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SOCIAL BENEFITS AND AUSTERITY THE CASE-LAW RESPONSE IN GREECE

REPORT BY

Mr. George GERAPETRITIS

Attorney-at-Law
Associated Professor at the University of Athens

SOCIAL BENEFITS AND AUSTERITY

The case-law response in Greece

I. The history

Until 2008 nobody could predict the forthcoming disaster. In fact, the EU authorities had the opportunity to set out a controlled fiscal policy well before the crisis, in 2003, when excessive deficit procedures were initiated against Germany and France. Article 104 EC (today Article 126 of the Treaty on the Functioning of the European Union) and Council Regulation 1467/97 of 7 July 1997 (OJ L 209, 02.08.1997 p. 1) provided the legislative framework for initiating procedures against Member States violating the set deficit and debt ceilings. Thus, Member States ought to avoid excessive government deficits and the Commission should monitor the development of the budgetary situation and of the stock of government debt, in particular compliance with budgetary discipline, with a view to identifying gross errors. If the Commission considered that an excessive deficit existed or might occur, it addressed an opinion to the Council which, in turn, acting by a qualified majority on a recommendation from the Commission decided after an overall assessment whether an excessive deficit existed. If so, the Council made non-public recommendations to the Member State concerned with a view to bringing that situation to an end within a given period. If no compliance occurred, recommendations might become public and the Council might decide to give notice to the Member State to take, within a specified time-limit, necessary measures for the deficit reduction and request reporting on its adjustment efforts. As long as a Member State failed to comply with a decision taken, the Council might on a recommendation from the Commission by a majority of two-thirds of the votes of its members decide to apply or intensify one or more of a series of measures. The excessive deficit procedure could be held in abeyance if the Member State acted in compliance with recommendations made or the notices given in the context of this very procedure. In this regulatory framework, the Council decided in 2003 (Council Decision 2003/89/EC of 21 January 2003, OJ L 034, 11.02.2003 p. 16), on a recommendation from the Commission, that an excessive deficit existed and recommended the German Government to bring that deficit to an end as rapidly as possible, by implementing various measures. It set 21 May 2003 as the deadline for taking the measures recommended. Since the measures taken by Germany were considered to be effective at that date, the excessive deficit procedure was implicitly held in abeyance. The Commission considered that the measures taken were inappropriate and sent a recommendation for a decision to the Council in order for it to establish that the action taken was proven to be inadequate and recommended that the Council decided to give notice to Germany to take measures to reduce its deficit by 2005 at the latest and to

achieve in 2004 an annual reduction in the cyclically-adjusted balance of 0.8% of gross domestic product ("GDP"). Almost the same procedure was followed at the same period for France (Council Decision 2003/487/EC of 3 June 2003, OJ L 165, 03.07.2003 p. 29). In the context of the Council, the Member States of the Eurozone on 25 November 2003 took votes on the Commission's recommendations, the required majority was not, however, achieved and the Council decided not to act, at that point, and held the excessive deficit procedures in abeyance. The Commission brought action before the ECJ against the Council seeking annulment of the decisions of the Council not to adopt the formal instruments contained in the Commission's recommendations and of the Council's conclusions to hold the excessive deficit procedure in abeyance. The Court in its decision C-27/04 of 13 July 2004 (OJ C 228, 13.07.2004 p. 16), despite declaring inadmissibility of the allegation for Council's non-action, annulled the Council's conclusions on the ground that it entailed *de facto* weakening of the excessive deficit procedures and the recommendations thereof by relying exclusively on unilateral commitments of the Member State concerned. The Court also annulled the decision modifying the recommendations previously adopted by the Council on the ground that this would necessitate a fresh recommendation from the Commission as the initiating organ in the excessive deficit procedure. Despite this bell by the ECJ, the Member States of the Eurozone, both disciplined and non-disciplined, refused to take any appropriate measures to prevent what should have been seen as inevitable. Instead, both President Chirac and Chancellor Schröder asked for a loosening of the Stability Pact. Ironically, then Vice-President of the European Central Bank Loucas Papademos, later Prime Minister of Greece, strongly opposed any curtailment of budgetary discipline by stating that allowing national governments to supervise the Stability Pact is like giving bar keys to an alcoholic.

In the above frame, when the financial crisis hit Europe's door through Greece, the Union was altogether unprepared to deal with a large-scale predicament. It seems that Europe either undervalued the eminent dangers of forming a monetary union with such differentiated countries or hypocritically refused to address the issue in order not to raise challenges with regard to a seemingly successful project. In 2007 the Council, following recommendation by the Commission (Council Decision 2007/466/EC of 5 June 2007, OJ L 176, 06.07.2007 p. 21 following European Commission Recommendation IP/07/672 of 16 May), found that statistics submitted by the Greek Government were of high quality and that the excessive deficit situation in Greece, for which investigation had been initiated 3 years ago (Council Decision 2004/917/EC of 5 July 2004 on the existence of an excessive deficit in Greece, OJ L 389, 30.12.2004 p. 25), was corrected. In the same year, the German Chancellor complimented Greece's economic growth (4.6% in 2006 and 3% in 2007), stating that Germany should look upon that model as a clear success story.

Only 8 years after the Euro launching, sovereign debt crisis hit Europe's door - an event that until then was mostly occurring in developing countries. This probably explains why Europeans never thought that such a thunder could ever hit them, although the debt levels in rich countries of Europe are double than those in emerging economies and the credit ratings are, at least today, higher for the latter countries. The misapprehension was strongly cultivated by the uncontrolled and profit-oriented credit rating companies, which rendered the circulation of private funding to states very easy. In a sense, Europe's inability to safeguard its currency and budgetary structure left a wide ambit for the private sector to altogether control global economy. In 2008, just before the eminent crisis, the credit ratings for Greece, by all three major credit rating companies, were close to the top 3A, which in turn resulted in the very low interest rates for the 10-year Greek bonds - in fact Germany and Greece despite their visible structural incongruity enjoyed almost the same interest rates as of the year 2001. At least not thoughtful, surely risky, maybe plotted. At any rate, an overall substitution of unaccountable officials and organisations for democratic decision-making on the basis of questionable creditworthiness ratings for overheated economies.

On 27 April 2009, after submission by the Greek government of new revised data seriously upgrading the debt and the deficit, the Council issued a decision confirming the existence of an excessive deficit in Greece. In January 2010 the European Commission issued a Report on Greek Government Deficit and Debt Statistics accusing Greek authorities in extremely offensive language for incapacity and hypocrisy, irrespective of the fact that the data had been confirmed at the time of original submission by Eurostat (COM(2010) 1 final, dated 08.01.2010). The irony is that the major default of the statistics of the Greek accounts in 2001, when the country acceded the Eurozone, came from a Goldman Sachs off-market swap that the Government made as a restructuring scheme in order to avoid registry of €2.8 billion in the sovereign debt. Eventually the swap was registered in the 2010 budget with the value of €5.2 billion and will cost Greece, until its expiration in 2037, €16 billion.

The reaction came belatedly and without a long vision plan. Responding to the imminent threat of Greek insolvency, Eurozone Member States, together with the International Monetary Fund (IMF), set up an *ad hoc* mechanism on 2 May 2010 to provide €110 billion of financial assistance to Greece in the form of bilateral loans. On 21 July 2011, Eurozone leaders announced a set of additional measures worth €109 billion, including a voluntary contribution from the private sector, the extension of maturities and lowering of lending rates. Apart from the above direct financing, the overall rescue package, including indirect assistance through bond purchase etc. is estimated in a total of €500 billion, almost 250% of the GDP. As a condition for

receiving the loans, Greek government declared through a Memorandum of Understanding its commitment to launch a series of strict austerity measures, including significant reductions in salaries and pensions, redundancies in public sector, curtailment of social benefits, privatisation of publicly-owned enterprises and a great number of structural reforms. Furthermore, the adherence to the austerity programme was agreed to be constantly supervised by a Troika composed of representatives of the European Commission, the IMF and the European Central Bank and a European task force has been ever since settled in Greece to provide expertise on the proposed changes.

From an institutional point of view, however, the European rescue mechanism for Greece clearly lacked any legal foundation on the Union's law - and still does on the level of primary EU law. Article 125 of the TFEU had explicitly agreed on a no bailout clause and, therefore, with full conscience no rescue mechanism was provided. Furthermore, it lacked any prior principle upon which a rescue strategy should be built. The "*ad hoc*" scheme largely became an unprecedented experiment for Europe. Thus, two temporary financial backstop mechanisms were set in place. The European Financial Stabilisation Mechanism (EFSM), based on guarantees from the Union budget up to €60 billion (Council Regulation 407/2010 of 11 May 2010, OJ L 118, 12.05.2010 p. 1), and the European Financial Stability Facility (EFSF), an inter-governmental body, launched as a Luxembourg company and special purpose vehicle, providing up to €440 billion in guarantees from the Eurozone Member States in the form of bonds, notes, debt securities and other instruments. The IMF decided additional potential financial support to Eurozone countries of up to €250 billion. Apart from Greece, Ireland, Portugal and Cyprus have been granted 85, 78 and 13 billion Euros respectively in assistance from the temporary financial mechanisms and Spain €100 billion to recapitalise its insolvent banks. Italy is getting closer to an equivalent assistance, since they are currently lending with intolerable high rates from the markets.

Furthermore, a permanent financial mechanism, the Treaty on the European Stability Mechanism (ESM) was signed on 11 July 2011, scheduled to enter into force on 1 July 2012 subject to ratification by Member States. ESM will supersede both temporary mechanisms and will have an effective lending capacity of €500 billion that will be administered by individual treaty signatories rather than European institutions. In parallel, the - proven inadequate - Council Regulation 1467/1997 was modified by Regulation 1177/2011 of 8 November 2011. According to the new Regulation "experience gained and mistakes made during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of

national economic policies". Therefore, it was stated that the common framework for economic governance needed to be enhanced, including improved budgetary surveillance, in line with the high degree of integration between Member States' economies within the Union, and particularly within the Eurozone.

Indeed, on 13 December 2011, a new set of rules on enhanced EU economic governance entered into force (Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011, OJ L 306, 23.11.2011 p. 1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011, OJ L 306, 23.11.2011 p. 8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011, OJ L 306, 23.11.2011 p. 12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011, OJ L 306, 23.11.2011 p. 25; and Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97, OJ L 306, 23.11.2011 p. 33.). The plan includes stronger preventive action through a reinforced Stability and Growth Pact and deeper fiscal coordination, stronger corrective action through a reinforced Pact, minimum requirements for national budgetary frameworks, and prevention and correction of macroeconomic and competitiveness imbalances within the Eurozone. In parallel, until 31 December 2013, EU Member States must bring into force the provisions necessary to comply with Council Directive 2011/85/EU of 8 November 2011 (OJ L 306, 23.11.2011 p. 41), which set out very strict requirements for budgetary frameworks in relation to accounting and statistics, forecasts, numerical fiscal rules, medium-term budgetary frameworks and transparency of general government finances and rules of comprehensive scope of budgetary frameworks. Finally, the multilateral "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" was signed between 25 EU Member States on 2 March 2012 in Brussels, in the margins of the European Council, "desiring to promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area" and "bearing in mind that the need for governments to maintain sound and sustainable public finances and to prevent a general government deficit becoming excessive is of essential importance to safeguard the stability of the euro area as a whole, and accordingly, requires the introduction of specific rules, including a 'balanced budget rule' and an automatic mechanism to take corrective action". Following the above Treaty, the parties have agreed to a balanced or in surplus budgetary position of the general government, in the sense that the annual structural balance must be at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the GDP at market prices. According to the Treaty, the ratio of the general government debt to GDP at market prices must be in principle significantly below 60%. In the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a

correction mechanism is provided to be triggered automatically, including the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time. The Treaty rules must be incorporated into the domestic law of the Member States at the latest one year afterwards "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes". Accordingly, the existing German model of constitutional debt and deficit ceilings shall be transferred to the other states of the EU as well.

Very belatedly, on 12 June 2012, the European Parliament pursuant to Rule 120 of the Rules of Procedure issue a resolution addressed to the Commission on new proposals to tackle the systemic financial crisis and stimulate the real economy through investment for growth and development (B7-0336/2012). Amazingly, the Parliament belatedly discovered that "the austerity policies and fiscal measures imposed on states with sovereign debt issues have caused additional social crises in conjunction with job losses, the closure of businesses, rising unemployment, increased living costs, reduced lending by banks and a high incidence of suicide among people whose businesses have failed, and persistent recession is destroying market confidence" and clearly accused the banks, for only them "have been 'saved' with taxpayers' money, without benefiting savers, but for the benefit of the major shareholders and the crazy system which created this enormous speculative bubble". Therefore, the Commission was called to submit proposals concerning the separation of the activities of general commercial banks and investment banks - a proposal clearly inspired by Roosevelt's New Deal legislation - and to launch Eurobonds and new financial instruments for investment to promote growth and development, and major infrastructure projects in particular. Further, The same was indicated in two parliamentary resolutions in March 2014 upheld with an overwhelming maority by the EP. The first (Karas/Hoang-Ngoc) argued that Troika's flawed structures and working methods hindered national ownership and compromised transparency and accountability and the second (Cercas) deplored the widespread negative impacts that Troika-inspired reforms had on employment and suggests revision. In the same line of reaction, the Committee of Social Rights in its June 2012 Conclusions declared that the situation in Greece was not in conformity with the European Social Charter on the ground that it has not been established that employment policy efforts have been adequate in combatting unemployment and promoting job creation. The same for access to vocational training, pension cuts access for disadvantaged persons

The above short history does not exlain the core of the crisis. It seemed unreasonable, and still is from many respects, how Greece, a country representing less than 1% of the world's debt and 4.3% of Europe's debt, could so easily destabilise an economic miracle, when according to

World Bank only 22% of the nations' wealth comes from produced capital share whereas the remaining 78% derives from intangible assets, i.e. assets that do not have a physical or financial embodiment. (further references at G. Gerapetritis, "Europe's new deal: a new version of an expiring deal", European Journal of Law and Economics, Volume 38, Issue 1 , pp 91-115, available at http://link.springer.com/article/10.1007/s10657-013-9422-z).

II. The Present

Anyhow, in the aftermath of the Memorandum of Understanding with the Troika, a series of measures seriously curtailing the prexisitng level of social state were taken: wide privatization schemes, including services of public utility such as the state owned electricity, water, and port services); merger of schools and hospitals; dismissal of public servants (in spite of the constitutional protection); reduction in remuneration, benefits, bonuses and retirement pensions of public servants 15-35%; reduction of the lowest salary (around 476 euro net for full time) and the retirement pensions in the private sector; reduction of the normative density of the collective uniong bargaining – mostly individual contracts; imposition of 3-year solidarity taxation, wide taxation upon the property, annual horizontal taxation on professionals, abolition of all tax exeptions for vulnerable categories; statutory intervention on existing contracts between state owned entities and individual or private companies to reducee state obligations or cut the promised profits of the state guaranteed bonds etc.

Today in Greece there is a sharp antithesis. Most economic indicators are blooming, whereas society still suffers. In terms of the economic indicators in 2014 the state returned to global capital markets with a coupon rate 4,75% for the 5 year bonds (7 times oversubscribed); Banks have been recapitalised); after 5 consecutive years of ressesion, marginal 0.8% positive GDP growth rate in the first quarter of 2014; there has been a primary surplus 0,7% of the GDP; and there has been negative headline inflation. On the other hand: unemployement is over 27% (with an EU average around 11%), of which 57% in youth under 25 (with an EU average around 23%); there is a huge leak of high qulatiy young working forces; debt is increasing, in spite of cuts; despite the opposite aspirations, competitiveness and investments were not raised; exports turn out influx is less than expected in spite of internal devaluation of prices and the labour costs; there is a remarkable increase of inequalities, and in turn of increase of wealth discrepancies; there is no effective restoring tax equity and tackling of tax evasion; publicly own assets are sold in a state of panic with very low compenstaion ("placing State-owned companies on a sounder footing"); and, overall, there is a wide popular disappointment leading in reverse stereotyping, extremism and nationalism.

In the light of the above, not surprisingly, Greece features 11th in the 2013 Misery Index (rating unemployment + inflation). Further, in the 2012 Happy Planet Index of the British New Economics Foundation is the leading global measure of sustainable well-being (life expectancy, experienced well-being and Ecological Footprint) Greece ranks 83rd - Costa Rica, Vietnam, Colombia, Belize and El Salvador are the top 5 countries in the list, whereas Brazil ranks 22nd and the US 105th. Among the top 25 happiest people Albania is the only European state, ranked 17th. It seems that there are two conditions precedent for sustainable growth: dominance of democracy over monetarism and social cohesion based on adequate level of a social welfare state. Otherwise it is bound to be a “Misery Growth”.

III. The judicial response

The reaction of the domestic case law in the wide austerity measures was rather timid and essentially resulted in a change of constitutional paradigm through an uncovnetional adaptation. The judicial vehicle of this adaptation was the mutation of the notion of public interest. Until 2010, the jurisprudence of the supreme administrative court of the land, i.e. the Council of State, did not uphold curtilements in constitutionally enshrined rights on the ground that a there was a compelling public interest to increase financial resources of the state. However, the Council of State in its plenary decision 668/2012, while assessing the constitutionality and compatibility with international and European law of the Memorandum of Understanding with the foreign lendors, stated that the public interest of financial rescue of the country is different than mere budgetary public interest, thus upholding in principle every austerity measure envisaged. The Council found that that the nobility of the cause allows the political power essentially larger margin of introducing measueres curtailing social rights. Thus proportionality test was hardly a high judicial obstacle to trespass. This proposition, reflecting the ancient and obsolete in a social liberal state roman mottow “salus popouli suprema lex esto”, essentially entailed in legal terms that there is no aquis in relation to the social welfare provided to citizens but merely an existential minimum below which the state cannot enact legislation. In the light of the above, the Council uphold all but 3 measures: the reduction of salaries of public servants engaged in public safety and national defense (2192-2196/2014 in plenary); the provision that no tax payment would result in electricity cut-off (decision 1972/2012 in Plenary); and the privatisation of the state owned water company through selling of its shares to private entities (1906/2014 in plenary). Reasonably enough, there has been huge popular criticism against the Council, on the ground that it assimilated itself to the government thus performing an institutionally unacceptable political role.

The austerity measures in Greece were also transferred at the level of the European Court on Human Rights in its decision of 7.5.2013 *Koufaki and Adedy (trade union organisation representing unions of public-sector workers v. Greece.* The Court eventually found the application inadmissible as manifestly ill-founded. Four premises stemm from the composite reading of the decision: First, there is a wide margin of appreciation for a member state in regulating its social policy; since the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, the Court considers that the national authorities are in principle better placed than the international judge to choose the most appropriate means of achieving this and will respect their judgment unless it is manifestly without reasonable foundation, i.e. are not based on a legitimate public interest and are not proportionate (a fair balance). Second, the notion of "public interest" is necessarily extensive, essentially all-embracing, thus being able to accommodate a very wide range of state purposes as defined by the political oragns (executives and legislatures). Third, as regards the implementation of the proportionality test, which is the standard mode of judicial review in the Court of Starsbourg, the Court held that possible existence of alternative solutions does not in itself render the contested legislation unjustified, provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way. And, four, Article 1 of Protocol No. 1 safeguardin the property right cannot be interpreted as giving an individual a right to a pension of a particular amount.