



## **Human Rights Law Clinic Papers 2019**

# The Impact of Austerity Policies on the Right to Health in Greece: The Role of European Union Institutions

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## ***i. Table of Cases***

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Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd et al v European Commission and European Central Bank* (2016) ECLI:EU:C:2016:701

Case T-291/13 *Eleftheriou and Papachristofi v Commission and ECB* (2014) EU:T:2014:978

Case T-293/13 *Theophilou v Commission and ECB* (2014) EU:T:2014:979

Case C-370/12 *Thomas Pringle v Government of Ireland et al* (2012) ECLI:EU:C:2012:756

## ***ii. Table of Legal Instruments***

Consolidated Version of the Treaty on European Union (signed 13 December 2007) OJ C 115/13 (TEU)

Consolidated Version of the Treaty on the Functioning of the European Union (signed 13 December 2007) OJ C 202/1 (TFEU)

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)

European Social Charter (revised) (Entered into force 1 July 1999) ETS No.163

Charter of Fundamental Rights of the European Union (Entered into force 1 December 2009) 2012/C 326/02 (CFREU)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Treaty Establishing the European Stability Mechanism (ESM) (adopted 2 February 2012, entered into force 27 September 2012)

### ***iii. Table of Abbreviations***

|         |  |
|---------|--|
| CESCR   | Committee on Economic, Social and Cultural Rights              |
| CFREU   | Charter of Fundamental Rights of the European Union            |
| CJEU    | Court of Justice of the European Union                         |
| COE     | Council of Europe  |
| Council | Council of the European Union                                  |
| CPRD    | Convention on the Rights of Persons with Disabilities          |
| EC      | European Commission  |
| ECB     | European Central Bank  |
| ECHR    | European Convention on Human Rights and Fundamental Freedoms   |
| EFSF    | European Financial Stability Facility                          |
| EU      | European Union   |
| ESC     | Economic Social and Cultural Rights                            |
| ESM     | European Stability Mechanism                                   |
| FAA     | Financial Assistance Agreement                                 |
| HRC     | Human Rights Council   |
| GDP     | Gross Domestic Product   |
| HRIA    | Human Rights Impact Assessments                                |
| HRC     | Human Rights Council   |
| ICESCR  | International Covenant on Economic, Social and Cultural Rights |

|       |   |
|-------|---|
| IDU   | Injecting Drug Users                              |
| IEEFD | Independent Expert on the Effects of Foreign Debt |
| MAP   | Macroeconomic Adjustment Programme                |
| MoU   | Memorandum of Understanding                       |
| TEU   | Treaty of the European Union                      |
| TFEU  | Treaty on the Functioning of the European Union   |
| UN    | United Nations                                    |

## 1. Introduction and Background

During the Greek financial crisis, Greece underwent a total of three separate Financial Assistance Agreement (FFA) periods.<sup>1</sup> The purpose of these FAAs was to consolidate Greek finances in order to safeguard financial stability in the Euro area as a whole.<sup>2</sup> In order to address the causes of Greece's public debt and to restore Greece's liquidity in the long term, the distribution of each loan was subject to 'strict conditionality' on Greece setting and implementing rigorous austerity programmes.<sup>3</sup> This report will analyse the first three Memorandums of Understanding (MoUs) that constituted the legal agreements of the FAAs between Greece and the European Union (EU). It will also detail the stipulations relevant to health care that Greece agreed to implement through changes to its budgetary policies.<sup>4</sup> Implementation of the stipulations was monitored by the EU, and the distribution of the loan instalments was dependent on Greece's compliance with the MoUs.<sup>5</sup>

The presumption is that the FAAs were designed and implemented by the EU directly, however the legal basis of the agreements is more complex than this, which complicates the justiciability of violations to the right to health in this case.<sup>6</sup> This presumption extends into the language the United Nations (UN) uses when describing the FAAs as discussed in section 2 and expounded in section 4. Firstly, the report discusses the legal framework of the FAAs and the actors involved. Secondly, the stipulations relating to the right to health are analysed and finally, we explore the links between the FAAs and the EU and assess potential routes to

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<sup>1</sup> European Commission, 'Financial Assistance to Greece: Information of the enhanced surveillance framework for Greece. Overview of the ESM stability support programme and previous programmes.'

<[https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece\\_en#enhanced-surveillance-framework-for-greece](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en#enhanced-surveillance-framework-for-greece)> accessed 29 March 2019.

<sup>2</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup (Brussels 2 May 2010); Statement by the Eurogroup (Brussels, 2 May 2010); EFSF Framework Agreement between the Euro Member States and the EFSF (20 June 2010), preamble recital 1; Treaty Establishing the European Stability Mechanism (ESM) (adopted 2 February 2012, entered into force 27 September 2012) preamble recital 6.

<sup>3</sup> EFSF Framework Agreement between the Euro Member States and the EFSF (20 June 2010), preamble recital 2 (EFSF Framework Agreement); Treaty Establishing the European Stability Mechanism (ESM) (adopted 2 February 2012, entered into force 27 September 2012) preamble recital 2 (Treaty establishing ESM).

<sup>4</sup> Memorandum of Economic and Financial Policies and Memorandum of Understanding on Specific Economic Policy Conditionality: Greece (3 May 2010) (MoU 2010); Memorandum of Understanding on Specific Economic Policy Conditionality: Greece (11 March 2012) (MoU 2012); Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and The Bank of Greece (19 August 2015) (MoU 2015); Supplemental Memorandum of Understanding: Greece (16 June 2016) (MoU 2016).

<sup>5</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup (Brussels 2 May 2010); Statement by the Eurogroup (Brussels 2 May 2010); EFSF Framework agreement, preamble recital 2; Treaty establishing the ESM, preamble recital 6.

<sup>6</sup> Council of Europe: Commissioner for Human Rights, 'Safeguarding human rights in times of economic crisis', (Council of Europe, 2013) 16.

enforcing EU accountability. The report is focussed solely on the EU and its institutions in order to ensure clarity and depth of analysis, and therefore the role of the International Monetary Fund (IMF) has not been explored. Furthermore, since the accountability of the EU is already clear under primary EU law, we did not include the possibility of the accountability of the EU under articles 17 and 61 Draft Articles on the Responsibility of International Organisations and the Vienna Convention on the Laws of Treaties. An annex at the end of the report details any stipulations within the FAAs that have the potential to affect the right to health.

While analysis is chiefly focussed on stipulations that have had an adverse effect on the right to health, there are positive aspects to the FAAs that must not be ignored. Reform of the Greek public health care system was overdue and measures to improve efficiency were broadly welcomed.<sup>7</sup> Structural changes such as creating a single health care provider and reducing the cost of pharmaceuticals by increasing the use of generics were positive reforms.<sup>8</sup> However, from 2010, severe cuts to keep health care spending at or below 6% of GDP profoundly affected access to, and quality of, health care and it will be shown that these cuts had a predominantly negative effect on the right to health.<sup>9</sup> The focus of this report will be the human rights obligations of the EU institutions that designed and implemented the FAAs. By analysing the impact of these agreements on the right to health, we will demonstrate that while Greece is ultimately responsible for its human rights obligations, the EU may also be held accountable for violations that occurred as a result of the strict conditionality of the FAAs.<sup>10</sup>

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<sup>7</sup> Human Rights Council, '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 on his mission to Greece' (21 April 2016) UN Doc A/HRC/31/60/Add.2, para 35 (IEEFD report 2016).

<sup>8</sup> European Parliament, Policy Department C: Citizen's Rights and Constitutional affairs, *The impact of the crisis on fundamental rights across Member States of the EU: Country Report on Greece* (Study for the LIBE committee) February 2015 available at <<http://www.europarl.europa.eu/studies>> accessed 5 March 2019, 14.

<sup>9</sup> Human Rights Council '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, Cephass Lumina: Mission to Greece' (27 March 2014) UN Doc A/HRC/25/50/Add.1, para 60 (IEEFD report 2014); Council of the European Union Decision (EU) 2011/734 of 12 July 2011 art 2 no. 4 e) 'Implementation of the comprehensive reform of the healthcare system started in 2010 with the objective to keep public health expenditure at or below 6% of GDP'.

<sup>10</sup> Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the second periodic report of Greece' (27 October 2015) E/C.12/GRC/CO/2, para 8.



## 2. Financial Assistance Agreements and Actors Involved

Each FAA has a unique institutional and legal basis, which often cannot be directly linked to the EU itself. In order to assess the EU's role in the austerity policies on the right to health, the following section will outline the structure and actors involved in each FAA.

### 2.1 The First Financial Assistance Agreement

The first FAA took place in the form of bilateral agreements between Greece and the Euro area Member States, requested by Greece and finalized by the Statement of the Euro area Member States on 2 May 2010.<sup>11</sup> The Euro area Member States, in a joint programme with the IMF, granted 80 billion Euros to Greece via bilateral loans.<sup>12</sup> These were made conditional on the determination and implementation of fiscal stipulations, laid down in the first MoU of 3 May 2010 between the Greek Government, the Bank of Greece, and the financial ministers of the Euro area States (Eurogroup).<sup>13</sup> The EU's role in the FAA itself was very limited. The European Commission (EC) combined the Euro area States' loans to Greece and was involved in setting up the MoU (further discussed in section 4). However, the EU itself is not party to the FAA agreement and thus, was not directly involved in the FAA.

### 2.2 The Second Financial Assistance Agreement

The primary actor of the second FAA besides the Greek Government and the IMF was the European Financial Stability Facility (EFSF).<sup>14</sup> The EFSF is a Luxembourg-registered limited liability company, established by an international framework agreement by the Euro area Member States who also act as shareholders.<sup>15</sup> In liaison with the IMF, the EFSF granted Greece the second loan of up to 144.6 billion Euros, which was again made conditional on the determination and implementation of fiscal stipulations.<sup>16</sup> These were laid down in the second

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<sup>11</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup, (Brussels 2 May 2010).

<sup>12</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup, (Brussels 2 May 2010).

<sup>13</sup> MoU 2010.

<sup>14</sup> Master Financial Assistance Facility Agreement between EFSF, the Hellenic Republic as Beneficiary Member State, the Hellenic Financial Stability Fund as Guarantor and the Bank of Greece (12 December 2012) (Master EFSF Agreement).

<sup>15</sup> Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Council Document 9614/10 of 10 May 2010; EFSF Framework Agreement.

<sup>16</sup> MoU 2012.

MoU of 9 March 2012, that was negotiated by the EC on behalf of the EFSF/ Euro-zone Member States.<sup>17</sup>

### 2.3 The Third Financial Assistance Agreement

The third FAA was concluded between the Greek Government, the IMF and the European Stability Mechanism (ESM). The ESM is an international financial institution set up by the Member States of the Euro-zone through the implementation of the ESM Treaty.<sup>18</sup> The legal basis is article 136 (3) Treaty on the Functioning of the European Union (TFEU), newly introduced by Council Decision 2011/199, which allows the Member States of the Euro-zone to establish a permanent crisis mechanism.<sup>19</sup> The ESM granted Greece the third loan of up to 86 billion Euros, which was once more made conditional on the determination and implementation of fiscal stipulations, laid down in the third MoU of 19 August 2015.<sup>20</sup> According to the Court of Justice of the European Union (CJEU) the FAAs do not constitute a violation of the 'bail-out prohibition' under article 125 TFEU, since they are conditioned on implementing budgetary policies.<sup>21</sup> The implementation of the stipulations were monitored, and the distribution of the loan instalments were made dependent on Greece's compliance with the 2015 MoU.<sup>22</sup>

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<sup>17</sup> EFSF Framework Agreement, preamble recital 2, art. 2 (1) (a); Master EFSF Agreement, preamble recital 7, art. 2 (5) (b) (i).

<sup>18</sup> Treaty establishing the ESM, art. 1 (1), (2).

<sup>19</sup> Consolidated Version of the Treaty on the Functioning of the European Union (signed 13 December 2007) OJ C 202/1 art. 136 (3) (TFEU); Council of the European Union Decision (EU) 2011/199 of 25 March 2011.

<sup>20</sup> MoU 2015; Treaty establishing the ESM, art. 12 (1) and art. 13 (1), (3).

<sup>21</sup> Case C-370/12 *Thomas Pringle v Government of Ireland et al* (2012) ECLI:EU:C:2012:756 para 129-147 (*Pringle case*).

<sup>22</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup (Brussels 2 May 2010); Statement by the Eurogroup (Brussels 2 May 2010); EFSF Framework Agreement, preamble recital 2; Treaty establishing the ESM, preamble recital 6.

### 3. Analysis of Austerity Measures: The Right to Health

International and regional human rights monitoring mechanisms have been critical of the EU institutions that imposed such stipulations, warning of the potentially long-term impact on public health.<sup>23</sup> The loans that the Greek government received came with strict conditionality that severely impeded the State's ability to comply with its legal obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU).<sup>24</sup> In order to assess the extent of EU responsibility, it is important to establish the impact that the FAAs had on the right to health. This will demonstrate how the EU violated its own human rights obligations by enforcing stipulations that would have undoubtedly impacted on the right to health of one of its Member States. The Committee on Economic, Social and Cultural Rights (CESCR) has been consistent in its opinion that Greece remains responsible for its obligations under the ICESCR even in times of economic depression.<sup>25</sup> However, CESCR is also clear that international organisations as lenders are also bound by international human rights law and therefore have an equivalent obligation to ensure that they refrain from adopting measures that would result in human rights violations.<sup>26</sup> Greece's compliance with the right to health is assessed against principles particularly relevant to Economic, Social and Cultural (ESC) rights and this section is divided accordingly. In the case of Greece, there is a clear evidential link between stipulations made in the MoUs and retrogression of the right to health. By demonstrating that Greece had no choice but to make drastic cuts to health care expenditure, EU accountability may be proven.

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<sup>23</sup> *ibid* (n6) 20.

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art. 12 (1); Council of Europe, European Social Charter (revised) (Entered into force 1 July 1999) ETS No.163 art. 11 and 13 (European Social Charter); European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR); Charter of Fundamental Rights of the European Union (entered into force 1 December 2009) 2012/C 326/02 (CFREU).

<sup>25</sup> Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the second periodic report of Greece' (27 October 2015) E/C.12/GRC/CO/2, para 8; Committee on Economic, Social and Cultural Rights, 'Chairperson letter to States parties 'in relation to the protection of Covenant rights in the context of the economic and financial crisis' UN Doc CESCR/48th/SP/MAB/SW; Committee on Economic, Social and Cultural Rights, 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (22 July 2016) UN Doc E/C.12/2016/1 (CESCR Statement).

<sup>26</sup> CESCR Statement paras 7 and 8.

### 3.1 Core Obligations

Core obligations that ensure minimum essential levels of all the ICESCR rights are explained in General Comment 3 and expounded in General Comment 14.<sup>27</sup> States that fail to deliver essential primary healthcare to a significant number of individuals would prima facie be failing to discharge their obligations under the Covenant.<sup>28</sup> The core obligation to take measures to prevent, treat and control epidemic and endemic diseases is pertinent to the Greek HIV prevention programme that experienced brutal funding cuts as a result of the FAAs.<sup>29</sup> Public financing to OKANA, the Greek government organisation against drugs, suffered a 40% decrease in 2011.<sup>30</sup> Furthermore, as a direct result of the funding deficit for OKANA, coverage of the Needle and Syringe Programme for Injecting Drug Users (IDUs) was far lower than international standards and was considered 'inadequate' for HIV prevention.<sup>31</sup> In its 2013 report to CESCR, Greece reported that between 2010 and 2011 the diagnosis of HIV infection in IDUs increased by 15 times.<sup>32</sup> The rise in HIV in Greece was further exacerbated by the suspension of distribution of free condoms.<sup>33</sup> The increase in HIV infection in Greece can be directly attributed to the cuts to public health financing that were made in order to comply with the 6% cap on health spending.

The ECHR does not guarantee an explicit right to health, however health-related cases brought before the European Court of Human Rights (ECtHR) have been argued under articles 2, 3, 8 and 14 of the ECHR.<sup>34</sup> The most relevant of these in relation to the right to health in Greece is article 2, the right to life.<sup>35</sup> Case-law has demonstrated that States have both positive and negative obligations regarding the health of individuals; denial of health care that puts an individual's life at risk would be in direct violation of the ECHR.<sup>36</sup> It follows that any stipulations within FAAs between the EU and Greece that relate to health care provision would be

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<sup>27</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3 (14 December 1990) UN Doc E/1991/23, para 10; Committee on Economic, Social and Cultural Rights, General Comment No. 14 (11 August 2000) UN Doc E/C.12/2000/4, para 43 (General Comment No. 14).

<sup>28</sup> Theo Van Boven 'Categories of Rights' in Daniel Moeckli, and others, *International Human Rights Law* (OUP 2018) 143.

<sup>29</sup> *ibid* (n27) para 44(c).

<sup>30</sup> Report to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) 'HIV outbreak among injecting drug users in Greece' 2012, 28.

<sup>31</sup> *ibid* (n30) 21.

<sup>32</sup> Committee on Economic, Social and Cultural Rights, 'Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Greece' (31 August 2012) E/C.12/GRC/2, para 263.

<sup>33</sup> *ibid* (n10) para 37.

<sup>34</sup> European Court of Human Rights, 'Thematic Report: Health-related issues in the case-law of the European Court of Human Rights' (Council of Europe/ European Court of Human Rights 2015) 5.

<sup>35</sup> ECHR, art 2.

<sup>36</sup> *ibid* (n34) 5.

justiciable under the ECHR. Indeed, where State policy can be shown to derogate from the protection of human life, then the duty to protect access to health care can certainly be held in violation of the right to life.<sup>37</sup>

### 3.2 Non-retrogression

Fulfilling the right to health entails positive measures that should be taken by a State to progressively realise the rights contained within the ICESCR.<sup>38</sup> CESCR is explicit in its view that any measures that lead to retrogression of the core obligations would constitute a violation of the ICESCR, including any ‘act of commission’ of legislation or policy that is ‘manifestly incompatible’ with pre-existing domestic or international legal obligations relating to the right to health.<sup>39</sup> Retrogression of the right to health can be seen in a 25% increase in the infant mortality rate between 2012 and 2015.<sup>40</sup> Additionally, the number of people who reported deferring a medical examination due to excessive health care costs increased by 85% between 2010 and 2013.<sup>41</sup>

In its report to CESCR, Greece is candid about the impact that cuts to public expenditure have had on the quality and quantity of health services.<sup>42</sup> They lay the blame firmly at the feet of their international lenders, accusing them of failing to ‘design and implement a human rights-based response to the debt crises’.<sup>43</sup> CESCR has been highly critical of the ‘severe impact’ the austerity measures adopted by Greece have had on ESC rights.<sup>44</sup> The specific stipulation limiting public health expenditure to 6% of GDP has had a significant impact.<sup>45</sup> With GDP in freefall between 2008 and 2016, linking the health care budget with GDP had a detrimental effect on spending. Between 2008 and 2016, Greek GDP fell by \$161.77 billion, which resulted in extensive expenditure cuts with catastrophic consequences on the right to health.<sup>46</sup> In 2013, the UN Independent Expert on the Effects of Foreign Debt (IEEFD) condemned the ‘significant regressive impacts on the enjoyment of human rights’ caused by the stipulations in the FAAs.<sup>47</sup>

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<sup>37</sup> Dimitrios Kagiarios ‘In search of a social minimum: Austerity and destitution in the European Court of Human Rights, (2019) 25 European Public Law 4, 7.

<sup>38</sup> *ibid* (n27) para 37.

<sup>39</sup> *ibid* (n27) para 48.

<sup>40</sup> Council of Europe, European Committee of Social Rights, (26 March 2018) Conclusions XXI-2 - Greece - article 11-1 HUDOC XXI-2/def/GRC/11/1/EN.

<sup>41</sup> *ibid*.

<sup>42</sup> Committee on Economic, Social and Cultural Rights, ‘List of issues in relation to the second periodic report of Greece: Replies of Greece to list of issues’ (6 August 2015) UN Doc E/C.12/GRC/Q/2/Add.1 para 3.

<sup>43</sup> *Ibid* para 10.

<sup>44</sup> *ibid* (n10) para 7.

<sup>45</sup> EU Council Decision 2011/734/EU art 4(e); MoU 2012.

<sup>46</sup> The World Bank, Greece GDP \$, <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=GR>> accessed 26 March 2019.

<sup>47</sup> IEEFD report 2016, para 5.

In order for retrogression to be justified, any proposed policy changes must be temporary, necessary and proportionate, non-discriminatory and protect a minimum core content.<sup>48</sup> Empirical assessment of retrogression requires careful monitoring over time; an issue that has made CESCR reluctant to attribute responsibility to international lenders in the past.<sup>49</sup>

### 3.3 Non-discrimination

The principle of non-discrimination is a non-derogable core obligation.<sup>50</sup> The UN, The Council of Europe and European Union human rights mechanisms all include non-discrimination as a component of ESC rights.<sup>51</sup> In the context of EU human rights law, basic principles to protect fundamental rights should underpin FAAs and such agreements should be 'non-discriminatory, justified and continue to provide effective support to those at risk of discrimination.'<sup>52</sup> Within the UN framework, a core obligation of the right to health includes the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.<sup>53</sup> One such group is people experiencing mental health difficulties. In 2012, funding for mental health units was reduced by 50% compared to 2009.<sup>54</sup> An increase in suicide by 37% between 2009 and 2011 coincides with these cuts.<sup>55</sup> The mental health of the Greek people has deteriorated sharply since the financial crisis, resulting in severe overcrowding in psychiatric hospitals, while involuntary psychiatric hospital admissions have risen dramatically since 2010.<sup>56</sup> It can be concluded that the stipulations of the FAAs have had a discriminatory impact on this group, leading to further marginalisation that violates the principle of non-discrimination enshrined within international human rights law.<sup>57</sup>

As a vulnerable and marginalised group, refugees, asylum-seekers and undocumented migrants have also been denied access to health care.<sup>58</sup> In 2015, an unprecedented number of people seeking international protection arrived in Greece, which put extra strain on health

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<sup>48</sup> *ibid*, para 17.

<sup>49</sup> Aoife Nolan, Nicholas J. Lusiani and Christian Courtis 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights' in *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 128.

<sup>50</sup> *ibid* (n27) para 47.

<sup>51</sup> ICESCR, art 2(2); General Comment No. 14, para 18; European Social Charter, part V, art E; CFREU, art 21.

<sup>52</sup> European Agency for Fundamental Rights, 'Protecting fundamental rights during the economic crisis' (December 2010), 4.

<sup>53</sup> *ibid* (n27) para 43(a).

<sup>54</sup> *ibid* (n32) para 258.

<sup>55</sup> IEEFD report 2014, para 66.

<sup>56</sup> Council of Europe 'Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her visit to Greece from 25 to 29 June 2018', CommDH(2018)24, para 115.

<sup>57</sup> European Social Charter, part V, article E.

<sup>58</sup> IEEFD report 2016, para 74.

services and resources already stretched to breaking point.<sup>59</sup> A report by the Commissioner for Human Rights of the Council of Europe echoes the difficulties this group has had in accessing basic health care.<sup>60</sup> The inability of Greece to provide health care services for its own population, let alone a vast number of refugees and migrants, prompted the IEEFD to recommend that international lenders ‘relax budgetary restrictions’ to enable Greece to respond to the crisis ‘in a manner that reflects best practices and standards in the field of human rights and refugee law’.<sup>61</sup> This did not happen.

In 2011, the EU became a party to the Convention on the Rights of Persons with Disabilities (CRPD). During the EU’s first treaty monitoring cycle in 2015, the committee raised concerns regarding the retrogressive effects of the FAA stipulations on the rights of persons with disabilities.<sup>62</sup> These concerns included continuing discrimination and barriers to accessing good quality health care for persons with disabilities within the EU. The CRPD Committee recommended the EU explicitly prohibit this discrimination within the field of health care.<sup>63</sup> The impact on people with disabilities has been significant, this group reporting higher unmet health care needs than the general population.<sup>64</sup> The impact of the severe cuts to public services disproportionately affects groups that are already vulnerable and marginalised, such as persons with disabilities.<sup>65</sup>

### 3.4 The legal obligation to ‘respect, protect and fulfil’

CESCR recognises that States are often constrained by a lack of resources, particularly in times of economic depression, however obligations that are of immediate effect are to *respect, protect and fulfil* the right to health.<sup>66</sup> The Human Rights Committee (HRC) has become increasingly critical of the expenditure cuts that were agreed between the Greek government and its international lenders, reprimanding them for the impact of the FAAs on health care accessibility, affordability, acceptability and quality.<sup>67</sup> With specific reference to the Greek financial situation, the IEEFD stated that the EC and the ECB, must not impose stipulations

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<sup>59</sup> *ibid*, para 15.

<sup>60</sup> *ibid* (n56) para 40.

<sup>61</sup> IEEFD report 2016, para 83(e).

<sup>62</sup> Committee on the Rights of Persons with Disabilities, ‘Concluding observations EU’ UN Doc CRPD/C/EU/CO/1, para 66.

<sup>63</sup> *ibid*, para 63.

<sup>64</sup> *ibid* (n56) para 117.

<sup>65</sup> IEEFD report 2014.

<sup>66</sup> *ibid* (n27) para 33.

<sup>67</sup> IEEFD report 2016, para 35.

that undermine the government's capacity to realise its obligations under the ICESCR.<sup>68</sup> The IEEFD has been clear that the FAAs are incompatible with the obligation of States to both progressively realize ESC rights, and their responsibility to avoid deliberately retrogressive measures.<sup>69</sup> Greece has found it impossible to comply with its duty to respect, protect and fulfil the right to health. As a result of the stipulations in the FAAs, health care spending was slashed from 7.1% of GDP in 2010 to 5.3% of GDP in 2013, levels below the average of the EU, with overall budget reduction of 40%.<sup>70</sup> These cuts, at well below the 6% the government were obliged to maintain, are indicative of 'disciplinary supremacy', which likens austerity to neo-liberalism, which once started is difficult to reject.<sup>71</sup> Whether the reduction in the health care budget beyond what was necessary is down to decisions made by the Greek government itself is perhaps beside the point. The stipulations of the FAAs are indicative of the 'undue external pressure' that Greece was under to meet the conditions of the MoUs in order to receive its bailout instalments and remain within the Euro-zone.<sup>72</sup>

A stipulation that had a significant impact on Greece's capacity to respect, protect and fulfil the right to health was the adoption of a policy to replace only 20% of retiring public sector employees.<sup>73</sup> To compound this, public sector wages experienced severe cuts that directly impacted public health workers.<sup>74</sup> This has caused what the Council of Europe Commissioner for Human Rights has called an 'exodus' of doctors abroad due to the deteriorating working conditions and general staff shortages in hospitals, critically impacting patients' access to health care.<sup>75</sup> As discussed in the report, the impact on access to health care is not only caused by stipulations that relate directly to health expenditure, but other conditions, notably cuts in patient's wages and pensions have also restricted access to health care at a time when demand has increased due to the deteriorating physical and mental health of the population as a result of the economic crisis.<sup>76</sup>

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<sup>68</sup> IEEFD report 2014, para 16.

<sup>69</sup> *ibid*, para 5.

<sup>70</sup> *ibid*, para 61.

<sup>71</sup> Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 *European Law Journal* 4, 542 (Salomon).

<sup>72</sup> Human Rights Council, 'Guiding principles on human rights impact assessments of economic reforms' (19 December 2018) UN Doc A/HRC/40/57, Principle 14.

<sup>73</sup> MoU 2010, para 12.

<sup>74</sup> MoU 2010, para 22; IEEFD report 2014, para 29.

<sup>75</sup> *ibid* (n56) para 109.

<sup>76</sup> *ibid* 1-2.



### 3.5 Human Rights Impact Assessments (HRIAs)

The recent publication by the HRC of its ‘Guiding principles on human rights impact assessments of economic reforms’ (2018 Principles) indicates an increasingly robust approach to protecting human rights in the context of economic reform policies.<sup>77</sup> These principles build on the 2012 ‘Guiding principles on foreign debt and human rights’, which recognise the need for international lenders to conduct ‘credible’ impact assessments as a prerequisite of FAAs with borrowing States.<sup>78</sup> The 2018 Principles set out explicit and coherent guidelines for States and international lenders, and emphasise the joint responsibility of all actors involved in economic policy making.<sup>79</sup> States and international lenders *must* carry out HRIAs prior to implementing any economic reform policies to evaluate and address potential effects of these policies on human rights.<sup>80</sup> Likewise, Greece would have to justify that any retrogressive actions met these criteria to ensure ICESCR compliance by carrying out its own HRIA.<sup>81</sup> When the first MoU was agreed in 2010, there was no formal guidance from the UN on HRIAs. Consideration of the social impact of FAAs was mentioned in 2011 as the responsibility of States alone.<sup>82</sup> The HRC has since strengthened its position. In 2015 it denounced the negotiations of Greece’s FAAs as ‘emblematic for the absence of clear and human-rights-based rules’ that lead to a worsening situation for vulnerable groups in particular.<sup>83</sup> Neither Greece nor the EU carried out any human rights impact assessments associated with the 2010 or 2012 MoUs. The first document attempting address this issue did not appear from the EC until the MoU of 2015 was agreed.<sup>84</sup> This document is the EC’s attempt to ensure that the 2015 ESM stability support programme protects ‘social fairness’ and ‘the most vulnerable’, however mention of human rights are conspicuous by their absence. The assessment notes only positive outcomes relating to the reforms of the healthcare system as stipulated in the FAAs, perhaps not a surprise given that it is a self-assessment of the potential impact of the EC’s own policies.<sup>85</sup> In the report following his 2016 mission to the institutions of the EU the IEEFD questions the credibility of this impact assessment by noting its failure to

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<sup>77</sup> *ibid* (n72).

<sup>78</sup> Human Rights Council, ‘Guiding principles on foreign debt and human rights’, UN Doc A/HRC/20/23, para 40.

<sup>79</sup> *ibid* (n72) Principle 3.

<sup>80</sup> *ibid*, Principle 3.

<sup>81</sup> *ibid*, Principle 10.

<sup>82</sup> Human Rights Council, ‘Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona’ (17 March 2011) A/HRC/17/34 para 28.

<sup>83</sup> UNGA, ‘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’ (4 August 2015) UN Doc A/70/275, para 20.

<sup>84</sup> European Commission, ‘Assessment of the Social Impact of the new Stability Support Programme for Greece’ (19 August 2015) SWD (2015) 162 final.

<sup>85</sup> *ibid*, s 3.3.

evaluate the impact of FAAs against international human rights standards.<sup>86</sup> HRIAs should be conducted by an independent institution that is not responsible for the financial agreements, in this case, the EU should not be conducting its own impact assessments, as these ultimately affect their legitimacy.<sup>87</sup> In 2016, the HRC condemned the European Commission for its failure to conduct any meaningful impact assessment when designing the FAAs and then criticises the failure of the EU to conduct these as ‘deplorable’.<sup>88</sup> A 2018 report published by the European Parliament recommends that the EU should make greater use of *ex ante* and *ex post facto* HRIAs in the context of trade agreements to mitigate the impact of such agreements on human rights.<sup>89</sup> The importance of HRIAs is reiterated by the Greek National Commission for Human Rights, who recommend that the Greek government and EU institutions act in unison to assess the impact of austerity measures on human rights.<sup>90</sup>

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<sup>86</sup> Human Rights Council, ‘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 on his mission to institutions of the European Union’ (28 December 2016) UN Doc A/HRC/34/57/Add.1, para 66 (IEEFD report on EU).

<sup>87</sup> *ibid* (72) Principle 22.

<sup>88</sup> IEEFD report 2016, para 28; IEEFD report on EU, para 65.

<sup>89</sup> European Parliament, ‘Enhancing EU actions on economic, social and cultural rights within its human rights policy’ (2018) EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/16, 25.

<sup>90</sup> Greek National Commission for Human Rights ‘The Greek National Commission for Human Rights (GNCHR) recognising the importance of the UN Expert’s Guiding Principles on Human Rights Impact Assessments of Economic Reforms’ 3, <[http://www.nchr.gr/images/English\\_Site/CRISIS/GNCHR%20for%20IEs%20Guidelines%20on%20HRIA%20.pdf](http://www.nchr.gr/images/English_Site/CRISIS/GNCHR%20for%20IEs%20Guidelines%20on%20HRIA%20.pdf)> accessed 4 March 2019.

## 4. Links between the Financial Assistance Agreements and the European Union

Ultimately, it must be determined whether the EU can be held accountable for the violations of the right to health. In general, the EU has several human rights obligations, both on European and international levels, for example through customary international law.<sup>91</sup> Pursuant to article 6 (1) and (2) Treaty on European Union (TEU) and article 51 (1) CFREU the EU and its institutions are bound by the CFREU.<sup>92</sup> Even though the EU is not party of the ECHR and the ESC, the jurisprudence of the CJEU and the wording of article 6 (1) and (2) TEU and article 52 (3) CFREU confirm that the EU is still bound by it.<sup>93</sup> In contrast to the CRPD, the EU is not a member of the ICESCR.<sup>94</sup> Nevertheless, the EU's obligations under the ICESCR is widely recognised.<sup>95</sup> Furthermore, under the principle of '*de facto accession*', the EU is obliged to consider and not infringe Greece's human rights obligations under international law.<sup>96</sup>

Despite this, the EU's responsibility is problematic from several points of view. As shown in section 2, each of the FAAs has a unique institutional and legal basis which often cannot directly be linked to the EU itself. If the FAAs can be classified as Union acts, the EU would be directly bound by its human rights obligations when shaping the FAAs. If, on the other hand, a Union act must be denied, the question arises as to whether the participation of the EU can still lead to an accountability. Therefore, it is important to clarify whether the FAAs can be qualified as Union act and, if not, to what extent the EU can be linked to the FAAs.

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<sup>91</sup> CESCR Statement, para 7.

<sup>92</sup> Consolidated Version of the Treaty on European Union (signed 13 December 2007) OJ C 115/13 art. 6 (1) and (2) (TEU); CFREU, art. 51 (1).

<sup>93</sup> TEU, art. 6 (1) and (2).

<sup>94</sup> The Regional Office for Europe of the UN High Commissioner for Human Rights, 'The European Union and International Human Rights Law'

<[https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)>

accessed 27 March 2019, 22-23.

<sup>95</sup> In the predominant view, the EU's obligation results, among other things, from art. 53 CFREU, the general principles of article 6 (3) TEU and the indirect obligations under article 21 (1) TEU and art. 151 (1) TFEU. In addition, the CJEU itself in its case law bound by UN Treaties (such as in Case C-540/03, *European Parliament v Council of the European Union*, (2007) ECR I 05769 para 35-37).

<sup>96</sup> Case-812/79, *Attorney General v Burgoa* (1980) ECR 2787, paras 9-11; The Regional Office for Europe of the UN High Commissioner for Human Rights, 'The European Union and International Human Rights Law'

<[https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)>

accessed 23 March 2019, 24-25; The EU has to ensure that Greece is able comply with their human rights obligations.

#### 4.1 Qualification as Union act

It is doubtful if the MoUs can be qualified as Union acts within the meaning of article 288 TFEU.<sup>97</sup> The ESM and EFSF are not Union bodies.<sup>98</sup> In contrast to the *Florescu* case, in which the CJEU ruled that the MoU between the EU and Romania constituted a Union act, none of the Greek FAAs were concluded directly with the EU.<sup>99</sup> In contrast to Union acts, the EC has no decision-making powers when negotiating the Greek MoUs.<sup>100</sup> Even though each MoU was negotiated and concluded by the EC in liaison with the ECB, they did not act on the basis of their own competence.<sup>101</sup> Moreover, the FAA is outside the competence of the EU.<sup>102</sup> The CJEU has found that the ESM is an economic policy, not a monetary policy, and therefore not a matter falling exclusively within the competence of the Union.<sup>103</sup> Instead, EC and ECB acted on behalf of the international lenders.<sup>104</sup> This procedure represents a form of ‘organ-lending’ and does not fall within the scope of EU law.<sup>105</sup> Therefore, the FAAs do not constitute a Union act.<sup>106</sup>

#### 4.2 Hybrid Nature of Financial Assistant Agreements

Whilst the Greek MoUs cannot be qualified as Union acts, the EU is in many respects strongly linked.<sup>107</sup> In order to clarify to what extent the EU nevertheless can be held accountable, it

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<sup>97</sup> TFEU, art. 288.

<sup>98</sup> *ibid* (n71) 531.

<sup>99</sup> Case-T258/14 *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others* (2017) ECLI:EU:C:2017:448 para 35 (*Florescu* case); The first FAA was concluded as a bilateral loan between Greece and the Euro-area Member States, while the second and third FAAs were each concluded through agreements with independent intergovernmental entities. The second FAA was concluded with the EFSF limited liability company (consisting of the Euro-area Member States) and the third with the international financial institution ESM (see Claire Kilpatrick, ‘Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’ (2014) 10 *European Constitutional Law Review* 393, 401).

<sup>100</sup> Koen Lenaerts and Jos. A. Gutiérrez-Fons, ‘The European Court of Justice as the Guardian of the Rule of EU Social Law’ in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds) *A European Social Union after the Crisis* (CUP 2017) 433- 456, 438.

<sup>101</sup> The competences of the Commission derive from article 17 TEU in conjunction with art. 234, art. 244-250, art. 290 and art. 291 TFEU.

<sup>102</sup> *ibid* (n100) 438.

<sup>103</sup> *Pringle* case, para 63-64.

<sup>104</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup (Brussels 2 May 2010); EFSF Framework Agreement art 2 (1) (a); Master EFSF Agreement, preamble recital 7, art. 2 (5) (b) (i); MoU 2015; Treaty establishing the ESM, art. 12 (1) and art. 13 (1), (3).

<sup>105</sup> Andreas Fischer-Lescano, ‘Troika in der Austerität – Rechtsbindungen der Unionsorgane beim Abschluss von Memoranda of Understanding’ (2014) 1 *Kritische Justiz* 2, 7 (authors translation from DeepL <<https://www.deepl.com/translator>>).

<sup>106</sup> Under art. 288 TFEU.

<sup>107</sup> Claire Kilpatrick, ‘On The Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailout’ (2015) 35 *Oxford Journal of Legal Studies*, 325, 338.

must be examined to what extent the EU is involved in the FAAs.<sup>108</sup>

#### 4.2.1 Institutional Links

EU institutions are linked to the MoUs in many respects. Firstly, EU institutions have been involved in the establishment of all three MoUs.<sup>109</sup> Within each FAA, the EC and ECB were entrusted with the task of conducting the negotiations of the stipulations set in the MoUs.<sup>110</sup> Moreover, the EC and ECB finalised and signed the MoUs on behalf of the international lenders.<sup>111</sup> In order to do this, the EC evaluated the fiscal and economic situation of Greece in advance, and assessed the potential financial needs of Greece and the risks inherent for the international lenders.<sup>112</sup> On the basis of this evaluation, it was the EC that proposed the main terms of the FAA, for example the amount and duration of the credit.<sup>113</sup> The disbursement of the financial assistance was dependant on the EC's positive assessment.<sup>114</sup> In addition, the EC has an observer status within the respective Board of Director meeting.<sup>115</sup> In consequence, even though the FAAs and the conditional MoUs have not been concluded with the EU, the EU institutions have determined the essential content. Thus, the EU plays a key role within all FAAs.<sup>116</sup> It is the EC that has the independent decision-making power.<sup>117</sup> The actual international lenders play only a minor role in the arrangement of the FAAs. The human rights-relevant conduct has thus, essentially been set by EU institutions.

#### 4.2.2 Substantive Links

Secondly, the denial of the EU's accountability due to the absence of the EU law must be rejected. Moreover, in addition to institutional links, numerous substantive linkages between the FAAs and EU law suggest the accountability of the EU. All three MoUs can be directly

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<sup>108</sup> Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991, 995-1004.

<sup>109</sup> Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, 404.

<sup>110</sup> EFSF Framework Agreement, art. 2 (1) (a); Master EFSF Agreement art. 2 (5) (b) (i); Treaty establishing the ESM, art. 13 (3).

<sup>111</sup> Statement on the support to Greece by Euro area Member States (Brussels 11 April 2010); Statement by the Eurogroup (Brussels 2 May 2010); EFSF Framework Agreement, art. 2 (1) (a); Master EFSF Agreement, preamble recital 7, art. 2 (5) (b) (i); MoU 2015; Treaty establishing the ESM, art. 12 (1) and art. 13 (1), (3) and (4).

<sup>112</sup> EFSF Framework Agreement, preamble recital 7; Treaty establishing the ESM, art. 13 (1) (a), (b) and (c).

<sup>113</sup> EFSF Framework Agreement, art. 2 (1) (a).

<sup>114</sup> EFSF Framework Agreement b art. 3; Treaty establishing the ESM, preamble recital 17, art. 13 (7), art. 14 (5) and art. 16 (5).

<sup>115</sup> EFSF Framework Agreement, art. 10 (2); Treaty establishing the ESM, art. 5 (3).

<sup>116</sup> *ibid* (n107) 338.

<sup>117</sup> Anastasia Poulou, 'The Liability of the EU in the ESM framework' (2017) 24 (1) *Maastricht Journal of European and Comparative Law*, 127, 135 (Poulou).

linked to the EU's Excessive Deficit Procedure on Greece under articles 126 (9), 136 TFEU.<sup>118</sup> Even before the first MoU was drafted, Greece was subject to a large number of fiscal stipulations on the basis of the Excessive Debt Procedure that was set out by Council Decision in February 2012.<sup>119</sup> Both the agreements on the first and second FAAs and the MoUs refer not only directly to the conditions set by the Council, but also include these stipulations in their MoUs.<sup>120</sup> Both the Council Decisions regarding the Excessive Deficit Procedure and the MoUs make continuous references to each other and largely have the same content.<sup>121</sup> Therefore, the stipulations of the MoU are neither explicitly attributable to the EU nor to the FAAs. Rather they have 'mixed legal parentage'.<sup>122</sup> Considering that the EC is the competent institution for setting stipulations in both procedures, the differentiation between FAAs and the EU legal order becomes even more blurred.

Another link between the FAAs and EU law is that the creation of the ESM for the third FAA required a change in EU primary law. With Council Decision 2011/199, Article 136 TFEU was extended by paragraph 3, which enables the Member States of the Euro-area to establish a permanent stability mechanism.<sup>123</sup> Prior to this extension, the EU and the Euro-area Member States were specifically looking for a way to handle FAAs outside the forum of the EU. The change in EU law was made specifically with the intention of establishing the ESM. Therefore, article 136 (3) TFEU illustrates that the ESM (as well as the other FAAs) primarily serves the interests of the Union.<sup>124</sup> Moreover, a link exists as a result of the consistency clauses within the framework agreements of the FAAs.<sup>125</sup> Both the EFSF and the ESM determine that the MoUs must be consistent with EU law and therefore include human rights obligations of the EU.<sup>126</sup> In consequence, even though the MoUs are outside the EU legal order they have to be consistent with EU law. As a result, the EC has a contractual obligation to comply with EU law when negotiating MoUs.

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<sup>118</sup> TFEU, art. 126 (9), 136.

<sup>119</sup> TFEU, art. 126 (9); Council of the European Union Decision (EU) 2010/182 of 16 February 2010.

<sup>120</sup> Statement by the Eurogroup (Brussels 2 May 2010); Master EFSF Agreement, preamble recital 7; MoU 2010; Treaty establishing the ESM, preamble recital 3; Although the third MoU did not explicitly refer to the excessive deficit procedure, it still had to comply with the conditions set in the relevant Council Decisions.

<sup>121</sup> Often the wording of these stipulations is even identical.

<sup>122</sup> *ibid* (n107) 340.

<sup>123</sup> Council of the European Union Decision (EU) 2011/199 of 25 March 2011 art. 7; Treaty establishing the ESM, art. 126 (3); Council of the European Union Decision (EU) 2011/199 of 25 May 2011, art. 136.

<sup>124</sup> *ibid* (n108) 1001.

<sup>125</sup> *ibid*, 1003.

<sup>126</sup> EFSF Framework Agreement, preamble recital 2; Treaty establishing the ESM, art. 13 (3).

One of the most important linkages between the MoUs and EU law was created by the Council's so-called 'Two-Pack-Decision' in 2013.<sup>127</sup> Under this, each Member State receiving financial assistance under the EFSF or ESM must undertake a Macroeconomic Adjustment Programme (MAP) negotiated with the EC and approved by the Council.<sup>128</sup> The MAP sets out all essential fiscal and economic stipulations for regaining the financial stability of the Member State.<sup>129</sup> The purpose is to translate the stipulations of the MoU into binding EU law.<sup>130</sup> The MAP concerning the third FAA of Greece was established on the same day as the third MoU by a Council Decision and is almost identical in substance to the stipulations set out in the third MoU.<sup>131</sup> The only difference between them is that the stipulations of the MoU are based on intergovernmental agreement and the stipulations of the MAP are based on Council Decision and therefore constitute a Union act.<sup>132</sup> This is relevant in two respects: First and most importantly, the FAA stipulations are now laid down in two different legal documents, the MoU and the MAP.<sup>133</sup> Thus, they have a dual legal nature.<sup>134</sup> With the latter, conditions are now also laid down within the EU law.<sup>135</sup> As a result, fiscal obligations are no longer merely imposed outside the EU legal order between the international lenders and Greece, but are brought within the framework of the EU. Thus the 'Two-Pack-Decision' brings conditionality back into the EU legal order.<sup>136</sup> For Greece this results in a dual obligation: on the one hand by intergovernmental agreement of the MoU and on the other hand by the binding Council Decision of the MAP.

Second, when negotiating the fiscal stipulations, the EC is now acting on two different grounds: On the one hand, it acts on behalf of the ESM when negotiating the MoU and, on the other, it acts within its own competence when negotiating the MAP.<sup>137</sup> At the same time, the Council Decision requires the EC to 'ensure that the memorandum of understanding signed by the EC

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<sup>127</sup> Council of the European Union Decision (EU) 2013/472 of 21 May 2013; Michael Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61, 63 (Ioannidis).

<sup>128</sup> Council of the European Union Decision (EU) 2013/472 of 21 May 2013 art. 7.

<sup>129</sup> Council of the European Union Decision (EU) 2013/472 of 21 May 2013.

<sup>130</sup> Paul Dermine, 'The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-C-8/15 to C-10/15, *Ledra Advertising et al. v European Commission and European Central Bank* (2017) 13 *European Constitutional Law Review* 369, 378 (Dermine); Ioannidis, 75.

<sup>131</sup> Council of the European Union Decision (EU) 2015/1411 of 19 August 2015; Council of the European Union Decision (EU) 2016/544 of 19 August 2015; Council of the European Union Decision (EU) 2017/1226 of 30 June 2017.

<sup>132</sup> TFEU, art. 288.

<sup>133</sup> *ibid* (n108) 1001.

<sup>134</sup> *ibid*, 1001.

<sup>135</sup> *ibid*.

<sup>136</sup> Dermine, 378.

<sup>137</sup> Pursuant to article 17 TEU in conjunction with art. 126 (7) and (9) TFEU.

on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council'.<sup>138</sup> As a result, the EC is bound by the stipulations of the MAP when negotiating the MoU, despite their action being outside the EU legal order.

### 4.3 Accountability of EU

As shown above, the EU is directly linked to the FAAs in more than one way. In order to assess the accountability of the EU, a distinction must be drawn between the two types of ways the EU might be accountable for the violation of the right to health:

Firstly, the EU can be held accountable for the stipulations of the MAP.<sup>139</sup> In contrast to the MoUs, the Council Decisions adopting Greece's MAPs lie within the EU legal order and constitute Union acts.<sup>140</sup> Since the Council, the EC and the ECB are bound by human rights law when acting as EU institutions, the EU can be held directly accountable for the human rights violations of the MAPs.<sup>141</sup> However, since the 'Two-Pack-Decision' has only been established in 2013, this only applies for the third FAA. Further, even though the MAP and the third MoU have been concurrently established, it has to be kept in mind, that the stipulations of the MoU are far more detailed and precise than the stipulations of the MAP, which only include the main lending conditions.<sup>142</sup> This suggests, that even though the EC acted on the basis of a 'double obligation' when negotiating the stipulations, it primarily acted on behalf of the ESM. Furthermore, it is unclear what impact a challenge of the Council Decision in front of the CJEU would have to the MoUs.<sup>143</sup> It could be argued that if the MAP is declared ineffective, there is also an obligation to modify the MoUs. However, this is highly questionable due to the difference in legal nature and therefore Greece would still be bound by the MoUs.<sup>144</sup> As of today, there is no CJEU decision on this matter.

Secondly, the EU could be accountable for the stipulations in the MoUs. Since in this case the EC and the ECB act outside the EU legal order, the extent to which the EU can be held accountable is controversial.

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<sup>138</sup> Council of the European Union Decision (EU) 2013/472 of 21 May 2013 art. 2.

<sup>139</sup> *ibid* (n100) 440.

<sup>140</sup> Lenaerts and Gutiérrez- Fons, 440; Ioannidis, 75.

<sup>141</sup> Menelaos Merkakis and Paul Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu' (2018) 55(2) *Common Market Law Review* 643, 654-655 (Menelaos and Dermine).

<sup>142</sup> *ibid* (n108) 1002.

<sup>143</sup> (Menelaos and Dermine), 655-656.

<sup>144</sup> *ibid*.



It has been argued that the EC and the ECB cannot be held accountable for acts performed when acting on behalf of the international lenders. Therefore, the EU itself does not acknowledge its responsibility and considers its participation in the FAAs to be legally unproblematic.<sup>145</sup> With regard to the reforms made to the health care system in Greece, the EU ‘regrets that the programmes are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law’.<sup>146</sup> Equivalently, the ECB declared that ‘it remains the responsibility of the Member State concerned to ensure the compliance of its national law and administrative practices with EU law’. Similarly, the European General Court has held that cases on Portuguese and Cypriot MoUs are inadmissible on the grounds that the MoUs did not originate from EU law.<sup>147</sup>

Notably, the CJEU clarified in the *Pringle* decision, that the ESM is not implementing Union law and therefore, the Member States are not bound by article 51 CFREU.<sup>148</sup> However, the requirement ‘when implementing union law’ in article 51 CFREU refers only to the Member States, but not to EU institutions.<sup>149</sup> Rather, the wording of article 51 CFREU implies that the EU institutions are bound by any action, whether or not they implement EU law.<sup>150</sup> For this reason, the *Pringle* jurisprudence cannot be extended to the EC and ECB.

This opinion is also shared by the CJEU which confirms the accountability of the EU for MoUs in the *Ledra* decision by stating that ‘the tasks conferred to the EC and ECB within the ESM Treaty do not alter the essential character of the powers conferred to those institutions by EU law’.<sup>151</sup> In the decision, the CJEU has clearly held that the EU institutions must respect human rights when negotiating the MoUs outside their competence. This opinion is also shared by the European Parliament, Advocate-General Kokott and the UN IEEFD, who stated in his report that the EC is bound by its human rights obligations ‘including when it acts on the basis of the treaty establishing the European Stability Mechanism’.<sup>152</sup> In contrast to the view of

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<sup>145</sup> European Parliament Committee on Economic and Monetary Affairs, ‘Report on the role and operation of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries’ (28 February 2014) A7-0149/2014.

<sup>146</sup> *ibid*, para 32, 80.

<sup>147</sup> Case T-291/13 *Eleftheriou and Papachristofi v Commission and ECB* (2014) EU:T:2014:978; Case T-293/13 *Theophilou v Commission and ECB* (2014) EU:T:2014:979.

<sup>148</sup> *Pringle* case, para 179-180.

<sup>149</sup> *ibid* (n117) 137.

<sup>150</sup> Salomon 532; Poulou, 137.

<sup>151</sup> Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd et al v European Commission and European Central Bank* (2016) ECLI:EU:C:2016:701 para 56 (*Ledra* case).

<sup>152</sup> European Parliament, ‘30th and 31st annual reports on monitoring the application of EU Law (2012–2013)’ (10 September 2015) 2014/2253(INI) para 23; Opinion of A.G. Kokott in Case C-370/12, *Thomas Pringle v Government of Ireland et al* (2012) EU:C:2012:675 para 176; IEEFD report 2016, para 23.

Advocate-General Wahl, the CJEU holds that this is not merely a ‘best effort’ obligation, but a true performance obligation.<sup>153</sup>

This is also supported by the fact that otherwise there is a danger of human rights being circumvented.<sup>154</sup> Since, according to case-law of the CJEU, the Member States are not bound by the CFREU when acting within the framework of the ESM, the CFREU would not provide protection for the MoUs. Therefore, the EU must not be allowed to circumvent existing human rights obligations by changing the framework in which they operate.<sup>155</sup> This would result in peripheralization of human rights accountability. Rather the EC and ECB are obliged under article 6 and 13 (1) TEU to ‘promote the values’ of the EU and serve the interest of its citizens, including the right to health.<sup>156</sup> Further, the accountability also results from the EC’s role as ‘Guardian of the Treaties’ pursuant to article 17 (1) TEU.<sup>157</sup> It therefore must refrain from signing a MoU that is inconsistent with EU law.<sup>158</sup> Equally, as a party to the CRPD, the EU has competence to ensure its policies, which include the FAAs, comply with their legal obligations to promote and protect human health in line with the Convention.<sup>159</sup>

Lastly, the accountability of the EU is called into question, as the conditions of the MoUs leave Greece scope for their implementation. It must be considered, that each of the MoUs was also set out through Council Decisions and therefore have a binding nature.<sup>160</sup> Due to the binding ‘strict conditionality’, Greece must comply with the FAAs in order to obtain financial assistance. Other than that, non-compliance with the stipulations, would not entail further legal consequences, for example the imposition of sanctions or the exclusion of the European Monetary Union.<sup>161</sup> Since some of the individual stipulations are broad, for example keeping health care spending at or below 6% of GDP, Greece was responsible for the scope of implementation and interpreted it as they saw fit. It is therefore plausible that this margin of implementation has an impact on the accountability of the EU. This question has not yet been raised either in case law or in academic literature. However, it must also be considered that

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<sup>153</sup> Opinion of A.G. Wahl in Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd et al v European Commission and European Central Bank* (2016) ECLI:EU:C:2016:701 para 70; (*Ledra case*), para 67; Dermine, 375.

<sup>154</sup> *ibid* (n108) 994.

<sup>155</sup> *ibid*.

<sup>156</sup> TEU, art. 13 (3).

<sup>157</sup> *Ledra case*, para 59; (Menelaos and Dermine), 651; TEU, art. 17 (1).

<sup>158</sup> *Ledra case*, para 59; (Menelaos and Dermine), 651.

<sup>159</sup> European Commission, ‘Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union’ SWD (2014)182 final, para 130.

<sup>160</sup> Maria Meng-Pepantoni, ‘Legal Aspects of the Memorandum of Understanding in the Greek Debt Crisis’, (2015) 1 *Zeitschrift für Europarechtliche Studien*, 3, 21-22.

<sup>161</sup> *ibid*, 25.

Greece, due to 'strict conditionality', was under severe pressure to sign the MoUs in order to receive financial assistance.<sup>162</sup> Therefore, where Greece has exceeded its stipulations the EU's responsibility may be called into question.

All things considered, the denial of EU accountability due to lack of EU law must be rejected.<sup>163</sup> However, it has to be kept in mind, that the right to health is not absolute and a violation can be justified under certain circumstances.<sup>164</sup> However, in previous rulings of the CJEU concerning the infringement of property and labour rights in cases concerning FAAs of other countries, the CJEU has shown a preference to decide in favour of the general interest of the financial stability of the EU.<sup>165</sup>

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<sup>162</sup> *ibid* (n72) principle 14.

<sup>163</sup> We did not include a possible accountability of the EU under article 17 and 61 ARIO and the Vienna Convention on the laws of treaties because the accountability of the EU is already clear under primary EU law.

<sup>164</sup> *Ledra* case, para 70; In the opinion of the ECJ a violation can be justified 'provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed'.

<sup>165</sup> *ibid* (n151) para 72-76.

## 5. Conclusion and Recommendations

Given the extent of Greece's financial crisis, it seems it had little choice but to accept the stipulations of the FAAs. This has led to the wholesale neglect of the core obligations of the ICESCR regarding the right to health. Additionally, Greece has violated the principles of retrogression, non-discrimination and the obligation to respect, protect and fulfil the right to health. With respect to HRIAs, we could speculate that the EU understood the FAAs would have a profoundly negative impact on human rights in Greece and therefore purposefully chose not to conduct any such assessment. While the UN has been critical of Greece, it has also denounced the EU and financial institutions for the strict conditionality that was imposed on Greece, which necessitated health care cuts. The IEEFD is explicit that fiscal measures enforced by international organisations such as the EU must respect the human rights obligations binding on their Member States.<sup>166</sup> The violations of the right to health that were perpetrated by the Greek government as a result of the strict conditionality, by extension, implicate the EU, for they ultimately played a pivotal role in the FAAs.

Even though the FAAs cannot be qualified as Union acts, there are nevertheless numerous substantive and institutional links between the EU and the Greek FAAs. Regardless of the hybrid nature of the FAAs, the EU can be held directly accountable for violations of the right to health resulting from the stipulations. Therefore, individuals directly affected by the stipulations can launch redress mechanisms against the EU under article 263 TFEU.<sup>167</sup> However, since the ECtHR and the CESCR have no jurisdiction over the EU, the ability to make individual complaints through these mechanisms is not possible.

As a result, we have identified the following recommendations:

- Amnesty could call on the EU to carry out *ex ante* Human Rights Impact Assessments when designing Macroeconomic Adjustment Programmes in the future. These must be carried out according to the UN Guiding Principles for HRIAs 2018. Further, the EU must ensure it has a robust HRIA policy in line with the UN Guiding Principles 2018.
- We recommend that Amnesty advise Member States to decline signing a MoU with the EU, whose stipulations would violate their and the EU's human rights obligations.<sup>168</sup>
- We have not assessed the human rights accountability of the IMF in this report; however, this could be considered by Amnesty.

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<sup>166</sup> CESCR Statement, para 19.

<sup>167</sup> *ibid* (n117) 138.

<sup>168</sup> *ibid*, 139.

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## Annex

### Stipulations on the Right to Health of the Bail-Out Agreements between the EU and Greece

| Stipulation  | MoU 2010   | MoU on specific economic policy conditionality 2010  | Council Decision (2011/734/EU)  | MoU on specific economic policy conditionality 2012 | MoU 2015  |
|--|--|--|---|---|---|
| <b>General Fiscal Stipulations</b>                 |  |  |   |   |   |
| Public Sector                                      | <p>Para 9: 'Public sector has to become smaller, more efficient and agile, and oriented to providing better services to citizen'</p> <p>Para 11: Rationalize public administration</p> |  | Article 2 Nr. 2 a:<br>Replace only 20% of retiring employees in the public sector |   |   |
| Budget   | <p>Para 11: cut expenditure by 7% of GDP by 2013</p> <p>Para 12: 'Replacing over time only 20 percent of retiring employees'</p>   | <p>2<sup>nd</sup> Review: The budget will establish detailed expenditure ceilings for each social-security fund consistent with the general government deficit</p> <p>3<sup>rd</sup> Review: Introduce an medium-term fiscal framework covering the general government based on rolling 3-year expenditure ceilings for the state, social security</p> |   |   | <p>Para 1:</p> <ul style="list-style-type: none"> <li>Greece will target a medium-term primary surplus of 3.5% of GDP by 2018 (1 ¾% by 2017, 9.5% by 2016)</li> </ul> |
| Savings  |  | 1 <sup>st</sup> Review: generate savings for a total amount of 2.5% of GDP   |   |   |   |
| Monitoring   |  | 2 <sup>nd</sup> Review: GOA starts publication of timely monthly statistics on revenue, expenditure and financing and spending areas for 'available general government' and its sub-entities (social security, hospitals)  |   |   |   |
| <b>Specific Health Care Stipulations</b>           |  |  |   |   |   |
| <b>A. Structural fiscal reforms on Health-Care</b> |  |  |   |   |   |
| 1. Accounting in Hospitals                         | Para 13: Implement double-entry accrual accounting   |  |   |   |   |

|  |   |  |  |   |   |
|--|---|--|--|---|---|
| <p>2. Monitoring</p>                         | <p>Para 13: Periodic publications of audited accounts</p>   | <p>2<sup>nd</sup> Review: GOA starts publication of timely monthly statistics on revenue, expenditure and financing and spending areas for 'available general government' and its sub-entities (social security, hospitals)</p> <p>3<sup>rd</sup> Review:</p> <ul style="list-style-type: none"> <li>● Introduce stronger expenditure monitoring mechanism, by implementing an appropriate control of spending commitments, through which spending entities (social security, hospitals) would report on regular basis</li> <li>● Governments ensures greater budgetary and operational oversight of health care spending by the Finance Minister</li> <li>● Government ensures publication of audited accounts and improvement in pricing and costing mechanisms</li> </ul> |  | <p>Para 1:</p> <ul style="list-style-type: none"> <li>● Tight supervision of expenditure commitments by Financial Minister by the government departments, including extra-budgetary funds, social security and hospitals</li> </ul> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>● Producing daily monthly auditing reports on the use of e-prescriptions</li> <li>● Implement an effective monitoring system of prescription behaviour</li> <li>● Produce reports on pharmaceutical prescription and expenditure (+volume and value of medicines)</li> <li>● Provide feedback and warning on prescription behaviour to each physician when they prescribe above the average of comparable physicians → sanctions and penalties on follow-ups</li> </ul> |   |
| <p>3. Separation health care and pension</p> | <p>Para 13: Separate health funds from administration of pensions</p>   |  |  |   |   |
| <p>4. Centralize the Health System</p>       | <p>Para 13: Merge the funds to simplify the overly fragmented system</p> <p>Para 13: Bring all health-related activities under one ministry</p> |  | <p>Art. 5 No 6m: Conduct the necessary tendering procedures to implement a comprehensive and uniform healthcare information system (e-health-system)</p> | <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>● Reducing the fragmented governance structures, reinforcing and integrating the primary healthcare network</li> <li>● Streamlining the hospital network</li> <li>● Strengthening central procurement</li> <li>● Concentrate all health-related decision-making procedures and</li> </ul>   | <p>Para 2.5.2</p> <ul style="list-style-type: none"> <li>● Amend Law 4332/2015 repealing part of Law 4052/2012 on the appointment of hospital CEOs</li> </ul> |

|  |   |  |   |  |  |
|--|---|--|---|--|--|
|  |   |  |   | <p>responsibilities (including payroll expenditures) under the Ministry of Health by at the latest June 2012 (→legislation change)</p> <ul style="list-style-type: none"> <li>• All health insurance funds are merged into EOPYY and come under the responsibility of the Minister of Health</li> <li>• EOPYY buys services in a cost effective way from NHS facilities and providers through contracts</li> <li>• From January 2012 EOPYY will purchase hospital services on the basis of prospective budgets following the development of costing of procedures</li> <li>• EOPYY rationalises the number of contracts with private doctors (→ bring down doctor-to-patient ratio to EU average)</li> </ul> |  |
| <p>5. Management, Accounting and Financing</p> | <p>Para 22: The health care system, where there have been major expenditure overruns, will be overhauled through reforms in managements, accounting and financing systems</p> | <p>3<sup>rd</sup> Review</p> <ul style="list-style-type: none"> <li>• Upgrading hospital budgeting systems</li> <li>• Reform of management, the accounting and financing system</li> </ul> | <p>Art. 2 No. 4 e: improvement in the accounting and billing systems of hospitals, through:</p> <ul style="list-style-type: none"> <li>• Finalising the introduction of double-entry accrual accounting systems in all hospitals</li> <li>• The use of the uniform coding system and a common registry for medical supplies</li> <li>• The calculation of stocks and flows of medical supplies in all the hospitals using the uniform coding system for medical supplies</li> <li>• The timely invoicing of treatment costs (no later than</li> </ul> | <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>• Introduction of analytical cost accounting system and the regular annual publication of balance sheets in all hospitals</li> <li>• Calculation of stocks and flows of medical supplies using a uniform coding system</li> <li>• Enforcing the collection of co-payments</li> </ul>   |  |

|                              |  |  |  |  |   |
|------------------------------|--|--|--|--|---|
|                              |  |  | two months) to Greek social security funds, other Member States and private health insurers  |  |   |
| 6. Restructuring Hospitals   |  | 3 <sup>rd</sup> Review: Governments completes the programme of hospital computerisation  | <p>Art. 2 No 5p:</p> <ul style="list-style-type: none"> <li>• Preparation of a plan for the reorganisation and restructuring of hospitals for the short and medium term with a view to reducing existing inefficiencies, utilising economies of scale and scope</li> <li>• Improving quality of care for patients</li> <li>• Reduce hospital costs by at least 10% in 2011 and by an additional 5% in 2012 in addition to the previous year</li> </ul>   | <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>• Develop the full and integrated system of hospitals' IT system (by HDIKA)</li> </ul>   | <p>Para 2.5.2.</p> <ul style="list-style-type: none"> <li>• Modernize IT</li> <li>• Develop a new electronic referral system for primary and secondary care that allows to formulate care pathways for patients</li> </ul>  |
| <b>B. Health Care Budget</b> |  | <p>2<sup>nd</sup> Review: Expenditure cuts</p> <p>3<sup>rd</sup> Review: Introduce a medium-term fiscal framework covering the general government based on rolling 3-year expenditure ceilings for the social security</p> | <p>Article 2 No. 4 e):<br/>'Implementation of the comprehensive reform of the healthcare system started in 2010 with the objective to keep public health expenditure at or below 6% of GDP'</p> <p>Art. 2 No 5o:</p> <ul style="list-style-type: none"> <li>• New Criteria and terms for the conclusion of contract by social security funds with all health care providers, with the aim of achieving the targeted reduction in spending</li> <li>• Initiate joint purchase of medical services and goods to achieve substantial expenditure reduction of at least 25% compared to 2010 through price-volume agreements</li> </ul> <p>Art. 2 No 6m:</p> <ul style="list-style-type: none"> <li>• Measures to extend in a cost-effective way the e-prescriptions of medicines, diagnostics and doctors'</li> </ul> | <p>Para 1:</p> <ul style="list-style-type: none"> <li>• Rationalization of welfare cash benefits will be specified</li> </ul> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>• Keep public health care expenditure at or below 6% of GDP while maintaining universal access and improving the quality of care delivery</li> </ul> | <p>Para 2.2</p> <ul style="list-style-type: none"> <li>• Introduce a requirement for social security administrations to shorten the duration for those with the capacity to pay tax earlier</li> <li>• Create a single SSC debt database that will encompass all social security funds</li> <li>• The government ensures that budgeted social security contributions are transferred from social security funds to health funds so as to clear the stock of health-related arrears</li> <li>• The authorities will complete an external audit of EOPYY's accounts payable, and rationalize the payment process in the social security and health system by end-June 2016</li> </ul> |

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|                           |  |  | <p>referrals to all social security funds, health centres and hospitals</p> <p>Art. 2 No 7 c: A hospital case-based costing system to be used for budgeting purposes from 2013 on</p> <p>Art. 2 No 7f: Review of fees for medical services to private providers with the aim of reducing related costs by at least 15% in 2011, and by additional 15% in 2012</p> <p>Art. 4 No 2d: infra-annual budgetary implementation by social security, local government and extra budgetary funds</p> |  | <ul style="list-style-type: none"> <li>• Commission private sector health care providers in a cost-effective manner</li> <li>• By September 2015 extend claw back ceiling for diagnostics, private clinics and pharmaceuticals to the next three years</li> </ul> |
| <b>C. Health Supplies</b> |  | 3 <sup>rd</sup> Review: Government adopts legislation on the institutional framework for health supplies (Law 3580/2007) |   |  | <p>Para 2.5.2.</p> <ul style="list-style-type: none"> <li>• Increase centralized procurement of hospital supplies</li> </ul>  |

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| <p>1. Pharmaceutical</p> |  | <p>3re Review: Government establishes new system for the management of drugs that favour more use of generic medicines</p> | <p>Art. 2 No. 3n: Reduction in pharmaceutical expenditure by social security funds by EUR 900 million owing to an additional reduction in drug prices and new procurement procedures and by hospitals (also including expenditure in equipment) by at least EUR 350 million</p> <p>Art. 2 No. 4e:</p> <ul style="list-style-type: none"> <li>Measures yielding savings on pharmaceuticals of at least EUR 2 billion relative to the 2010 level, of which at least EUR 1 billion in 2011</li> <li>ensure that at least 50 % of the volume of medicines used by public hospitals by the end of 2011 is composed of generics and off-patent medicines by making it compulsory for all public hospitals to procure pharmaceutical products by active substance</li> </ul> <p>Art. 2 No. 5h:</p> <ul style="list-style-type: none"> <li>additional measures to promote the use of generic medicines</li> <li>associating a lower cost-sharing rate to generic medicines that have a significantly lower price than the reference price (&lt; 60%) on the basis of EU Member States</li> <li>setting the maximum price of generics to 60% of the branded medicine with similar active substance</li> </ul> <p>Art. 2 No 6n: Ensure at least 30% of the volume of medicines used by public hospitals is composed of generics with a price below that of similar branded products and</p> | <p>Para 1:</p> <ul style="list-style-type: none"> <li>Reduction in pharmaceutical expenditure by at least EUR 1 076 million, in 2012 by reducing medicine prices (generics, off-patent and branded medicines), increasing co-payments</li> <li>The update of the positive list of medicines</li> <li>Implementation of a mechanism of quarterly rebates (automatic claw-back) to be paid by the pharmaceutical industry</li> <li>A further rationalization of pharmaceutical spending</li> </ul> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>Simultaneously implement a set of consistent policies comprising changes in pricing, prescribing and reimbursement of medicines that enhance the use of less expensive medicine</li> <li>Control prescription and consumption and prosecute misbehaviour</li> <li>Governments defines a consistent set of incentives and obligations for all participants along the medicine supply chain</li> <li>Promote use of generic medicines</li> <li>Update complete price list for the medicines in the market, using new pricing mechanism</li> <li>Introduce an automatic claw-back mechanism on</li> </ul> | <p>Para 2.1</p> <ul style="list-style-type: none"> <li>Reduce the price of all off-patent drugs</li> </ul> <p>Para 2.5.2.</p> <ul style="list-style-type: none"> <li>Managing prices of pharmaceuticals</li> <li>Manage demand for pharmaceuticals and health care through evidence-based e-prescription protocols</li> <li>Reduce the price of off-patent drugs to 50 % and all generics to 32.5% of the patent price, by repealing the grandfathering clause for medicines already in marked in 2012</li> <li>Publish a price bulletin to reduce pharmaceutical prices and publish it every 6 month</li> </ul> |
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|  |  |  | <p>off-patent medicines, in particular by making it compulsory that all public hospitals procure pharmaceutical products by active substance</p> | <p>the turnover of pharmaceutical producers which guarantees that the outpatient pharmaceutical expenditure does not exceed budget limits</p> <ul style="list-style-type: none"> <li>● Increase the share of generic medicines to reach 35% of overall volume by 2012 and 60% by 2013</li> <li>● Reducing maximum price of the generic to 40% of the price of the originator patent medicine with same active substance at the time patent expires</li> <li>● Automatically reduce price of originator medicines when their patent expires</li> <li>● &lt;40% of volume of medicines used by hospitals is made up of generics</li> <li>● hospitals use centralised tenders procedures developed by EPY</li> <li>● Code of good conduct</li> </ul> |  |
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| <p>2. Prescriptions</p>                      |  | <p>3<sup>rd</sup> review: New system of electronic monitoring of doctor prescriptions</p> | <p>Article 2 No. 5h: compulsory e-prescription by active substance and of less expensive generics when available</p> <p>Art. 2 No 5p: publication of binding prescription guidelines for physicians on the basis of international prescription guidelines to ensure a cost-effective use of medicines and publication and continuous update of the positive list of reimbursed medicines</p> | <p>Para 1: Application of compulsory e-prescription by active substance and protocols</p> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>● Intensifies measures to reach savings in the purchasing of outpatient medicines of close to EUR 1 billion in 2012 compared to the 2011</li> <li>● Goal of bringing average public spending on outpatient pharmaceuticals to about 1 % of GDP by end-2014</li> <li>● Extend the current e-prescribing to all doctors, health centres and hospitals</li> <li>● E-prescribing is made compulsory and must cover &lt; 90% off all medical acts covered by public funds (medicines, referrals, diagnostics, surgery)</li> <li>● Making it compulsory for physicians to follow prescription guidelines</li> </ul> | <p>Para 2.1</p> <ul style="list-style-type: none"> <li>● Re-establish fill-inn prescription</li> </ul> |
| <p><b>D. Pharmacies &amp; Wholesaler</b></p> |  |   | <p>Art. 2 No 8b: calculation of pharmacies' profit margins as a flat amount or flat fee combined with a small profit margin with the aim of reducing the overall profit margin to no more than 15% including on the most expensive drug</p>  | <p>Para 1: Reducing pharmacist' and wholesalers' trade margins</p> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>● Pharmacies' profit margins are readjusted and a regressive margin is introduced (i.e. a decreasing % combined with flat fee on EUR 30 on the most expensive medicines (&gt;200 EUR) – with aim of reducing the overall profit margin to below 15%</li> </ul>   |  |



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|                            |  |  |  | <ul style="list-style-type: none"> <li>Wholesalers' profit margin are reduced to converge to 5 % upper limit</li> </ul>   |   |
| <b>E. Hospitals</b>        |  |  |  | <p>Para 1: Rationalization of operational spending of hospitals</p> <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>Reducing further hospital operating costs by 8% in 2012</li> <li>Increasing mobility of health staff</li> <li>Adjusting public hospital provision within and between hospitals within the same district and health region</li> <li>Revising activity of small hospitals towards specialisation in areas where relevant</li> <li>Revising emergency and on-call structure</li> <li>Optimise and balance the resource allocation of heavy medical equipment on the basis of need</li> </ul> | <p>Para 2.5.2</p> <ul style="list-style-type: none"> <li>Improve hospital management</li> <li>By Oct 2015 the authorities will decide whether to re-establish a means-tested 5 EUR fee for hospital visits or to adopt equivalent measures in fiscal and demand management terms</li> </ul> |
| <b>F. PAYMENT</b>          |  |  |  | <p>Para 2.8: Revise the co-payment system in order to exempt from co-payment only a restricted number of medicines related to specific therapeutic treatments (Q1-2012)</p>   |   |
| <b>Diagnostic Services</b> |  |  |  | <p>Para 2.8:</p> <ul style="list-style-type: none"> <li>Fees for diagnostic services contracted to private providers are reviewed with the aim of reducing related costs by EUR 45 million in 2012</li> <li>Government publishes a quarterly report on the prescription and</li> </ul>  |   |

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|  |  |  |  | <p>expenditure of diagnostic tests</p>  |  |
| <p><b>Wages and human resource management in the health care sector:</b></p> |  |  |  | <p>Para 2.8</p> <ul style="list-style-type: none"> <li>● Report on human resource that will be used as planning instrument</li> <li>● Allocation and re-qualification of HR</li> <li>● Education and training</li> <li>● The revised payment system used by EOPYY for contracting with physicians</li> <li>● efficiency in the use of staff</li> <li>● Reduction in overtime cost</li> <li>● Savings of &gt; EUR 100 million in the overall social security cost associated with wages and fee of physicians in 2012</li> </ul> |  |