as well as, ‘to negotiate ... (ii) the MoU with the Borrower’. Article 2(1) of the Intercreditor Agreement stipulates in this regard:

The Parties agree that the Commission on behalf of the Parties shall negotiate (i) the Loan Facility Agreement under which the Pooled Bilateral Loans will, subject to the terms and conditions set out therein, be made available to the Borrower; (ii) the MoU with the Borrower; and (iii) collect and hold in safe custody any conditions precedents. The Parties (other than Germany) hereby authorise the Commission to sign the Loan Facility Agreement on their behalf, subject to the prior approval by all of them, after having liaised with the ECB. The Parties hereby authorise the Commission to sign the MoU on their behalf, subject to the prior approval by all of them, after having liaised with the ECB. These authorisations and the authorisation referred to in Article 3 shall take immediate effect as of the signature of this Agreement notwithstanding the terms of Article 1(2) above.

The Parties may participate in the negotiations with the Borrower by the Commission.

The Lenders agreed to act in a coordinated manner and to channel communications to the Commission through the Euro Working Group Chairman.⁶

The Loan Facility Agreement makes explicit the link between the provision of financial assistance on the one hand, and compliance by Greece with the macroeconomic adjustment measures prescribed on the other hand: ‘Measures concerning the coordination and surveillance of the budgetary discipline of Greece and setting out

² Loan Facility Agreement between the following member states whose currency is the Euro: Kingdom of Belgium, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland and KfW, acting in the public interest, subject to the instructions of an with the benefit of the guarantee of the Federal Republic of Germany, as Lenders and The Hellenic Republic as Borrower, the Bank of Greece as Agent to the Borrower, 8 May 2010, Euro Area Loan Facility Act 2010 [Ireland], Schedule 2, preambular para. 2. [Hereinafter, Loan Facility Agreement, 2010]

³ Intercreditor Agreement between Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland, 8 May 2010, Euro Area Loan Facility Act 2010 [Ireland], Schedule 1. [Hereinafter, Intercreditor Agreement, 2010].

⁴ Loan Facility Agreement (2010), preambular para. 3.

⁵ Id., preambular para. 4.

⁶ Id., preambular para. 5.

economic policy guidelines for Greece [were] defined in a Council Decision on basis of Article 126(9) and 136 of the Treaty on the Functioning of the European Union (the “TFEU”), and the support granted to Greece is made dependent on compliance by Greece with measures consistent with such decision and laid down in a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding (hereinafter referred to together as MoU).⁷ While the European Commission signed the 2010 MoU, this was ‘after approval by all Euro Area Member States (except Greece), by the borrower and the Bank of Greece’.⁸ Indeed, Article 4(1) of the Intercreditor Agreement provides that: ‘Before each disbursement of a Loan under the Loan Facility Agreement, the Commission will, in liaison with the ECB, present a report to the Parties analysing compliance by the Borrower with the terms and the conditions set out in the MoU and in the Council Decision. The Parties will evaluate such compliance and will unanimously decide on the release of the relevant Loan. The first Loan is released upon signature of the MoU and will not be the object of such a report.’ This report to the lending parties by the European Commission, in liaison with the European Central Bank, confirming that Greece has complied with the terms and the conditions set out in the MoU and in the Council Decision, is therefore a precondition of the disbursement of loans under the agreement. This is further confirmed by the Loan Facility Agreement concluded with Greece, according to which:

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

The Second Rescue Plan (2012)

The second rescue plan was launched after the Greek government, in a letter of 8 February 2012, requested the President of the Group of Finance Ministers of the Member States of the euro currency area (Eurogroup) to provide further emergency loans. By then however, the European Council and the Economic and Financial Affairs Council (ECOFIN Council) had established both the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM), in order to avoid future shocks to the eurozone. The EFSM was established on the basis of a regulation, founded on Article 122(2) of the Treaty on the Functioning of the European Union.⁹ The EFSF is a special purpose vehicle created by an inter-state agreement between the Member States of the euro currency area, as a joint-stock company incorporated in Luxembourg, tasked with issuing bonds and granting loans and credit lines to cover the financing requirements, subject to conditions, of Member States of the euro currency area which are in financial difficulties. The EFSF constituted the financial assistance facility for Greece from 2012. The Framework Agreement establishing the EFSF recalls that the Finance Ministers of the eurozone agreed on 20 June 2011 that:

EFSF shall finance the making of Financial Assistance by issuing or entering into bonds, notes, commercial paper, debt securities or other financing arrangements (“Funding Instruments”) which are backed by irrevocable and unconditional guarantees (each a “Guarantee”) of the euro-area Member States which shall act as guarantors in respect of such Funding Instruments [...]

The EFSF entered into force on 7 June 2010. It was intended to operate on a provisional basis, for a period of three years, and it has now been succeeded by the ESM, which started its operations on 8 October 2012. As of 1 July 2013 the EFSF was no longer eligible to engage in new financing programmes or enter into new loan facility agreements.

The second loan requested by Greece was approved by ECOFIN on 14 March 2012. The receipt of loans is conditional upon the agreement of Greece to the Memorandum of Economic and Financial Policies (MEFP)

⁷ Id., preambular para. 6.

⁸ Id., preambular para. 6.

⁹ Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism (OJ L 118 of 12.5.2010, 1).

of 9 March 2012, which outlines the economic and financial policies that the Greek Government and the Bank of Greece will implement during 2012–2015.¹⁰ The new loan, in the form of a Master Financial Assistance Facility Agreement (MFFA) for Greece, included the undisbursed amounts of the first programme decided in 2010 plus an additional 130 billion euros for the years 2012–2015. These loans are provided through the EFSF, for a period initially running through 28 February 2015, later extended until 30 June 2015. The EFSF funding is backed by guarantees allocated among the Member States of the euro currency area proportionately according to their share of the capital of the European Central Bank. As provided for in the EFSF Framework Agreement: ‘The availability of such Financial Assistance Facility Agreements will be conditional upon the relevant euro-area Member States which request such Financial Assistance Facility Agreements entering into memoranda of understanding (each an “MoU”) with the European Commission, acting on behalf of the euro-area Member States, including conditions such as budgetary discipline and economic policy guidelines and their compliance with the terms of such MoU.’¹¹

3. Questions of Responsibility Arising as regards the Euro Area Member States

Although the European Commission and the European Central Bank, as well as the International Monetary Fund, all played a role in the negotiation with Greece of the 2010 Memorandum of Understanding and have been tasked with ensuring compliance with the macroeconomic adjustment measures prescribed as a condition for the provision of loans, the Euro Area Member States approved the signature of the Loan Agreement and MoU,¹² and remain subject to the law on state responsibility for their respective actions and the legal consequences that flow from any breach of their international human rights law obligations. As noted in the European Parliament’s 2014 report on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries¹³: ‘within the Troika, the Commission, acting as an agent of the Eurogroup, is entrusted with negotiating the conditions for financial assistance for euro area Member States “in liaison with the ECB”, and, “wherever possible together with the IMF”, the financial assistance hereinafter referred to as “EU-IMF” assistance, but *the Council is politically responsible* for approving the macroeconomic adjustment programmes; whereas each member of the Troika followed its own procedural process’ (para. D, emphasis added); ‘... despite the Commission acting on behalf of the Member States, the *ultimate political responsibility for the design and approval of the macroeconomic adjustment programmes lies with EU finance ministers and their governments*’ (para. 50, emphasis added); ‘... following preparatory work by the Troika, formal decisions are made, separately and in accordance with their respective legal statutes and roles, by the Eurogroup and the IMF, *who thus respectively acquire political responsibility for Troika actions*’ (para. 58, emphasis added). Based on these considerations, the European Parliament ‘[deplored] the way EU institutions are being portrayed as the scapegoat for adverse effects in Member States’ macroeconomic adjustment, when it is the Member States’ finance ministers who bear the political responsibility for the Troika and its operations’ (para.60); and it ‘call[ed] on the Eurogroup, the Council and the European Council to assume full responsibility for the operations of the Troika’ (para. 61).

The case of Germany deserves a brief comment in this regard. While Germany is party to the Intercreditor Agreement, it is the German bank KfW that is the Lender to Greece and the signatory to the Loan Facility Agreement¹⁴ albeit acting ‘subject to the instructions and with the benefit of the guarantee of the Federal Republic of Germany’.¹⁵ The conduct of KfW is attributable to Germany under international law however,

¹⁰ IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies. <http://www.imf.org/external/np/loi/2012/grc/030912.pdf>

¹¹ EFSF Framework Agreement between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland and European Financial Stability Facility (Consolidated version as Amended), preambular para. 2

¹² Intercreditor Agreement (2010), Art. 2(1); Loan Facility Agreement (2010), preambular para. 6.

¹³ European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28.2.2014.

¹⁴ Intercreditor Agreement (2010), Art. 1(3); Loan Facility Agreement (2010), para. (A).

¹⁵ Intercreditor Agreement (2010), Art. 1(3); Loan Facility Agreement (2010), para. (A).

on this delegated basis by which it is ‘acting on the instructions of, or under the direction or control’ of that State.¹⁶

The responsibility of the Euro Area Member States is engaged if two conditions are fulfilled: the measures described above should be (a) attributable to these States and (b) they must constitute a breach of their international obligations.¹⁷ The first condition is uncontroversial as regards the acts adopted by the Euro Area Member States acting as Lenders, in particular in the negotiation and conclusion of the Intercreditor Agreement and the Loan Agreement. Insofar as these States acted through the Council of the European Union, it may be recalled that under general international law,

A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.¹⁸

The rule implies that the responsibility of a State may be engaged for the acts adopted by an international organization if those acts were adopted on the basis of powers delegated to the organization by the State concerned, where such attribution of powers did not include safeguards to ensure that the said powers would be exercised in accordance with the pre-existing obligations of the State. Notably, such a responsibility exists even where a Member State of an international organization is acting *in accordance with the rules of the organization*.¹⁹ The responsibility of a State for the acts of an international organization, as just described, applies also to EU Member States of the Council and the Member States of the IMF. We return to these points below.

Once the question of attribution is answered, the second condition for the responsibility of the Euro Area Member States to be engaged is that the measures allegedly engaging the responsibility of the States concerned constitute a breach of the international obligations of those States. We are not concerned here with the question of whether the measures adopted were, or were not, in conformity with EU law. In this regard, it will be sufficient to note that the measures concerning the coordination and surveillance of the budgetary discipline of Greece and setting out economic policy guidelines for Greece were defined in a Council decision²⁰ on the basis of the TFEU (articles 126(9)²¹ and 136²²).²³ As we noted above, the release of the

¹⁶ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (annex to General Assembly resolution 56/83 of 12 Dec. 2001, and corrected by document A/56/49(Vol. I)/Corr.4), [Hereinafter, ARS], Art. 8. ‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’ Loan Facility Agreement (2010), para. (A). ‘KfW was also mandated by the Federal Government, in accordance with the KfW Law, to participate, without assuming any risk, in the European Union measures to refinance Greece and granted a loan of EUR 22.3 billion in this context. The total commitment volume for financial year 2010 was therefore EUR 97.0 billion.’ *KfW Management Report and Financial Statements 2010*, 7, available at: https://www.kfw.de/Download-Center/Finanzpublikationen/Financial-publications-PDFs/3_Finanzberichte-E/Management-Report.pdf

¹⁷ ARS, Art. 2.

¹⁸ Art. 61, Draft Articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), and welcomed by the UN General Assembly in Res. 66/100 of 9 Dec. 2011 [Hereinafter, ARIO].

¹⁹ See, International Law Commission, *Draft Articles on the Responsibility of International Organizations with Commentaries* 2011 (A/66/10) Art. 58(2) at 91, para. 5. See similarly, ARIO, Art. 59(2).

²⁰ Council Decision, addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010/320/EU), 10 May 2010, OJ L 145/6 of 11.6.2010.

²¹ ‘If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation. In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.’

²² ‘In order to ensure the proper functioning of economic and monetary union ... the Council shall ... adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their

loans subsequent to the conclusion of the first MoU of 2010 were to be conditional upon verification that the implementation of the economic policy of the Borrower ‘accords with the adjustment programme or any conditions laid down in the Council decision on the basis of article 126(9) and 136 TFEU and the MoU’.²⁴ In adopting decision 2010/320/EU of 10 May 2010 and other similar decisions subsequently in order to define the macroeconomic adjustment measures that Greece was expected to adopt, the Council of the EU was acting under EU law. The economic policy guidelines that underpinned the support to be granted and the release of loans under the scheme of pooled bilateral loans of Euro Area states should, therefore, comply with the Charter of Fundamental Rights as a requirement of EU law itself.

Our chief concern here, however, is with questions of responsibility under general international law. The Euro Area Member States are all parties to the major instruments of international human rights law adopted at the universal level that protect economic and social rights,²⁵ that prohibit discrimination against women,²⁶ or that guarantee the rights of the child.²⁷ They also have acceded to the European Social Charter within the Council of Europe, though their undertakings are variable in this regard²⁸; and they have acceded to many of the core conventions opened for signature within the International Labour Organization. While it is not the purpose of this briefing note to discuss the details of the implications of each of these instruments, three considerations should be borne in mind in assessing questions of responsibility in this context.

1. It bears emphasizing that the responsibility of the Euro Area Member States, as Lenders to Greece, may be engaged either as a result of their own human rights undertakings being breached, or as a result of their conduct leading Greece to violate the human rights duties it owes to its own population. We may reason per analogy with the adoption of economic sanctions against a State. When, in 1997, it adopted its General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights,²⁹ the Committee on Economic, Social and Cultural Rights took the view that States parties voting for sanctions within the Security Council acting under chapter VII of the UN Charter should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted State since this would constitute a violation of their obligations not least under the International Covenant on Economic, Social and Cultural Rights. In explaining its position, the Committee stated the following:

While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that [most of the members of the Security Council are parties to the Covenant. As such, each] of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”. When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the

budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance 2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote. ...’

²³ Intercreditor Agreement (2010), preambular para. 6; Loan Facility Agreement (2010), preambular para. 6.

²⁴ Loan Facility Agreement (2010), preambular para. 8.

²⁵ Among many others, the International Covenant on Economic, Social and Cultural Rights (A/RES/21/2200A, 16 Dec. 1966) (993 U.N.T.S. 3).

²⁶ Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180, 18 Dec. 1979) (1249 U.N.T.S. 13).

²⁷ Convention on the Rights of the Child (A/RES/44/25, 20 Nov. 1989) (1577 UNTS 3).

²⁸ European Social Charter, signed in Turin, on 18 Oct. 1961 (CETS No. 35; 529 U.N.T.S. 89); gradually to be succeeded by the Revised European Social Charter, signed in Strasbourg on 3 May 1996 (CETS No. 163).

²⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. doc. E/1998/22.

Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.³⁰

The notion that it is ‘doubly incumbent upon’ States parties to the Covenant to comply with the rights guaranteed under this instrument in the adoption of economic sanctions, stems from the fact that such States have two separate obligations. First, they are prohibited from adopting conduct that could lead to the Covenant rights being violated in the country targeted by sanctions. This is because the International Covenant on Economic, Social and Cultural Rights, like other human rights instruments, impose extraterritorial obligations that exceed the exclusively *territorial* jurisdiction of the States parties. This is a point we return to in the next paragraph. Secondly, the States parties to the Covenant may be violating their international obligations by coercing other States into violating their own obligations under either the Covenant or under other rules of international law.³¹ In other words, in assessing whether the international responsibility of the Euro Area Member States may be engaged, we need to consider not only their obligations under international human rights law, but also the obligations of Greece, which the Euro Area Member States should take into account in order to ensure that they are not pressuring Greece to set those obligations aside.

2. Focusing on the first source of these obligations of the Euro Area Member States, we note that the international human rights instruments to which these States have acceded include extraterritorial obligations and have been interpreted as such. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant undertake to ‘take steps, individually *and through international assistance and co-operation*, especially economic and technical’, to the maximum of their available resources, ‘with a view to achieving progressively the full realization of the rights’ recognized in the Covenant. The notion of international cooperation is also mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which ‘States Parties will take appropriate steps to ensure the realization of this right, *recognizing to this effect the essential importance of international co-operation based on free consent*’ (emphasis added). Under Part IV of the Covenant, which relates to the measures of implementation, two provisions address international assistance and cooperation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which ‘may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant’. Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action ‘includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned’. These various provisions have been interpreted to imply an obligation to engage in international cooperation, as recognized by the Committee on Economic, Social and Cultural Rights.³² Similarly, the Convention on the Rights of the Child requires states to take measures to implement the economic, social and cultural rights in the treaty ‘... to the maximum extent of their available resources and, where needed, within the framework of international cooperation.’³³ Thus, as noted by the Committee on the Rights of the Child, ‘[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international

³⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), cited above, para. 51.

³¹ This is the hypothesis envisaged under Article 18 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, cited above, under the heading ‘Coercion of another State’: ‘A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act’.

³² See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Fifth session, 1993), U.N. doc E/1991/23 at para. 14. See, Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007).

³³ Art. 4. Articles 24 (4) and 28 (3) require states to promote and encourage international cooperation in regard to the right to health and to education, taking particular account of the needs of developing countries.

cooperation, to global implementation.³⁴ The Committee on the Elimination of Discrimination against Women has also confirmed that the Convention on the Elimination of All Forms of Discrimination against Women applies to the actions of a State outside its territory.³⁵

The International Court of Justice has also confirmed the extraterritorial protection of human rights. In its 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice took the view that Israel, as an Occupying Power, should comply with its obligations under the International Covenant on Civil and Political Rights, under the International Covenant on Economic, Social and Cultural Rights, and under the Convention on the Rights of the Child, in the Occupied Palestinian Territory.³⁶ The Court reiterated this position in the Case of *Democratic Republic of the Congo v. Uganda*,³⁷ where it confirmed that human rights law may extend extraterritorially in respect of core human rights instruments. In its decision on Provisional Measures in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, the International Court of Justice noted that ‘there is no restriction of a general nature in CERD relating to its territorial application’ and that, ‘in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation’; it consequently found that ‘these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.’ The International Court of Justice consequently called on both Russia and Georgia to: ‘do all in their power to ensure that public authorities and public institutions under their *control or influence* do not engage in acts of racial discrimination against persons, groups of persons or institutions.’³⁸

It can be argued that such extraterritorial human rights obligations are imposed under the United Nations Charter itself. Article 56 of the Charter stipulates that, ‘[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55,’ which includes ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,’ as well as ‘higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems, and international cultural and educational cooperation’. The pledge to take ‘joint and separate’ action recognises a state’s obligation to contribute to human rights realisation under the terms of the Charter whether carried out by a single state or by several states acting together.

3. Finally, there is a third dimension to the responsibility of the Euro Area Member States which deserves to be highlighted. The undertakings of the States concerned under the human rights instruments that have been cited imply a duty not only to respect human rights, but also to protect them by regulating non-State actors over which these States exercise control. This is undoubtedly the case as regards the European Financial Stability Facility.

In the area of economic and social rights, the duty to protect has been affirmed, for instance, by the Committee on Economic, Social and Cultural Rights,³⁹ and by the European Committee of Social Rights, the body of independent experts tasked with supervising compliance with the Council of Europe’s Social

³⁴ Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child, U.N. doc. CRC/GC/2003/5, para. 5.

³⁵ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (Forty-seventh session, 2010) U.N. doc CEDAW/C/GC/2, para. 12.

³⁶ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 109.

³⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 19 Dec. 2005 paras. 178-180 and 216-217.

³⁸ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, [2008] I.C.J. Reports 353, paras. 109 and 149 (emphasis added).

³⁹ See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The right to adequate food (Art. 11), U.N. doc. E/C.12/1999/5, para. 15 (‘The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food’).

Charter.⁴⁰ The principle is that States are expected to take all measures that could reasonably be taken, in accordance with international law, in order to prevent private actors from adopting conduct that may lead to human rights violations. The international responsibility of the State will be engaged where such violations do occur which the State could have prevented without this imposing on the State an unreasonable burden.

It should therefore be queried whether, when the EFSF was established by an agreement of the Euro Area Member States, safeguards were included to ensure that it would only discharge its functions in full compliance with international human rights law.

4. Questions of Responsibility as regards the Institutions of the European Union

The EU institutions, established under the EU Treaties, have played a decisive role in the implementation of the successive loans provided to Greece. The first rescue plan, of May 2010, for a total amount of 110 billion euros, was based on an ‘Economic Adjustment Programme for Greece’ formally based on the Intercreditor Agreement of 8 May 2010 involving the 15 EU Member States belonging to the eurozone (other than Greece), and the Hellenic Republic on the other hand. The Agreement, however, followed a joint European Commission/IMF/ECB mission which visited Athens from 21 April to 3 May 2010 after Greece made a request for international financial assistance, the Memorandum of Understanding being signed on 3 May 2010 by the borrower (Greece) and the Bank of Greece.⁴¹ As addressed above, the Eurogroup agreed to activate stability support to Greece via bilateral loans which were centrally pooled by the European Commission: the Intercreditor Agreement stipulates in this regard, in preambular paragraph 3, that ‘Representatives of the Member States of the European Union have decided on 5 May 2010 to entrust the Commission with the tasks in relation to coordination and management of the Pooled Bilateral Loans as set out in this Agreement’.⁴² As to the role of the Council of the EU acting under articles 126(9) and 136 of the Treaty on the Functioning of the European Union, it has been mentioned above and there is no need to outline it again here.

The Application of the EU Charter of Fundamental Rights

We remark, first, that the institutions of the EU are bound to comply with the requirements of the EU Charter of Fundamental Rights.⁴³ It is true that, in the *Pringle* case in which the validity of the establishment of the European Stability Mechanism (ESM) was challenged,⁴⁴ the Court of Justice of the European Union stated that the EU Member States were not bound to comply with the EU Charter of Fundamental Rights when they were acting outside EU Law: the Court took the view that ‘the Member States are not implementing Union

⁴⁰ See, e.g., European Committee of Social Rights, complaint no. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 Oct. 2005, para. 14 (‘the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant’s allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator’).

⁴¹ Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding, available at: <http://www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf>

⁴² In particular, the Intercreditor Agreement provides that ‘The Parties agree that the Commission on behalf of the Parties shall negotiate (i) the Loan Facility Agreement under which the Pooled Bilateral Loans will, subject to the terms and conditions set out therein, be made available to the Borrower; (ii) the MoU with the Borrower; and (iii) collect and hold in safe custody any conditions precedents’ (para. 2.1.).

⁴³ It is acknowledged that the protection of certain social rights affected by the macroeconomic adjustment programmes imposed on Greece -- such as the right to health, the right to work, the right to social security, which were all particularly affected -- remains relatively weak under the EU Charter of Fundamental Rights. It is as such even more striking therefore that the Charter was entirely ignored in the process of adoption and implementation of the MoUs of 2010 and 2012.

⁴⁴ The ESM was established by European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, 1). The decision inserted a new paragraph 3 in article 136 TFEU, in order to allow the establishment of a new stability mechanism to safeguard the stability of the euro area. The Treaty establishing the European Stability Mechanism was thereafter signed in Brussels on 2 February 2012, between all the eurozone member States.

law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism'.⁴⁵ The reasoning of the Court was that, since 'neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM',⁴⁶ the EU Member States were not implementing EU law when establishing the ESM. The EU Charter of Fundamental Rights therefore does not apply to the establishment of the ESM, in accordance with the wording of Article 51(1) of the Charter, which defines its scope of application. However, whether or not one agrees with this position insofar as it concerns the establishment by the EU Member States of the ESM, it is clear that this does extend to the situation where *mechanisms or institutions established by the EU Treaties* take action.

Article 51 paragraph 1 of the EU Charter of Fundamental Rights states:

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

The phrase 'when they are implementing Union law' in that sentence applies to the EU Member States. The Member States may act either in the field of application of EU law, or in situations that are not covered by EU law. In contrast, EU institutions per definition are bound to comply with the requirements of the Charter, since the same distinction does not apply to them: they owe their very existence to EU law, and the Charter necessarily applies to any conduct they adopt. The Explanations relating to the Charter of Fundamental Rights strongly support this reading:⁴⁷ the explanations to Article 51 clearly distinguish EU institutions, bodies, offices and agencies, on the one hand, and the EU Member States on the other hand, referring to the expression 'implementing Union law' only with regard to the latter.⁴⁸ We share the position expressed by Advocate General J. Kokott in the *Pringle* case itself, where she noted in the view she delivered on 26 October 2012 that 'The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights'.⁴⁹

Thus, the European Commission as well as the ECB, in discharging the roles assigned to them under the Intercreditor Agreement and Loan Facility Agreement of 8 May 2010, and the Council of the EU, acting under Articles 126(9) and 136 of the Treaty on the Functioning of the European Union, to impose on Greece to take certain measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, should have acted taking into account the requirements of the Charter of Fundamental Rights.

The same applies as regards the EU institutions involved in the establishment and functioning of the European Financial Stability Facility. The EFSF is established outside of EU law, as a public limited liability company registered in Luxembourg. Its object, as stipulated in its Articles of Association, is to 'facilitate or provide financing to Member States of the European Union in financial difficulties whose currency is the Euro and which have entered into a memorandum of understanding with the European Commission containing policy conditionality': the Company is entitled for that purpose to 'raise money by issuing financial instruments or by entering into financing arrangements with its shareholders or third parties, in respect of which the liabilities of the Company may be guaranteed by some or all of its shareholders or may be otherwise collateralized or benefit from credit support mechanisms'.⁵⁰ Again however, insofar as it assumes a role in the EFSF – in particular in the negotiation of the Memorandum of Understanding with the borrowing Member State –, the European Commission cannot ignore that, as an institution of the European Union, it is bound to ensure that all its actions comply with the Charter of Fundamental Rights. The same is

⁴⁵ Case C-370/12, *Thomas Pringle*, judgment of 27 November 2012 (Full Court), para. 180.

⁴⁶ *Id.*, para. 105.

⁴⁷ OJ C 303/17 of 14.12.2007.

⁴⁸ Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' 9 *European Constitutional Law Review* 1 (2013) 37, at 51-52.

⁴⁹ At para. 176 of her View. See, Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' *European Law Journal* 4 (2015).

⁵⁰ European Financial Stability Facility, Société anonyme, Statuts coordonnés au 23 avril 2014 (Consolidated Articles of Association), Art. 3.

the case for the ECB in its role under the EFSF, for example, when liaising with the Commission and IMF in negotiating the MoU.⁵¹

On 21 May 2013, Regulation (EU) No. 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability was adopted.⁵² This Regulation defines the conditions applying to countries of the eurozone placed under ‘enhanced surveillance’. These are countries experiencing or threatened with serious financial difficulties, and which have therefore called on the financial assistance either from one or several other Member States or third countries, the EFSM, ESM, EFSF, or another relevant international financial institution such as the IMF. Such countries are placed under closer monitoring than that provided normally under the ‘European semester’ for economic policy coordination. The enhanced form of surveillance is established in order to ensure that the macroeconomic structural adjustment programmes imposed as a condition for the provision of financial assistance are effectively implemented: the objective, as stated in the Regulation, is to allow for the ‘swift return to a normal situation’ and to ‘[protect] the other euro area Member States against potential adverse spill-over effects’.⁵³ The Regulation applies to Greece, as a country in receipt of financial assistance from the EFSF on the date of 30 May 2013.⁵⁴

Two implications follow. First, after the date of 30 May 2013, even the financial mechanisms originally established outside EU law were provided with a framework based in EU law, under Article 136 of the Treaty on the Functioning of the European Union (the legal basis of the Regulation) and Regulation (EU) No. 472/2013 itself. The measures adopted under the framework of the Regulation are clearly ‘implementing EU law’, and are therefore subject to the requirements of the EU Charter of Fundamental Rights: the Regulation confirms this, by highlighting in particular the requirement that such measures comply with Article 28 of the Charter, which concerns the right of collective bargaining and action. The measures thus drawn into the ambit of EU law include the Memoranda of Understanding concluded with the Member State concerned, as well as the Council decision approving the macroeconomic adjustment programme: this decision ‘may be challenged (either directly before the EU Courts or indirectly before the national courts on the ground that it is incompatible with the Charter).’⁵⁵ Arguably, the domestic measures adopted in order to fulfill such a programme also could be considered to fall within the scope of application of EU law and have to comply with the Charter of Fundamental Rights. Indeed, although the case law of the Court of Justice of the European Union has shed doubt on this issue,⁵⁶ Regulation (EU) No. 472/2013 in fact imposes certain obligations of a procedural nature on the Member State having sought financial assistance, and it may therefore be said that that State is acting under the scope of application of that Regulation in implementing the macroeconomic programme it has agreed to.

Second, Regulation (EU) No. 472/2013 establishes certain requirements of its own. These include in particular a requirement imposed on the European Commission to evaluate the sustainability of the sovereign debt (Article 6: the Commission presents the results of such evaluation to the Eurogroup Working Group where the financial assistance is to be granted under the ESM or the EFSF, and to the Economic and Financial Committee (EFC) where the financial assistance is to be granted under the EFSM), as well as a requirement of participation imposed on the Member State placed under enhanced surveillance (Article 8: ‘A Member State shall seek the views of social partners as well as relevant civil society organisations when

⁵¹ EFSF Framework Agreement, Art. 2(1)(a).

⁵² OJ L 140/1 of 27.5.2013. This Regulation, together with Regulation (EU) No. 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L140/11, form the ‘Two-Pack’ combination of measures placing the eurozone Member States under surveillance in order to safeguard its overall stability.

⁵³ Regulation (EU) No. 472/2013, preambular, para. 5.

⁵⁴ See Article 16 of Regulation (EU) No. 472/2013.

⁵⁵ Koen Lenaerts, ‘EMU and the EU’s Constitutional Framework’ 39 *European Law Review* 6 (2014) 753-769.

⁵⁶ See Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, Order of the Court (Sixth Chamber), 21 Oct. 2014 (Court of Justice of the EU lacking jurisdiction to assess compliance with the Charter of Fundamental Rights of Portuguese Law No 64-B/2011 of 31 Dec. 2011 approving the State Budget for 2012, which resulted in the suspension of Christmas bonuses or any other benefit relating to the 13th and/or 14th month pay in respect of 2012, although the budgetary measures involved were explicitly stated in Article 21(1) of the 2012 Budget Law to be linked to the Economic and Financial Assistance Programme (EFAP) applied to Portugal).

preparing its draft macroeconomic adjustment programmes, with a view to contributing to building consensus over its content’).

It follows therefore that the Memoranda of Understanding negotiated respectively in 2010 and in 2012 for the two successive loans agreements should have taken into account the requirements of the EU Charter of Fundamental Rights. For the 2010 agreement, this is the implication of the roles fulfilled by the European Commission as well as the ECB, tasked under the Intercreditor Agreement of 8 May 2010, *inter alia*, to negotiate and supervise the agreement, and by the Council of the EU, acting under Articles 126(9) and 136 of the Treaty on the Functioning of the European Union, to impose on Greece certain measures for the deficit reduction judged necessary to remedy the situation of excessive deficit. For the 2012 agreement with the EFSF, this follows from the role assigned to the European Commission, as well as the ECB, in the Framework Agreement and the Consolidated Articles of Association establishing the Facility. Any doubts as to whether the EU Charter of Fundamental Rights applies to the implementation of the Memoranda of Understanding are removed by the adoption on 21 May 2013 of Regulation (EU) No. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability: this Regulation provides the process of negotiation of MoUs and of enhanced surveillance of borrowing States with a legal framework under EU law, attracting the applicability of the EU Charter of Fundamental Rights. While the Regulation (EU) No. 472/2013 does not operate retroactively to the negotiation of the 2010 and 2012 Memoranda of Understanding as such, the Regulation serves to confirm that the Charter should have applied to the MoUs.

The Application of International Human Rights Law

We are concerned here with the relevance of international human rights law in addressing the role of the EU in the conclusion and implementation of the 2010 and 2012 MoUs negotiated with Greece. As any other subjects of international law, international organizations are ‘bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’.⁵⁷ Whereas the European Union as such is not a party to any major international or regional human rights instrument relevant in the context of this note, with the exception of the Convention on the Rights of Persons with Disabilities,⁵⁸ it is nonetheless bound to comply with human rights, as listed in particular in the Universal Declaration on Human Rights, those that are part of customary international law or of general principles of law recognized by civilized nations, both of which are sources of international law.⁵⁹ Although there is clearly an accountability gap in this regard, the absence of any external mechanism to ensure that the EU complies with its human rights obligations does not affect the content of the obligation itself.⁶⁰

Procedural Duties of EU institutions: Impact Assessment and Preventing Violations

In our view, the implication of the applicability of both the EU Charter of Fundamental Rights and of international human rights law to the acts of the EU is that that the European Union and its institutions should strengthen their assessment of impacts on fundamental rights of the legislation or policies that relate to the Economic Monetary Union, in particular as regards the recommendations addressed to countries under financial assistance. The European Commission has pledged since 2001 to ensure that its legislative proposals would comply with the requirements of the EU Charter of Fundamental Rights.⁶¹ In 2005, it clarified the methodology it would use in order to assess the compatibility with the Charter of Fundamental

⁵⁷ International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion (20 Dec. 1980), I.C.J. Reports 1980, 73 at 89–90 (para. 37).

⁵⁸ Signed in New York on 13 Dec. 2006 and in force since 3 May 2008, 2515 U.N.T.S. 3. The European Union (EU) concluded the CRPD on 22 Jan. 2011 in its capacity as a regional integration organisation within the meaning of Article 44 of the CRPD. See Council Decision 2010/48/EC concerning the conclusion, by the European Community (now European Union), of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

⁵⁹ On the status of human rights in general international law, see Olivier De Schutter, *International Human Rights Law* (2nd edn., Cambridge University Press, 2014) 62–70.

⁶⁰ Olivier De Schutter and Israel de Jesus Butler, ‘Binding the EU to International Human Rights Law’ 27 *Yearbook of European Law* (2008) 277–320.

⁶¹ SEC(2001) 380/3.

Rights of its legislative proposals,⁶² and in 2009, it re-examined this methodology and announced a range of improvements.⁶³ In parallel to such assessments of the compatibility of the draft legislative proposals submitted by the European Commission, the practice of impact assessments (a standard practice since 2002⁶⁴) was improved in order to better take into account the requirements of fundamental rights: the 2005 guidelines for the preparation of impact assessments include an examination of the potential effects of different policy options on the guarantees listed in the Charter⁶⁵ and the most recent guidelines on impact assessments further strengthen the role of fundamental rights in such assessments.⁶⁶

We have doubts as to whether this is sufficient to ensure that the European Union will comply with its international obligations in the area of human rights. First, the range of rights taken into consideration either in compatibility checks with the EU Charter of Fundamental Rights or in impact assessments as they are currently prepared is a narrow one: the Charter does not integrate the full body of economic and social rights listed in instruments such as the International Covenant on Economic, Social and Cultural Rights or the Council of Europe's Social Charter. In this regard, we share the view expressed by the European Parliament in its December 2012 resolution on the situation of fundamental rights in the EU (2010-2011), where it 'recommends that the Commission revise the existing Impact Assessment Guidelines to give greater prominence to human rights considerations, widening the standards to include UN and Council of Europe human rights instruments'.⁶⁷

Second, for human rights impact assessments to be credible, they should be performed independently. In the same resolution, the European Parliament also calls on the Commission 'to make systematic use of external independent expertise, notably from the Fundamental Rights Agency, during the preparation of impact assessments'.⁶⁸

Third, impact assessments should extend to all legislative and policy-making of the European Union, including where recommendations addressed to the EU Member States having requested financial assistance are concerned. One way to achieve this would be to interpret the requirement to assess the sustainability of the sovereign debt, as provided for in Article 6 of Regulation (EU) No. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, to include an examination of the impacts on human rights -- not least the right to work, the right to health, the right to education and the right to an adequate standard of living (including the right to food and the right to housing), the levels of enjoyment of which are typically affected by fiscal consolidation measures.

5. Questions of Responsibility as regards the International Monetary Fund

Just like any other international organization, the IMF is bound to act in compliance with general international law, including the human rights that are part thereof. The IMF, moreover, cannot ignore that, as a specialised agency of the UN,⁶⁹ it is bound to act in accordance with the principles of the Charter of the United Nations, which refers to the realization of human rights and fundamental freedoms as one of the purposes of the Organization, to be achieved in particular through international economic and social cooperation.⁷⁰

⁶² Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

⁶³ See COM(2009) 205 final of 29.4.2009 on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights.

⁶⁴ Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

⁶⁵ See SEC(2005)791, 15.6.2005. Indeed, a specific report was commissioned by the European Commission (specifically, by what was then DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, The Consideration of Fundamental Rights in Impact Assessment. Final Report, Dec. 2004.

⁶⁶ SEC(2009) 92 of 15.1.2009.

⁶⁷ Cited above, para. 3.

⁶⁸ Id., para. 6. The same applies to the Council when it initiates legislation.

⁶⁹ UN Charter, Arts. 57 and 63.

⁷⁰ UN Charter, Arts. 1(3) and 55(3).

The IMF's Articles of Agreement require it to 'respect the domestic social and political policies of members, ... and in applying these principles the Fund shall pay due regard to the circumstances of members'.⁷¹ This 'political prohibition' Article has sometimes been interpreted by the IMF as requiring it to refrain from interfering in domestic political affairs for the purposes of rejecting the human rights implications of its work. In our view, there is little basis upon which deeply interventionist policy prescriptions can be considered consistent with the political prohibition, whereas taking the impact on the exercise of human rights into account is considered to constitute political interference. The IMF's economic decisions will have an impact on human rights and on that basis alone accountability can reasonably be expected to follow. In addressing a similar clause under the Articles of Agreement of the World Bank (International Bank for Reconstruction and Development),⁷² Sands and Klein note:

'It has been suggested that, for example, the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds.'⁷³

We agree, and this conclusion is equally valid for the IMF. To this we would add that the States making decisions within the IMF cannot ignore their human rights obligations in that capacity. In its 1990 General Comment on Article 22 of the International Covenant on Economic, Social and Cultural Rights, which relates to international technical assistance measures, the UN Committee on Economic, Social and Cultural Rights noted that 'States parties to the Covenant, as well as the relevant United Nations agencies, should [...] *make a particular effort to ensure* that [the protection of the most basic economic, social and cultural rights] is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment'.⁷⁴ The assumption is that States parties to the Covenant have obligations, *as member States* of the international financial institutions in general and of the International Monetary Fund in particular, insofar as such institutions impose on indebted States certain austerity programmes as a condition for access to the international financial markets. In the General Comment on the right to the highest attainable standard of health, which it adopted in 2000,⁷⁵ the Committee on Economic, Social and Cultural Rights moved from the affirmation of an obligation of means to an obligation of result. It noted that 'States parties have an *obligation to ensure* that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions'.⁷⁶ A very similar formulation appears in the General Comment on the right to water.⁷⁷ States parties to the International Covenant on Economic, Social and Cultural Rights would be acting in violation of their obligations under the Covenant if they were to delegate powers to the IMF and

⁷¹ Art. IV(3)(b).

⁷² Art. IV, section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development states, under the heading 'Political Activity Prohibited': 'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1'.

⁷³ Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th edn, Sweet & Maxwell Ltd, 2001) 459.

⁷⁴ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990), International technical assistance measures (Art. 22), U.N. doc. E/1990/23, para. 9.

⁷⁵ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. doc. E/C.12/2000/4 (2000), para. 39 ('In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health').

⁷⁶ *Id.*, para. 39.

⁷⁷ See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. doc. E/C.12/2002/11 (26 Nov. 2002), para. 36: 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures'.

allow such powers to be exercised without ensuring that they will not infringe on human rights, or if they were to vote within the IMF without taking rights into account.

In his recent testimony to the Debt Truth Committee of the Hellenic Parliament, Panagiotis Roumeliotis, Greece's former alternate Executive Director at the IMF from 2010-2011, was asked whether, during the exchanges on the MoU, he or the Executive Director raised at *any point in time* the fact that Greece had human rights obligations that had to be taken into account in the negotiation of the conditionality, including regarding right to social security, labour rights and the rights of women? Mr Roumeliotis replied as follows:

Unfortunately during the IMF discussions we don't raise human rights. We [Member States] never refer to them. Such issues – while I was serving at the IMF – were never raised. We never have such discussions. Reform would be good.⁷⁸

6. Questions of Responsibility as regards Greece

None of what is stated above concerning the conditions under which the responsibility of the Euro Area Member States, the European Union, or the International Monetary Fund might be engaged for the human rights violations resulting from the fiscal consolidation measures adopted in Greece as a result of the MoUs of 2010 and 2012, should be seen as discharging Greece from its own responsibility in the process.

Greece decided to join the Euro Area, as such it accepted certain disciplines imposed on the countries sharing the single currency. The Committee on Economic, Social and Cultural Rights has made it clear that while obligations under the International Covenant on Economic, Social and Cultural Rights do not preclude States parties entering into various forms of international cooperation, they should ensure that this does not reduce their ability to respect, protect and fulfil the rights of the Covenant. As recalled in a letter sent on 16 May 2012 by the Chair of the Committee to the States parties, it is a duty both of the State party concerned and of the other States to assess the impact on the rights of the Covenant of the international agreements they enter into, and to take all necessary measures to ensure that any negative impacts are avoided or, if the adoption of retrogressive measures is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights, that such retrogressive measures remain strictly temporary, do not result in discrimination or increased inequalities, and do not affect the minimum core content of the rights protected under the Covenant.⁷⁹

This was explicitly confirmed by the European Committee of Social Rights, acting under the 1961 European Social Charter, in a case concerning the implementation by Greece of austerity measures. After an organization of pensioners argued that legislative changes adopted in Greece in order to implement the prescriptions of the 2010 Memorandum of Understanding between Greece and its creditors – the IMF and the 15 other eurozone Member States – were in violation of the obligations of the country under the European Social Charter, the government asserted that the changes made to the pensioners' social protection 'have been approved by the national parliament, are necessary for the protection of public interests, having resulted from Greece's grave financial situation, and, in addition, result from the Government's other international obligations, namely those deriving from a financial support mechanism agreed upon by the Government together with the European Commission, the European Central Bank and the International Monetary Fund ("the Troika") in 2010'.⁸⁰ This argument was dismissed by the European Committee of Social Rights, which took the view that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter'.⁸¹ Recalling its previous case law in which it refused to remove from the cover of the European Social Charter national legislation adopted by a EU Member State in order to comply with prescriptions of EU law – for instance,

⁷⁸ Hearing of the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee): Panagiotis Roumeliotis, 15 June 2015. Notes on file with authors.

⁷⁹ CESCR, *Letter to States Parties to the International Covenant on Economic, Social and Cultural Rights*, 16 May 2012, Ref: CESCR/48th/SP/MAB/SW.

⁸⁰ European Committee of Social Rights, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012, decision on the merits of 7 Dec. 2012.

⁸¹ *Id.*, para. 50.

implementing an EU directive – the Committee drew the following implication:

[W]hen states parties agree on binding measures, which relate to matters within the remit of the Charter, they should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the [European Committee of Social Rights] to assess compliance of a national situation with the Charter, including when the implementation of the parallel international obligations into domestic law may interfere with the proper implementation of those emanating from the Charter.⁸²

7. Procedural Duties: Impact Assessment and Preventing Violations

In our review of the materials presented, we cannot avoid being struck by the fact that the actors involved in the negotiation and implementation of the 2010 and 2012 MoUs have acted in total disregard of international human rights, and that they have not even taken the elementary precaution of assessing the potential impacts on the level of enjoyment of human rights of the measures they were recommending or that they adopted. The Guiding Principles on Foreign Debt and Human Rights, endorsed by the UN Human Right Council in 2012,⁸³ require that ‘Lenders should not finance activities or projects that violate, or would foreseeably violate, human rights in the Borrower States. To avoid this eventuality, it is incumbent upon lenders intending to finance specific activities or projects in Borrower States to conduct a credible Human Rights Impact Assessment (HRIA) as a prerequisite to providing a new loan. Alternatively, lenders may request the national human rights institution of the Borrower State, if any, conduct such assessment’.⁸⁴ The Guiding Principles on Extreme Poverty and Human Rights, which were adopted by the UN Human Right Council in 2012, also require human rights impact assessment, including where conduct would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders. These Guiding Principles state in paragraph 92:

As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices.

Duties to assess the human rights impacts apply both to the Lenders – the Euro Area Member States and the IMF – and to Greece itself. The European Social Rights Committee expressed its surprise at the fact that the Greek government failed to undertake even a minimum assessment of the impact of measures on vulnerable groups for which it has been held internationally responsible.⁸⁵ In its recent review of Greece, the UN Committee on the Elimination of Discrimination Against Women provided the following recommendation as a response to the crisis:

Due to the seriousness of the situation and lack of any gender-sensitive approach to the current crisis policy within the State party, the Committee recommends that all important policymakers in Greece, including the European Union institutions and the IMF, cooperate in setting up an observatory to fully evaluate the impact on women of the many measures taken during the economic and financial crisis. Furthermore, a comprehensive gender equality policy should be developed in order to respond to the crisis and make sure that the obligations under the Convention and the aim and spirit of the Treaty of the functioning of the European Union,

⁸² Id., para. 51.

⁸³ U.N. doc. A.HRC/20/23.

⁸⁴ Id., para. 40.

⁸⁵ ‘[T]he Committee [...] considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.’ European Committee of Social Rights, *Pensioners’ Union of the Agricultural Bank of Greece (ATE) v Greece*, Complaint No. 80/2012 16 Jan. 2012, para. 75.

which requires that in “all its activities the Union shall aim to eliminate inequalities, and to promote equality, between men and women”, can be fully implemented by the State party.⁸⁶

Indeed, there is evidence to conclude that there were widespread transparency failures in the arrangement of the pooled bilateral loans and an absence of any social or human rights impact assessment. Covering the loan period of 2009-2014, a range of procedural deficiencies were raised and denounced by the European Parliament including: the ‘lack of transparency as to the extent to which a Member State seeking assistance has been able to influence the outcome of negotiations’;⁸⁷ and ‘... the lack of transparency in the MoU negotiations’.⁸⁸ The European Parliament noted ‘that documents [published by the Troika] ... did not permit the public to form an overall view of the negotiations and thus that this does not constitute sufficient means of accountability’,⁸⁹ and that ‘because of ... the nature of the Troika decision-making process, the Troika’s mandate has been perceived as being unclear and lacking in transparency and democratic oversight’.⁹⁰

The failures by Greece and the Euro Area Member States (as well as by the European Commission and the European Central Bank) to conduct appropriate human rights impact assessments were not compensated for by the IMF. Quite to the contrary, the IMF – by its own admission – does not consistently conduct prior social impact assessment, despite the potentially regressive impacts of the measures adopted in order to comply with IMF conditionalities: between 2006 and 2010, nine of the 18 countries in an IMF case study sample were subject to programme conditionality affecting the prices of products consumed by the poor.⁹¹ It is also worth noting that the ‘specific’ terms and requirements provided for in the Memoranda with Greece which are categorical on the extent of Troika oversight and explicit in their substantive prescriptions, come after ‘prior action’ policy, that is measures that a country agrees to take *before* the IMF’s Executive Board approves financing or completes a review.⁹²

It is hardly surprising that, in the absence of such impact assessments, the human rights duties of the parties concerned tend to be disregarded in the name of macroeconomic adjustment. A study on austerity in the EU Member States prepared for the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) by the Directorate-General for Internal Policy concluded that:

... it rarely appeared that the spending cuts introduced during the crisis were specifically targeted at the wasteful uses of public resources. Rather, it seems that many of the imposed measures were horizontal, indiscriminate cuts across the policy areas they targeted, in order to meet financial savings that were determined in advance. [I]n Greece, in order to meet the goal of reducing the number of public employees by a certain number, the entire structure of the national broadcaster was abolished. Spending cuts should not be horizontal – they should be based on detailed evaluation of the effectiveness, efficiency, relevance and added value of public expenditure, and should include a public consultation.⁹³

The enquiry by the European Parliament on the role and operations of the Troika with regard to the euro area programme countries concludes that ‘too little attention has been paid to alleviating the negative economic and social impact of adjustment strategies in the programme countries’. The Parliament ‘deplores the fact that too often one-size-fits-all approach to crisis management has not fully considered the balance in the economic and social impact of the prescribed policy measures’.⁹⁴ Panagiotis Roumeliotis, Greece’s former

⁸⁶ Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh period report of Greece, U.N. doc. CEDAW/C/GRC/CO/7 (1 Mar. 2013) para. 40.

⁸⁷ European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28.2.2014, para. L. [Hereinafter EP Report A7-0149/2014]

⁸⁸ Id., para. 30.

⁸⁹ Id., para. 39.

⁹⁰ Id., para. 48.

⁹¹ IMF, *Review of Conditionality*, 19 June 2012, available at: <http://www.imf.org/external/np/pp/eng/2012/061912a.pdf>, para. 26.

⁹² Factsheet, *IMF Conditionality*, 31 Mar. 2014, available at: <http://www.imf.org/external/np/exr/facts/conditio.htm>

⁹³ *The Impact of the crisis on fundamental rights across the Member States of the EU*, Study for the LIBE Committee Directorate-General for Internal Policies (2015) 165.

⁹⁴ EP Report A7-0149/2014, para. 45.

alternate Executive Director at the IMF, was asked in June 2015 at a hearing of the Debt Truth Committee about the veracity of a written statement he delivered to the IMF on 9 May 2010 in which he affirmed that: ‘The program [for Greece under the Standby Arrangement/MoU] includes measures to protect the most vulnerable segments of the population. My authorities are committed to an equitable and fair distribution of the adjustment burden. The tax burden for the rich will increase, while the minimum pension and family allowances will be preserved’. In his testimony he offered an altogether different account:

I did not see measures to protect those groups, on the contrary they saw cuts. No one said the minimum wage should not be reduced, and it was. To say we will protect the most vulnerable groups is theoretical. Instead they suffered the most. The results were an increase in unemployment, an increase in poverty; we did not work on protecting the vulnerable social groups and what we saw was their further marginalization. Yes, there was a general reference in the first MoU [to protecting the most vulnerable] but [in the IMF meetings] they go measure by measure and discuss, for example, how to reach the target deficit, the primary surplus etc. There is no discussion on vulnerable social groups.⁹⁵

Despite the absence of any human rights impact assessment of the measures undertaken by Greece under the MoUs, the ‘Form of Legal Opinion’ at Annex 4 of the 2010 Loan Facility Agreement has a Greek Legal Advisor to the requisite Ministry attest to having examined the Agreement and the MoU, the relevant provisions of national and international law applicable to Greece, along with other investigations and review of matters deemed relevant.⁹⁶ The Legal Advisor’s signature is meant to confirm that Greece’s ‘execution, delivery and performance of the Agreement and MoU ... have not and will not violate any ... treaty binding on it’.⁹⁷ Further, the signature is meant to confirm that ‘The Agreement and the MoU are in proper legal form under Hellenic laws for the enforcement against the Borrower and the Borrower’s Agent. The enforcement of the Agreement would not be contrary to mandatory provisions of Hellenic Law, to the ordre public of the Hellenic Republic, to international treaties or to the generally accepted principles of international law binding on the Borrower’.

A comparable provision can be found in the Amendment to the Loan Facility Agreement of February 2012:

The Amendment is in proper legal form under Hellenic laws for enforcement against the Borrower and the Borrower’s Agent. The enforcement of the Amendment would not be contrary to mandatory provisions of Hellenic law, to the ordre public of the Hellenic Republic, to international treaties or to generally accepted principles of international law binding on the Borrower.

We question whether such an assurance could be given in the circumstances described. We find, instead, that the Euro Area Member States, the EU institutions (including in particular the European Commission and the ECB), and the IMF and IMF Member States have failed to meet the most basic of requirements to prevent human rights harms in the policies they pursue. There was a failure to undertake ex ante and ex post impact assessment that forms a basic expectation of international human rights law and EU law and policy, including guarantees of consultation by persons likely to be affected by the policies and access to information and transparency regarding public access to the results of assessments.⁹⁸

8. Conclusions

This legal brief has unpacked the actors and vehicles through which the conditionalities were imposed on Greece. It covered the period 2010 to date and addresses the breach of human rights obligations and the questions of international responsibility. We examined the responsibility of the following actors: the Euro Area Member States, the European Commission, the European Central Bank, the

⁹⁵ Hearing of the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee): Panagiotis Roumeliotis, 15 June 2015. Notes on file with authors.

⁹⁶ Loan Facility Agreement (2010), Annex 4: Form of Legal Opinion, letter to the Commission template.

⁹⁷ Id., para. 2.

⁹⁸ See, Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, U.N. doc. CEDAW/C/GRC/CO/7 (1 Mar. 2013) paras. 13(c), 33(b), 40.

Council of the European Union, the EU Member States, the International Monetary Fund, the Members States of the IMF, and Greece.

Although the European Commission and the European Central Bank, as well as the International Monetary Fund, all played a role in the negotiation with Greece of the 2010 Memorandum of Understanding and had been tasked with ensuring compliance with the macroeconomic adjustment measures prescribed as a condition for the provision of loans, it was the Euro Area Member States that approved the signature of the Loan Agreement and MoU. These States remain subject to the law on state responsibility for their respective actions and the legal consequences that flow from any breach of their international human rights law obligations. In the case of Germany, it was the German bank KfW that was the Lender to Greece and the signatory to the Loan Facility Agreement, however Germany is party to the Intercreditor Agreement and KfW was acting subject to the instructions and with the benefit of the guarantee of the Federal Republic of Germany. As such, the conduct of KfW is attributable to Germany under international law and Germany can be held internationally responsible for any breach of its international human rights obligations as a result of the 2010 scheme.

The measures concerning the coordination and surveillance of the budgetary discipline of Greece and setting out economic policy guidelines for Greece were defined in a Council decision on the basis of TFEU articles 126(9) and 136. The release of the loans subsequent to the conclusion of the first MoU of 2010 were to be conditional upon verification that the implementation of the economic policy of the Borrower accords with the adjustment programme or any conditions laid down in the Council decision on the basis of those TFEU articles and the MoU. In adopting decision 2010/320/EU of 10 May 2010 and other similar decisions subsequently in order to define the macroeconomic adjustment measures that Greece was expected to adopt, the Council of the EU was acting under EU law. As such, the economic policy guidelines that underpinned the support to be granted and the release of loans under the scheme of pooled bilateral loans of Euro Area states should have complied with the Charter of Fundamental Rights as a requirement of EU law.

The Euro Area Member States are also all parties to the major instruments of international human rights law adopted at the international and regional levels, including the International Covenant on Economic, Social and Cultural Rights, International Labour Organization treaties, and the Council of Europe's European Social Charter. In light of the harms that have come to pass in Greece as part of the conditionalities under lending schemes, the responsibility of Euro Area Member States may be engaged either as a result of breaches of their extraterritorial human rights obligations (obligations owed to people in Greece), or as a result of conduct as lenders that may have led Greece to violate the human rights duties it owes to its own population. Finally, the international responsibility of Euro Area Member States could be engaged for violations of the socio-economic rights of people in Greece as a result of the failure to regulate non-State actors over which the Euro Area states exercise effective control, and here we need refer to the European Financial Stability Facility.

The responsibility of a State may be engaged for the acts adopted by an international organization if those acts were adopted on the basis of powers attributed to the organization by the State concerned, where such attribution of powers did not include safeguards to ensure that the said powers would be exercised in accordance with the pre-existing human rights obligations of the State. Such a responsibility exists even where a Member State of an international organization is acting in accordance with the rules of the organization. In the current context, the responsibility of a State for the acts of an international organization would apply to the EU Member States acting within the Council of the EU and the Member States of the IMF.

EU institutions played a decisive role in the implementation of the successive loans provided to Greece, which entailed also the negotiation of the MoUs. The institutions of the EU are bound to comply with the requirements of the EU Charter of Fundamental Rights, including where mechanisms or institutions established by the EU Treaties take action, which is the case both for the scheme of bilateral pooled loans and for the EFSF. In short, the European Commission as well as the ECB, in discharging the roles assigned to them under the Intercreditor Agreement and Loan Facility Agreement of 8 May 2010 and in the establishment and functioning of the EFSF, and the Council of the EU, acting under Articles 126(9) and 136 of the Treaty on the Functioning of the European Union

to impose on Greece to take certain measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, should have all acted taking into account the requirements of the Charter of Fundamental Rights.

Regulation (EU) No. 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability defines the conditions applying to countries of the eurozone placed under ‘enhanced surveillance’. These are countries such as Greece which have called on the financial assistance either from one or several other Member States or third countries, the EFSM, ESM, EFSF, or another relevant international financial institution such as the IMF and were in receipt of financial assistance on the date of 30 May 2013. The measures adopted under the framework of the Regulation are clearly implementing EU law, and are therefore subject to the requirements of the EU Charter of Fundamental Rights, and these measures would include the MoUs. After the date of 30 May 2013 therefore, the implementation of the financial assistance to Greece should have taken into account the requirements of the EU Charter of Fundamental Rights.

Whereas the European Union as such is not a party to any major international or regional human rights instrument relevant in the context of this note, with the exception of the Convention on the Rights of Persons with Disabilities, it is nonetheless bound to comply with human rights as part of general international law. Although there is clearly an accountability gap in this regard, the absence of any external mechanism to ensure that the EU complies with its human rights obligations does not affect the content of the obligation itself.

Just like any other international organization, the IMF is bound to act in compliance with general international law, including the human rights that are part thereof. The IMF, moreover, cannot ignore that, as a specialised agency of the UN, it is bound to act in accordance with the principles of the Charter of the United Nations, which refers to the realization of human rights and fundamental freedoms as one of the purposes of the Organization, to be achieved in particular through international economic and social cooperation. Traditionally, the IMF has interpreted its Articles of Agreement as imposing a political prohibition which requires the Fund to reject the human rights implications of its work. In our view, there is little basis upon which deeply interventionist policy prescriptions can be considered consistent with the political prohibition, whereas taking the impact on the exercise of human rights into account is considered to constitute political interference. As for the Member States of the IMF, they would be acting in violation of their obligations under a range of human rights treaties to which they are bound if they were to delegate powers to the IMF and allow such powers to be exercised without ensuring that they will not infringe on human rights, or if they were to vote within the IMF without taking their human rights obligations into account.

Greece has undertaken to uphold a range of human rights vis-à-vis the people under its jurisdiction and may not ignore those obligations in the negotiation and conclusion of agreements with its creditors and in their implementation.

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