Studien aus dem Max-Planck-Institut
für Sozialrecht und Sozialpolitik

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The Case of Greece

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List of Abbreviations

ADEDY	Civil Servants' Confederation
Appl.	Application
ARB	Arbitral Tribunal
Art.	Article
ASISP	Analytical Support on the Socio-Economic Impact of Social Protection Reforms
AUP	Arduous and Unhygienic Professions
BVerfGE	Bundesverfassungsgericht
BvL	Normenkontrolle auf Vorlage der Gerichte
CESCR	Committee of Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
DiDik	Administrative Litigation (Greek Journal)
Doc.	Document
DRV	Deutsche Rentenversicherung
DtA	Journal of Human Rights (Greek Journal)
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
Ed.	Editor
EDKA	Review of Social Security Law (Greek Journal)
Edn.	Edition
Eds.	Editors
EED	Review of Labour Law (Greek Journal)
EFF	Extended Fund Facility
EfimDD	Journal of Administrative Law (Greek Journal)
EFSF	European Financial Stability Facility
EJPE	European Journal of Political Economy
EJSL	European Journal of Social Law
EJSS	European Journal of Social Security
ELLJ	European Labour Law Journal
EMU	Economic and Monetary Union
ESC	European Social Charter
ESM	European Stability Mechanism
Et al.	et allii
Etc.	et cetera
EU	European Union

EU-COM	European Commission
Ff.	and the following pages
Fn.	Foutnote
GDP	Gross Domestic Product
GSEE	General Confederation of Labour
GVG	Gesellschaft für Versicherungswissenschaft und -gestaltung
I.e.	Id Est
Ibid.	Ibidem
ICESCR	International Covenant of Economic, Social and Cultural Rights
IJCL	International Journal of Constitutional Law
ILO	International Labour Organisation
IMF	International Monetary Fund
ISSR	International Social Security Review
JCMS	Journal of Common Market Studies
JEPP	Journal of European Public Policy
JESP	Journal of European Social Policy
KAS	Konrad Adenauer Stiftung
LVA Mitt.	Mitteilungen der bayerischen Landesversicherungsanstalten
MEFP	Memorandum of Economic and Financial Policies
MoU	Memorandum of Understanding
MTFS	Medium-Term Fiscal Strategy
NDC	Notional Defined-Contribution
No.	Number
Nos.	Numbers
NZA	Neue Zeitschrift für Arbeitsrecht
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
OMC	Open Method of Co-ordination
Para.	paragraph
Paras.	paragraphs
PAYG	Pay-As-You-Go
Pp.	pages
PSI	Private Sector Involvement
Rn.	Randnummer
SBA	Stand-By Arrangement
SGB	Sozialgesetzbuch
SGP	Stability and Growth Pact
SPSI	Social Protection and Social Inclusion
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMoU	Technical Memorandum of Understanding

ToS	The Constitution (Greek Journal)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
USA	United States of America
V.	versus
VAT	Value Added Tax
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht
ZVerWiss	Zeitschrift für die gesamte Versicherungswissenschaft

Introduction

A. Background

The economic growth witnessed by Greece following its entry into the Economic and Monetary Union (hereinafter: EMU), ended in a financial crisis in 2009.[1] The 2008 wide global financial and economic crisis exposed Greece's vulnerabilities, which were determined by national characteristics.[2] Some of these national characteristics were the fiscal expansion following the accession to the EMU, a lack of resilience in the Greek economy and its banking sector, the accumulation of macroeconomic constant unsustainable fiscal policies partly hidden by unrealistic data, rigid labour and product markets as well as low competitiveness, rising external and internal fiscal debt and low domestic savings rate.[3] Another strong national characteristic was a long period of lack or delay of change.[4] As a result, Greece had to be faced with the threat of potential insolvency and inflicted serious macroeconomic damage on both the domestic and European economy.

In an attempt to contain the crisis, Greece signed financial facility agreements with the Member States of the EMU and the International Monetary Fund (hereinafter: IMF) in May 2010 and March 2012. Within the framework of these agreements, the IMF, in collaboration with the European Union (hereinafter: EU), has advised Greece to implement stringent fiscal and monetary policies in return for financial support. More specifically, in order to meet the conditions of the financial assistance agreements, Greece has had to adopt an economic structural programme that includes *inter alia* the reduction of the public deficit, so as to combat

1 *Hellenic Republic*(2011), p. 2.
2 *Rose / Spiegel*, Pacific Economic Review 2010, p. 341.
3 *EU-COM*(2010) 61 final, p. 9. For a succinct review of the domestic origins of the Greek crisis see: *Featherstone*, JCMS 2011, pp. 195-198; *Kouretas / Vlamis*, Panoeconomicus 2010, pp. 394-397; *Katsimi / Moutos*, EJPE 2010, p. 572.
4 Radaelli argues that inertia, which depicts a long period of lack or delay of change, may produce crisis and abrupt change. See *Radaelli*, in: *Featherstone / Radaelli* (eds.), The Politics of Europeanization, p. 34.

the effects of the shortages that result from disproportionate government spending in comparison to its revenues.

Against this background, with the aim of boosting fiscal soundness, Greece has structured its public pension system in 2010 as well as in 2012 (although the reform of the public pension system had been deliberated for at least a decade prior to these developments). The new public pension reforms were designed to remedy the deficiencies of the Greek public pension system, ensure its sustainability and significantly reduce public expenditure on pension benefits in the long-run.[5] While these reforms would have led to long-term economic benefits, they proved to be inadequate in and of themselves, as Greece also needed a short-term solution to the public deficit problem. Hence, Greece introduced reductions in the old-age pension benefits payments of the current retirees within the period 2010-2012, contrary to the earlier agreed terms of the pension schemes. Consequently, the financial crisis and its aftermath diverted the policy-strategy towards immediate crisis managements.[6] The reduction in old-age pension benefits is a socio-economic and fiscal policy measure aimed at reducing in the short-term government spending, and thus provides short-term reduction in the budget deficit. This is largely due to the fact that old-age pension benefits are partly financed by the state (but in regards to public pensions of the civil servants, the state is fully responsible). Additionally, in the event of financial difficulties *vis-a-vis* the pension public funds, the state provides a guaranteed allocation of the pension benefits.

B. The Subject-Matter of the Book

The subject of research in the present work is to assess the legal implications of the reductions in old-age pension benefits for the prospective pensioners, that resulted from the long-term redevelopment of the public pension system, as well as the legal implications of the reductions in the old-age pension benefits of current pensioners, that resulted from the reductions that took place within the period of 2010-2012. I chose the period 2010-2012 because it exemplifies the first reaction to the financial crisis. The public pension reforms introduced in this period invoked interesting

5 *IMF*(2010a) 10/111, at para. 13.

6 *Diamond / Liddle*, in: *Morel / Palier / Palme* (eds.), Towards a Social Investment Welfare State?, p. 287.

legal considerations because of the element of urgency which characterised this period. The element of urgency stems from a severe financial crisis and the urgent and unprecedented dire need for external financial support. It creates interesting legal implications, since in case of a severe financial crisis in combination with the urgent need for financial support, human rights, and particularly economic and social rights, might be affected by economic adjustment programmes which require states to undertake urgently retrogressive measures affecting in this way the level of the rights enjoyment.[7] In times of severe financial crisis, the social resources are limited and an overall restructuring of the public budget is prerequisite for the economic stability.

The catalyst for this book is the dearth of legal discourse on the legality pension rights' restrictions that have occurred in the context of the current economic and financial crisis. Last but not least, the Greek court, Council of State, which is the Supreme Administrative Court of Greece,[8] as well as the European Court of Human Rights, ruled a number of interesting rulings on the legality of the old-age pension benefits reductions in times of financial crisis. The presentation and legal assessment of the rich national and international jurisprudence became another key factor that motivated the idea of the present book.

I. Aim of the Book

The main purpose of this book is, firstly, to propose a legal framework in which prospective and current pensioners can raise legal claims in court proceedings with a view to the ongoing pension reforms and reductions in old-age pension benefits. It seeks to take a stand on which rights ought to be recognised in cases of public pension reforms. At this point, I should note that my primary object is the Greek constitutional law, although some

7 *Goldmann*, in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 83.

8 According to Article 95 of the Greek Constitution, main jurisdiction of the Council of State is the review of final judgments of the ordinary administrative courts. Yet, in certain cases, the Council of State decides in first and last instance, i.e. by virtue of an express constitutional provision (as in cases of downgrading of civil servants) or by virtue of a law issued upon constitutional authorization. Cases of special importance that raise issues of unconstitutionality are reviewed by the plenary session of the Council of State.

of my claims about pensioners' rights may apply also in other legal systems and may extend to the field of international law. Secondly, this book aims to contribute to the legal academic knowledge regarding the role and influence of the financial crisis in the restrictions of pensioners' rights. The rationale of this book is to demonstrate the impact of the financial crisis and the element of conditionality imposed by the international financial assistance. The assessment of this impact upon the enjoyment of pensioners' rights is particularly important, given the fact that the international financial institutions have been a major player in relation to the designing of responses to the crisis and their legal justification. Thirdly, the present work seeks to define which constitutional limits and rules should the legislature and the policy-makers respect when they reform the public pension system in times of an economic and financial crisis in order to assess the proper content and implementation of pensioners' rights. This research is essential and necessary for legal scholars and national constitutional judges who search for answers on the legality and legitimacy of pension reforms and old-age pension benefits reductions in times of financial crisis. In light of this contextual backdrop, the impact of the financial crisis and the financial facility agreements with the international creditors cannot be ignored. In order to achieve the objectives of this book, the following three legal research questions are examined.

II. Legal Research Questions

The main focus of this book is the legality of the public pension reforms and the old-age pension benefits reductions in times of financial and economic crisis. In light of this background, this work addresses three main legal research questions: (1) which legal provisions may protect the pensioners' legal positions in case of public pension reforms and cuts in pension payments?; (2) which aims of the public pension reforms and reductions may be used as "*public interest*" justification in times of financial crisis and to what extent do the financial crisis and the conditional financial assistance determine the legitimacy of the aims, i.e. of meeting the fiscal interests of the state?; (3) which principles, rules and criteria must the legislature take into account when reforming the public pension system and reducing the old-age pension benefits in times of financial crisis?

The first research question focuses on the manner in which the pensioners' rights are legally protected by the Greek Constitution as well as inter-

national law. It concentrates on the issue which legal rights and principles may potentially protect the pensioners' legal positions and which are the protected legal positions.[9] The recent Greek public pension reforms have economically affected the individuals that expect to receive pension rights and those that have already established and exercised their pension rights. Against this background, I analyse the potential interference with the existing and future positions of the pensioners. The examination of these two legal positions takes place in relation to specific legal provisions. In particular, as legal provisions are examined: a. the right to property, which is provided by Article 1 of the First Protocol of the European Convention on Human Rights (hereinafter: ECHR) and more specifically, I examine whether the acquired pension benefit and the expectations to future pension benefits fall within the concept of property as was interpreted by the jurisprudence of the Greek courts as well as the European Court of Human Rights (hereinafter: ECtHR); b. the principle of legitimate expectations (or protection of confidence); c. the right to equality and non-discrimination; as well as d. the social rights of the protection of old-age and social insurance.

Assuming that a *prima facie* legal claim can be made, on the basis of one or more of the legal provisions discussed above, the next issue that arises is the grounds of justification of the public pension reforms and pension reductions. The second research question focuses on whether the public pension reforms are in pursuit of a legitimate aim(s). The present book analyses the aims provided by the explanatory reports on the laws that introduced the reforms. In particular, aims of the measures were the fiscal interests of the state, the sustainability of the public pension system and the proper functioning of the EMU.

In relation to these aims pursued, the second research question revolves around the role of the financial crisis and the financial facility agreements in the legitimacy of these aims. In the assessment of the legitimacy of the aims, crucial roles have played the severe financial crisis and its subsequent conditional financial assistance agreements with the Member States of the EMU and the IMF. Prior to the current

9 A legal position in the continental law means the ability of an individual to make a legal claim or seek judicial enforcement of a right. In common law, this term is similar to the common law concept of standing or locus standi, see Garner, Black's Law Dictionary, p. 1026, 1536.

crisis, the general reduction in social benefits and pension benefits had been a subject of concern to Greek jurisprudence and Greek legal literature. However, in more recent times, these issues have taken on more significance given that this crisis is the most severe crisis that Greece has faced in its modern history. Both factors have started playing a crucial role in the framework of judicial review and in the new developments in the recent jurisprudence, concerning the legitimacy of the aims pursued.[10]

Accepting that the aims pursued are legitimate grounds of public policy, the third research question concerns which common principles and rules must the national legislature take into consideration when pensioners' rights are restricted. Certain rules are placed on the manner in which reforms are made to a pension system and reductions in the already granted pension benefits. The national legislature is not totally free to enforce these changes, but the Constitution set the limits and the framework within which the legislature must act in cases of socio-political decisions.[11] The principle of proportionality sets these rules and criteria and may be used as a legal tool and guidance for the examination of whether an interference with an individual right is undertaken within the framework of the Greek Constitution. In the process of carrying out this assessment, the fiscal crisis and the external pressures for the re-arrangement of fiscal policy in return for financial support, influence the way in which the legislature must adopt the public pension reforms compatibly to the principle of proportionality. The respect of the latter principle has to be assessed, taking into consideration the notion of the urgent need for reduction in the public deficit and the external financial support. Both factors influence the way that the legislature introduced pension reductions, to the extent that they underlie the notion of urgency, i.e. the urgent need for external financial support to avoid potential solvency of the state. It seems that in cases of urgent financial needs and the obligation to address the demands of commitment to international creditors, the crisis may amount to a state of urgency. This situation, indisputably, exerts stronger pressure on the national legislature in regards to the fulfilment and respect of the above mentioned principle. In cases of exceptional and imminent crisis, the principle of pro-

10 *Angelopoulou*, EDKA 2010, p. 915.
11 *Becker*, ZVerWiss 2010, p. 589.

portionality may not be used to "*hinder restrictions of rights but to clothe restrictive measures with extra legitimation*".[12]

III. Methodology

The main methodology adopted in this book is an analysis of the academic discourse. In addition, it was relied on desk research of legislation, the explanatory reports on the laws, the discussions in the parliamentary committees and the *ex-ante* evaluation of the pension legislation as well as reports and finding of international sources, i.e. memoranda of understanding. To analyse the subjects in question, a scientific method is followed which involves three steps: recognition of the problem, assumptions, examination of the assumptions and results. The recognition of the problem is achieved by describing both the background of the public pension reforms as well the actual pension reforms undertaken. The assumptions are achieved by describing the academic literature and national, as well as international, jurisprudence in order to determine potential legal provisions that may protect pensioners' rights. The examination of the assumptions and results is achieved through an analysis of diverse case-studies, which have been selected to define legal principles with wide applicability. Namely, the selected case-studies offer a detailed illustration of legal issues of wider interest by taking as examples the reduction in old-age pension benefits and age discrimination cases and drawing analogies among the case-studies themselves. They were deliberately chosen as examples of broader phenomena, in order to make a contribution to a comprehensive understanding of the legality of the pension reforms and reductions in times of financial crisis, when there is lack of public finances.

Greece represents the only country for the analysis of the legality of the pension reforms and reductions. The case of Greece may illustrate how damaging effects the repayment of sovereign debt can have on state resources to provide economic and social rights.[13] This is because Greece is not only a country which is strongly affected by the financial crisis, but it is more importantly, one of the first Member States of the EMU in which

12 *Contiades / Fotiadou.*, in: *Contiades* (ed.), Constitutions in the Global Financial Crisis, p. 33.

13 *Cernic*, in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 144.

its debt repayment, and consequently the restructuring of its public pension expenditures is dependent on the conditionality of the financial facility assistance imposed by the Member States of the EMU and the IMF. However, whilst this book takes Greece as an example of old-age pension benefits reductions, it goes beyond the particular case of Greece, in that it uses the analysis of the pension reforms and reductions in old-age pension benefits adopted in Greek legislation, in order to develop more general legal concepts and arguments that could be used in similar cases by the jurisprudence and legal literature of other European countries that are forced due to the crisis and the conditional financial support to restrict the provision of the old-age pension benefits.

IV. Progression of the Argument

This work is divided in five main chapters. In the first chapter, I give a short account of the background regarding the normative and factual internal and external influences that necessitated pension reforms prior to the Greek economic and financial crisis. To the normative factors belong the international guidelines on pension reforms, the EMU as well as the Open Method of Co-Ordination (hereinafter: OMC). The factual factors concern the financial imbalances in the Greek public pension system, the negative demographic changes in Greece as well as the need for globalisation. Moreover, the first chapter illustrates the tipping points of the Greek public pension reforms of the period 2010-2012. The tipping points were the Greek financial and economic crisis of the late of 2009 and the new form of conditionality imposed in the framework of the financial facility agreements with the international creditors. This chapter clearly shows that, despite the serious socio-economic factors which predated the crisis, the efforts of successive Greek governments made to implement ground-breaking pension reforms and major reductions in old-age pension benefits prior to the crisis were unsuccessful. However, the financial crisis became "*the last drop that spilled the cup*" and forced successive Greek governments to introduce pension cutbacks and structural pension reforms. While this work focuses on an academic legal analysis of some of the issues surrounding the pension reforms and old-age pension benefit reductions, the division between the factors predated the crisis with the tipping points of the reforms, which were introduced after the crisis, is particularly important. This division is particularly important in gaining an understanding of

the necessity and urgency of the redesign of the Greek public pension system as well as in showing the strong influence of the crisis and the external financial support on the need to restructure the public expenditures on pensions, which play a major role upon the constitutionality of pension reforms.

The pension reductions and structural pension reforms undertaken after the financial crisis are described in the second chapter. The second chapter provides a detailed overview of the legal framework of the reformed Greek statutory pension system as well as a description of the specific reductions in old-age pension benefits which have been undertaken progressively by the Greek parliament since the beginning of the crisis within the period 2010-2012. The changes in the Greek public pension system are presented step-by-step along with the tipping points of the reforms presented in the previous chapter. Namely, chapter two presents the reforms with regard to the legislative arguments mentioned in the explanatory reports on the relevant legislation, the memoranda of understanding and the economic adjustment programmes for Greece. Through this systematic and founded presentation of the reforms and pension reductions, this chapter, firstly, seeks to detail the provisions that recognise the interference with the old-age pension benefits of the public pillar. This is essential as a legal basis for the third chapter, which examines potential protection of the pensioners' legal positions against this interference. Secondly, the second chapter attempts to indicate further the strong influence of the financial crisis and the conditional financial assistance with the pension reforms. In this way, the second chapter shows that the seriousness of the financial crisis and the subsequent need for financial assistance acted as the major stimuli for cuts in public pension expenditure. The examination of the main stimuli for the public pension reforms and reductions in pension benefits is necessary for the legal analysis of the fourth chapter, which analyses whether the reforms are in pursuit of legitimate aim(s). The more close the link between the relevant reforms and the tipping points, the more likely it is the aims of the reforms to be classified as legitimate.

The third, fourth and fifth chapters focus on the compatibility of the public pension reforms and reductions in old-age pension benefits with the Greek Constitution and international law. Aim of the following three parts is to assess the legality of the public pension reforms in times of financial crisis. The assessment is achieved using as balancing concept the principle of proportionality. In a balancing process using the principle of proportionality, the restricted pensioners' rights and the general interests are bal-

anced. The examination of such compatibility starts in the third chapter; it follows in the fourth chapter and ends up in the fifth chapter. The restricted pensioners' rights are described in chapter three and the pursued general interests are mentioned in chapter four, whilst the balancing process takes place in chapter five using case-studies as examples.

In the third chapter, an attempt is made to establish whether any legal provisions may potentially provide protection to the existing and future positions of the pensioners. Namely, it examines whether any legal right or principle could provide pensioners with justiciable rights. This is because the proportionality test is fruitful only when there is a pre-existing understanding of the content of the affected rights and the weight to be accorded to them.[14] The legal provisions examined is the right to property, the principle of legitimate expectations (or protection of confidence) and the right to equality and non-discrimination as well as the social rights guaranteed under domestic constitutional and international law. The examination of the constitutional right to dignity[15], which could potentially protect the level of minimum existence of the pensioners, is not included as a legal provision in the book. This is because, at least up until the time of this book, no studies have been conducted which prove that the public pension reforms and reductions in the old-age pension benefits may lead to endanger the minimum existence. Even after successive reductions in pension benefits, the level of pension benefits remained above the average of the main pension benefits provided by the compulsory social insurance scheme for employees.[16] The inadequacy of the pension benefits may concern only individual cases, which do not fall under the scope of this book.

The fourth chapter examines whether potential restrictions of the legal provisions, discussed in chapter three, can be justified in the context of the financial crisis. The fourth chapter deals with the role of the financial crisis and the conditional financial assistance in the legitimacy of the aims pursued by the legislature in order to reform the pension system and reduce the pension benefits.

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14 *Bilchitz*, IJCL 2014, p. 737.

15 Article 2(1) of the Greek Constitution defines that "*Respect and protection of the value of the human being constitute the primary obligations of the State*".

16 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014. All judgments of the Greek Courts cited in this work are available in the Nomos database accessible at the following website: https://lawdb.intrasoftnet.com/.

The fifth and last chapter of this book examines the legality of specific cases of public pension reforms that have interfered with specific legal provisions. The cases under examination are divided into three main groups: a. reductions in old-age pension benefits; b. cases of progressive reductions in pension benefits of high amount; and c. age discrimination cases. In each case, this chapter addresses the question, whether, in times of economic and financial crisis, the aims pursued by the legislature can constitute overriding aims that are able to outweigh the restricted legal provisions.

Chapter One: The Influences of the Pension Reforms 2010-2012

The aim of this chapter is to examine and highlight the fact that the pension reforms undertaken within the period 2010-2012 were directly caused by the national debt crisis that arose at the end of 2009, as well as the consequent financial assistance provided by the Member States of the EMU and the IMF. The emphasis on this observation is important in showing the influence of the financial crisis in the examination of the legality of potential interference with the pensioners' rights. The more urgent and severe the background for the pension rights' interference is, the more likely it is that the interference will be classed as legal.

This chapter clearly shows that there were unsuccessful efforts by successive Greek governments to implement ground-breaking pension reforms and reduce public pension expenditures despite the serious internal and external socio-economic factors which pre-dated the financial crisis. However, only after the financial crisis, significant pension reforms and cuts in pension payments were introduced. This indicates that it was actually the serious financial crisis and the consequent need for financial assistance the urgent tipping points which generated domestic pressures for pension reforms and gave rise to opportunities for public pension expenditure cuts.

To illustrate this, the present chapter begins with a description of the internal as well as the external influences behind the pension reforms prior to the financial and economic crisis. Thereafter, the focus shifts to the tipping point of the public pension reforms of 2010 and 2012 and reductions in pension payments of the period 2010-2012. More specifically, I begin with a description of the normative factors that constituted the guidelines for the Greek pension reforms, namely the international guidelines on pension reforms of international organisations, such as of the Organisation for Economic Co-operation and Development (hereinafter: OECD), the World Bank and the IMF (A.I.1), the *vincolo esterno* of the EMU (A.I.2) and the non-binding tool of the OMC (A.I.3). Afterwards, I move on to examine the factual factors that necessitated for reforms in the Greek pension system. More specifically, I will focus on the financial imbalances in the Greek public pension system (A.II.1) as well as the domestic demographic changes (A.II.2). Subsequently, I will then shift the focus to the driving

forces of the public pension reforms introduced after the Greek financial and economic crisis which were the national financial and economic crisis (B.I) and the new form of conditionality imposed through the financial facility agreements between Greece and its international creditors (B.II).

A. The Influences of the Pension Reforms Prior to the Financial Crisis

Pension systems have been influenced by diverse socio-economic challenges and have thus had to be redesigned. In the EU, the factors that motivated the Member States to redesign their pension systems stemmed from demographic challenges,[17] high unemployment rates,[18] financial imbalances in the public budget, European integration as well as wider international developments.[19] The contemporary society is characterised by changing structures in the family pattern and household, such as high participation of women in the labour force, growing rates of divorce and vanishing of the traditional model of social protection based on family support.[20] Moreover, mass unemployment is radically increasing and a large segment of the west world's population is employed with the widespread atypical forms of employment, namely the part-time and fixed-term employment.[21] These new developments influence the way that the public pension systems should function, on the grounds that "*there is a systematic link between the existence of strong family ties, a rigid institutional labour market and an emphasis on pension.*"[22] Besides, in some European countries, like Italy, the impetus for pension reform was the entry into the

17 *Overbye*, in: *Petersen / Petersen* (eds.), The Politics of Age: Basic Pension Systems in a Comparative and Historical Perspective, pp. 148ff.; *Hicks*, in: *Friedrich-Ebert-Stiftung* (ed.), Rentenpolitik in Europa, pp.16ff. For information about the consequences of the demographic changes see *Höhn / Schmid / Wöhlcke,* Demographische Entwicklungen in und um Europa, pp. 96ff. Population ageing as a cause see *Schönmäckers*, in: *Schönmäckers / Kotowska* (eds.), Population Ageing and its Challenges to Social Policy, pp. 27ff.

18 *Jallade*, in: *Ferge / Kolberg* (eds.), Social Policy in a Changing Europe, pp. 44-47.

19 *Eichenhofer*, Geschichte des Sozialstaates in Europa: Von der „sozialen Frage" bis zur Globalisierung, p. 15.

20 *Petmesidou*, in: *Petmesidou / Mossialos* (eds.), Social Policy Developments in Greece, p. 7.

21 *Leschke*, Working Papers on the Reconciliation of Work and Welfare in Europe 2011, p. 6.

22 *Ferrera,* in: *Kuhnle* (ed.), Survival of the European Welfare State, p. 171.

EMU.[23] In addition, the EU Member States have had to cope with the most severe financial crisis in recent times. The 2007-2008 financial crisis not only caused substantial losses in private pension funds, but it also had a negative impact on public pensions.[24]

The need to address these common challenges had as a result, a situation in which many western countries have shifted from the policy of social welfare expansion, which started in the post-war period, to a policy of welfare retrenchment.[25] The European welfare reform momentum of the past two decades is best captured as a search for a new welfare state.[26] The policy of welfare retrenchment consists of tight fiscal and monetary rules, the role of the state is limited and individual responsibility through the promotion of private enterprise is fostered, promoting the idea that social contributions should be reduced, in order to achieve low labour costs. Furthermore, social welfare expenditures should be reduced when they conflict with wider economic objectives.

In the field of pension reforms, the need for greater globalisation has played also an important role. Globalisation is regarded as "*a vehicle for significant welfare enhancement*".[27] Under the notion of globalisation one can understand the efforts towards global economic integration.[28] The aim of the new global economic integration is to secure high competitiveness and economic growth through the liberalisation of financial markets and the free circulation of international capital. It leads to the deregulation of international markets and thus, the privatization of pension funds. Nevertheless, only a weak causal-link between globalization and retrenchment policy has been documented.[29] The association of globalisation with the reduction of welfare expenditure and retrenchment policy is disputable.[30] It has been argued that changes in the global economy play an important role in welfare retrenchment policy, but these changes are not primarily

23 *Hemerijck / Ferrera,* in: *Martin / Ross* (eds.), Euros and Europeans: Monetary Integration and the European Model of Society, pp. 262, 269-71.
24 *Hinrichs,* in: *Eren Vural* (ed.), Converging Europe: Transformation of Social Policy in the Enlarged European Union and in Turkey, p. 110.
25 *Pierson*, in: *Pierson* (ed.), The New Politics of the Welfare State, pp. 80ff.
26 *Hemerijck,* Changing Welfare States, p. 49.
27 *Schulze / Ursprung,* The World Economy 1999, p. 295.
28 For a general overview of globalisation as a cause see *Castles*, The Future of the Welfare State: Crisis Myths and Crisis Realities, pp. 3ff.
29 *Swank,* Social Policy and Society 2005, p. 187.
30 *Starke*, Social Policy and Administration 2006, p. 107.

associated with it,[31] while other scholars argue that globalisation is not an influencing factor regarding such a policy, but one that is frequently presented by the national government as an external economic constrain, when domestic reforms are proven difficult to be adopted.[32]

Despite diversity in the structuring and financing of the European welfare states' pension systems, common trends of pension reforms can be observed.[33] Among the most common trends is the increasing of retirement ages to prolong working lives; changes in the system of calculating pension benefits (i.e. reduction of the level of pension benefits by calculating them according to earnings across the career),[34] the introduction of less generous eligibility criteria for full pension benefits through extension of the required contribution periods and limitation of access to early retirement schemes:[35] Another major policy response is the introduction of an automatic mechanism which links life expectancy to pensionable age.[36]

The central and eastern European countries adopted more groundbreaking pension reforms than the western European countries, mainly due to influence by the World Bank.[37] This may be also explained with reference to the fact that the central and eastern European countries aimed to satisfy the Copenhagen criteria and achieve greater convergence with EU guidelines.[38] Although there are many differences in the pension systems of the central and eastern European countries, two main common characteristics are observable. Firstly, the first public and mandatory pillar was shifted from a defined-benefit to a defined-contribution system,

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31 *Pierson,* in: *Pierson* (ed.), The New Politics of the Welfare State, p. 410.

32 *Hay / Rosamond*., JEPP 2002, p. 152. Hay argues that globalisation is used as a "*blame avoidance strategy*" so that unpopular policies may be easier adopted. The "*blame avoidance strategy*" was first described by Pierson. See *Pierson*, World Politics 1996, p. 147.

33 *Becker*, in: *Becker / Hockerts / Tenfelde* (eds.), Sozialstaat Deutschland – Geschichte und Gegenwart, p.333. See also *Becker*, in: *Becker / Kaufmann / Baron von Maydell et al*. (eds.), Alterssicherung in Deutschland, pp. 588-594.

34 *OECD*(2011), p. 64.

35 *Barr / Diamond*, Pension Reform: A Short Guide, p.19.

36 *OECD*(2011), p. 81.

37 *Horstmann / Schmähl.*, in: *Schmähl / Horstmann* (eds.), Transformation of Pension Systems in Central and Eastern Europe, pp. 77ff. Hungary introduced a first ground-breaking reform in 1998, Poland in 1999, Bulgaria in 2002, Estonia in 2002, Lithuania in 2004, Slovakia in 2005.

38 *Grabbe*, in: *Featherstone / Radaelli* (eds.), The Politics of Europeanization, p. 307.

whereby the sum of all contributions paid is converted into an annuity, and; secondly, a capital-funded mandatory tier was introduced.[39] However, recently, the de-capitalisation and re-nationalisation of the pension schemes has started taking place in some of the central and eastern European countries.[40]

A tendency towards less state intervention and the establishment of private components can also be witnessed in the pension systems of the western European countries.[41] Italy, in 1995, abandoned the defined-benefit principle and introduced a notional defined-contribution system completely altering the pension formula, linking it closely to contribution in a quasi-actuarial fashion.[42] Germany, in 2001, introduced the Riester-pension, which subsidises savings for private pensions, strengthening the complementary pension plans.[43] Austria introduced a supplementary private pillar while Belgium through the Law on Supplementary Pensions ("*Vandenbroucke*") aims to generalise access to private pensions.[44]

Following, the internal and external socio-economic factors that predated the Greek financial and economic crisis and necessitated a restructuring of the Greek public pension system is presented. In Greece, the public pension system was reformed to a large extent in 1992, while small-scale efforts of pension reforms took place several times within the period 1993-2008.

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39 *Schulz-Weidner*, DRV 2010, pp. 119-142; *Fultz*, ISSR 2004, pp.6ff.; *Müller*, in: *Stuchlik* (ed.), Rentenreform in Mittel- und Osteuropa: Impulse und Politikleitbilder für die Europäische Union, pp. 100-105.

40 Some of the eastern and central European countries, like Hungary, decreased or ceased the contribution rates of the second-pillar pension allocating the contributions to the state pension systems. See *Hirose*, in: *Hirose* (ed.), Pension Reform in Central and Eastern Europe, pp. 171ff.

41 *Palier*, in: *Castles / Leibfried / Lewis et al.* (eds.), The Oxford Handbook of the Welfare State, pp. 612ff.

42 *Ferrera*, in: *Castles / Leibfried / Lewis et al*. (eds.), The Oxford Handbook of the Welfare State, p.625.

43 *Ruland*, Soziale Sicherheit: Zeitschrift für Arbeit und Soziales 2001, pp. 43-48; *Blomeyer*, NZA 2001, pp. 913-919.

44 *Palier*, in: *Castles / Leibfried / Lewis et al*. (eds.), The Oxford Handbook of the Welfare State, pp. 612ff.

I. Normative Factors

1. International Guidelines on Pension Reforms

Multi-lateral institutions, such as the OECD, the World Bank and the IMF published a number of proposals and policy recommendations for a better functioning of the pension systems and tried to influence the structure and functioning of the national social security systems.[45] More specifically, the OECD put forward a number of proposals in the area of pension policy, suggesting that pension schemes should adjust to the requirements of the new global socio-economic environment, so that a comprehensive coverage and long-term sustainability can be guaranteed.[46] It recommended the OECD-countries should avoid a single public pillar that is based on public expenditures and proposed the establishment of pension schemes that combine public and private elements.[47] As far as the guidelines given to Greece are concerned, the OECD reported in 1997, the need for further reforms, since the pension reform of 1992 provided only some temporary breathing space.[48] Ten years later, in 2007, the OECD reported that the Greek pension system was a '*fiscal time bomb*', highly fragmented, with loose eligibility conditions, fostering early retirement as well as contribution evasion.[49] The OECD thus recommended a number of measures to be taken by Greece, such as the reduction of pension incomes, the elimination of the provisions regarding early retirement, a lengthening of the contribution periods, increases in incentives to work at older ages, and the development of private pensions.[50]

Besides the OECD, the World Bank also imposes policy recommendations that have major implications on the social security systems of indebted countries seeking financial assistance. These recommendations are usually applied by the indebted countries. The World Bank, in 1994, proposed the establishment of a multi-pillar pension system.[51] In particular, it recommended a three pillar model: a. one mandatory public pillar which pro-

45 *Jorens,* in: *Jorens* (ed.), The Influence of International Organisation on National Social Security Law in the European Union, p. 18.
46 *OECD*(1981), pp. 10-12.
47 *Disney,* The Economic Journal 2000, p. 13.
48 *OECD*(1997), p. 65.
49 *OECD*(2007), p. 68.
50 *OECD*(2007), p. 80.
51 *World Bank*(1994). p. 234.

vides only a minimum basic pension with the aim of reducing the old age poverty; b. one mandatory or voluntary privately managed pillar providing fully funded pensions; and c. one voluntary privately managed pillar. Its financial regime is based on the defined-contribution system and the introduction of individual accounts for the insured. However, the proposed model was said to be inappropriate for countries with low economic growth, huge fiscal deficits, large external debt and unstable monetary and fiscal policies.[52] The World Bank, in 2006, revised its approach holding that private accounts do not guarantee better protection, since they are unpredictable, have high administrative costs and failed to extend pension coverage.[53] The World Bank suggested that countries with financial imbalances should first adopt parametric reforms, which will guarantee fiscal sustainability, before the introduction of a multi-pillar reform.

Besides the World Bank, also the IMF provides pension policy recommendations to its contracting countries. Reforming of the Greek public pension system is one of the IMF's policies. The IMF monitored Greece also in the past before the Greek financial crisis and assessed Greece's progress on area of pension policy, pointing out that efforts to moderate pensions and other costs in the economy are needed. In 2002, the IMF directly imposed policy recommendations on Greece.[54] At that stage, however, the application of these policy recommendations was not part of the conditions for financial assistance. The IMF pointed out that the mounting public spending on pension benefits was among the highest in the EU[55] and the public expenditures on pension could be achieved through parametric and structural reforms.[56] More specifically, concerning the parametric reforms, the IMF recommended the increasing of the retirement age, longer years of contributions and a reduction of the replacement rate, in cases whereby if they remain high and the state would face an excessive pension related public expenditure.[57] Concerning the structural reforms, the IMF proposed the introduction of a flat-rate pension proportionate to the contribution period but not dependent on earnings. They also proposed that the amount of pension payments received should correlate with the

52 *World Bank*(2006), p. 21.
53 *Ibid*.
54 *IMF*(2002) 02/58.
55 *IMF*(2002) 02/58, p. 8.
56 *IMF*(2002) 02/58, p. 12.
57 *IMF*(2002) 02/58, p. 13f.

amount of the contributions made as well as with the actual life expectancy rates.[58] Finally, the IMF proposed an introduction of individual savings accounts encouraging additional voluntary contributions.[59]

2. European Economic and Monetary Union

The European EMU is a prominent driver for fiscal discipline and public deficit reduction. Since its establishment, its Member States have deliberately given up their autonomy in regards to fiscal discipline, in order to meet set objectives for the proper functioning of the EMU.[60] The fact that fiscal discipline and public deficit reduction serves the proper functioning of the EMU derives, for instance, from the establishment of Council recommendations and decisions in cases of excessive public deficit by Member States. Namely, for the proper functioning of the EMU, a Council Regulation on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies was made pursuant to Article 121 of the Treaty on the Functioning of the European Union (hereinafter: TFEU).[61] If a Member State fails to adhere to the Council's broad guidelines, or if its policies jeopardise the proper functioning of the EMU, the Council may make recommendation and address decisions to the Member States concerned with regard to the level of government's expenditures and revenues.[62] The Council Decisions are fully binding for the Member States[63] and thus the Member State is obliged to undertake the respective reductive measures to ensure the proper functioning of the EMU.

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58 *Ibid*.
59 *Ibid*.
60 *Clark,* European Pensions and Global Finance, p. 10.
61 Council Regulation (EC) No 1466/97, OJ L 209 of 2.08.1997, as amended in Council Regulation (EU) No 1175/2011, OJ L 306 of 23.11.2011. This Surveillance Regulation obliges the Member States of the EMU to submit at the start of each year (European Semester) "*stability programmes*", setting out the steps being taken to achieve a balanced budget.
62 Art. 126(7) and 136(1) of the TFEU: The Council recommends the Member States to respect their medium-term budgetary objectives and to take effective action in order to ensure a prompt correction of excessive deficits, as well as to correct the current account deficit by implementing structural reforms, boosting external competitiveness and contributing to their correction via fiscal policies.
63 Art. 288 of the TFEU.

Yet, the relationship between the proper functioning of the EMU and the need for pension reforms is uncertain. Even though the Member States are indirectly forced to reform their pension systems, in light of the fact that there is a certain correlation between economic performance and public expenditures on pensions, there is no clear pension reform provision at the EMU level.

The influence of the EMU on the Greek pension system is thus "*a complex issue*".[64] Initially, it was believed that the candidacy of Greece and its subsequent membership in the EMU could prove to be an important instrument for sustainable public finances.[65] Indeed, the EMU exerted strong pressure on social spending at the time that Greece was a candidate to join the EMU.[66] The Greek socialist government with Prime Minister Costas Simitis planned to adopt a series of austerity measures, such as the curtailment of public pension spending. More specifically, it attempted, during the period 1996-2000, to pass through the Greek parliament a radical and multi-tier pension reform. However, a viable pension reform was not adopted, because it became evident that entry into the EMU could be achieved without it.[67] Besides, massive protests movements of trade unions opposed to any pension reform, showing thus that the external stimulus of meeting the convergence criteria to enter the EMU did not preclude any social conflicts and the strong opposition of trade unions.

On the 1st of January 2001, Greece entered the third stage of the EMU with the legal introduction of the Euro, which became the new national currency replacing the drachma.[68] Nevertheless, even after the introduction of the Euro and Greece's obligation to respect the Stability and

64 *Featherstone / Kazamias / Papadimitriou,* Political Studies 2001, p. 465. Featherstone supports that, firstly, there is no clear pension reform provision at EMU level; secondly, EMU is not the only stimulus to pension reforms; thirdly, the requirement for more liberal and flexible pension schemes is actually forwarded by the wider pressures of globalisation; and lastly, pension reforms may have occurred because of indigenous problems.

65 *Börsch-Supan / Tinios,* in: *Bryant / Garganas /Tavlas.* (eds.), Greece's Economic Performance and Prospects, p. 361.

66 *Petmesidou*, in: *Petmesidou / Mossialos* (eds.), Social Policy Developments in Greece, p. 25.

67 *Matsaganis*, South European Society and Politics 2002, p. 115.

68 Noteworthy is that later it became apparent that the financial information which the Greek government had submitted had been excessively optimistic. See *EUCOM*(2004) IP/04/1431.

Growth Pact (hereinafter: SGP), the political scene in the field of pension policy did not change. The SGP, which was introduced in 1997 at the Amsterdam European Council and was established by the Regulations No. 1466/97 and No. 1476/97, stipulated corrective and preventive elements, i.e. it demanded that the Member States of the EMU take "*corrective budgetary action*" in case of excessive deficits.[69] The SGP also envisaged the imposition of fines in case of any infringement of the Pact, in order to ensure that the Member States of the EMU did not implement policies that would jeopardize its proper functioning. However, the sanctions were rather abstract.[70] The Pact did not address many other threats faced by the EMU, such as "*the excessive private borrowing and lending, the accompanying moral hazard and the deficient corporate governance*".[71] Greece was thus free to violate the obligations which were set in the SGP and did not adopt the essential reforms in public pension expenditure. The re-elected socialist government (2000-2004) as well as the successive conservative government of Nea Dimokratia with Prime Minister Costas Caramanlis (2004-2009) adopted only small-scale pension reforms. Thus, the external stimulus of the EMU proved to be weak. The evolving EMU did not manage to play a crucial role in increasing pressures on welfare social protections programmes and addressing new social risks, in order the sustainability of the Greek public pension system to be ensured in the long-term.

3. Open Method of Co-Ordination

In addition to the pressures tried to be exercised through the EMU, the EU decided to use another soft channel as a tool of economic surveillance. On the grounds that the EU has no competence to regulate the structure and financing of the Member States' pension system, which belongs exclusively to the discretion of the EU Member States,[72] in 2000, the EU

69 Resolution of the European Council on the Stability and Growth Pact, 97/C 236/01, Amsterdam, 17/06/1997.
70 *Clark*, European Pensions and Global Finance, p. 10.
71 *Katsimi / Moutos,* EJPE 2010, p. 569.
72 This is indicated in articles 151-161 of the TFEU.

launched the soft non legal-binding tool of the OMC.[73] The OMC is essentially a tool of '*soft*' policy co-ordination and '*an additional resource for those domestic actors seeking reform*'.[74] Despite the fact that it is not legally binding, it may serve as a guide for the Member States' social policy.[75] Its main objective is to aid the Member States of the EU, in areas where there is no explicit legislative competence at the European level.[76] It does not harmonise the diverse social security systems of the Member States, but enables the EU to minimize the heterogeneity within the EU and to modernize the social protection of its Member States.[77]

In March 2002, the European Council of Lisbon introduced the OMC on pensions.[78] The aim was to give the Member States general guidelines on reforming their pension systems. In March 2006, the European Council established the OMC on Social Protection and Social Policy,[79] which streamlined the OMC on social inclusion and on pensions alongside the OMC on health and long-term care. Within this framework, the EU has given a number of guidelines regarding pension policy that are generally in tandem with those of the World Bank promoting a multi-pillar pension system. The European pension strategy rests on the following common objectives: solidarity and fairness for all generations; a guarantee of adequate retirement incomes for all, so that individuals can maintain their living standard after retirement; sustainability of public pension schemes by encouraging longer working lives, ensuring an appropriate and fair balance of contributions and benefits and promoting affordability and security of public funded and private schemes; striving for a transparent pension system, designed with reference to age demographics and the pursuit of

73 *Lisbon European Council*, Presidency Conclusions of 23rd and 24th March 2000, at para. 37.
74 *Featherstone,* JEPP 2005, p. 737.
75 *Eichenhofer*, Geschichte des Sozialstaats in Europa: Von der „sozialen Frage" bis zur Globalisierung, p. 68.
76 For further information about the OMC see *Eckardt*, JESP 2005, pp. 247-267; *Trubek / Trubek*, European Law Journal 2005, pp. 343–364; *Dawson*, European Law Review 2009, pp. 55-79.
77 *Eichenhofer*, Sozialrecht der Europäischen Union, p. 258.
78 *Lisbon European Council*, Presidency Conclusions of 15th and 16th March 2002, at para 33.
79 *Lisbon European Council*, Presidency Conclusions of 23rd and 24th March 2006, at paras. 69-71.

greater equality amongst men and women.[80] More specific guidelines have not been provided. Exceptionally, the European Commission, in its proposals for a better functioning of the OMC, proposed the establishment of a minimum pension income.[81] The abstract proposal through the OMC illustrates the fact that setting specific policies is a rather complex process and successful enforcement of the OMC can only be achieved through a reliable cross-country comparative analysis of the diverse pension systems.[82]

Evidently, pension reforms have been put forward at the national level in many Member States of the EU and common trends are observable. This may indicate that the OMC plays indeed an important role in the policy-making of Member States of the EU. However, it is difficult to argue that they are as a result of the OMC. This is because domestic factors seem to influence the pension policies of the Member States to a greater degree and common trends are seen due to the fact that the Member States face similar social and labour-market policy problems.[83]

Under the framework of the OMC, successive Greek governments reformed the pension system based upon these guidelines. The first effort to implement the general guidelines of the OMC was in 2002 by the so-called "*Reppas Law Reform*", named after the Minister of Employment and Social Security[84] that introduced an occupational system. However, despite the establishment of a second pillar, the occupational funds in Greece are still not well-developed and thus the multi-tier system does not function properly.[85] A second effort was made through the adoption of the Law No. 3655 of 2008.[86] This legislation introduced provisions in line with the OMC's guidelines, i.e. by strengthening the link between contributions and benefits, tightening eligibility criteria for early retirement, encouraging older people in employment as well as promoting gender equal-

80 *EU-COM*(2001) 362 final, p. 2; EU-COM(2005) 706 final, p. 2.
81 EU-*COM*(2008) 418 final, p. 5.
82 *Becker*, in: *DRV-Schriften* (ed.), Renten in Europa: Die offene Methode der Koordinierung im Bereich Alterssicherung – Bilanz und Perspektiven, p.27.
83 *Ibid*, p. 22.
84 Law No. 3029 of 2002, Official Gazette of the Hellenic Republic 160/A/11.07.2002.
85 *OECD*(2007), p. 27.
86 Law No. 3655 of 2008, Official Gazette of the Hellenic Republic 58/A/03.04.2008.

ity.[87] Nonetheless, the pension bills of 2010 introduced a number of reforms that are more in line with the common guidelines set out by the OMC. These are presented in the next chapter.

II. Factual Factors

1. Financial Imbalances in the Greek Public Pension System

Mismanagement of the social insurance funds, evasion of contributions by public corporations and private firms as well as wrongful granting of pension benefits, were some of the causative factors leading to financial difficulties of the Greek public pension system.[88] Public expenditure on pension benefits increased from below 6 percent of Gross Domestic Product (hereinafter: GDP), in the mid-1970s, to over 12 percent of GDP in 1990, on the grounds that between 1975 and 1990, an increasing amount of old-age pension benefits was allocated to citizens below the age of 60 and about a-quarter of pensioners received an invalidity pension, while about 40 percent of private sector workers were classified as working under "*arduous and unhealthy employment conditions*".[89] The public pension expenditures on cash benefits for old-age and survivors' pensions were 11.7 percent of GDP in 2007,[90] and future public expenditures on pensions are predicted to steadily increase over the next 50 years (2010-2060) by 24.1 percent.[91]

The financial imbalances were also attributable to the large number of public pension funds. There were approximately one hundred and thirty social insurance funds with different regulations regarding coverage and retirement prerequisites.[92] These different regulations brought about an unfair distribution of pension benefits among pensioners.[93] More specifi-

87 *Petmesidou,* ASISP 2010, pp. 7-10.
88 *Petmesidou,* in: *Petmesidou / Mossialos* (eds.), Social Policy Developments in Greece, p. 40; *Matsaganis,* South European Society and Politics 2002, pp. 110-111; *Sotiropoulos,* JESP 2004, p. 271.
89 *Mylonas / De la Maisonneuve,* The Problems and Prospects Faced by the Pay-As-You-Go Pension System: A Case Study of Greece, p.22-24.
90 *EU-COM*(2009) 56 final, p. 122.
91 *Ibid*, p. 127.
92 *Petmesidou*, ASISP 2010, p. 4.
93 *Hellenic Republic*(2005), p. 9.

cally, the diverse provisions for retirement ages and replacement rates across occupations allowed the introduction of privileges in some funds, such as the pension funds of state-owned banks and public utilities paying generous pension benefits.[94] Political parties took advantage of the increasingly large fragmentation, in order to build strategic political networks with the leaders of civil service trade unions.[95] For instance, in the mid-1980s, the socialist *PASOK* government granted higher incomes and old-age pension benefits to public-sector employees in comparison to other occupations and empowered the civil service trade unions.[96] Furthermore, old-age pension benefits of the private-sector workers were lower than their public sector peers, but relatively generous in light of the amount of contributions they made. Workers were eligible for old-age pension benefits after contributing for a minimum of 15 years, which corresponded to a minimum pension and a relatively high replacement rate.[97] Moreover, the segmentation and complexity of the public pension system caused poor administration and lack of adequate supervision.[98] Poor record-keeping in regards to pensioners and contributors, as well as a lack of collaboration between the social insurance funds and the income tax authorities led to fraud and abuse.[99] The wrongful granting of old-age pension benefits and unfair welfare distribution towards the populace is depicted in national studies; Greece has one of the highest rates of pension expenditures among the OECD countries, but at the same time, high level of poverty among the elderly.[100]

Since the beginning of the 1990s, a comprehensive pension reform had been at the top of the political agenda. The first reforms took place, in 1992, when the conservative party, *Nea Dimokratia*, gained power. The

94 *Matsaganis / Leventi,* Basic Income Studies 2011, p.7.
95 *Börsch-Supan/ Tinios,* in: *Bryant / Garganas / Tavlas* (eds.), Greece's Economic Performance and Prospects, p. 412.
96 *Triantafillou,* in: *Overbye / Kemp* (eds.), Pensions: Challenges and Reforms, p. 155.
97 *Mylonas / De la Maisoneuve,* The Problems and Prospects Faced by Pay-A-You-Go Pension System: A Case Study of Greece, p 6.
98 *Ibid*, pp.20-21.
99 *Hellenic Republic*(2005), p. 9.
100 In 2006, the proportion of the population below the poverty line was 20.5 percent and the 25 percent of which were elderly. Source: *Hellenic Republic*(2008), p.3.

Greek parliament adopted two pension regulations (Law No. 1902 of 1990[101] and Law No. 2084 of 1992[102]) that introduced parametric changes. It unified the regulations for individuals entering the labour force after the 1st of January 1993. The regulations regarding retirement age, retirement prerequisites and methods of financing became less generous than the regulations applying to individuals who had entered the labour force before the 1st of January 1993. In 1996, the socialist party, *PASOK*, with Prime Minister Costas Simitis won the national elections. The main aim of the socialist government was the Europeanisation of Greece as well as Greece's entrance into the EMU. The government thus implemented a retrenchment welfare policy and prioritised the pension reform. In 1997, a special committee of technocrats (the so-called: *Spraos Committee*) was set up to report on the medium and long-term development of the Greek economy.[103] It put forward a proposal for a sustainable Greek pension system, and presented various options for reforms. Nevertheless, disagreements with the trade unions caused constant general strikes and social unrest, and the government dissociated itself from the Committee's report. In 2002, the re-elected socialist government proposed another pension reform to the Greek parliament. The Greek parliament adopted then the Law No. 3029 of 2002. This was the first step towards the establishment of a multi-pillar system, as it introduced for the first time a scheme of occupational funds. However, the reform failed to guarantee the financial stability of the public pension funds and they also failed to balance inequalities.[104] Probable reasons for this are that the main public pension pillar adequately covers all of the working population, the contributions are rather high and the occupational scheme was introduced too late.[105] In 2008, the conservative party, *Nea Dimokratia*, with Prime Minister Costas Caramanlis proposed a third piece of pension reform to the Greek parliament and the latter adopted Law No. 3655 of 2008 concerning the administrative and organisational reform of the social security system. The reform introduced

101 Law No. 1902 of 1990, Official Gazette of the Hellenic Republic 138/B/17.10.1990.

102 Law No. 2084 of 1992, Official Gazette of the Hellenic Republic 165/B/07.10.1992.

103 *Featherstone / Kazamias / Papadimitriou*, Political Studies 2001, p. 467.

104 Matsaganis characterised the Reppas reform as "*timid and ineffective*": See *Matsaganis*, South European Society and Politics 2002, pp. 118.

105 *Petmesidou*, ASISP 2010, p.5.

essential parametric reforms, i.e. stricter eligibility criteria for early retirement, and an improvement of the administrative structuring of the schemes by merging the various pension funds to just thirteen.[106] Nevertheless, the 2008 legislation did not secure a long-term fiscal sustainability of the pension system neither did it improve the financing of social security nor the transparency of budget allocation.[107]

Therefore, despite the above efforts, the successive Greek governments failed to adopt a pension system that could guarantee its viability and not heavily burden the public budget. None of the above reforms could guarantee the reduction of the public expenditures on pension or address the unfair welfare distribution of the pension welfare benefits. In fact, none of the Greek governments were prepared or eager to risk their political power in the short term, in order to adopt pension reforms that would produce long-term benefits.[108] The domestic impediments were too strong. Under domestic impediments fall "*the limited relevance of technocratic legitimisation, the low levels of trust among the social partners, insurmountable veto-points and strong political and electoral interests*".[109] The trade unions played a decisive role and limited the possibility of the development of a consensus in regards to the pension reforms,[110] like in many other democratic countries, where trade unions and institutional vetoes can represent a serious obstacle to the administrative capacity of the government in policy-making.[111]

2. Demographic Changes

Three main demographic components are of significance in cases of public pension reforms: fertility, mortality and migration. The ageing of the population, decline of fertility rates, as well as the flow of migration, all

106 *Hellenic Republic*(2008), pp. 62 ff.
107 *Ibid*, pp.5, 11.
108 *Featherstone / Tinios*, in: *Petmesidou / Mossialos* (eds.), Social Policy Developments in Greece, p.182.
109 *Ibid*.
110 *Clark,* European Pensions and Global Finance, p.2; *Featherstone / Tinios*, in: *Petmesidou / Mossialos* (eds.), Social Policy Developments in Greece, p.183.
111 *Bonoli,* The Politics of Pension Reform: Institutions and Policy Change in Western Europe, p. 38ff; *Radaelli,* in: *Featherstone / Radaelli* (eds.), The Politics of Europeanization, p. 34; *Pierson*, World Politics 1996, p. 150.

fall under the banner of demographic changes. Following, I highlight the first two components. During the last few decades, western countries have witnessed dramatic increases in life expectancy[112] and a decline in fertility rates.[113] Rapid growth of the population aged 60 and over and, the decline in younger population has resulted in a situation in which the number of workers, who pay contributions to the social security system, are less than the number of pensioners, who receive social security benefits. This situation illustrates substantial difficulties in the effective functioning of the pension system, since the majority of western countries have adopted the Pay-As-You-Go System (hereinafter: PAYG).[114] The basis of the PAYG is that active workers finance the pension benefits of current pensioners, while the next generation finances the pension benefits of current workers. This intergenerational contract requires steady population growth and high capital accumulation for a long-term sustainable pension system.[115] Therefore, in light of the above mentioned demographic changes, reforms in the financing and administration of the pension systems become necessary and essential.

More intensive financial imbalances and intergenerational conflict may arise, when the large segment of the population, born between 1945 and 1965, the so-called "*baby boomers' generation*", will be eligible for pensions in the first quarter of this century.[116] This massive retirement may pose challenges to the national economy and the pension system, since it will cause a dramatic rise in the old-age dependency ratio.[117] More specifically, there are currently, on average, just over four workers for every pensioner,[118] while in 1950, there were more than seven workers for every

112 In 2005-10, on average in OECD countries, women aged 65+ could expect to live an additional 19.9 years. This is expected to increase to 23.5 years by 2045-50. Men of the same age could expect to live 16.4 more years, with a projected increase of 3.1 years by 2045-50 to reach 19.5 years. Source: *OECD*(2011), p. 166.

113 Fertility rates averaged 1.69 across OECD countries in the period between 2005-2010. This level does not ensure population replacement. Source: *OECD*(2011), p. 162.

114 *IMF*(1996), p. 1.

115 *Barr / Diamond*, Oxford Review of Economic Policy 2006, p. 18.

116 *Visco*, Ageing and Pension System Reform: Implications for Financial Markets and Economic Policies, p. 9.

117 *Hirte,* Pension Policies for an Aging Society, p. 105.

118 *OECD*(2011), p. 168.

pensioner.[119] Furthermore, by 2047 the ratio of workers to retiree is estimated to be two to one.[120]

Demographic challenges in Greece developed in tandem with other western countries. In 1975, the population of individuals aged over 65 years and 80 years, was 12.2 percent and 2.1 percent respectively, while, in 2000, the percentages increased to 17.6 percent and 3.6 percent respectively.[121] Furthermore, it is estimated that by 2050, the figures will reach the 31.5 percent and 11 percent.[122] In the period 1975-1980, the life expectancy for females was 75.8, and for males 71.7 years, while in the period 2000-2005, the life expectancy for females increased to 81.2 years and for males 75.9.[123] A further increase of 87.3 years for female life expectancy, and 83.7 years for males, is forecasted for the year 2050.[124] Therefore, the ageing of the population will lengthen the duration of old-age pension benefit dependency.

Furthermore, the sustainability of a public pension system in the future is questionable also due to low fertility rate. The natural growth of the Greek population was at 0 percent during the period 2000-2005, while a negative growth rate of 0.6 percent is expected by 2050.[125] Another scenario foresees that by 2050, the total fertility rate is expected to reach 1.62 percent.[126] The low of birth rate in southern Europe is a result of difficulties among young to gain firm foothold in labour market as well as because of a lack of affordable childcare, forcing, especially women, to choose between participating in the workforce or forming families.[127] In addition to the reduction of birth rate, the reduction in the employment rate of the prime working age (25-54) and for the group of older workers (55-64) is another contributing factor to the average public expenditure pressures. The unemployment rate increased by 19.7 percent from March 2008 to September 2013 reaching 27.6 percent.[128]

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119 *Ibid*, p. 42.
120 *Ibid*.
121 *UN*(2002), p.248.
122 *EU-COM*(2012) European Economy 2/2012, p. 402.
123 *Ibid.*
124 *EU-COM*(2012) European Economy 2/2012, p. 402.
125 *UN*(2002), p.249.
126 EU-*COM*(2012) European Economy 2/2012, p. 402.
127 *Hemerijck / Ferrera,* in *Martin / Ross* (eds.), Euros and Europeans: Monetary Integration and the European Model of Society, p. 259.
128 *EU-COM*(2013), p. 37.

In light of the above, as population ages, combined with low levels of labour market participation and the general economic recession, the public pension expenditures will get higher. Greek demographics over the last decades along with economic adversities affected disproportionately an already fragile social security system. These changes negatively affect the social security system, since mounting aging-related spending is a threat to long-term fiscal sustainability of the state and sustainability of the pension system. Indisputably, under these circumstances the sustainability of the pension system and the adequacy of the pension income is clearly endangered and thus a significant cause for alarm. Public pension costs will get higher as population ages, unless policies are changed and labour-market participation rates increased.

B. The Influences of the Pension Reforms After the Financial Crisis

I. The Financial Crisis

The European financial crisis of 2010 has been explicitly connected with the global financial crisis of 2008. Various causes had been suggested as potential reasons for the global crisis; such as the loan market crisis that began in 2007, in the United States of America (hereinafter: USA), the bankruptcy of Lehman brothers in 2008, the real estate bubble in the USA and in other countries, such as Spain and Ireland; as well as the weakness of the financial regulation system.[129] To address the new challenges, the initial response of the majority of the Member States of the EU was to implement Keynesian measures (investing in jobs, investing in infrastructure, tax relief) and grant financial support to the banks.[130] However, the pressures exerted by the financial crisis and its economic aftermath became stronger. As a result, the German leadership consistently requested other Member States to advocate prevailing policy in the EU which would balance household budget, tighter fiscal and monetary rules and greater economic co-ordination.[131] The logic behind this retrenchment policy is that

129 *Allen / Carletti*, International Review of Finance 2010, p.5; *Levine,* International Review of Finance 2012, p. 39.

130 *Vis / Van Kersbergen / Hylands,* Social Policy and Administration 2011, p.346.

131 *Diamond / Liddle,* in: *Morel / Palier / Palme* (eds.), Towards a Social Investment Welfare State?, pp. 301ff.; *Pisani-Ferry / Sapir*, Economic Policy 2010, p.343.

tighter fiscal regulations and improvement of financial imbalances may avoid insecurity in international markets.

For this reason, the Member States introduced in their political agenda *inter alia* progressive reductions in government spending on welfare benefits in an attempt to tackle the escalating debt crisis and prevent excessive public deficit.[132] The political agenda involved a cutting of public expenditures on social services and welfare benefits relating to employment, education, health and pension. The German government, for instance, agreed on significant cutbacks amounting to approximately 80 billion Euros between the 2011-2014 period (Sparprogramm), while in the Netherlands the government decided on cutbacks amounting to the sum of 18 billion Euros between the 2010-2015 period, and the Danish government decided on cutbacks amounting to a total of 3,2 billion Euros.[133]

As a result of the European financial and economic crisis, the vulnerabilities of the Greek economy were exposed in late 2009, when the refinancing of the gross government debt increased dramatically.[134] More specifically, the gross government debt of Greece reached 115 percent of the GDP and the net external debt almost 100 percent of the GDP, while the general government deficit was 13.6 percent in 2009.[135] In addition to this, domestic demand dropped by 2.5 percent, while the value of investment also fell dramatically with the number of non-performing loans increasing from 5 percent in 2008, to 7.7 percent, in December 2009.[136] Moreover, Greece entered the financial crisis with mounting pension-related spending which was projected to increase by 12.5 percentage of GDP over the period 2010-2050.[137]

These national economic deficiencies were attributable to a wide-range of factors. The accumulation of constant macroeconomic imbalances, low external competitiveness, rising external and internal fiscal debt and dependency on international funding in combination with high ageing costs,

132 *Vis / Van Kersbergen / Hylands,* Social Policy and Administration 2011, p. 348-349.
133 *Vis / Van Kersbergen / Hylands*, Social Policy and Administration 2011, p.348-349.
134 *Visvizi*, Acta Oeconomica 2012, p.17.
135 *EU-COM*(2010) 61 final, p.4; IMF(2010) 10/110, p. 4.
136 *Ibid*.
137 *IMF*(2010) 10/110, p. 4.

and a low domestic savings rate were some of them.[138] Due to the huge public deficit and the external debt and the poor business environment, the international capital markets started to become concern for Greece's fiscal credibility and sustainability of the Greek economy. A revision of misreported fiscal deficit data for the years 2008 and 2009 shocked further the international markets due to the fact that they were twice as large as the originally reported figures.[139] The majority of rating agencies downgraded the credibility of the Greek economy and Greece could not thus continue to have access to the international markets, which brought about the problem of liquidity. Against this background, the financial collapse of Greece was called into question threatening the sustainability of the banking system and the economy as a whole.[140]

To tackle the crisis, the elected socialist party with Prime Minister Giorgos Papandreou announced an economic programme that set 2012 as the target date for reducing the public deficit to a figure below 3 percent of GDP, as well as it introduced reductions in the public expenditure (i.e. reductions in the defence expenditures and operating costs, reduction in public salaries over 2,000 Euros and reductions in health procurement expenditures).[141] Greece's updated stability programme was approved by the Council of Economic and Finance Ministers of the EU (ECOFIN) in February 2010.[142] However, the international markets remained concerned about Greece's credibility and ability to service its public debt, while their concern heightened when it was made clear that a worsening of the economic crisis of Greece could provoke spillovers to the other Member States of the EMU.[143]

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138 *IMF*(2010) 10/110, p. 4; EU-*COM* (2011) 717 final, p. 2. For a succinct review of the domestic origins of the Greek crisis see: *Featherstone,* JCMS 2011, pp. 195-198; *Kouretas / Vlamis,* Panoeconomicus 2010, pp. 394-397; *Katsimi / Moutos,* EJPE 2010, p. 572.

139 The deficit for 2008 was revised from 5 percent of GDP to 7.7 percent of GDP, while the projected deficit for 2009 was revised from 3.7 percent of GDP to 13.6 percent of GDP. The corresponding public debt was corrected from 99.6 percent of GDP to 115.1 percent of GDP at the end of 2009. Source: *IMF*(2010) 10/110, p. 6.

140 *Ibid,* p. 7.

141 *Hellenic Republic*(2014).

142 *Council*(2010) 6560/10.

143 *IMF*(2010) 10/110, p. 7.

Consequently, the Greek financial and economic crisis turned out to be the cause for the introduction of new intergovernmental institutional arrangements at European level that are described below. The latter proved to be a strong impetus on reductions in public expenditures, which intensified the pressure to reforms of welfare benefits. As a result, the severe Greek financial crisis provided a significant opportunity for high reductions in public pension expenditures showing the vulnerabilities of the Greek economy and of the public pension system and emphasised the emergency that long- and short-term measures had to be undertaken.

II. The Conditionality of the Financial Facility Agreements

1. The Content of the Financial Facility Agreements

The Greek financial and economic crisis could have negative influence on the economic growth of the EMU and its Member States. So as to prevent the Greek debt crisis from being transferred in the form of a '*sovereign debt*' in the EMU, Europe undertook immediate and effective measures. The EU leaders, in collaboration with the IMF, decided to find a solution at European level by introducing new intergovernmental institutional arrangements. A possible default of one or more Member States has the EU not envisaged in the TFEU nor in the SGP. The Treaty set actually out in Article 125 that no Member State is liable to provide a bail-out to other Member State of the EMU, when the latter face financial and economic difficulties. However, under the severe jeopardy of the EMU's financial stability and its dismantlement, a new paragraph to Article 136 TFEU was added,[144] according to which *"3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality"*.

The initial institutional initiative to the Greek sovereign debt crisis was the first Greek rescue package of May 2010. According to calculations by the European Commission and the IMF, the external financing gap for Greece between May 2010 and June 2013 reached 110 billion Euros, in-

144 Article 136(2) of the TFEU.

cluding banking sector support.[145] Consequently, on the 2nd of May 2010, the Member States of the EMU approved the First Economic Adjustment Programme for Greece.[146] The financing of the first economic programme was based on bilateral loans between Greece and the Member States of the EMU, pooled by the European Commission for a total amount of 80 billion Euros.[147].The remaining 30 billion Euros was agreed to be provided by the IMF under a Stand-By-Arrangement (hereinafter: SBA).[148]

Although Greece made progress in the implementation of the First Economic Adjustment Programme,[149] and the Greek State responded to its conditionality and did institute a series of reforms, it was projected that Greece could not return to market financing by 2015,[150] since the reforms proved to be unsuccessful in achieving the performance criteria. The real GDP fell by more than 7 percent in the last three months of 2011, the final domestic demand shrunk by 9 percent, the account deficit remained at an unsustainable level (just above 10 percent of GDP in 2011), inflation averaged 3.1 percent, while the total employment rate declined by over 6 percent in 2011.[151] Against this background, the European Commission, the European Central Bank (hereinafter: ECB) and the IMF agreed on the 14th of March 2012, to shift the First Economic Adjustment Programme to a Second Economic Adjustment Programme of financial assistance of 164.5 billion Euros for the years 2012-2014.[152] The financing of the second economic programme was agreed to be provided through the temporary European Financial Stability Facility (hereinafter: EFSF) amounting to 144.47 billion Euros, while from the IMF's side, the financing shifted from the

145 *EU-COM*(2010) 61 final, p. 25.
146 *EU-COM*(2010) 61 final.
147 This amount was reduced by 2.7 billion Euros, because Slovakia, Portugal and Ireland decided not to participate in the Greek Loan Facility Agreement. Retrieved June 2014 from http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/.
148 The details and conditions of the loan facility agreement between Greece, the Euro Area Member States and the IMF is available online in English: http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/30/2d/05/302d058d2ca156bc35b0e268f9446a71c92782b9/application/pdf/sn_kyrwtikoimf_2010_06_04_A.pdf. Retrieved July 2014.
149 *EU-COM*(2012a) 94 final, p.21.
150 *Ibid,* p. 1.
151 *Ibid*, pp. 11-16.
152 *Ibid.*

SBA to the Extended Fund Facility (hereinafter: EFF) amounting to 19.8 billion Euros.[153].

The EFSF resolution mechanism was temporarily founded as a response to the sovereign debt crisis of the Member States of the EMU that "*are experiencing or are seriously threatened by a severe economic and financial disturbance caused by exceptional occurrences beyond its control"*.[154] Its main aim was to provide financial assistance to the Member States of the EMU that faced problems of liquidity through issuance of bonds and other debt instruments, ensuring, therefore, the proper functioning of the EMU.[155] The financial assistance was provided in the framework of a macroeconomic adjustment programme. This temporary crisis resolution mechanism was replaced by a permanent resolution mechanism, the European Stability Mechanism (hereinafter: ESM). The ESM was grounded on the 2nd of February 2012[156] and as of the 1st of July 2013, it is the only mechanism that provides financial assistance to the Member States of the EMU.

The framework of the financial facility agreements (or economic adjustment programmes for Greece) between Greece, the Member States of the EMU and the IMF consist of two steps. The first step is to specify the fiscal objectives and performance criteria of the long-term adjustment economic programme as well as the general framework of the policies that have to be undertaken for the achievement of the objectives. This step is taken place by the European Commission and the ECB in collaboration with the IMF.

One of the fiscal objectives of the programme was the urgent and effective reduction of the public deficit and the achievement of a primary surplus of the public budget. More precisely, the objective of the First Economic Adjustment Programme for Greece was the improvement of the public budget from a public deficit of 8.5 percent of GDP in 2009 to a sur-

153 *EU-COM*(2012a) 94 final, p. 5.

154 Council Regulation (EC) No. 407/2010, OJ L 118 of 12.05.2010.

155 *EFSF Framework Agreement between the Member States of the EMU and the EFSF* as amended with effect from the Effective Date of the Amendments, Consolidated Version. Retrieved August 2015. From http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf.

156 *Treaty Establishing the European Stability Mechanism* – consolidated version following Lithuania's accession to the ESM, OJ L 91 of 06.04.2011. Retrieved August 2015 from http://www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%2003-02-2015.pdf.

plus of just below 6 percent of GDP in 2014.[157] The European Commission has expressed the view that the Greek pension system "*poses a threat to the long-term sustainability of public finances*"[158] and this made thus the necessity of a pension system reform and the reduction in old-age pension benefits imminent and urgent. The Commission required from the Greek state large cutbacks in pensions, adjustment of the benefits-level of the supplementary pensions as well as stricter link between contributions and benefits.[159] Besides the European Commission, also the IMF has pointed out the mounting spending on old-age pension benefits that is among the highest in the EU, since the government is the main pension-provider in the economy.[160]

Against this background, in the first letter of intent and memoranda of May 2010, the Greek Government launched in details reductions in old-age pension benefits and committed reforming the pension system by the end-June of 2010,[161] with the view to ensure its medium and long-term sustainability of the system as well as to increase the pension expenditures between 2010-2060 under 2.5 percent of the GDP.[162] The proposed pension reforms were designed by the Greek state in close consultation with the IMF, the ECB and the European Commission, that acted as representative of the Member States of the EMU, (hereinafter: Troika). Briefly, the Greek government presented the following parametric reforms: *elimination of the Christmas, Easter and holiday bonuses,*[163] *simplification of the fragmented pension system by merging it into three funds by 2018; application of the new system to all current and future employees; increase of the retirement age for all to 65 years, which will automatic be adjusted according to the life expectancy; increase of the minimum required contributory years to 40 years; introduction of stricter requirements for early retirement and disability pensions; amendment of the pension award formula; calculation of the pension income based on the entire life-time earnings; establishment of a means-tested social pension for all citizens*

157 *EU-COM*(2010) 61 final, p. 12.
158 *EU-COM*(2010) 61 final, p. 4.
159 *EU-COM*(2010) 61 final, p. 15-20.
160 *IMF*(2010) 10/110, p. 4, 12.
161 *IMF*(2010) 10/110, at para. 13, p. 8.
162 *IMF*(2010) 10/110, p. 51.
163 *IMF*(2010) 10/110, p.47.

above the retirement age etc.[164] IMF responded positively to the proposed pension reforms, arguing that it can guarantee the long-term sustainability of the pension system and moreover, it can curtail pension spending to less than 8.2 percent of GDP in 2050.[165]

In the Second Economic Adjustment Programme for Greece, the objective of the public deficit was refreshed so that the programme was anchored on the objective of reaching a primary deficit of 1 percent of GDP in 2012 and a primary surplus of 4.5 percent of GDP in 2014.[166] As far as the proposed general framework of the policies is concerned, the outlined economic and financial policies are categorised as fiscal policies (including the restructuring of the social security system), financial sector policies and structural policies. Aims of these policies are to strengthen Greece's market confidence as well as its fiscal and financial position during a difficult transition period towards a more open and competitive economy, boost the economy's capacity to produce, save and export, adopt a comprehensive banking sector and promote privatisation.[167]

The second step is the drafting of letters of intent and memoranda by Greece which specify the economic adjustment programme and include the specific policies that shall be implemented in order to achieve the performance criteria. They are formulated by the Greek Minister of Finance and by the Governor of the Bank of Greece in close consultation with the IMF and become integral part of the domestic law, once they are ratified by the simple minority of the total number of Members of the Greek parliament. Under this framework, the Greek state is obliged, in close cooperation with its international creditors, to describe in detail, on a quarterly basis, the fiscal and monetary measures that shall lead to the proper implementation of the economic programme. The letter of intent includes the memoranda, which are: a. one Memorandum of Economic and Financial Policies (hereinafter: MEFP); b. one Memorandum of Understanding (hereinafter: MoU); and c. one Technical Memorandum of Understanding (hereinafter: TMoU). The MEFP describes the recent economic developments and outlines the economic and financial policies that the Greek government and the Bank of Greece will implement to strengthen Greece's economic policies and competitiveness. The MoU details the general

164 *IMF*(2010) 10/110, pp. 51-52.
165 *IMF*(2010) 10/110, p. 41.
166 *EU-COM*(2012a) 94 final, p. 2.
167 *IMF*(2010) 10/110, p. 45; IMF(2012).

guidelines to meet the targets of the economic programme and defines the time frame within which measures shall be implemented. The TMoU entails technical definitions and quantitative criteria already employed in the MEFP and MoU. All memoranda contain various measures, such as an attempt to lower the fiscal deficit by achieving higher and more equitable tax collections. They project a limit on spending in specific sectors, such as public services, healthcare and social security as well as they aim the restoration of competitiveness by reducing minimum wages and market rigidities. The proper implementation of the letter of intent and the memoranda that specify the fiscal objectives are absolute necessary documents approving the grant of the requested by Greece financial assistance at initial phase and then further disbursements of the assistance, at a follow-up phase.

Illustrative of the impact of the EU's and the IMF's policies is the reduction in the Greek public expenditures on pension benefits. For instance, in the first letter of intent and memoranda, the Greek State committed to reforming the pension system by the end of June 2010 and implementing reductions in old-age pension benefits by the end of June 2010,[168] with the view to ensure the short and long-term sustainability of the system as well as to limit public sector spending on pension.[169]

In addition to the memoranda, the measures concerning the coordination and surveillance of the budgetary discipline of Greece and the setting out of economic policy guidelines for Greece are also defined by Council decisions on the basis of the Articles 126(9) and 136 of the TFEU. The Council regarded that Greece was not in constancy with the broad guidelines of the economic policies of the TFEU and reported that this "*may have negative spill-over on the euro-area members... and the current situation risks jeopardising the proper functioning of the EMU*".[170] The Council thus ascertained that an excessive public deficit existed in Greece and issued decisions addressed to Greece to take effective action in reducing the excessive deficit.[171] For instance, on the 10th of May 2010, the Council adopted the Decision No. 2010/320/EU, providing a number of fiscal consolidation measures intended to reduce the public expenditure, such as a reduction in the Easter, summer and Christmas bonuses, a reduc-

168 *IMF(*2010a) 10/111, at para. 13, p. 8.
169 *IMF*(2010) 10/111, p. 51.
170 Council Recommendation to Greece, No. 2010/190/EU, OJ L 83 of 30.03.2010.
171 I.e. *Council*(2010a); (2011); (2011a); (2012); (2015).

tion in the retirement benefits to be paid to civil servants and the adoption of a pension bill.[172] That Council Decision provided the general guidelines governing the content of the pension bill of 2010. The Council Decisions are fully binding on Greece regarding the excessive deficit procedure.[173] However, remarkable is that the Council addressed very detailed and specific measures that Greece had to undertake to correct excessive deficit and that the decisions contained measures which belong to the pension policy field, in which the EU has no competence to intervene. The legitimacy and validity of these Council decisions were challenged before the General Court of the EU by the Greek trade union for civil servants and two of its members.[174] The latter brought an action for annulment of Council Decision No. 2010/320/EU and No. 2010/486/EU, which amended the Council Decision No. 2010/320/EU. The General Court held that the applicants were not competent to bring the action before the Court, on the grounds that the relevant Council decision were not of direct concern to them, since they provide only general measures and their proper implementation requires adoption by national law.

2. The IMF' Policy of Conditionality

The IMF is an international organisation that operates according to international monetary laws that are enshrined in its Statutes.[175] It supervises exchange-rate arrangements and provides loans to its member countries when they are experiencing difficulties in meeting their external financial obligations. Furthermore, it provides technical expertise. The legal basis of the Fund's conditionality consists of three tiers: the first tier relates to the provision of the Articles of Agreement that requires the IMF to adopt general policies on the use of its general resources; the second tier relates to the performance criteria designed by the Fund to identify the conditions necessary for releasing purchases under an agreement; and the third tier concerns the recommendation of the IMF's staff to the Executive Board on

172 *Council*(2010a), Art. 2.
173 Articles 288 and 126 of the TFEU.
174 General Court, *ADEDY et al. v. Council of the European Union*, T-541/10; EU:2012: 626, at para. 76.
175 *Denters,* Law and Policy of IMF Conditionality, p. 15.

financing decisions for member countries.[176] Its economic policies have turned into globally applicable approaches to economic development. The IMF provides financial assistance to its members in situations whereby they face problems regarding balance of payments or have difficulties in finding finance on affordable terms in international or domestic markets. The most basic monitoring tool is the performance criteria, which are either quantitative measures or specified structural reforms which are specified in the country's arrangement with the IMF.[177]

In and of itself the membership does not automatically provide financial support but the provision of financial support requires separate acts in law. The request for financial support is made by the member-country through a declaration (letter of intent – Art. V Sect. 3 (b) (ii)).[178] The loan provided to the member-country is mainly one of assistance, since, firstly, the borrowing terms are more advantageous than what countries would find in the international or national private markets and secondly, its aim is to correct the balance of payment problems. Under Article I of its Statute, its main objectives are to promote international monetary cooperation, facilitate the growth of international trade, promote exchange stability, assist in the establishment of a multilateral system of payments, give confidence to members by making temporarily available the general resources of the IMF under adequate safeguards, shorten the duration and lessen the degree of disequilibrium in the international balance of payments.[179] The prime goal of IMF is thus economical. However, its involvement extends also to poverty alleviation, since this may also ensure macroeconomic and political sustainability. Poverty alleviation was introduced as an IMF's objective.[180]

The IMF's loan is usually provided under concessional loans with zero interest rates that are provided to low-income countries through the Extended Credit Facility, the Stand-By Credit Facility and the Red Credit Facility, while non-concessional loans are provided through Stand-By Arrangement (hereinafter: SBA), the Flexible Credit Line, the Precautionary and Liquidity Line and the Extended Fund Facility (hereinafter: EFF).[181]

176 *IMF*(2001), p. 8-10.
177 *Ibid,* p. 14.
178 *IMF*(1945), p. 9.
179 *Ibid, p*. 2.
180 *IMF*(2016).
181 *IMF*(2016a).

The SBA is the IMF's workhorse lending instrument for emerging and advanced market countries,[182] which allows instalment withdrawals over a period of time.[183] The SBA was established in 1952 and its aim is to provide financial assistance especially to emerging market countries that face economic turbulences, so that they can emerge from crisis and restore sustainable growth.[184] The SBA provides flexibility in terms of the amount and timing of the loan. The length is typically 12 to 24 months. The repayment of the loan takes place in instalments starting from 3 to 5 years after the date of each disbursement. The lending rate is tied to the IMF's market-related interest rate, known as the basic rate of charge.[185] The EFF was established in 1974 to help countries facing serious financial imbalances that require fundamental economic reforms. The length of an EFF is longer than that of a SBA. A maximum duration of up to four years after approval is also allowed and repayment is due within 4 and a half to 10 years from the date of disbursement.[186]

Many criticised the IMF's structural adjustment programmes, on the grounds that in most cases the objectives have not been achieved, such as the balance of payments, economic growth and reduction of inflation. Although its tight lending policies aim to pool financial resources, the reality is that asking for support from IMF has become akin to writing an economic and political suicide for economies and governments. In the late 1980s and after the collapse of Soviet Union and the communist regime the critiques over the policies of IMF "*reached a crescendo*" with result that IMF acknowledged the social implications of its adjustment programmes.[187] In 1996, a critical review was published towards the Fund.[188] According to this review, the adjustment programmes implemented in developing countries have failed because the programmes had not sufficiently focused on minimum social safety nets and there was no cooperation with international labour organisations. The failure of the Fund's lack of knowledge and inability in times of financial crisis was also revealed in

182 *IMF*(2016b).
183 *Denters,* Law and Policy of IMF Conditionality, p. 85.
184 *IMF*(2016a).
185 *IMF*(2016b).
186 *IMF*(2016a).
187 *Park / Vetterlein.,* Owning Development: Creating Policy Norms in the IMF and the World Bank, p. 101.
188 *IMF*(1998), p.4.

the East Asian financial crisis in the late of 1990s.[189] During the 2008-2010 financial crisis the IMF revised the policies to prevent and resolve crisis. It includes more protection to the vulnerable during the crisis and strengthening of the use of resources for social safety nets.[190] However, its policies have been regarded as out-dated and that in the long-term they should be revised.[191]

3. The Legal Status of the Agreements and their Element of Conditionality

The relationship between conditionality, ownership and the implementation of the financial facility agreements is a complex one. The original documents of the economic adjustment programmes for Greece, the memoranda and the Council's Decisions do not contain any information that could be of assistance to proving that they are legally binding acts. The absence of the lenders' signature leads to the argument that the financial facility agreements are not international treaties and thus legally-binding agreements that would make obligatory the execution of the economic programme.[192] It appears that the Member States of the EMU and the IMF display a margin of discretion to Greece in choosing the specific measures and do not impose legal obligations. Besides, according to the IMF, the member-country may alter or terminate the adjustment programme at any stage and this rule appeals to the primacy of the state's economic sovereignty and this does not entail any violation of a legal obligation; while the resources already released are not possessed unlawfully.[193]

However, IMF will in that case refuse further purchase.[194] The element of conditionality is introduced to ensure that the Fund's resources are used for their intended purpose, which is the proper implementation of the economic adjustment programmes. Namely, the financial assistance is conditional upon the achievement of specific performance criteria, the imple-

189 *Park / Vetterlein,* Owning Development: Creating Policy Norms in the IMF and the World Bank, p. 108.
190 *IMF*(2016c).
191 *Botchway,* Law and Financial Markets Review 2009, pp. 368-376.
192 *Denters,* Law and Policy of IMF Conditionality, p. 101.
193 *Ibid,* p. 99.
194 *Ibid*, p. 103.

mentation of strict, national fiscal and monetary policies and the acceptance of tight supervision. Once the debtor state acquires financial assistance within the aforementioned financial facility agreements, the state is factually bound to follow the programme set out for the resolution of its debt crisis.[195] In a different case, an insolvency of the state could put in jeopardy the substance of the state itself, on the grounds that the lack of financial support could result so that Greece may not be in the position to service its external public debt.

This policy of conditionality has been subject of extensive debate.[196] The use of IMF conditionality acts as a powerful incentive, when the debtor state's adherence to a particular set of standards is made a condition for the disbursement of IMF funds under a stand-by arrangement, providing a unique platform to exert influence upon the debtor state's policies.[197] The IMF's traditional thesis is that the financial assistance agreements are fundamentally the member-country's ownership and it is the member-country that decides what policies to adopt. However, the margin of appreciation of the debtor state is rather small, since, although the chosen policies are considered voluntary commitments, the IMF influences their development and implementation through the element of conditionality.[198]

In the case of Greece, the development and proper implementation of the economic programmes is monitored by tight national budget control. The surveillance is operated through periodic consultation by the international creditors using quantitative programme targets. The frequency of reviews runs on a quarterly basis. The Member States of the EMU carry out their monitoring activities through quarterly reviews by the European Commission after consultation with the ECB. The Member States of the EMU decide after consultation with the ECB on the basis of the findings of the European Commission, that the implementation of the economic policy of Greece is in accord with the adjustment programme and any other conditions that are laid down by the Council decisions and the memo-

195 *Goldmann,* in: *Bohoslavsky / Cernic,* (eds.), Making Sovereign Financing and Human Rights Work, p. 91.

196 *IMF*(2001), pp. 19, 52.

197 *Lastra*, in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 137.

198 *Goldmann,* in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 95.

randa.[199] The IMF does its monitoring through staff reports of its executive board. It combines a retrospective assessment, i.e. whether the programme was implemented within the agreed timetable, as well as a forward-looking perspective, i.e. whether the programme has to be modified in light of new developments.[200]

Furthermore, the Greek Council of State deciding on the legal nature of the financial facility agreements and memoranda of understanding regarded them as political programmes and not as international treaties.[201] The Court argued that they are not international treaties, on the grounds that they do not transfer powers to international institutions and bodies, which according to the Greek Constitution belong to the Greek state. Namely, it remains in the state's own discretion to choose the specific appropriate policy measures to achieve the fiscal targets set out in the economic adjustment programmes. In this way, it is the Greek government that defines and directs the general policy of the state, as this is provided by Article 82(1) of the Greek Constitution, and not the IMF or the European Commission.

However, even if the financial facility agreements appear as non-legal binding instruments, they are functionally linked to other legally binding instruments, namely to national laws. As advocated above, the memoranda are ratified by the Greek parliament. In practice, the Greek parliament attaches the text of the memoranda in national laws, so that they become legally-binding. The first memorandum, the implementation of which approved the First Economic Adjustment Programme for Greece, was attached in Law No. 3845 of 2010,[202] while the second memorandum, which approved the Second Economic Adjustment Programme for Greece, was attached in Law No. 4046 of 2012.[203] By this way the financial facility agreements became an integral part of the domestic law by being rati-

199 Loan Facility Agreement between Greece, the Euro Area Member States and the IMF, Loan Preamble at para. No. 8. Retrieved July 2014 from http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/30/2d/05/302d058d2ca156bc35b0e268f9446a71c92782b9/application/pdf/sn_kyrwtikoimf_2010_06_04_A.pdf.

200 *IMF*(2016c).

201 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 27.

202 Law No. 3845 of 2010, Official Gazette of the Hellenic Republic 65/A/06.05.2010.

203 Law No. 4046 of 2012, Official Gazette of the Hellenic Republic 28/A/14.02.2012.

fied by a simple majority of the total number of the members of the Greek parliament. The ratification of the financial facility agreement imposes on the Greek legislature to adopt specific measures laid down in the national laws which specify the financial agreements. In this way, Greece designed, legislated and implemented a number of specific measures that were in line with the economic adjustment programme, as these measures are foreseen in national law.

Against this background, the legislative power stated repeatedly in the explanatory reports on the impugned legislation that the commitment of Greece to adopt all necessary measures so as to achieve fiscal consolidation according to the objectives and targets set in the financial facility agreements was essential in order the release of the financial assistance`s instalments to be ensured. More particular, the explanatory report on the law which adopted the first-round of old-age pension benefits reductions, provided that the Greek state was obliged to undertake these measures in order to guarantee the release of the first instalment of the financial assistance.[204] In addition, the explanatory reports on other laws that introduced further reductions in pension payments defined that it was of great public interest the release of further instalments of the first financial facility agreement.[205] Furthermore, in the explanatory reports on laws, that implemented the Second Economic Adjustment Programme for Greece, the legislature defined that further old-age pension benefit reductions were necessary, since they constituted one of the prerequisites for the release of further instalments of the second financial facility agreement.[206] In light of this, the financial facility agreements constitute important driving forces pressuring the Greek state to ratify the memoranda by adopting national laws and thus undertake specific unpopular measures, such as reforming the pension system and reducing pension payments. This element of conditionality, which the financial facility agreements contain, plays a signifi-

204 See explanatory Report on the Law No. 3845 of 2010.

205 I.e. Explanatory reports on the Law No 3986 of 2011, Official Gazette of the Hellenic Republic 152/A/01.07.2011; Law No. 4002 of 2011, Official Gazette of the Hellenic Republic 180/A/22.08.2011, which amended the pension legislation of the public sectors; and Law No. 4024/2011, Official Gazette of the Hellenic Republic 226/A/27.10.2011.

206 I.e. Explanatory reports on the Law No. 4051 of 2012, Official Gazette of the Hellenic Republic 40/A/29.02.2012, which introduced further old-age pension benefit reductions; and Law No. 4093 of 2012, Official Gazette of the Hellenic Republic 222/A/12.11.2012.

cant role, in the sense that it actually obliges Greece to respect these specific measures ratified in national law so that Greece may receive the financial assistance at an initial stage as well as further instalments in order to overcome its solvency difficulties.

Therefore, in light of the above, the financial facility agreements are not, on the one hand, legal binding documents but, on the other hand, they are also not identical to the soft-law instruments of i.e. the OMC or the EU recommendations for the general co-ordination of economic and employment policy under Articles 121(2) and 148(4) of the TFEU.[207] Correct appears to be the thesis that the financial facility agreements are a *quasi* instrument of hard-law because of the element of conditionality that they contain. Their legal nature belongs between a soft law and hard law legal instrument. They are not legal binding but because of their element of conditionality, the lending states are obliged to implement them in order to acquire the financial assistance.

Indeed, this form of stringent conditionality created strong pressure on the Greek legislature for undertaking pension reforms as well as quick and short-term effective measures to reduce the public deficit, such as reductions in pension payments. Potentially, the financial assistance could still have been released, even if the Greek state had not implemented pension reforms and old-age pension benefit reductions. Instead, however, the Greek State should have undertaken alternative measures of equivalence size and quality to safeguard the budget deficit target. To leave untouched, however, the pension benefits should be regarded as a science fiction scenario in the case of Greece. As it was mentioned above, the need for urgent and effective reduction of the public deficit constituted one of the prerequisites for the release of the financing and the need to balance the public budget is closely related to the need to balance the public pension expenditures. The expenditures and revenues of the pension system are closely related to the overall economic situation of the state and its available resources, on the grounds that "*pensions are the dominant part of so-*

207 See also *Fischer-Lescano*, Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding, p. 59. Fischer-Lescano argues that "*the establishment of conditionality and its relationship to EU law … mean more than voluntary and non-binding coordination of behaviour. The signature of the MoUs has binding effects with consequences in international law, which establish precise conditions in each case and can give rise to reciprocal claims for compensation for infringements.*".

cial security and they form a significant component of the entire Greek macro-economy".[208] In addition, cuts in pension payments constitute a quick and effective measure that can decrease in the short-term the public deficit and it is a common policy tool of many countries that face fiscal imbalances and liquidity problems.[209] Against this background, the Greek state was obliged to reform its public pension system and reduce its pension benefits. In a different case the IMF and the Member States of the EMU would refuse further releases of the financial assistance. This could have devastating consequences on the Greek economy inflicting serious macroeconomic and structural damage, both on the Greek economy and on the proper functioning of the EMU.

III. Concluding Remarks

The present chapter illustrated broadly the necessity of reforms in the Greek public pension system. It has showed that many efforts were made to change the public pension system and many reforms were under way before the 2010 economic crisis, since a Greek public pension reform was inevitable over the last three decades. The financial imbalances of the pension funds and the demographic changes have been the most influential domestic pressures since the early 1990s. Moreover, the guidelines given by international institutions, the EMU and the OMC have had a significant influence on the decision making in regards to the reforms. The OMC provided the essential data and indicators underlining the urgency of a pension reform,[210] while the IMF provided general guidelines associated with the need for fiscal consolidation, such as the gradually raising of the retirement age, limiting early retirement eligibility conditions and cutting pension benefits.

Nevertheless, the above factors proved to be insufficient conditions for bringing about the essential pension reforms in the Greek public pension system. The pressure on national public pension reforms reached its apex

208 *Börsch-Supan / Tinios*, in: *Bryant / Garganas / Tavlas* (eds.), Greece's Economic Performance and Prospects, p. 361.

209 I.e. Portugal (Section 25, Law No. 64-B/2011 on the 2012 State Budget Act); Latvia (Art. 2(1) of the Law on State Pensions and State Allowance Disbursement in the Period from 2009 to 2012.

210 *Tinios,* The Open Method of Co-ordination and Forced Pension Reforms, p. 3.

in the case of the economic and financial crisis. Despite the pressure exercised and irrespective of Greece's commitment to restructuring its pension system, a ground-breaking pension reform and the necessary reductions in public pension expenditures had not been adopted prior to the crisis. Potentially, this is because of internal impediments such as strong veto-points and electoral interests, as well as the political incompetence of successive Greek governments. A serious effort is now being made in the context of a severe national sovereign debt crisis combined with the demand for public deficit reduction in return for financial support by the international creditors.

Economic recession has prompted the reform process with cutbacks in welfare expenditures. This is mainly because, when the country is facing economic crisis, domestic actors can easier adopt radical changes without any serious political risks.[211] The Greek experience confirms that a severe financial and economic crisis has the capacity to trigger radical reforms and limit various electoral pressures as well as the resistance of the trade unions.[212] Furthermore, the public is more willing to accept unpopular policies, provided they are presented under the promise of "*an effort to save the welfare state*".[213]

The Greek financial and economic crisis that emerged in late 2009 served thus as a far more immediate constraint on the expansive welfare state policy through the assignment of financial facility agreements which contained a form of conditionality. The serious national external and sovereign debt problem resulted in the adoption of financial facility agreements between Greece, the Member States of the EMU and the IMF, which unofficially demanded the adoption of an unprecedented retrenchment policy in return for financial assistance. Namely, the disbursements of the loan can solely take place upon proper implementation of the prerequisites of the Economic Adjustment Programmes. One of the prerequisites is the restructuring of the pension system, so that the public deficit is

211 *Horstmann / Schmähl*, in: *Schmähl / Horstmann* (eds.): Transformation of Pension System in Central and East Europe, p. 33; *Pierson,* World Politics 1996, p. 177; *Bonoli,* The Politics of Pension Reform, p.33; *Schmidt*, JEPP 2002, p. 898.

212 *Palier*, in: *Palier* (ed.), A Long Goodbye to Bismarck? – The Politics of Welfare Reforms in Continental Europe, pp. 334; *Overbye*, in: *Petersen / Petersen* (eds.), The Politics of Age: Basic Pension Systems in a Comparative and Historical Perspective, p. 148.

213 *Pierson,* World Politics 1996, p. 177.

reduced and Greece's economic stability is restored. This financial assistance plays thus an important role in the legitimacy of the aims pursed by the Greek legislature concerning the Greek public pension reforms introduced after the year of 2010.

Therefore, although the urgent need for reducing public expenditures on pensions and face the negative demographic changes pre-dated the financial crisis; it was only after the outbreak of the financial crisis that a drastic pension reform and steady reductions in old-age pension benefits were adopted by the Greek parliament. Redressing the Greek public pension system was conditional upon receiving financial assistance from the Member States of the EMU and IMF, on the grounds that the stabilisation of the public expenditures on pension was one of the policies to meet the required reduction of the public budget and the achievement of a primary surplus. In the proceeding chapter, the reforms and old-age pension benefit reductions, which were introduced following the national economic and financial crisis, are presented and examined.

Chapter Two: The Greek Public Pension System 2010-2012

Chapter two describes the core elements and main provisions of the reformed Greek public pension system that were introduced after the eruption of the national financial crisis. It begins with an overview of the Greek public pension system (A). Next, the Greek public pension system is presented, as it was reformed after the financial and economic crisis within the period 2010-2012 affecting the prospective pensioners (B). Then, the progressive reductions in the old-age pension benefit payments introduced in the period 2010-2012 and affected the current pensioners are in details presented (C). Lastly, a summary of the reforms is presented in the last section (D).

Structuring chapter two in this way will illustrate that the Greek public pension system was reformed in the name of the crisis, but the current reforms are not as temporary as the phenomenon of a financial and economic crisis. It will show that the way in which the Greek public pension system was reformed in times of financial crisis and financial external interdependence was result of deeper changes, such as to confront with the demographic ageing and the jeopardy of the sustainability of the public pension system. For instance, the measures of increasing the retirement age or linking the retirement age with the life expectancy ratio will remain in force, even in the aftermath of the financial crisis and the end of the economic adjustment programmes for Greece. Also the measure of reducing the old-age pension benefits of the current pensioners, which appears to be a direct result of the financial crisis, seems to be permanent, in the sense that the level of pension payment may not return to the level they had before the crisis.This is because the Greek economic and financial crisis acted as the main driving force for in-depth reforms in order to face pre-existing problems.

A. Overview of the Greek Public Pension System

The public pension system is part of the social insurance system of Greece. The Greek social insurance system provides care in cases of i.e. sickness, medical care, maternity, old-age, and alongside with the health

care and the social assistance system, they constitute the social security system of Greece.[214] The pension system in Greece operates under public law and is enshrined in the Greek Constitution (Art. 22(5)). Its fundamental principles are that it is public, universal and compulsory.

The Greek public pension system aims to provide care in cases of old-age. The main old-age pension benefits are provided only through public pension funds, while the supplementary pension benefits are provided through public as well as private pension funds. The main objective of the public pension system in Greece is to ensure that the elderly are not exposed to the risk of poverty and provide decent pensions that ensure satisfactory living standards after retirement.[215] This is highlighted by the compulsory provision of a minimum pension income and the various supplementary pension schemes,[216] as well as by the almost universal coverage. Another defining feature of the Greek public pension system is the principle of equivalence. Namely, the granted pension benefits should guarantee that the pensioners may enjoy satisfying living conditions similar to the living conditions they were enjoying prior to retirement.[217] This derives from the fact that the pension payments are provided based on the years of contributions as well as the earnings of the pensioners' professional career.

The financing of the public pension system is based on a redistribution principle; namely the PAYG.[218] The PAYG is based on the Bismarck approach and establishes a bilateral relationship between the currently employed populace and the pensioners to whom the earmarked revenues are distributed as cash benefits.

The pension legislation is regulated through statutory acts and cannot be regulated under the terms of collective agreements. The procedure for the adoption of legislation is as follows: the executive power, namely the government and the competent ministries make a proposal to the plenum of the parliament.[219] After discussions in the parliament and consultation

214 *Kremalis,* Social Security Law in Greece, p. 21; *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 147.
215 *Hellenic Republic*(2005), p. 10.
216 *Kremalis*, Social Security Law in Greece, p.20.
217 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.
218 *Hellenic Republic*(2005), p. 5.
219 *Hellenic Republic*(2002), p. 12.

with the Court of Audit, the parliament adopts the pension bill.[220] In certain cases, the legislature may provide certain legislative powers to the government or to administrative bodies to simplify the complexity of the procedures, by allowing the delegation of certain rule-making functions. This delegation may take the shape of a presidential or ministerial decree or a decision by the social insurance administration.[221]

I. Horizontal Dimension – Personal Scope of Coverage

The origins of the Greek social welfare protection can be traced back to the 19th century, although only a limited range of professions was covered.[222] The social security fund for civil servants was established in 1852 (for military officials) and in 1861, it was expanded to all civil servants. It was regulated by the Code of Civil and Military Pensions.[223] The majority of the social insurance funds of the self-employed were established in 1934, while private employees were covered in 1935 by a single compulsory social insurance scheme (IKA-ETAM).[224] After the Second World War, the general trend towards the promotion of social solidarity and the extension of coverage influenced Greek legislatures to adopt the emergency Law No. 1846 of 1951 concerning the social insurance system:[225] The function of the Greek pension system enacted in the 1950s was to address the needs of the elderly through cash benefits and services.[226] Moreover,

220 The Court of Audit is one of the three supreme courts in Greece. The other two supreme courts are the Council of State and the Supreme Civil and Criminal Court (Aeropagus). According to Article 98 of the Greek Constitution, the Court of Audit has jurisdiction on the audit of the expenditures of the State, municipalities and other legal public entities. Furthermore, the Court of Audit provides advisory opinions concerning bills on pensions or on the recognition of service for granting the right to a pension.

221 *Hellenic Republic*(2002), p. 12.

222 *Ibid,* p. 8.

223 Code of Civil and Military Pensions No. 169 of 2007, Official Gazette of the Hellenic Republic 210/A/31.08.2007.

224 *Hellenic Republic*(2002), p. 8.

225 Emergency Law No. 1846 of 1951, Official Gazette of the Hellenic Republic 179/A/21.06.1951.

226 *Hellenic Republic*(2002), p. 5.

supplementary insurance funds were further extended in order to cover the supplementary benefits provided for by the primary insurance funds.[227]

While, under the previous pension legislation, the national pension system in Greece was highly fragmented,[228] in the new pension legislation, the various pension funds are merged under four major headings and are classified by employment category: a. IKA-ETAM, which is the social insurance fund for employees in the private sector and new entrants into the public sector, b. OAEE, which is the social insurance fund for the self-employed, c. OGA, which is the farmer's social insurance fund and d. ETAA, which is the social insurance fund of lawyers, doctors and engineers.[229]

The above-mentioned pension funds are independent public legal entities governed by public law.[230] They are self-governing bodies under the control of the relevant ministry concerning employment and social protection. Their managing bodies take decisions at the administrative level by a collective administrative board that is mainly composed of representatives from the state, employers, employees and pensioners, as well as experts in insurance matters and the Government Commissioner.[231]

IKA-ETAM was originally regulated by Law No. 1846 of 1951, as amended. It is a general compulsory insurance fund for private employees and civil servants appointed after the 1st of January 2011. It covers also individuals who are not registered with any other primary social insurance fund and are employed for a limited period, as well as persons employed on a temporary and part-time basis. It consists of three main branches: a. a compulsory pension branch (old-age, invalidity, and survivors' pensions); b. a supplementary pension branch to which all IKA-insured persons are compulsorily insured; and. c. a sickness insurance branch. OAEE covers the self-employed, apart from the professions covered by ETAA. It was set up in 1999 and it provides old-age, invalidity and survivor's pensions as

227 *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 153.

228 Up to the year of 2008, the number of social insurance funds were approximately one hundred thirty. In 2008, the Law No. 3655 of 2008 reduced the various funds to thirteen. See also *Petmesidou*, ASISP 2013, p. 4.

229 However, some other funds, such as the pension fund for journalists and the fund for the employees of the Bank of Greece maintained their independency so far as they finance the basic pension of their pensioners. See *Petmesidou,* ASISP 2012, p. 6.

230 *Kremalis*, in: *Kerameus / Kozyris* (eds.), Introduction to Greek Law, p. 230.

231 *Hellenic Republic*(2005), p. 5-6.

well as sickness benefits in kind and cash payments.[232] OGA is a compulsory public fund for farmers as well as for self-employed individuals working in villages of less than 2,000 inhabitants. Furthermore, priests, nuns and all employees living in communities less than 5,000 inhabitants are also covered by OGA, as long as they are not insured by any other social insurance fund. OGA was established in 1961 and provides cover for events of sickness, death, maternity, invalidity as well as general care for the elderly.[233] This scheme was funded by the public tax revenue until 1998. After 1998 its financing was based on a bi-partite basis (farmers and the state) and provides coverage in cases of sickness, maternity, old-age, invalidity and death, while it also administers the social assistance scheme to uninsured individual.[234]. ETAA was founded in 2008 and unified the social insurance funds of lawyers, engineers and medical doctors.[235]

II. Vertical Dimension – Form and Function

Classifying the vertical dimension of pension systems is not an easy task. Not all countries classify their pension systems in the same way, nor do the different tiers or pillars involved have the same meaning and function in all national pension systems.[236] There are two main typologies. The most traditional and common typology divides pension schemes into the following three pillars: a. the mandatory earnings-based pension (either defined-benefit or defined-contribution), b. the occupational pension (voluntary or mandatory) and c. the private voluntary pension. The second typology equally classifies the pension system into three pillars, but in a dif-

232 Law No. 2676 of 1999, Official Gazette of the Hellenic Republic 1/A/05.01.1999. For more information see *Samothrakis*, in: *Bedee* (eds.) The International Guide to Social Security: A Country by Country Overview, p.183.

233 Law No. 4169 of 1961, Official Gazette of the Hellenic Republic 81/A/18.05.1961.

234 Law No. 2458 of 1997, Official Gazette of the Hellenic Republic 15/A/14.02.1997. For more information about OGA see *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 161.

235 Law No. 3655 of 2008.

236 *Devetzi,* in: *DRV-Schriften* (ed.), Rentenversicherung im internationalen Vergleich, p. 419; the complexity of the diverse social security systems is extensively analysed by *Zacher,* in: *Zacher* (ed.), Alterssicherung im Rechtsvergleich, pp. 31-58.

ferent manner: a. the first pillar consists of a basic/minimum pension, b. the second pillar concerns an earnings-based mandatory pension or obligatory occupational pension and c. the third pillar concerns a voluntary occupational or private pension.[237] The difference between the above two typologies depends on whether the safety net for the elderly is classified as a minimum pension (*Mindestrentenregelungen*) or as a benefit of social assistance (*Mindestsicherungsregelungen*).[238] In the first typology, a safety net for the elderly of minimum assistance falls outside the scope of the pension system and is classified as a social assistance benefit. In the second typology, the minimum pension, either means-tested or universal, falls inside the scope of the pension system and is regarded as a social insurance benefit. For instance, in Germany, the pension system would be classified as falling under the first variant. This is because it provides a social assistance benefit, which is not part of the pension system. In more liberal welfare states, like the United Kingdom (hereinafter: UK) and Australia, the classification of their pension systems falls under the second variant. In liberal welfare states, the basic/minimum pension plays an important role in providing financial assistance to the elderly. Their system is based upon a social assistance approach, the Beveridge approach, which does not focus on an earnings-based system but on poverty alleviation, through flat-rate pensions financed by the public tax revenue.[239]

In regards to the Greek public pension system, despite the fact that Greece is not classified as a liberal welfare state, but rather as being among the southern European welfare states,[240] its reformed structure would be classified as falling under the second typology, after the changes implemented after the financial crisis. Prior to the financial crisis, the Greek public pension system was divided into a public, obligatory pillar that consisted of an earnings-related primary pension and an earnings-related supplementary pension and into a private pillar which consisted of a voluntary occupational and private pension. In addition, social assistance

237 *Barr / Diamond*, Oxford Review of Economic Policy 2006, pp. 17-19; *Whiteford / Whitehouse*, Oxford Review of Economic Policy 2006, pp. 84-88.

238 *Hauser*, in: *Eisen / Hardes / Hauser et al.* (eds.), Alternative Konzeptionen der sozialen Sicherung, p.176-177.

239 *Hinrichs,* in: *Petersen / Petersen* (eds.), The Politics of Age: Basic Pension Systems in a Comparative and Historical Perspective, p. 121.

240 For more information about the southern European social model see *Karamessini,* International Labour Review 2008, pp. 43-70; *Ferrera,* JESP 1996, pp. 17-37.

scheme was not well-developed, due to the absence of a general social welfare scheme, covering all persons in need without sufficient means.[241]

After the financial crisis, this structure has been altered and re-modelled based upon a social assistance approach, removing characteristics of the Bismarckian earnings-related system.[242] The vertical dimension of the Greek public pension system took after the crisis the following form: the first pillar consists of a means-tested, non-contributory minimum pension (so-called basic pension); the second pillar consists of a mandatory, contributory pension (so-called proportional pension); and, the third pillar consists of a voluntary occupational and private pension.[243] The occupational and private schemes have been classified in the same pillar, rather than in two separate ones, since they cover only a small percentage of the retirees and therefore, a separate classification is not necessary. I considered the basic pension as a stand-alone pillar, on the grounds that the basic pension is regulated within the framework of the social insurance system, seeing as it is associated with the pensionable service. However, the basic-pension has been classified by other scholars as falling under the social assistance scheme, on the grounds that it involves a minimum pension and its function correlates to a more general protective shield.[244]

Concerning the issue of which pillar the supplementary pension belongs to is still a disputed matter. It could be regarded as an occupational pension and thus belongs in the third tier. This is because it functions as a supplement to the proportional pension, designed to provide pensioners with a standard of living on the same level as was obtainable during their working lives, and also because it is financed by the employer as well as employee contributions. The state neither finances it nor does it guarantee its existence. However, the Council of State ruled that the supplementary pension falls under the statutory pillar, on the grounds that firstly, it is mandatory, secondly, it is regulated by the state and it is not a result of negotiations between social partners and thirdly, it is provided for by public entities.[245] Moreover, in other rulings, the same court stated that the Greek

241 *Pieters,* The Social Security Systems of the Member States of the European Union, p 157.
242 *Petmesidou*, ASISP 2013, p. 4.
243 *Diliagka,* ZIAS 2012, p. 29.
244 *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 180.
245 Council of State (Plenary Session), Judgment No. 5024/87.

Constitution excludes the supplementary compulsory social insurance from private initiatives.[246] Nevertheless, the Court of Justice of the European Union (hereinafter: CJEU) declared that the only decisive factor in regards to the question of whether or not a type of pension benefit belongs to the occupational or statutory scheme is the nature of the employment relationship.[247]

B. Pension Reforms Affecting Prospective Pensioners

As it has been advocated in chapter one, reforming the Greek public pension system was indirectly conditional upon receiving financial assistance from the Member States of the EMU and IMF, on the grounds that the reduction of the public pension expenditures was one of the policies to meet the required reduction of the general public expenditures and the achievement of a balanced public budget. In this context, Greece's international creditors recommended Greece to increase the retirement ages, since this would boost employment rate and promote growth of real consumption; as well as reduce replacement rates, when they remain high, since this would face the high debt and rising age-related spending.[248] At parallel, the international lenders of Greece disclosed that the Greek state should undertake measures to protect people with low pension income from the impact of the pension cutbacks and that pension benefits should be cut to such an extent, so that a social balance is kept, because major pension reductions could otherwise undermine the broader support of the programme and increase inequity.[249]

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246 Council of State (Plenary Session), Judgment of 21 September 2001, No. 3099/2001. For more information see also *Angelopoulou*, in: *Becker / Pieters / Ross* (eds.), Security: A General Principle of Social Security Law in Europe, p. 158-159.

247 CJEU, *DEI v.* Evrenopoulos, C-147/95, Judgment of 17 April 1997, EU:C:1997:201, at para. 19; *Commission of the European Communities v. Hellenic Republic*, C-457/98, Judgment of 14 December 2000, EU:C:2000:692, at para. 11. The case law of the CJEU cited in this work is available in the Eur-Lex database accessible at the following website: http://eur-lex.europa.eu/homepage.html.

248 *IMF*(2010) 10/110, p. 12.

249 *IMF*(2010) 10/110, p. 19, 24.

In addition, the European Council presented the pension reforms in its Decision No. 2010/320/EU potentially to make the proposed by the Greek state pension reforms fully legal binding for Greece. In particular, Article 2(1) provides that "*Greece shall adopt the following measures before the end of June 2010 … point e: a reduction of the highest pensions, point g: the abolition of the Easter, summer and Christmas bonuses paid to pensioners; par.2: point a: freeze in the indexation of pensions; point b: a law reforming the pension system with a view to ensuring its medium and long-term sustainability. The law should in particular introduce; a unified statutory retirement age of 65 years including for women; a merger of the existing pension funds in three funds and a unified new pension system for all current and future employees (applicable as of 1 January 2013); a reduction of the upper limit on pensions; a gradual increase in the minimum contributory period for retirement on a full benefit from 37 to 40 years by 2015; a minimum retirement age of 60 years; the abolition of the special rules applicable to persons insured before 1993; a substantial narrowing of the list of heavy and arduous professions; a reduction of pension benefits for people retiring between the age of 60 and 65 with a contributory period of less than 40 years; the creation of an automatic adjustment mechanism linking the retirement age with the increase in life expectancy; the creation of a means-tested minimum guaranteed income for elderly people above the statutory retirement age; stricter conditions and the regular re-examination of eligibility for disability pensions; an amendment of the pension award formula in the contributory based scheme to strengthen the link between contributions paid and benefits received (with accrual rate limited to an average annual rate of 1,2 per cent); and an extension of the calculation of the pensionable earnings to entire lifetime earnings (while retaining acquired rights)*".

The majority of pension reforms envisaged in the Council Decision No. 2010/320/EU were ratified by the Greek parliament. Exceptionally, the Greek parliament did not merge the public pension funds into three. The elimination of the Christmas, Easter and holiday bonuses were ratified through Law No. 3845 of 2010 and Law No. 3847 of 2010, related mainly to the field of pension policy, as well as to other areas, such as health sector, tax system, administration and public financial management. The other pension reforms were adopted, in July 2010, by the Greek parliament, with a narrow majority, through two pension bills (Law No. 3863 of 2010 concerning the New Social Security System, applicable to the private sec-

tor and self-employed[250] and Law No. 3865 of 2010 applicable to civil servants).[251] These two pension bills were passed after consultation by a special committee, which made its recommendation on the forthcoming public pension reforms after the financial crisis. The committee's report of March 2010, gave emphasis to "*the need to crack down on contribution evasion, implement actuarial surveillance, rationalize the disability pensions, make better use of social insurance funds' assets, standardize procedures for regulating contribution arrears, improve legal provisions for successive insurance by different social insurance funds and the need to distinguish between social insurance and social assistance*".[252] Lastly, in November 2012, the Greek parliament introduced new provisions concerning the provisions on the retirement age.[253]

Following the public pension reforms that affected the prospective pensioners are in details described.

I. Safety-Net for Elderly

1. Safety-Net Inside the Scope of the Pension System

There are four main models that may ensure a safety net for the prevention of old-age poverty: a. a tax-financed means-tested or universal basic pension, b. a basic-pension or guarantee-pension that is associated with contributions, c. a means-tested basic income scheme in old-age (social assistance), and d. a minimum pension that functions as a cushion for those, who already receive a pension.[254] The Greek state provides the pensioners safety-net through the provision of a basic pension for all pensioners and social solidarity benefits for all low-income pensioners.

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250 Law No. 3863 of 2010, Official Gazette of the Hellenic Republic 115/A/15.07.2010.

251 Law No. 3865 of 2010, Official Gazette of the Hellenic Republic 120/A/21.07.2010. Aim of this law was to bring the pension system of civil servants into accord with the pension system of the private sector. See: *Hellenic Republic*(2011), p. 16.

252 *Petmesidou,* ASISP 2010, p. 12.

253 Law No. 4093 of 2012, Official Gazette of the Hellenic Republic 222/A/12.11.2012.

254 *Bäcker,* Soziale Sicherheit 2000, pp. 42-43; *Whiteford / Whitehouse*, Oxford Review of Economic Policy 2006, pp. 84.

a) Basic Pension

The basic pension concerns a safety net for the prospective pensioners and it is set inside the regulatory framework of the social insurance system.[255] In the explanatory report on the Law No. 3863 of 2010, the legislature stated that the basic pension has the characteristic of social assistance and are provided to those that are in need implementing the principle of redistributive justice.[256] The scope of the basic pension scheme covers pensioners across all the public pension funds. The basic pension is also awarded to public sector employees that are entitled to pensions after the 1st of January 2015.[257]

In order to be eligible for a basic-pension, the prospective pensioners must fulfill three requirements. Firstly, they must be at least 67 years of age; secondly, they must have contributed to the public pension system for at least 15 years or 4.500 working days; and thirdly, they must have resided in Greece for a minimum of 15 years as an adult (between the ages of 15 and 67).[258] The full rate of the basic-pension is provided only in cases of 35 years of residence. In cases of shorter periods of residence, the benefit is reduced by 1/35 for each remaining year up to 35 years.[259] Before the introduction of the basic-pension scheme, certain minimum pension limits were legislated and provided for pensioners that had not established a sufficient contribution record, so as to secure a top-up income.[260] However, the minimum pension limits regulation is abolished and replaced by the basic pension.[261] Elderly citizens that do not fulfil the above described

255 Art. 2, Law No. 3863 of 2010 and Art. 3, Law No. 3865 of 2010.
256 Explanatory report on the Law No. 3863/2010, p. 1.
257 Art. 3, Law No. 3865 of 2010.
258 Art. 2, Law No. 3863 of 2010 and Art. 3, Law No. 3865 of 2010 in combination with Art. 1, B.2 and IA. 4, Law No. 4093 of 2012.
259 Art. 2, Law No. 3863 of 2010.
260 For example, employees insured with IKA-ETAM before the 1st January of 1993 received a minimum pension equal to 20 times the statutory minimum wage, while employees insured with IKA-ETAM after the 1st January of 1993 received a minimum pension equal to 70 percent of the statutory minimum wage as determined by the National Labour Collective Agreements. See also *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 371-372.
261 Art. 34(1.11), Law No. 3996 of 2011, Official Gazette of the Hellenic Republic, 170/A/05.08.2011.

three requirements are provided only with the social insurance benefit for uninsured elderly that is described below.

The main objective of the basic-pension is to ensure a basic income in old-age and to combat poverty and inequality among the elderly, as well as the strengthening of social inclusion.[262] The Greek financial and economic crisis made the introduction of a basic-pension scheme an urgent matter, by aiming to prevent any further increase in poverty among the elderly.[263] According to the explanatory report on the Law No. 3863/2010, the basic pension has a preventive function and is provided to those in needs reflecting the principle of inter-generational solidarity.[264] Moreover, the new basic-pension scheme constitutes a transposition of Article 58 of Regulation No. 883/2004 of the EU, which provides that the national legislature must fix a minimum benefit for all resident pensioners in the territory of the country.

The amount of the basic-pension is a flat-rate for all new labour-market entrants after the 1st of January 2011 and was set at 360 Euros per month for the year 2011. The benefit is funded by the state-budget and provided for by the public pension funds that also provide for their proportional pension. It is adjusted according to GDP fluctuations and the consumer price index by a joint decision between the Minister of Finance and the Minister of Employment and Social Protection.[265] For all individuals that were first insured with a social insurance organisation before the 1st of January 2011, the amount of the basic-pension is calculated according to the years of insurance before the 1st of January 2011.[266] In cases of early retirement, the full rate of the basic pension is proportionally reduced in tandem with the reduction rate of the proportional pension. The pensioners receiving disability pensions receive 75 percent or 50 percent of the basic pension, depending on the severity of their disability. Regarding the survivor's pension, the basic pension is reduced according to the regulations of each social insurance institution or national legislation.

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262 Art. 1(1), Law No. 3863 of 2010.

263 In 2012, 23.1 percent of the total population was at risk of poverty, while in 2010, the risk of poverty rate was 20.1 percent, which is 3 percent higher. See *Hellenic Statistical Authority*(2013).

264 Explanatory report on Law No. 3863 of 2010, p. 1.

265 Art. 11(1), Law No. 3863 of 2010.

266 Art. 2(2a), Law No. 3863 of 2010 and Art 3(2a), Law No. 3865 of 2010.

b) Social Solidarity Benefit (EKAS)

Besides the basic-pension scheme, Greek law provides additional safeguards against old-age poverty through social solidarity benefits (EKAS), inside the scope of the social insurance system. The Greek legislature provides marginal benefits to specific groups of pensioners that cannot guarantee dignified living conditions and an adequate income, while as the amounts given is much lower than the benefits granted by other southern European counties.[267]

EKAS is a means-tested safety net income given to low-income pensioners. It is funded through the public tax revenue. The scheme was introduced in 1996 and caters for the poorest pensioners without significant cash savings, who have reached the age of 65 years and are Greek residents.[268] It is designed to supplement the awarded pension entitlements, namely the primary pension (old-age pension, disability pension or survivor pension). Eligible for this benefit are pensioners, whose pension incomes are below a certain income level and whose total taxable personal and household income does not exceed a specified amount per year. EKAS is also payable to those who receive invalidity pension and are more than 80 percent disabled.[269] Individuals that receive early retirement or reduced disability pension have their social benefits reduced by a third.[270]

2. Safety-Net Outside the Scope of the Pension System

Uninsured elderly that are not eligible for basic pension and EKAS are granted social solidarity benefits. Namely, individuals that have not made contributions to the social security system nor have a contribution record which is less than 4,500 working days or 15 years are eligible to the social assistance of the uninsured elderly. This form of benefits exists outside the

267 *Matsaganis,* JESP 2000, pp. 75-76.

268 Art. 20, Law No. 2434 of 1996, Official Gazette of the Hellenic Republic, 188/A/20.08.1996, as amended in Art. 34, Law No. 3996 of 2011.

269 This group of pensioners does not have to fulfil the requirement of being 65 years old. This applies also to children of the deceased who receive survivor's pension. Art. 8(1), Law No. 4237 of 2014, Official Gazette of the Hellenic Republic 36/A/12.02.2014.

270 Art. 34(3c), Law No. 3996 of 2011.

regulatory framework of the social insurance system and concern a social assistant benefit. It is granted to those who have serious financial needs and have a more '*therapeutic*' rather than '*preventive*' function.[271] The pension provisions for the uninsured elderly comprises of a means-tested social assistance benefit financed by the public tax revenue. It is provided for, by the national agricultural insurance institute (OGA): This social welfare provision is a flat-rate benefit. OGA is responsible for providing this welfare benefit to all uninsured elderly persons that satisfy the following prerequisites: a. they have reached the statutory pension age of 67 years; b. they have been Greek residents for at least 20 years as adults (the value of the benefit is adjusted depending on the length of residence); c. they do not have a sufficient yearly personal or household income.[272]

II. Proportional Pension

1. Qualifying Conditions

The reformed Greek public pension system provides stricter eligibility criteria for pension entitlement. The disbursement of a proportional pension is conditional upon two criteria: a. the pension age; and b. the years of contribution. Ratione personae falling within the scope of the new public pension system include private sector employees and self-employed individuals, whereas Law No. 3865 of 2010 concerns the regulations of the public sector pension. Despite the fact that the regulation of private and public sector pension are regulated by two separate legislative texts, the requirements for pension entitlement are similar.

271 *Amitsis,* Hellenic Justice 1992, p. 505.

272 Law No. 1296 of 1982, Official Gazette of the Hellenic Republic, 128/A/12.10.1982, as amended in Art. 1(IA.6.5), Law No. 4093 of 2012.

a) Pension Age: Pre and Post Crisis

aa) Normal Pension Age

In 1951, the pension age was set at 65 for men and 60 for women.[273] However, special arrangements were made. More specifically, employees insured with IKA-ETAM before the 1st of January 1993 could qualify for a full pension at the age of 58 as long as they had a contribution record of at least 10,500 working days or 35 years of pensionable service,[274] or if at the age of 63 (for men) and 58 (for women), they have a contribution record of 4,050 working days.[275] The pension age was set at 65 years for both men and women (workers, self-employed and public employees) insured with a social insurance scheme after the 1st of January 1993.[276] The equalisation of the pension age for both men and women aims to comply with the CJEU ruling.[277] In particular, the Court ruled that the different pension ages between men and women in the public sector was not in line with the EU law and in particular with Article 141 of the European Community (hereinafter: EC) (Article 157 TFEU), which requires equal pay for male and female workers.

The pension qualification ages of civil servants appointed before the 1st of January 1993 as well as of other privileged groups were much lower and diverse. The old national social security system allowed public sector employees or certain employees insured with privileged social security funds to claim full pension benefits before the age of 65. For example, privileged civil servants, who were appointed before the 1st of January 1983 and retired by the 1st of January 1998, were allowed to receive pension payments after 35 years of pensionable service and upon reaching the age of 55 years for men and 53 years for women.[278] Furthermore, mothers with underage children or children incapable of working were entitled to retirement at the age of 55 after 20 contributory years or 5,500 working

273 Art. 28(1), Emergency Law No. 1846 of 1951.
274 Art. 28(1), Emergency Law No. 1846 of 1951, as amended in Art. 143(1), Law No. 3655 of 2008.
275 Art. 27(1), Law No. 1902 of 1990.
276 Law No. 2084 of 1992.
277 CJEU, *European Communities v. Hellenic Republic*, C-559/07, Judgment of 26 March 2009, EU:C:2009:198.
278 Art. 2a, Law No. 2084 of 1992.

days, while mothers with at least three children could retire at the age of 50 after 20 years of service.[279]

The new pension legislation increased the pension age by two years i.e. to 67 years of age.[280] The Greek government reported in the letter of intent of December 2012 that "*despite measures taken in 2010, the share of pensions in GDP remained high by European standards*" and therefore, *inter alia* the statutory retirement age will be increased to 67 and in all other cases including early retirement the retirement eligibility will be postponed by two years.[281] In the explanatory report on the pension bill that introduced the increasing in the retirement age, the legislature states that the reason of this measure is to reduce the public pension expenditures. The European Commission stated in its report on the economic adjustment programme of the second financial assistance that the increase in the retirement from 65 to 67 will reinforce the sustainability of the Greek public pension system over the medium and long –term,[282] while the IMF reported that this pension measure as well as other pension measures of 2012 that bring forward the impact of the 2010 pension reform „*will reduce pension spending from 17 percent to about 14 percent of GDP in 2013*".[283]

The increasing of the retirement age from the statutory retirement age to the age of 67 came into force as of the 1st of January 2013.[284] More particularly, the pension age, for men and women, first insured after the 1st of January 1993 as well as men, insured with IKA-ETAM before the 1st of January 1993, was increased from 65 to 67 years. The pension age of women insured with IKA-ETAM before the 1st of January 1993 was increased from 60 to 67 years for a full old-age pension benefit. Public sector employees entitled to old-age pension benefits may claim for a proportional pension upon reaching the normal pension age of 67 years. Furthermore, the retirement age of mothers in the public sector with underage children was raised from 55 years to 67 years.

279 Art. 3 and Art. 24, Law No. 2084 of 1992, as amended in Art. 144, Law No. 3655 of 2008.
280 Law No. 4093 of 2012.
281 *IMF*(2012), p. 19.
282 *EU-COM*(2012b) 123 final, p. 25.
283 *IMF*(2013) 13/20, p.26.
284 Art. 1, Law No. 4093 of 2012.

Moreover, a link is drawn between the pension eligibility age and the life expectancy rate.[285] More specifically, the normal pension age will be revised in line with the life expectancy rate from the 1st of January 2021. The readjustment of the pension entitlement ages will start form the age of 65, taking into consideration the life-expectancy statistics of the period 2010-2020. After the 1st of January 2024, the pension ages will be revised every three years. The adjustments will not be automatically applied, but it will be implemented by joint decision between the Minister of Finance and the Minister of Employment and Social Protection, in light of the previous year's statistical data provided by the Hellenic Statistical Authority and Eurostat.

bb) Early Pension Age

Individuals who decide to claim pensions before the normal retirement age will be classed as taking an early retirement. This decision requires actuarial deductions. The old framework of the pension system allowed workers insured with IKA-ETAM before the 1st of January 1993 to receive an early pension with actuarial adjustments at the age of 60 (for men) and at the age of 55 (for women).[286] The pension age of workers insured with IKA-ETAM after the 1st of January 1993 was made equal and set at the age of 60.[287] However, at this point, it should be emphasised that the actuarial adjustment was not applied, when the individual received the minimum pension limits. About 70 percent of all IKA-ETAM pensioners were receiving the minimum pension, and therefore the actuarial adjustment was not applied in the majority of cases.[288]

The new framework of the pension system restricts access to an earlier pension. Under the new legislation, the early retirement age for both men and women is increased to 62 years for an early pension entitlement for all individuals across the public pension funds, subject to 15 years of contri-

285 Art. 11, Law No. 3863 of 2010, Art. 7, Law No. 3865 of 2010.

286 Art. 28(5a), Emergency Law No. 1846 of 1951, as amended in Art. 27(1.3), Law No: 1902 of 1990.

287 Art. 24(2), Law No. 2084 of 1992.

288 *Börsch-Supan / Tinios.,* in: *Bryant / Garganas / Tavlas* (eds.), Greece's Economic Performance and Prospects, p. 433.

bution or 4,500 working days.[289] The early pension age of civil servants is also set at 62 years.[290] Old-age pension benefits are reduced by 1/200 of the full pension for each month pending the reaching of the normal pension age, which is the age of 67.[291] Further disincentives for early retirement were imposed on the grounds that early retirement pensions were high and this had as a result that many individuals, in particularly those with low income or short contributory history, did not declare revenues or pay the corresponding social security contributions only to the point where they are entitled to the minimum pension.[292]

However, although the option to receive a full old-age pension benefit earlier than at the age of the statutory retirement age is now, generally, abolished, certain categories may retire earlier. More particular, the judges may retire at the age of 65 and members of the security corps may retire at the age of 60.[293] Furthermore, four more exceptions to the general pension age still remain, namely the retirement age for a parent with children who are unable to work (the mother or the father may retire at the age of 65);[294] disability pension; pensions for workers engaged in arduous and unhygienic professions; and pensions for individuals who have contributed 40 years to the pension system.[295] However, despite the fact that these exceptions remain, there have been some significant changes that are detailed below.

cc) Late Pension Age

In the pre-crisis period, the legislature encouraged citizens to claim old-age pension benefits beyond the normal retirement age. The old-age pension benefits of individuals insured with a public pension fund before the 1st of January 1993 could be deferred, earning a 3.3 percent increment for each year after the age of 60 – up to a maximum of 38 years of contributions, while the old-age pension benefits of individuals insured with a pub-

289 Art. 1, subparagraph IA.4, Law No. 4093 of 2012.
290 Art. 1, subparagraph B.2, Law No. 4093 of 2012.
291 Art. 3, Law No. 3863 of 2010.
292 *EU-COM*(2015a) 162 final, p. 8.
293 Art. 20, Law No. 3865 of 2010.
294 Art. 10, Law No. 3863 of 2010.
295 Art. 10, Law No. 3863 of 2010.

lic pension fund after the 1st of January1993 could be deferred after reaching the age of 65.[296]

However, in the post-crisis period, the yearly bonus for late retirement was reduced for those that had vested pension rights before the 1st of January 2011. More specifically, the old-age pension benefits were increased by 2.5 percent per year, up to a maximum of 37 years of contribution, and 3.5 percent per year up to a maximum of 40 years of contribution.[297] The old-age pension amount is not awarded with corresponding bonuses for those that were first insured with a pension fund after the 1st of January 1993 or those that have vested pension rights after the 1st of January 2011.

b) Pensionable Service[298]

In addition to the requirement of reaching the age of eligibility for pension payments, prospective pensioners are also required to fulfill a specific length of pensionable service. The pensionable service is divided into two categories, the minimum pensionable service and the full pensionable service. In the first case, the individual has the right to a minimum proportional pension benefit, whereas in the second case the individual has the right to a full proportional pension benefit. In addition, the individuals may also put forward specific periods as pensionable service under the banner of notional insured time.

aa) Minimum Pensionable Service

Under the previous pension legislation, the minimum service period required for both men and women to receive the minimum pension was 15 relevant years of contribution or 4,500 working days.[299]

Similarly, under the pension legislation of 2010, both men and women that are first insured with a social insurance scheme receive a pension according to their record of contributions and to qualify for an entitlement to

296 Art. 145, Law No. 3655 of 2008.
297 Art. 25, Law No. 3863 of 2010.
298 Under the term "*pensionable service*" is meant the period, for which an employee has contributed to the public pension system.
299 Art. 3 and Art. 24, Law No. 2084 of 1992.

a proportional pension, the individuals must have contributed to the system for no less than 4,500 working days or 15 years of contribution.[300] As far as the civil servants are concerned, they are entitled to an old-age pension benefit, as long as they have completed at least 15 years of service.[301]

bb) Full Pensionable Service

Under the Greek public pension system, individuals are entitled to early retirement without actuarial reduction. Under the old public pension system, workers insured with IKA-ETAM after the 1st of January 1993 were entitled to a full-pension, as long as they had a contributory record of 37 years or 11,100 working days regardless of their age.[302] However, civil servants had the right to full old-age pension benefits after 25 years of pensionable service.[303]

The new national public pension system increased the 37 years or 11,100 working days to 40 years or 12,000 working days. The working population including civil servants may receive full old-age pension benefits earlier than the age of 67, as long as their contributions are over a period of at least 40 years or 12,000 working days.[304]. The normal pension age of eligibility for the full pension has been fixed at 62 since the 1st of January 2013.[305]

cc) Recognition of Notional Insured Period

The legislature provides the individual with the possibility of recognising notional insured time as years of pensionable service that can be bought off. This operates as a "*counter balance*" to the increasing of the pension age.[306] Such notional insured time is *inter alia* military service, maternity or parental leave, years of study until the acquisition of a first diploma or

300 Art. 3, Law No. 3863 of 2010 and Art. 4, Law No. 3865 of 2010.
301 Art. 1, subparagraph B.2, Law No. 4093 of 2012.
302 Art. 2(2), Law No. 3029 of 2002.
303 Art. 1, Code of Civil and Military Pensions No. 169 of 2007.
304 Art. 10, Law No. 3863 of 2010.
305 Art. 1 subparagraphs B.2 and IA.4, Law No. 4093 of 2012.
306 *Petmesidou*, ASISP 2011, p.10.

certificate and periods of unemployment and sickness for up to 300 days each.[307] As far as the child-rearing period is concerned, parents have the possibility of buying 300 workings days or 1 year of contribution for the first child, and 600 working days or 2 years of contribution for the 2nd as well as for the 3rd child. In total, a maximum of 5 years may be counted as periods of gainful employment. A contribution of at least 3,600 working days or 12 years is a prerequisite for the recognition of child-rearing notional period.[308] This provision is advantageous to women, since it is usually female employees that interrupt their careers in order to raise the children. The incorporation of unpaid family commitments into the benefit calculation system could result in an improvement in the level of pension reduction accorded to women.

2. Financing

The proportional pension is provided by the public pension funds. It is financed on the PAYG basis. The benefit formula is regulated by the state and not through collective agreements between workers and employers. The pension benefits that are granted up until the 1st of January 2015 are financed on a tripartite basis, i.e. by employee and employer contributions, regular and additional state subsidies as well as resources gained from the optimal use of the assets controlled by the public pension funds.[309] The contribution rates vary depending on the public pension fund. The total contribution rate in IKA-ETAM is 33 percent of the insured citizen's salary, out of which the employee provides 6.67 percent, the employer provides 13.33 percent, while the state contributes 10 percent.[310]

After the 1st of January 2015, the state budget will no longer contribute by means of a fixed percentage towards all public pension funds.[311] More particularly, the upper limit for state's participation on the basic, proportional and supplementary pension benefits was set through Article 11 (2) of the Law No. 3863 of 2010. According to the latter provision, until the

307 Art 40(1), Law No. 3996 of 2011.
308 Art. 39 (1), Law No. 3996 of 2011.
309 *Hellenic Republic*(2005), p. 5-6.
310 Art. 3(4), Law No. 3863 of 2010 with combination of Art. 22(1), Law No. 2084 of 1992.
311 Art. 37, Law No. 3863 of 2010.

year of 2060 the increasing in public pension expenditures must remain under the targeted threshold of 2.5 percent of GDP. This clause provides a self-correcting re-adjusting mechanisms contributing to the sustainability of the system, on the grounds that it links the social insurance benefits to the available public resources.

Until recently, the national legislature has not regulated upper limits of the state's participation in the financing of the public pension system, which was regarded almost unlimited. Under the revised view of the new public pension system, the state's participation in the financing of the funds is reduced, so that the individuals are exclusively responsible for the sustainability of the funds, which may be achieved mainly and exclusively by the mathematical relationship between benefits and contributions. The national legislature set upper limits in the state's participation, in order to avoid that the public pension funds' deficit lead to an increasing of the public deficit. Reducing thus the state's participation, the legislature aimed to confront with the problem of sustainability of the public pension funds as well as the sustainability of the public finances, keeping a balance between these two chronicle problems. However, state contributions are not to be completely abandoned, based on the fact that the state (although not expressly declaring this) guarantees a dignified level of protection, by preserving the system's finances and intervening in case of emergencies.[312] The scientific committee of the Greek parliament emphasised that the state is actually obliged to finance or guarantee the social benefits of the public social insurance system, on the grounds that the social insurance of the employees as well as the payment of contributions is obligatory according to the Greek Constitution.[313]

The total amount of pension allocation is determined with reference to the earnings record, the contribution record and the accrual rate. The new established benefit-calculation formula is regulated by Articles 3 and 4 of Law No. 3863 of 2010 for private-sector workers and the self-employed; as well as Article 4 of Law No. 3865 of 2010 for public sector employees. There is a uniform regulation by these two laws and they apply to the pension income of those who will retire after the 1st of January 2015. Pension benefits that are claimed for the period of employment after the 1st of Jan-

312 *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 506-507.

313 *B' Scientific Parliamentary Committee*, Report of the Draft of the Law No. 3863 of 2010, July 2010.

uary 2011 are incorporated into the new formula, while pension entitlements that are claimed for the period of employment before the 1st of January 2011 are calculated according to the previous legislative regulated benefit formula.

According to the previous benefit formula, the pension payment amounts were calculated in accordance to the years of pensionable service, the family burden(s),[314] as well as the estimated daily earnings for the last five years prior to retirement.[315] The estimated daily earnings were classified to 28 insurance classes, which corresponded to a fixed amount and to a specific percentage used to calculate the pension. The percentage was higher for those with low earnings and lower for those with high earnings. The replacement rate was 60 percent of the salary corresponding to a contribution record of 35 years for a primary pension and 20 percent for a supplementary pension. When the supplementary pension was included, total replacement rate could even be as high as 80 percent.[316] In situations whereby the total final pension amount was less than the sums specified by the legislature, the minimum pension was awarded.

According to the new benefit formula, the amount of the old-age pension benefit to be awarded is calculated in accordance with the average earning over an entire employment career, while according to the previous calculation formula the pensionable earnings used to be calculated on the five or ten last years of a person's careers. Thus, assuming that the earnings from the earlier parts of the employment history are low, this full-career measure works in manner that reduces the pension income. The earnings are adjusted yearly according to a sustainability principle. This sustainability principle is adjusted in accordance with the annual earnings registered in the social security to the consumer price index (inflation).[317] The replacement rate is set at about 34 percent for 35 years of service and 41 percent for 40 years of service. According to the new law, the adjustment is defined each year by legislation following consultation with the

314 By family burdens it is meant unmarried or dependent children below the age of 18, or below the age of 24 if the child is in full-time education.

315 Art. 28(1), Law No. 2084 of 1992, as amended in Art. 145(2), Law No. 3655 of 2008. For more information see *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 367-368.

316 *Petridou*, in: *Reynaud /apRoberts / Davies et al.* (eds.), International Perspectives on Supplementary Pensions: Actors and Issues, p. 26.

317 Art. 3(2), Law No. 3863 of 2010.

Hellenic Statistical Authority (EL.STAT) and the National Actuarial Authority (EAA).[318]

The record of contributions defines the unified accrual rate for all insured persons. The new legislation foresees 10 classifications of the years of service or working days and accords low old-age pension benefits to individuals that cannot complete a full-length career. Each classification functions at a different accrual rate. The estimated accrual rate ranges between 0.8 percent and 1.5 percent of individual earnings.[319] For example, the accrual rate is 0.8 percent, when the individual has between 300 to 4,500 workings days or 1 to 15 years of contribution, while the accrual rate is 1.4 percent when the individual has completed between 10,801 to 11,700 working days or 36 to 39 years of contribution. For a full-career employment starting from the age of 27 until retirement at the age of 67 (12,000 working days or 40 years of contribution up to a maximum of 50 years of contribution or 15,000 working days), the pension benefit accrues at 1.5 percent of earnings. This progressive benefit formula creates incentives to work longer, since when the individual contributes for more than 40 years, the accrual rate continuously increases. The final amount of the pension to be awarded is calculated according to the rate of the last pensionable year.[320]

However, the total amount of the basic and proportional pension should not surpass the threshold of 15 times the wage of an unskilled worker, when the individual has completed at least 15 years of contribution or received a full disability pension (i.e. 80 percent and over disabled).[321] The amount of both the basic and proportional pension to be awarded will be adjusted yearly from the 1st of January 2014 onwards in reference to the GDP fluctuations and the consumer price index, by joint decisions between the Minister of Finance and the Minister of Employment and Social Protection.[322] After the 1st of January 2011, the EAA determines and evaluates the actuarial studies every two years, confirmed by the EU Economic Policy Committee. According to these studies, the legislature adjusts the amount of pension benefits, in order to ensure the sustainability of the public pension system. This model is applied in order to structure the pen-

318 Art. 3, Law No. 3863 of 2010.
319 Art. 3(1), Law No. 3863 of 2010.
320 *Ibid*.
321 Art. 3(3), Law No. 3863 of 2010.
322 Art. 11(1), Law No. 3863 of 2010.

sion system in line with increases in living standards. The increase in life expectancy is not taken into account in regards to the calculation of the amount of pension payments to be awarded, but it is relevant to the regulation of the pension age.

III. Supplementary Old-Age Pension Benefits

The supplementary pension schemes in Greece exercise authority as public legal entities.[323] The supplementary pension has a complementary function to the proportional pension, and a mandatory character, namely the employees and employers are obliged to pay contributions to the supplementary public pension funds. This has been held as constitutional by the Council of State, on the grounds that the supplementary pension benefits are necessary in order to secure similar living conditions to those that the pensioners were enjoying prior to their retirement, as this is indicated by Article 22(5) of the Greek Constitution.[324]

Prior to the crisis, the supplementary public pensions were provided by a large number of insurance funds. This created an operational framework for the supplementary earnings-based system. For instance, besides the IKA-ETEAM, which was the supplementary pension scheme for employees that pay contributions to IKA-ETAM,[325] a great number of supplementary pension funds was existed for employees, such as TEAIT, which was the supplementary pension scheme for the private sector and TAYTEKO, which was the supplementary pension scheme for bank employees and public utility services. The supplementary pension scheme for civil servants was TEADY. There were also other numerous supplementary schemes covering various other professions. A supplementary pension

323 *Hellenic Republic*(2002), p. 26.

324 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

325 It was founded in 1979 as legal public entity (IKA-TEAM) by Law No. 997 of 79, Official Gazette of the Hellenic Republic 287/A/28.12.1979 and was incorporated into IKA-ETAM in 1983 by Law No. 1358 of 1983, Official Gazette of the Hellenic Republic 64/A/24.05.1983. In 2003, it was replaced by IKA-ETEAM by Law No. 3029 of 2002.

scheme for farmers was established in 1987[326] which was, nonetheless, abolished in 1998.[327]

On the 28th February of 2011, the Greek state provided that Greece will reform by the end-September of 2011 the supplementary and welfare funds "*to eliminate imbalances in those funds with deficits; introduce a strict link between benefits and contributions to guarantee the sustainability of all funds, and reduce the number of existing funds*."[328] On the 7th March of 2011, the Council adopted Decision No. 2011/257/EU providing that "*Greece shall adopt the following measures by the end of March 2012:(a) a reform of the secondary/supplementary pension schemes, by merging funds and starting the calculation of benefits on the basis of the new notional defined- contribution system; freezing of nominal supplementary pensions and reduction of the replacement rates for accrued rights in funds with deficits, based on the actuarial study prepared by the National Actuarial Authority. In case the actuarial study is not ready, replacement rates would be reduced, starting from the 1st of January 2012, to avoid deficits*".[329]

The reforms of the supplementary pension schemes and the relevant measures concerning these schemes were implemented by a pension bill that was adopted by the Greek parliament on March of 2012.[330] Since 2012, the operational system of the supplementary contribution system has being amended whereas the various supplementary pension schemes have been reduced.[331] Five are the main supplementary funds functioning as public entities. The five public entities supplementary funds are: a. ETEA, which was introduced in 2012 and is monitored by the Minister of Labour and Social Insurance and covers the employees and the civil servants,[332] b. ETAP-MME, which covers all individuals who work in the media, c.

326 Law No. 1745 of 1987, Official Gazette of the Hellenic Republic 234/A/31.12.1987.
327 Law No. 2458 of 1997.
328 *IMF*(2011a), p. 6.
329 *Council*(2011), Art. 11.
330 Law No. 4052 of 2012, Official Gazette of the Hellenic Republic 41/A/01.03.2012.
331 Art. 35, Law No. 4052 of 2012.
332 Art. 35(1), Law No. 4052 of 2012. Until the 27th March of 2013, sixteen supplementary public pension schemes for public and private sector employees have been merged with ETEA, *inter alia* IKA-ETEAM and TEADY. Further supplementary pension schemes can be added in the future, upon request by the funds'

OAEE, which covers the self-employed, d. ETAA, which covers the lawyers, doctors and engineers, e. TEAPASA, which covers the employees of the uniformed forces. The above supplementary funds may be amended to occupational pension funds functioning as private entities upon their contributors' request.[333] The remaining supplementary funds are functioning as private entities with mandatory contributions.[334]

1. Qualifying Conditions

Pensioners receive a supplementary pension from the supplementary pension schemes as long as they have satisfied the qualification requirements. The eligibility conditions to receive a supplementary pension are the same as the requirements for the primary pension. These supplementary pension benefits are available to those who are registered and have fulfilled the requirement for the primary proportional pension, while their pensionable service period must also have been for at least fifteen years.[335] In June 2013, two out of three pensioners received a supplementary pension.[336]

2. Objective and Calculation Method

The function of the supplementary old-age pension benefits is to supplement the primary earnings-related pension benefits and to improve the financial well-being of the insured individual.[337] Aim of the 2012 reform is to eliminate imbalances and guarantee the budgetary neutrality of supplementary pension schemes through the maintenance of a strict link between contributions and benefits.[338]

Under the previous legal framework, the supplementary system operated under a defined-benefit system.[339] Each supplementary scheme was au-

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representative board. ETEA provides supplementary monthly old-age pension benefits, disability pensions as well as survivor's pension benefits.

333 Art. 7 and Art. 8, Law No. 4052 of 2012.

334 See also *Paparrigopoulou-Pechlivanidi*, EDKA 2014, pp.475-476.

335 Art. 41, Law No. 4052 of 2012.

336 EU-*COM*(2013a) 159 final, p. 23.

337 *Kremalis*, Right to Social Security, p. 76.

338 *EU-COM*(2012a) 123 final, p.8.

339 *Hellenic Republic*(2005), p. 6.

tonomous in defining its own management system, while the proportion of contribution and benefits were legislatively formulated.[340] The upper limit of the supplementary pension benefits to be awarded corresponds to 20 percent of the previous earnings during the insurance period of 35 working years, while in cases of early retirement the supplementary pension was reduced by 4.5 percent for every year prior to the year of retirement.[341]

After the domestic financial crisis, the old defined-benefit system changed to a notional defined-contribution system (hereinafter: NDC), i.e. one with an actuarially neutral calculation of the pension benefits, precluding any kind of fund transfer from the public budget. The source of finance has not been altered. The supplementary pension is still financed by the contributions of employers (3 percent) and employees (3 percent) as well as by property proceeds of the supplementary public pension schemes.[342] The state does not guarantee to cover any deficits incurred by the supplementary schemes, as any transfer of funds from the public budget to the supplementary funds is prohibited.[343].

The new formula is applied to individuals that enter the labour market after the 1st of January 2014, while it is also applied to individuals that entered the labour market before that date. However, this only applies to contributions which are made after the 1st of January 2015.[344] The amount of the supplementary pension to be awarded is dependent on the choice of the beneficiary whether the social benefits will be transferred to the survivors or not.[345] Furthermore, the amount to be awarded depends on the notional return that is applied to the contributions, with consideration also given to the sustainability factor, which guarantees the continuity of the system. The sustainability factor depends on the average earnings of the insured as well as the number of insured persons and demographic

340 *Petridou*, in: *Reynaud / apRoberts / Davies et al.* (eds.), International Perspectives on Supplementary Pensions: Actors and Issues, p. 28, 30.

341 *Hellenic Republic*, Ministry of Labour and Social Security 2002, p. 39.

342 Art. 38, Law No. 4052 of 2012.

343 It is argued that this preclusion violates the constitutional right of social insurance of Article 22(5) of the Greek Constitution, on the grounds that the state must be obliged to guarantee the existence of the schemes because of its obligatory character. See *Katrougalos*, EDKA 2011, p.660.

344 Art. 39, Law No. 4052 of 2012 as amended in Law No. 4254 of 2014, Official Gazette of the Hellenic Republic 85/A/7.4.2014.

345 Art. 42, Law No. 4052 of 2012.

changes.[346] It concerns the clause of "*null deficit*", which constitutes a self-correcting mechanism in the supplementary public pension funds. In other words, according to this clause, when the expenditures exceed the revenues, the benefits shall be re-adjusted. The pension benefits must be then reduced in accordance to the paid contributions, so that any deficit in the supplementary pension fund is avoided. As a result, this may lead to a continuing reduction of the supplementary old-age pension benefits The Council of State declared that this clause and consequently the state's failure to participate in the financing of the supplementary public pension funds were unconstitutional.[347] According to the court, the state is obliged to finance these funds, on the grounds that the payment of contributions is mandatory for the employees and employers. Namely, since the state obliges the individuals to pay contributions for their supplementary pension benefits, it is obliged to participate in their financing.

IV. Further Regulations

1. Arduous and Unhygienic Professions

A number of professions are specifically classified as arduous and unhygienic professions (hereinafter: AUP). Workers in such professions have the right to receive a full pension earlier than the statutory pension age. This preferential treatment is justified firstly, on the basis that it is necessary to protect the health of workers in unhealthy professions by reducing the time that they are exposed to their unhealthy working environment, seeing as they generally tend to have a lower life expectancy. Secondly, there is no proper legislative framework concerning health and safety at work, in Greece.[348] The favourable conditions granted for early retirement were first introduced by Articles 28 and 29 of Law No. 1846 of 1951.

According to the previous public pension system, both men and women first insured before the 1st January of 1993, who have engaged in AUP, could

346 Decision of the Ministry of Labour, Social Insurance and Welfare No. 1168/31.08.2012, Official Gazette of the Hellenic Republic 2276/B/06.08.2012.

347 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

348 *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 332.

receive a full rate pension, at the age of 55, if they had a contribution record of 10,500 working days (7,500 working days in an AUP) and an early pension at the age of 53.[349] Old-age benefits may be received by the individual at the age of 60 (men) and 55 (women) after 4,500 working days (3,600 of which were in an AUP).[350] The individuals first insured after the 1st January of 1993, may receive old-age benefit at the age of 60 after the accomplishment of 4,500 working days (3,375 of which in an AUP).[351]

The current public pension system provides that employees (both men and women) engaged in AUP are entitled to a full pension at the age of 62 or to an early pension at the age of 60, as long as the individual has contributed to the social security funds for a minimum of 10,500 working days (out of which 7,500 are in an AUP).[352] Thus, the required contribution record remained the same, while the retirement age is increased by 7 years for the individuals first insured before the 1st January of 1993 and by two years for the individuals first insured after the 1st January of 1993.

The classification of professions as AUPs is defined and revised by decisions of the Ministry of Employment and Social Protection after consultation with a committee of experts.[353] This committee was set up by Article 32 of Law No. 1902 of 1990 and is composed of 11 members, among whom are representatives of the Greek General Confederation of Labour (hereinafter: GSEE) and the Hellenic Federation of Enterprises (SEV) as well as medical experts. The committee submits a report to the Ministry of Employment and Social Protection in which it recommends which specific professions should be classified as AUP. The previous pension system classified about one thirds of the total labour force as being in AUP. However, the aim of the legislature was to reduce the extensive list of those professions to less than 10 percent of the total working population.[354] In fact, the legislature finalised the list to 8 percent of the total labour force, [355] while on the 28th of February 2011, the Greek Government com-

349 Art. 32, Law No. 2874 of 2000, Official Gazette of the Hellenic Republic 286/A/29.12.2000.
350 Art. 143, Law 3655 of 2008, Official Gazette of the Hellenic Republic 58/A/03.04.2008.
351 Art. 27(1), Law No. 1902 of 1990, as amended in Art. 2(6), Law No. 3029 of 2002.
352 Art. 10(2), Law No. 3863 of 2010.
353 Art. 17, Law No. 3863 of 2010.
354 IMF(2010b) 10/286, p. 10.
355 *Ibid*, p. 16.

mitted further to revise the list of AUP.[356] Some of the professions that are removed from the list include: hairdressers, workers in pharmaceutical manufacturing as well as cashiers in department stores. However, new professions were added i.e. nursing staff, TV technicians and cameramen. The new AUP list is applicable to all current and future workers, who are entitled to a pension after the 1st of January 2015 and should be reviewed every three years.

2. Invalidity Pension

Individuals permanently or temporarily unable to work are allowed to receive an invalidity pension. The qualifying conditions for an invalidity pension include the accomplishment of a certain number of minimum years of service and the establishment of a certain degree of disability.[357] More specifically, the individual must complete 4,500 working days or 300 days, if he or she has not reached the age of 21. The 300 workings days are progressively increased to 4,200 working days by adding 120 days for each year after the age of 21. Should the individual fail to fulfil the above mentioned minimum years of service, he or she can receive an invalidity pension after having contributed to the system for five years, provided that within the last five years before the disability occurred, he or she had contributed for at least two years.[358] In a situation whereby the insured became disabled due to an occupational accident, he or she is entitled to an invalidity pension regardless of his or her years of contribution or age.[359] The individuals insured with a public pension fund after the 1st of January 1993 and receive a temporary disability pension, are entitled to a permanent disability pension, as long as they have reached the age of 55 and have performed seven years of pensionable service, or are at the age of 60 and have completed 5 years of pensionable service.[360]

The invalidity rates as well as the amount of the invalidity pension to be awarded are legally defined. The amount of the invalidity pension to be awarded is calculated in accordance to the level of disability. Disability is

356 IMF(2011a), p. 6.
357 The qualifying conditions are regulated by Law No. 1902 of 1992.
358 Art. 25(1), Law No. 1902 of 1992.
359 Art. 26, Law No. 1902 of 1992.
360 Art. 8, Law No. 3863 of 2010.

considered as absolute (at least 80 percent disabled), when the individual earns less than a fifth of the earning capacity of a healthy person, who carries out the same or a similar profession. Acute invalidity (at least 67-79 percent disabled) occurs when the individual earns less than a third of the earning capacity of a healthy person, while partial invalidity (at least 50-66 percent disabled) occurs when the individual earns less than half of the earning capacity of a healthy person.[361] Absolute disabled persons receive a full old-age pension income. They can retiree earlier and receive a full pension, based on their years of service. Individuals that are classified as 67-79 percent disabled receive three- quarters of a full pension, while the partially disabled are entitled to the half of a full pension.[362] Additionally, the flat-rate amount of the basic pension is provided at 100 percent in cases of absolute invalidity, then 75 percent in cases of acute invalidity and 50 percent in cases of partial invalidity.[363]

After the financial and economic crisis, the eligibility rules for an invalidity pension have not been changed. However, following the new pension law changes were introduced to the method of deciding on the levels of disability. The level of disability is defined by the Ministry of Employment and Social Protection after consultation with the independent Disability Certification Centre of IKA-ETAM. The latter was established in 2011[364] and is responsible for assuring, whether an individual is eligible to claim a permanent or temporary invalidity pension. Other committees that had been established by previous laws are abolished. This independent medical committee is composed of 7 members and makes its decision based on common criteria system.[365] The committee reviews the regulations in order to determine the severity of the disability and categorise the disability either as physical or as mental. The state's aim is to introduce tighter disability criteria, so as to ensure that only 10 percent of the overall pension population will be eligible for disability benefits by the year 2015.[366]

361 Art. 27(5), Law No. 1902 of 1992.
362 Art. 29, Law No. 1902 of 1992.
363 Art. 2, Law No. 3863 of 2010.
364 Art. 6, Law No. 3863 of 2010.
365 Art. 6(1) and 7, Law No. 3863 of 2010.
366 *IMF*(2011) 11/351, p. 16.

3. Survivor's Pension

The reformed Greek public pension system has tightened the eligibility rules regarding the ability of spouses and children to claim survivor's benefits, while certain privileges accorded to unmarried or divorced daughters of civil servants have been abolished. More specifically, a surviving spouse is eligible for a survivor's pension benefit, if he or she was married to the deceased more than three years before the death, or if they were married less than five years before the death and the deceased does not receive an old-age or disability pension. These rules do not apply when the death is caused by an accident, or if the couple have natural or adopted children or the widow was pregnant at the time of the death.[367] The children of the deceased are equally entitled to the benefit as long as they are under the age of 18 or permanently disabled, regardless of any other conditions. Surviving children between ages 18 and 24 can also claim for the benefit, as long as they are in full time education.[368] Additionally, another condition that is necessary for a survivor to be eligible to the benefit is that the deceased member must be insured for a specific number of years. The required years of contribution are not the same across all public pension funds. The public pension fund of IKA-ETAM requires the deceased to have completed at least 1,500 working days, 300 of which were within the five year period prior to the death.[369] The public pension fund for self-employed individuals requires 3,000 working days.[370]

The amount awarded under the survivor's pension depends on the profession and the records of the deceased earnings. The survivor's pension is calculated in the same way the old-age pension would have been calculated excluding any additions for family allowances. If the deceased was already receiving a pension at the time of the death, the amount to be paid is the existing monthly entitlement.[371] However, the survivors' pension benefits must not supersede a specified amount.[372] Prior to the pension re-

367 Art. 12, Law No. 3863 of 2010.
368 Art. 13(1), Law No. 3863 of 2010.
369 Art. 27(6), Law No. 1902 of 1992.
370 Art. 36(4), Law No. 1902 of 1992.
371 Art. 28(12), Emergency Law No. 1846 of 1951.
372 The Law No. 4093 of 2012 specified the benefit at the amount of 720 Euro. See Art 1subparagraph B.5.

form of 2010, the amount awarded under the benefit depended on whether the deceased was first insured before or after the 1st of January 1993. When the deceased was first insured before the 1st January of 1993, the benefit was granted at a rate of 70 percent to the spouse and 20 percent to each child. When the deceased was first insured after the 1st of January 1993, the benefit was granted at a rate of 50 percent to the spouse and 25 percent to each child. Moreover, under previous legislation, a surviving spouse that was over 40 years could receive the entire pension for more than three years.[373] According to the new pension legislation of 2010, the survivor's benefit is paid to the spouse on a monthly basis for a period of three years. Following, the period of three years, the surviving spouse receives half of the benefit and then 70 percent of the benefit, when the surviving spouse reaches the normal pension age. The spouse receive the full survivor's pension even beyond the three year period, when the spouse does not work and neither does he or she receive any other kind of pension benefits, nor has an earnings record, nor is he or she classified as being at least 67 percent disabled.[374]

As far as the survivors' pension for unmarried or divorced daughters of civil servants, banking employees and army officials is concerned, under the previous public pension system, they were entitled to a lifetime monthly survivor's pension without any other specific prerequisites, while divorced daughters were eligible to the benefit under specified circumstances, such as reaching the age of 40.[375] This privileged treatment is abolished. Exceptionally, male and female disabled children (at least 67 percent) whose parents were appointed in the public sector or army forces before the 1st of January 1983 are entitled to the survivor's pension, as long as they have reached the age of 50 and their income is less than the minimum pension.[376] Unmarried or divorced daughters, who already receive the survivor's pension, are still entitled to the benefit, under the condition that their income does not surpass the threshold of thirty times the

373 Art. 62, Law No. 2676 of 1999. For more information, see *Korda*, The Role of International Social Security Standards: An In-Depth Study through the Case of Greece, p. 377.
374 Art. 13(2), Law No. 3863 of 2010.
375 Art. 5, Code of Civil and Military Pensions No. 169 of 2007.
376 Art. 14, Law No. 3863 of 2010 and Art. 9(1), Law No. 3865 of 2010.

wage of an unskilled worker.[377] In a situation in which there is more than one daughter, the survivor's pension is equally divided among them.[378]

4. Employment of Pensioners

Employment of pensioners is possible, subject to certain restrictions.[379] The whole amount of the old-age pension benefit is withheld, when the pensioner is below the age of 55. If the pensioner is above the age of 55 and his or her gross income surpasses the wages of an unskilled worker by 60 times, the old-age pension will be reduced by 70 percent.[380] However, the gross amount is calculated differently when the pensioner has underage child who is up to 24 years. In this scenario, the total amount of the pension to be awarded will be increased by 6 times the wages of an unskilled worker for each child.[381] When the pensioner receives the pension from the public pension fund of OAEE or ETAA (funds for the self-employed), he or she is obliged to contribute a sum that is 50 percent higher to OAEE or ETAA. In a situation whereby the amount of the pension to be awarded surpasses 60 times the wages of an unskilled worker, this payment will be withheld suspended.[382] A retiree that works as an employee or one that is self-employed has the right to make more contributions towards his final pension allocation during his second period of employment.[383]

C. Pension Reforms Affecting Current Pensioners

In addition to the above described parametric public pension reforms, the Greek parliament introduced also a number of reductions in the old-age pension benefits awarded to current pensioners. These reductions stem from the urgent need to regulate the expenditure of the social insurance budget, in light of the fact that this plays a major role in determining the

377 *Ibid.*
378 Art 1 subparagraph B.5, Law No. 4093 of 2012.
379 Art. 63, Law No. 2676 of 1999, as amended in Art. 16 of Law No. 3863 of 2010.
380 Art. 16(1), Law No. 3863 of 2010 in combination with Art. 4(5a), Law No. 4151 of 2013.
381 Art. 16(1), Law No. 3863 of 2010.
382 Art. 16(2), Law No. 3863 of 2010.
383 Art. 16(3), Law No. 3863 of 2010.

overall economic well-being of the state and were recommended to Greece, because the reduction in public sector pensions could help the boost of competitiveness.[384]

The first wave of reductions was introduced by Law No. 3845 of 2010 „*Measures for the Implementation of the Economic Adjustment Programme for Greece as was set in the Agreement with the Member States of the EMU and the IMF*".[385] According to its explanatory report, aim of the reduction was to achieve a public deficit below than 3 percent of GDP by 2014, regression 4 percent in 2010 and progression from 2012 onwards.[386] The legislature supported that the undertaken measures were necessary for the ability of the state to continue paying the old-age benefits and the salaries of the public servants, while the alternative solution would have been the economic collapse of the country. More specifically, the Law No. 3845 of 2010 introduced the abolishment of Christmas, Easter and holiday allowances for the pensioners who were less than 60 years old, and the reduction of these allowances for those above 60 years.[387] By way of substitution, a vacation benefit of 800 Euros was paid once a year, but only to pensioners whose monthly gross income was up to 2,500 Euros. Retirees who received disability pensions were excluded. This substitution was eventually abolished, in November 2012, for all pensioners, apart from those suffering from tetraplegia and paraplegia.[388]

Moreover, the Greek legislature imposed a solidarity contribution fee on pensioners receiving old-age pension benefits of more than 1,400 Euros.[389] This special contribution flows into a solidarity fund AKAGE (Asfalistiko Kefaleo Allilegiis Geneon – Social Insurance Capital of Generation Solidarity), which had already been established under Law No. 3655 of 2008.[390] In the explanatory report on the law, it was stated that the aim of this special levy is to address the deficits of all public pension funds

384 *IMF*(2010) 10/110, p. 12.
385 Law No. 3845 of 2010.
386 See explanatory Report on the Law No. 3845 of 2010, EDKA 2010, p. 380-386.
387 Art. 3(10), Law No. 3845 of 2010; Art. 1, Law No. 3847 of 2010, Official Gazette of the Hellenic Republic 67/A/11.05.2010 (concerning public sector retirees) as amended in Art. 24, Law No. 4038 of 2012, Official Gazette of the Hellenic Republic 14/A/02.02.2012.
388 Law No. 4093 of 2012.
389 Art. 38, Law No. 3863 of 2010.
390 Law No. 3655 of 2008, Official Gazette of the Hellenic Republic 58/A/03.04.2008.

that provide the primary old-age pension benefits. The levy is charged on a gross primary pension income over 1,400 Euros a month, and the rates vary from 3 to 10 percent depending on the amount of old-age pension benefits received by the retiree.

Old-age pension benefits reductions were also introduced in 2011, namely in the second year of the financial and economic crisis. While the initial old-age pension benefits reductions introduced in 2010 aimed to avoid the solvency of the state and were more urgent, the reductions introduced in 2011 were undertaken to achieve the medium-term fiscal strategy (hereinafter: MTFS), set in the memoranda and council's decisions.[391] The Greek Parliament transferred the MTFS into domestic law, so that these fiscal targets find direct application in national law. In June 2011, the MTFS was adopted including measures which would ensure a further reduction in the deficit in the period 2012-2015 and combat the fiscal recession that was continuing.[392] One of the fiscal targets was the reduction of the general government deficit from 7.5 percent of GDP in 2011 to 2.6 percent of GDP in 2014.[393] The MTFS 2011-2015 was ratified by Law No. 3985 of 2011[394] and was developed by Law No. 3986 of 2011,[395] Law No. 4002 of 2011[396] and Law No. 4024 of 2011.[397] First of all, according to the explanatory report on the Law No. 3986 of 2011 "*Emergency Measures for the Implementation of the Medium-Term Fiscal Strategy 2012-2015*", the deep continuing economic recession and the loss of financial sovereignty constituted the main reasons of further reductions in the pension payments. The relevant law introduced the following measures: a. the solidarity contribution rate of Art. 38, Law No. 3863 of 2010 was in-

391 The MTFS include the medium term fiscal targets for the general governments, macroeconomic and fiscal forecasts contingency reports on the fiscal forecasts as well as annual expenditure ceilings for public entities and institutions over a defined period.

392 *Hellenic Republic*(2011a).

393 *Ibid.*

394 Law No. 3985 of 2011, Official Gazette of the Hellenic Republic 151/A/01.07.2011.

395 Law No. 3986 of 2011. Official Gazette of the Hellenic Republic 152/A/01.07.2011.

396 Law No. 4002 of 2011. Official Gazette of the Hellenic Republic 180/A/22.08.2011.

397 Law No. 4024 of 2011. Official Gazette of the Hellenic Republic 226/A/27.10.2011.

creased to 14 percent (Art. 44(10)); b. the pension income amounting to more than 1,700 Euros was reduced by 6 percent for pensioners under 60 years of age (Art. 44(11)); and c. solidarity contributions ranging from 3 to 10 percent of supplementary pensions over 300 Euros per month were introduced (Art. 44(13)). Secondly, Law No. 4002 of 2011 "*Reforming the public pension reforms, Regulations for the Economic Growth and Fiscal Consolidation. Matters of the Ministry of Finance, Culture and Tourism, and Labour and Social Security*" introduced retrospective pension reductions. More specifically, the solidarity contribution rate imposed on public sector pensioners was increased (Art. 2(13)), while the old-age pension benefits of civil servants were retrospectively reduced as follows: old-age pension benefits amounting to between 1,700.01 Euros and 2,300 Euros were reduced by 6 percent; old-age pension benefits amounting to between 2,300.01 Euros to 2,900 Euros were reduced by 8 percent; and old-age pension benefits amounting over 2,900.01 Euros were reduced by 10 percent (Art. 2(14)). Thirdly, Law No. 4024 of 2011 "*Pension Regulations, Uniform Payment Scale – Rank Scale, Labour Reserve and other Provisions for the Implementation of the Medium-Term Fiscal Strategy 2012-2015*" reduced by 20 percent the old-age pension benefits of former public sector employees receiving a monthly payment exceeding 1,200 Euros (Art. 1(10a)). Furthermore, pensioners below the age of 55 receiving over 1,000 Euros were faced with reductions of 40 percent (Art. 1(10a)). Aim of these reductions was to face the still emergent financial needs of the state and the economic and financial difficulties faced by the public pension funds.

Due to continuing economic recession, old-age pension benefits reductions were further introduced also in the third year of the crisis. In 2012, further old-age pension benefits reductions were introduced in order to implement the fiscal objectives of the Second Economic Adjustment Programme for Greece. The Second Economic Adjustment Programme was ratified by the Greek parliament by Law No 4046 of 2012.[398] The programme was developed through Law No. 4051 of 2012 „*Provisions for Pension Issues and other Urgent Provisions for the Application of the Memorandum of Understanding of Law No. 4046 of 2012*".[399] Aim of the re-

398 Law No. 4046 of 2012, Official Gazette of the Hellenic Republic 28/A/14.02.2012.

399 Law No. 4051 of 2012, Official Gazette of the Hellenic Republic 40/A/29.02.2012.

ductions was the public deficit to be reduced by 66 million Euros. According to the law, the old-age pension benefits of public sector pensioners amounting to over 1,300 Euros per month were to be reduced by 12 percent (Art. 1). However, the total sum of the primary pension benefits must not be less than 1,300 Euros. The supplementary pension benefits ranging from 1 Euro to 250 Euros were reduced by 10 percent, but never amounting to less than 200 Euros. The supplementary pension benefits ranging from 250.01 Euros until 300 Euros were reduced by 15 percent, but never amounted to less than 225 Euros, while supplementary pension benefits over 300.01 Euros were reduced by 20 percent but never amounted to less than 255 Euros. The disabled pension benefits were excluded from the above described provisions.

In November 2012, a MTFS for the period 2013-2016[400] was adopted by the Greek Parliament by Law No. 4093 of 2012 "*Ratification of Medium-Term Fiscal Strategy 2013-2016 – Urgent Regulations relating to the Implementation of Law No. 4046 of 2012 and the Medium-Term Fiscal Strategy of 2013-2016*".[401] The revised fiscal objectives of the MTFS 2013-2016 was the primary surplus of 4.5 percent in 2016.[402] To achieve this aim, included in the MTFS 2013-2016 was the introduction of further reductions in old-age pension benefits. More specifically, Law No. 4093 of 2012 reduced by 5 percent old-age pension benefits ranging between 1,000 Euros and 1,500 Euros per month; as well as introducing 10 percent reduction in old-age pension benefits ranging between 1,500.01 Euros and 2.000 Euro per month; and 20 percent reduction in old-age pension benefits amounting to over 3,000 Euros per month (Art. 1B.3 and IA.5). Pensioners suffering from tetraplegia and paraplegia were excluded.

Besides the reductions in the old-age pension benefits of current pensioners, their pension income has also been indirectly devalued by the direct and indirect increases in already existed taxes as well as the introduction of new emergency-taxes. For example the tax-free allowance was reduced and set 5,000 Euros for pensioners aged under 65 years of age and 9,000 Euros for those over 65 years of age.[403] Consequently, pensioners receiving 750 Euros in pension income per month respectively are obliged

400 *Hellenic Republic*(2012).
401 Law No. 4093 of 2012, Official Gazette of the Hellenic Republic 222/A/12.11.2012.
402 *Hellenic Republic*(2012).
403 Art. 38, Law No. 4024 of 2011.

to pay taxes. Furthermore, value added tax was raised from 19 percent to 23 percent and an extra solidarity tax was introduced concerning old-age pension benefits which amounted to over 12,000 Euros per year.[404] In addition, a special tax on buildings powered by electricity was introduced in 2012 and it was calculated according to the total surface area of the immovable property of the pensioner, its location, as well as the age of the building.[405]

D. Concluding Remarks

Reforming the Greek public pension system was top priority issue in the agenda of Greece's bailout plan. The Greek parliament, responding to the conditions of the financial facility assistance offered by the IMF and the Member States of the EMU, adopted pension reform bills that are far more radical than previous pension reforms. The relevant pension reforms bills introduced a fundamental change; namely, the establishment of a quasi-universal tax-financed basic pension and its distinction from the proportional earnings-related pension. The basic pension constitutes expression of social solidarity and redistributive justice while the proportional pension constitutes expression of the principle of equivalence between the paid contributions and the benefits. In this way the Greek public pension system is now structured in three pillars. The first pillar constitutes a basic pension which is financed by the state. The second pillar has a contributory character and is financed from the contributions, while the amount of the benefits is proportional to the paid contributions. The third pillar consists of the occupational and private pension benefits.

Additionally, the alarming projections regarding the sustainability of the Greek public pension system and public pension expenditures made necessary the introduction of parametric changes, so that the pension benefits' level will be reduced. The new statutory Greek pension system minimises the duration of the old-age pension benefits by increasing the retirement age without introducing in most cases transitional measures. Moreover, the pension reform bills of 2010 decrease the generosity of pension benefits by i.e. introducing stricter conditions for the calculation of

404 Art. 27, Law No. 3986 of 2011.

405 Art. 53, Law No. 4021 of 2011, Official Gazette of the Hellenic Republic 218/A/03.10.2011.

the pension benefits, stricter conditions of early retirement, longer required periods of pensionable service, strong linkage between retirement age with life expectancy rates as well as low accrual rates. Furthermore, the pension income is based on the average of earnings of the whole working career after the 1st of January 2011. As a result the initial projections on public pension expenditures have been revised, although to a lesser extent than expected,[406] while the highest increases in the average contributory period (+ 7.1 years) is observed in the case of Greece.[407]

In light of the fact that the above changes will take decades to become fully effective, the Greek state introduced additional reductions in old-age pension payments to decrease the public deficit in the short-term, resulting in lower retirement incomes of current pensioners. The national legislature reduced old-age pension benefits based on the basis of the amount of pensioners' last gross pension income without taking into consideration the level of the previous contributions as well as the taxable personal and household income. The latter led a change in the method of handling both highly and lowly paid pensioners and thus differences in the treatment of pensioners.

From the way in which the Greek public pension system is reformed appears to be obvious the strong influence of the financial crisis and the conditional financial assistance by the international creditors. First of all, this is because only after the financial crisis extremely retrogressive pension reforms were introduced. Secondly, the undertaken measures aim not only to minimise the public pension expenditures but also to face pre-existing problems. Namely, the introduced reforms established a new public pension structure aiming not only to decrease the public deficit through the reduction of the public pension expenditures, as this was advocated by the Troika, but also to create a sustainable PAYG system, in order to face the pre-existing financial adversities from the high ageing of the population, compounded by other high entitlement costs such as massive early retirement and favourable pension provisions for some privileged group of employees. Thirdly, it appears that the reformed pension bills had already been planned and placed in the drawer, while retrieved only after the crisis. This is obvious from that fact that the undertaken measures are in conformity with the international and European guidelines and objectives. The reforms included provisions in line with the normative European and international guidelines on pensions of

406 *EU-COM*(2015b), p. 105.
407 *Ibid,* pp. 96- 97.

the IMF, the OECD and the OMC,[408] presented in the previous chapter. For instance, in order to meet the objective of ensuring adequacy of the income received by pensioners, the Greek government adopted an almost universal tax-financed basic pension. Furthermore, other examples of the European and international influences on the reformed Greek public pension system was the reduction of the various public pension funds, which reduced the high fragmentation of the public pension system, as well as the change of the old defined-benefit system of the supplementary pension funds to a notional defined-contribution system. Moreover, the new legislation projected the introduction of a number of measures, to guarantee the long-term sustainability of the pension schemes, such as the increase in the normal as well as the early retirement age. In addition, it took into consideration population ageing by introducing an automatic adjustment mechanism linking pension age with the increase of life expectancy.

Last but not least, the third pillar of the Greek public pension system, which has a more saving character, was not developed and reformed in the crisis-period. However, the reduction of the pension benefits' level makes private saving much more necessary, taking into consideration that no necessary measures were introduced that could in fact compensate for the reduced pension benefits. The amount of the basic pension may not guarantee an adequate standard of living.[409] Profoundly, the above pension reforms will minimise the public pension expenditures in the short and long-term but at the same time they will lead to a low level of old-age pension benefits for current pensioners and for individuals with low average earnings and long breaks in their working career, possibly owing to a high unemployment rate. Therefore, certainly, the necessity of private saving will result over time, in a quite different structure of income in retirement, and thus resulting in a fundamental change.[410]

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408 For more information about the compatibility of the Greek pension reforms with the OMC see *Diliagka*, *Dafni*, The Europeanisation of the Greek Public Pension System under the View of the Financial Crisis, contributed paper at the 12th Annual ESPAnet Conference, Oslo, 4th – 6th September 2014.

409 *Matsaganis / Leventi,* Basic Economic Studies 2011, p. 12.

410 *Schmähl*, in: *Becker / Böcken / Nußberger et al.* (eds.), Reformen des deutschen Sozial- Arbeitsrechts im Lichte supra- und internationaler Vorgaben, p. 45.

Chapter Three: The Protection of Pensioners' Existing and Future Legal Positions

The right to old-age pension benefits is enshrined in a litany of constitutional and international rights. The aim of chapter three is to explore the protection of this right by outlining the respective legal provisions that address the right to pension entitlements. The role of the Greek Constitution and wider international law in protecting this right becomes even more important in instances where there is a financial crisis, which tends to be a period characterized by reductions in social benefits, affected previously acquired rights of pensioners.

To achieve this aim, the present chapter is structured as follows: Section A addresses the question of which legal provisions (national or international) could potentially protect the right to old-age pension benefits. In this section, it is the protection of the individual from pension reductions that is to the fore. More particular, in section A, it is presented the negative right to property that demands non-interference by the legislature within the private sphere. Next, the principle of legitimate expectations is analysed, which is a core issue as regards to the maintenance of legal positions. Following on from this the right to equality and non-discrimination is analysed that provides for the requirement of equal treatment of all people under the law. Lastly, the right to social security is explored, which sets out the state's obligation not only to legislate and act but also to withhold from interference, which can function as a right in defence against state intervention. From these legal provisions, subjective rights may be provided that are justiciable, so that pensioners can raise legal claims before a court on the basis of public pension reforms. The justiciability of fundamental rights can be defined as "*the possibility for an individual to invoke these rights before a judge, and the judge's power to rule on the basis of the rights invoked*."[411] To assess whether the legislative norm in question may provide a justiciable right, the preconditions of the respective human rights are laid out, which have to be met so that the latter finds

411 *Moizard,* ELLJ 2014, p. 323.

application. Finally, Section B contains the concluding remarks of the present chapter.

A. Legal Provisions Protecting the Right to Old-Age Pension Benefits

I. The Right to Property

The right to property belongs within the spectrum of "*negative*" rights. Negative rights are justiciable and demand the legislature to abstain from any action. This section illustrates, whether the right to property could create claims of enforceability for current and prospective pensioners. In social security law, the right to property has served to ground social security rights claims. The legal implication rests upon the fact that due to unfavourable changes in social legislation the duration of the period of social benefits payments, as well as the actual value of the benefits is reduced.

In this book, as legal basis for old-age pension benefits claim is used Article 1 of the First Protocol of the ECHR.[412] This is on the grounds that this legal provision may provide wider protection for old-age pension benefits claims in comparison to the legal provision foreseen in the Greek Constitution that provides protection of the right to property. While the Greek Constitution protects the right to property and prohibits unlawful property invasion,[413] there is no clear authority in Greek jurisdiction which clarifies whether the protection of social security benefits falls under the constitutional right to property. The Greek jurisprudence dictates that "*property*" as protected by the Constitution may not be social insurance claims.[414] Only recently has the Council of State acknowledged that reductions in already granted old-age pension benefits may fall under the concept of property within the meaning of Article 17 of the Greek Constitution.[415]

412 See p. 142 ff.

413 According to Article 17 of the Greek Constitution, no one shall be deprived of his/her property, unless this right is exercised at the expense of the public interest. In this case, any deprivation of property must be acquired by law and the owner must be fully compensated.

414 Aeropagus (Plenary Session), Judgment of 17 December 1998, No. 40/1998; Judgment of 12 December 2002, No. 43/2002.

415 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

However, on the grounds that from the ECtHR's jurisprudence derives an *"interpretative res judicata"*, the national courts have adopted the jurisprudence of the ECtHR declaring that the claim for old-age pension benefits, as well as for other social benefits, falls under the concept of *"possession"* of Article 1 of the First Protocol.[416] The concept of a possession within the ECHR is an autonomous one and is not dependent on classifications in national law.[417] The ECHR and its First Protocol was ratified by Greece in 1953 by Law No. 2329 of 1953[418] and once again after the restoration of democracy in 1974 by Law No. 53 of 1974.[419] The ECHR, as an international treaty, was ratified by the procedure described in the Constitution and finds direct applicability in Greek law. The ECHR functions only in a supplementary manner to the Greek Constitution, and holds no supremacy over it. This principle of subsidiarity is *inter alia* reflected in Article 53 ECHR, which indicates that the ECHR shall not limit any human rights or fundamental freedoms ensured by domestic law and that it shall not preclude a higher level of protection for such rights.

Article 1 of the First Protocol proscribes that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by the law and by the general principles of international law. The preceding provisions shall not, however, in any way*

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416 Court of Audit, Judgement Nos. 1617/98; 1562/2005. Exceptionally, the Court of Audit in 1994 ruled that Article 1 of the First Protocol does not find applicability in cases of old-age pension benefits' claims, since its application would contradict to the constitutional provision of the right to property (Art. 17). The main reasons of this narrow interpretation of Article 1 of the First Protocol is the fact that Article 87(2) of the Greek Constitution states that "*judges shall be subject only to the Constitution and the laws*" and thus the jurisprudence of other national or international courts shall not constitute a source of law. Court of Audit, Judgment No. 28/1994.

417 ECtHR, *Beyeler v. Italy*, Judgment of 05 January 2000, Appl. No. 33202/96, at para. 100; *Iatridis v. Greece*, Judgment of 19 October 2000, Appl. No. 31107/96, at para. 54; *Broniowski v. Poland,* Judgment of 28 September 2005, Appl. No. 31443/96, at para. 129; *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, Appl. No. 73049/01, at para. 63. The case law of the ECtHR cited in the present work is available in the HUDOC database accessible at the website http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=.

418 Law No. 2329 of 1953, Official Gazette of the Hellenic Republic 68/A/04.11.1953.

419 Law No. 53 of 1974, Official Gazette of the Hellenic Republic 256/A/20.09.1974.

impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". Article 1 of the First Protocol is of great importance in the area of social security. Although the ECHR and its Protocols, in general, do not include the right to social security as such, the ECtHR has given a social dimension to the Convention through this article.[420] The ECtHR interpreted the concept of possession that is guaranteed in the above article broadly, and accepted in a number of cases that the social security benefits fall within the scope of application.[421]

1. Protection of Allocated Pension Benefits

Pensioners' rights may be protected through the right to property. The right to property finds application if the already allocated pension benefits fall under the concept of possession. It is thus ripe for legal consideration under which circumstances exactly do social security benefits fall under the concept of possession. Generally, the old-age pension benefits are considered as property once the pensioners have already established (or acquired) rights. Established rights are full, inalienable and incontrovertible rights that offer strong legal protection, when the individual has fulfilled all the requirements necessary for the application of the legal norm that provides the enjoyment of the right in question. The protection of established rights is a protective normative pattern, with origins in civil law, and includes the protection of an owners' rightful possession.[422] However,

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420 *Katrougalos*, Institutions of Social Policy and Protection of Social Rights at International and National Level, p 68. The ECtHR has given social dimension to the Convention also through the prohibition of torture (Art. 3 of the ECHR), the right to a fair trial (Art. 6 ECHR), the right to respect private and family life (Art. 8 of the ECHR) and the prohibition of discrimination in the application of rights (Art: 14 of the ECHR).

421 I.e. ECtHR, *Gaygüsüz v. Austria*, Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41; *Asmundsson v. Iceland,* Judgment of 12 October 2004, Appl. No. 60669/00, at para. 45; *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 84; *Kohniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 69.

422 *Rönnmar*, in: *Numhauser-Henning / Rönnmar* (eds.), Normative Patterns and Legal Developments in the Social Dimension of the EU, p. 97.

this pattern is "*silent on how these positions are established and who will be able to achieve these establishments*".[423]

In German law, claims to social benefits are protected by the right to property in the wording of Article 14(1) I of the Grundgesetz (Basic Law) when three conditions are met: 1. the rights derived from public law serve private interests; 2. they serve the purpose of securing a subsistence; and 3. they are based on a contribution on the part of the insured person which can be qualified as being more than "i*nsignificant*".[424] Claims to social assistance are excluded from the protection of property, since such claims rest upon the state's obligation to provide welfare benefits and the criterion of personal contribution does not exist.[425]

According to a general principle of the Greek social insurance law, the right to old-age pension benefits depends on the pension legislation that was in effect at the time of occurrence of the social insurance risk.[426] According to Greek jurisprudence, the social insurance risk takes place when all the substantial and formal prerequisites set out by the pension legislation are met.[427] Therefore, the pensioners may establish full rights when they fulfil all substantial and formal prerequisites. The substantial prerequisites include the *ratione personae*; which is the required contributory period and the reaching of the required age of retirement.[428] The formal prerequisites refer to the essential administrative procedures for a pension entitlement i.e. the application for an old-age pension benefit and the allocation of welfare benefits.[429] Exceptionally, the Council of State held that the claim for an old-age pension benefit that was pending, before the courts or before the administrative authorities, was protected and fell under the favourable pension legislation that was in effect at the time of the

423 *Christensen*, Scandinavian Studies in Law 2000, p. 290.

424 German Federal Constitutional Court, 53, 257, 290 ff. See also *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 109.

425 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 109.

426 The term "*social insurance risk*" is used in Greek law and defines an event after which social insurance benefits may be claimed, such as: sickness, disability, maternity, family, unemployment and old-age.

427 Council of State, Judgment of 18 May 2004, No. 1297/2004; Judgment of 14 July 2006, No. 718/2006; Judgment of 01 June 2009, No. 1817/2009.

428 *Angelopoulou,* EDKA 2010, p. 911.

429 *Kremalis,* Right to Social Security, p. 297.

application.[430] Therefore, in the event that the administrative departments or the courts are overburdened, the allocation of the welfare benefits is not a prerequisite for a pensioner's right to claim for benefits.[431]

The ECtHR has declared that in cases in which the state has already adopted legislation that is in force and provides for welfare benefit as of right, that legislation must be regarded as generating pecuniary rights with a proprietary interest falling within the ambit of Article 1 of the First Protocol.[432] Namely, where the entitlement to a welfare benefit is subject to a conditional claim and the claimant concerned fulfils and satisfies the legal conditions laid down in domestic law for the grant of the welfare benefit, then the right to this welfare benefit can be considered to amount to "*possession*" for the purposes of Article 1 of the First Protocol. The court has also ruled that even the entitlement to an increased pension falls under the concept of property.[433]

Therefore, in light of the ECtHR's jurisprudence, the legal positions of the pensioners are protected through the right to peaceful enjoyment of possession in cases relating to pensioners that have already been provided with old-age pension benefits. Therefore, current pensioners would be able to establish a legal basis for an old-age pension benefit claim in national law within the meaning of Article 1 of the First Protocol, on the grounds that they have fulfilled all requirements concerned and satisfy the legal

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430 Council of State, Judgment of 19 January 1998, No. 177/1998; Judgment of 26 April 1999, No. 1453/1999; Judgment of 28 February 2007, No. 579/2007.

431 However, Article 37 of Law No. 3996 of 2011 seems to be contrary to this jurisprudence; it provides that the new pension provisions concerning the stricter requirements for a pension entitlement of parents or siblings of disabled individuals are also applicable to applications for pension benefits that have been submitted before the publication of Law No. 3996 of 2011 and are pending before administrative authorities. For more details see *Morfakidis*, EDKA 2011, p.814.

432 ECtHR, *Gaygüsüz v. Austria*, Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41; *Antonakopoulos and others v. Greece*, Judgment of 14 December 1999, Appl. No. 37098/97; *Supreme Administrative Court and others v. UK,* Decision of 6 July 2005, Appl. Nos 65731/01 etc., at para. 54; *Rasmussen v. Poland*, Judgment of 28 April 2009, Appl. No. 38886/05, at para. 71; *Moskal v. Poland,* Judgment of 15 September 2009, Appl. No. 10373/05, at para. 45; *Apostolakis v. Greece,* Judgment of 22 October 2009, Appl. No. 39574/07; *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. No. 2033/04, at para. 84; *Kohniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 69.

433 ECtHR, *Kuznetsova v. Russia*, Judgment of 07 June 2007, Appl. No. 67579/01, at para. 49.

conditions laid down in domestic law for the grant of old-age pension benefits.

Last but not least, even if pensioners establish that their old-age pension benefits fall under the notion of possession within the meaning of Article 1 of the First Protocol and prove the interference with this right, the right to peaceful enjoyment of one's possessions is subject to limitations and conditions. The limitations and conditions stem from Article 1 of the First Protocol, which allows the Contracting States to restrict the right to peaceful enjoyment of one's possessions on grounds of general interest. This requirement is expressly stated in Article 1, par.1, 2nd sentence ("*in the public interest*") and par. 2 ("*in the general interest or to secure the payment of taxes and other contributions or penalties*").[434] Absence of the element of legitimate aim has as a result the violation of Article 1 of the First Protocol. The requirements of the existence of a general interest and the justification of the interference are laid down in chapter four of the present work.

2. Protection of Pension Benefits to be Allocated in the Future

Another subject of examination is the pre-acquisition period. In contrast to the established rights, which are full rights, there are also future rights. The future rights are pseudo full rights, but they may become full rights in the future when certain requirements are met. Against this background, the question that needs to be addressed is whether, and if so under which circumstances do pensioners who have not established rights but have contributed to the public pension system receive protection during the qualifying period by the right to property, and more particular by Article 1 of the First Protocol. This question concerns particularly the cases in which the required contributory period has been completed, while other requirements, such as the reaching of the statutory pensionable age, have not yet been fulfilled.

In order for pension benefits to be protected by the right to property during the pre-acquisition period (or qualifying period), pensioners should have a protected legal position. In German law, this legal position is the

434 Art. 1(1, sentence 2) of the First Protocol provides that "*No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principle of international law*".

so-called "*Anwartschaft*". The legal term "*Anwartschaft*" has its origins in German civil property law. It is a vested (or deferred) entitlement which can give rise to a future right, if the individual has reasonable expectations. In German pension law, the "*Anwartschaftsrecht*" concerns the vested pension rights or the entitlement to acquire future allocation of pension benefits, if the insured has fulfilled the required pensionable service (5 years) but has not reached the required retirement age yet (Rentenanwartschaften).[435] It concerns a future entitlement to pension benefits that the insured has earned in return for having contributed a specific number of years to the public pension system. The period of expectation that runs until the acquisition of the full right arises is called "*Anwartschaftszeit*". The period of expectation to acquire pension benefits ends once the insured has fulfilled the required minimum pensionable service and reached the required retirement age.[436] However, the beginning of the period of protection of expectations is very difficult to define. One argument could be that the protection begins after the payment of the first contribution to the public pension system, because at this moment the social insurance relationship begins.[437]

In Greek law, the "*Anwartschaftsrecht*" has not been recognised by the Greek legislature or jurisprudence. The Greek jurisprudence does not protect the expectation of the pensioners to acquire future pension benefits.[438] However, part of the Greek academic literature has pontificated that paying contributions for a reasonable period of time must bring into existence actionable expectations protected through the right to property.[439] The notion of what constitutes a "*reasonable period*" that could be given a pecuniary value has not yet been determined. The notion of a reasonable period constitutes an open legal term that is difficult to be defined on a general level. According to the Greek public pension system, as described in chapter two, the prospective pensioners may establish the right to claim for old-age benefits after 15 years of pensionable service. So it may be argued that the pensioners, who have contributed to the system for 15 years, may

435 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 195.
436 *Ibid.*
437 *Ibid.*
438 I.e. Council of State, Judgment of 14 July 2006, No. 718/2006.
439 *Stergiou*, DiDik 2008, p. 845.

establish a protected expectation (*Anwartschaft*) under the concept of possession to acquire future pension entitlement.

The Greek jurisprudence determined the notion of a "*reasonable period*" in cases of retrospective recalls of illegal administrative acts.[440] It holds that before any amendment or recall of a specific administrative act or of an administrative practice, the expectation of a diligent citizen that his or her rights and legal interests established under national law shall be retained should be taken into consideration, and so the administrative act or practice shall not be amended without transitional periods or the provision of compensation. More specifically, the Council of State held that the reasonable period in which the administrative authorities may recall illegal administrative acts that had been carried out in favour of the individual, should be defined according to the circumstances of each case.[441] However, a recall of an illegal administrative act within a period of five years may take place without any further requirements.[442] According to the courts, this administrative law doctrine is derived from Law No. 261 of 1968,[443] as well as the constitutional principle of the rule of law. On this basis, it may be argued that the prospective pensioners, who are due to retire within the following five years, may determine the moment of establishing pension rights under the concept of possession. Therefore, this would mean that the public pension reforms should not be applied to the prospective pensioners that are due to retire within the next five years, as according to the previous pension law.

The legitimate expectations fall under the concept of possession within the meaning of Article 1 of the First Protocol. According to the ECtHR, the notion of possession within the meaning of Article 1 of the First Protocol covers claims in respect of which an applicant can argue that he has at least a '*legitimate expectation*' of a claim arising under national law.[444] The legal term of "*legitimate* expectations" refers to a legal position, in which the individual has not yet acquired an established or full right but

440 Council of State, Judgment of 31 October 1996, No. 5267/1996; Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

441 Council of State, Judgment of 13 May.2008, No. 1501/2008.

442 Namely, the authorities are not obliged to call the individual to a prior hearing.

443 Emergency Law No. 261 of 1968, Official Gazette of the Hellenic Republic 12/A/23.01.1968.

444 ECtHR, *Pressos Compania Naviera SA and others v. Belgium*, Judgment of 20 November 1995, Appl. No. 17849/91, at para. 31.

has reasonable expectations to establish a right in the future. Legitimate expectations may arise in instances where an individual has fulfilled all substantial requirements (contribution of minimum years of service and reaching of retirement age) but the formal prerequisites have not yet been met. The legal norm of legitimate expectations verifies the existence of a protected legal position between the established rights (the insured has fulfilled all substantial and formal prerequisites to be provided with pension benefits) and the "*Anwartschaft*" (the insured has contributed the minimum required period but has not reached the retirement age).[445]

The expectations of the individual which are affected by legal alterations are thus legitimate protected under the right to property, when three requirements are met.[446] First of all, an individual attempting to make a claim for legitimate expectations must demonstrate that there has been a generalised, stable and uniform practice of the administration.[447] Secondly, another requirement which must be met is that of reliance on a legal provision in good faith. The Council of State has ruled that citizens should be legally protected only where they have demonstrated reliance on a favourable legal provision.[448] For example, it would be contrary to the principle of legitimate expectations for a public pension fund to declare an individual as uninsured under the fund, if an individual has paid long-term contributions into a pension fund, in the good faith that he was obliged to pay.[449] Thirdly, a consistent precedence by the national courts must be demonstrated to landing a successful claim for a breach of legitimate expectations. From a recent case law of the ECtHR, the court acknowledged in social insurance law the protection of legitimate expectations of the pensioners from any amendment of welfare benefits that the individual could not have foreseen through Article 1 of the First Protocol, when the claims would have a prospect of success following previous steady case law of the national courts.[450]

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445 The legal norm "*legitimate expectations*" mentioned here should not be confused with the principle of legitimate expectations that is laid down in the next section. This refers to the protection of confidence that the insured showed towards the legislature and the administration.

446 *Dewhurst / Diliagka*, EJSS 2014, pp. 230-232.

447 *Katrougalos,* DiDik 1993, p. 948.

448 Council of State, Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

449 Council of State, Judgment Nos. 166/1983 and 2068/1986.

450 ECtHR, *Ichtiaroglou v. Greece*, Decision of 19 June 2008, Appl. No. 12045/06.

The ECtHR confirmed that the expectations of an individual concerning the provision of welfare benefits are legitimate and thus fall under the concept of possession when their expectations are based on the steady case law of the national courts. This case concerned the right of Greek nationals to buy off and classify the period, in which they worked in Turkey and made contributions to the Turkish pension system, as notional insured time. The ECtHR accepted that the expectations of the claimants are protected through the Article 1 of the First Protocol and the right to fair trial (Article 6 ECHR), because of prior stable jurisprudence of the Council of State, which had declared that the Greek national had the right of recognition of the insured time in Turkey. Therefore, the expectations of the pensioners may be potentially protected by the right to property, as long as the above requirements are met.

The Greek case-law has not acknowledged any protection of pensioners in cases of pension reforms. There is no case law of the national courts that protect the pensioners' expectations to acquire old-age pension benefits in the pre-acquisition period, when they have not fulfilled the substantial and formal requirements. According to steady jurisprudence of the Council of State, a legitimate expectation to receive an old-age pension benefit under a previously more favourable pension law is not a possession under Article 1 of the First Protocol.[451]

Therefore, the prospective pensioners may not make a claim of legitimate expectations within the meaning of Article 1 of the First Protocol and the pension benefits to be allocated in the future are not protected by the right to property. According to the Greek jurisprudence, till the establishment of a pension right, the prospective pensioners have a mere hope to receive old-age pension benefits. Hope alone does not fall under the concept of possession within the purposes of Article 1 of the First Protocol. "*The hope, that a long-extinguished property right may be revived, cannot be regarded as a 'possession' within the meaning of Article 1 of the First Protocol, nor can a conditional claim, which has lapsed as a re-*

451 Council of State, Judgment of 11 June 2002, No. 3267/2002; Judgment of 30 June 2005, No. 2118/2005; Judgment of 14 July 2006, No, 718/2006. See also *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 175.

sult of the failure to fulfil the condition."[452] This is because Article 1 of the First Protocol does not confer a general right to acquire a welfare benefit[453] and it does not entitle the individual to an old-age pension benefit of a particular amount.[454]

The Greek jurisprudence should, however, be amended. An individual who has fulfilled all substantial requirements for a pension entitlement should have legitimate expectations (protected through the right to property) to acquire pension benefits in the future according to the previous favourable law, while the formal requirements should not be decisive. This system would ensure that the expectations of the individual who opted for a late retirement, and continued working even after they had accomplished the substantial prerequisites, are protected.[455]

II. The Principle of Legitimate Expectations (Protection of Confidence)

The principle of legitimate expectations or protection of confidence (in German law "*Vertrauensschutz*") is a very important principle in pension law. This is because in a public pension system the relationship between the insured and the public pension funds is a long-last relationship. The insured have to contribute for at least 15 years to the public pension system and must reach the age of 67 in order to acquire old-age pension benefits.

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452 ECtHR, *Polacek and Polackova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 38645/97, at para. 62; *Gratzinger and Gratzingerova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 39794/98, at para. 69.

453 I.e. ECtHR, *Vesna Hasani v. Croatia*, Decision of 30 September 2012, Appl. No. 20844/09.

454 I.e. ECtHR, *Aunola v. Finland*, Decision of 06 March 1996, Appl. No. 30517/96; *Vasilyev v. Russia*, Judgment of 10 October 2005, Appl. No. 66543/01, at para. 38.

455 In a different case, the insured who fulfilled all substantial requirements and did not apply for a pension entitlement would be disadvantaged compared to those who chose to exercise their pension rights earlier. This would constitute an infringement of the fundamental right to equality, on the grounds that there would be differential treatment of members of the same group (current pensioners) using solely the criterion of whether the current pensioner applied for the provision of pension benefits or not. The application of pension benefits is not an objective criterion, but rather a chronological one. It does not indicate whether the pensioner is entitled to a pension benefit according to law but it indicates simply the time of submission.

This long period creates an expectation from the insured that they will acquire pension benefits once they have fulfilled the prerequisites. In addition, the period of benefit payments may also be long lasting and therefore an expectation that the current pensioners will continue to receive their benefits is created.

The public pension reforms that were introduced as a first reaction to the Greek financial crisis affected the expectations of the current and prospective pensioners. Pensioners were faced with situations whereby the state had previously made policy decisions, but then adopted different ones in the context of the Greek financial crisis and the consequent terms and conditions set out by the international creditors. Current pensioners were affected, on the grounds that the old-age pension benefits' reductions reduced their pension income. Prospective pensioners were affected, on the grounds that the benefit calculation formula and the qualifying conditions became stricter, which may consequently reduce the length of the period of pension payments, as well as the actual value of the pension. In this sense, the expectations of the pensioners are multifaceted, since they concern the expectation that their already acquired rights are fully respected as well as the continuous existence of a public pension system, based on the expectation in reference to the ability of the public pension system's function.[456]

The principle of legitimate expectations guarantees that established legal relationships will be sustained and will not be unfavourably amended, protecting the citizen against any arbitrary action by public authorities or the state itself.[457] It obliges the state to respect the expectations that the citizens could have developed under a specific legal order. It requires the legislature and the national authorities to exercise their powers over a period of time in such a way that situations and relationships lawfully created under national law are not affected in a manner which could not have been foreseen by a diligent person.[458] In such a way, the principle of legitimate

456 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 155.

457 *Spiliotopoulos*, DtA Special Edition 2003, p. 25.

458 Opinion of Advocate General Cosmas, delivered on 8 June 1995, *Fintan Duff and others v. Minister for Agriculture and Food and Attorney General,* C- 63/93, EU:C:1995:170, at paras. 24 and 25.

expectations refers to the requirement of predictability of law as well as to the avoidance of unexpected amendments.[459]

The principle of the legitimate expectations derives from principle of the rule of law, which guarantees that legal provisions are governed by constancy and good governance. The principle of the rule of law is an unwritten constitutional principle deriving from a number of provisions in the Greek Constitution, i.e. the principle of separation of powers (Article 26); the right to legal protection (Article 20(1)); the examination of constitutionality through the national courts (Articles 87(2) and 93(4)); the principle of the protection and exercise of the fundamental rights (Article 25(1)) etc. The right to dignity (Article 2(1)) as well as the principle of social state (Article 25(4)) function further as a supplement legal basis.[460] The rule of law is also enshrined in Article 3 of the Statute of the Council of Europe[461] and finds expression in a number of Articles of the European Convention on Human Rights,[462] the notion of the principle of legitimate expectations is recognised as general principle of European Law.[463]

The Aeropagus ruled that the principle of legitimate expectations is legally binding and supersedes any national law, since it is a general principle of European Law. Therefore, because of the superior legal rank of the European Law over national law, the principle of legitimate expectation has a superior legal validity. However, Aeropagus did not recognise the principle as constitutional.[464] The Council of State has acknowledged,

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459 *Tsatsos*, Constitutional Law-Part A: Theoretical Fundament, p 388.

460 *Katrougalos*, DiDik 1993, pp. 962-963.

461 Art. 3 of the Statute of the Council of Europe provides that: "*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms…*".

462 For instance, the principle of the rule of law finds expression in Art. 6 of the ECHR that secures the right to fair trial and precludes any interference by the legislature within the judicial power designed to influence the judicial determination of the dispute. See ECtHR, *Stran Greek Refineries and Andreadis v. Greece*, Judgment of 09 December 1994, Appl. No. 13427/87, at paras. 46 and 49.

463 CJEU*, Mulder and others v. Council of the European Communities and Commission of the European Communities*, C-104/1989, Judgment of 19 May 1992, EU:C:2004:1, at para. 15: "*In general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*".

464 Aeropagus (Plenary Session), Judgment No. 31/2002.

generally, the supplementary function of the principle.[465] Exceptionally, the Council of State recognised only once the principle of legitimate expectations as a constitutional principle.[466] More specifically, the Council of State held that legislation which amends existing relationships declaring the already statute-barred claims of the state as not having been fallen under the statute of limitation before the publication of the law, contradicts the constitutional principle of legitimate expectations. However, it is disputable whether it is a stable jurisprudence, since the court did not decide on a plenary session.

In sum, the principle of legitimate expectations or protection of confidence is mainly conveyed in Greek law via the right to property, when a concrete individual position falls under the scope of the right to property. Therefore, the principle of legitimate expectations is not as a stand-alone legal claim that protects the right to old-age pension benefits. It can be, however, used as a balancing concept of justice or as a guiding measure indicating how the right to old-age pension benefits should be reduced so that the right to property is not violated. For instance, the principle of legitimate expectations may provide protection in cases of retrospective legislative acts.[467] The principle of legitimate expectations may prohibit the retrospective reductions in old-age pension benefits, since this would infridge the confidence that the diligent pensioners showed towards the legislative and administrative authorities.

465 Council of State, Judgment 13 January 1997, No. 17/1997; Judgment of 20 June 1997, No. 2403/97; Judgment of 13 May.2008, No. 1501/2008.

466 Council of State, Judgment of 20 May 2002, No. 1508/2002.

467 The law is retrospective when it takes effect after its publication in the Official Gazette. The retroactivity is divided into two categories: a. material retroactivity, which means that the retrospective legislative measure is applied to legal situations that have been legislated under prior law but their legal effects have not yet been accomplished; and b. true retroactivity, which means that the legislative measure is applied retrospectively to a legal situation which has already been fully realised.

III. Equality and Non-Discrimination

1. The Right to Equality

The right to equality provides an individual the right to equal treatment by the state. It is a negative right forbidding the state from illegitimate intervention. The Greek Constitution foresees in Article 4 a number of equal protection clauses. Two are the most important of them. Article 4(1) proscribes that "*all Greeks are equal before the law*", while Article 4(5) provides that "*Greek citizens contribute without distinction to public charges in proportion to their means*". Aspect of the right to equality and the principle of proportional contribution to public charges is the principle of proportional contribution to the social insurance system. The principle of proportional contribution to the social insurance system indicates that the equal distribution of burdens (and benefits) among the current pensioners means that people claiming or being subject to welfare services should be treated with equality.[468]

Article 4(1) promotes equality among pensioners within a social insurance fund and precludes any equation of different situations or differential treatment of those in same or similar situations.[469] It implies that any equal treatment of different situations, as well as any different treatment of the same or similar situations, is precluded. In other words, situations which are substantially the same should be treated in the same way; whereas situations which are substantially different should be granted a different, but proportional treatment.[470]

The right to equality finds application when the following three prerequisites are fulfilled. Firstly, a difference in treatment must be identified (i.e. different prerequisites for an entitlement to old-age pension benefits). Secondly, the pensioners should be in relevantly similar situations (i.e. different treatment among the prospective pensioners of the same fund). Thirdly, objective criteria and grounds of public interest must be examined.[471] The Greek jurisprudence has classified the following as objective

468 *Galligan,* in: *Coote* (ed.), The Welfare of Citizens: Developing New Social Rights, p. 61.
469 Court of Audi (Plenary Session), Judgment No. 1938/2009.
470 *Stergiou*, EDKA 2012, p. 322.
471 Council of State, Judgment o f 10 January 2000, No. 26/2000; *Manitakis,* ToS 1978, p. 441.

criteria: the time of submission for a pension application,[472] the time of recruitment[473] and the time of leaving employement.[474] The grounds of public interest are identified in cases where restrictions on the right to equality pursue a legitimate aim.[475] For instance, the Council of State acknowledged that individuals of the same social insurance funds may be treated differently but only under legitimate grounds of justification[476] and the legislature may not apply Article 4 when the different treatment is essential and necessary by reasons of public interest.[477] For instance, the state may impose financial contributions to the public pension system allowing different treatment when the unequal contribution is related to legitimate purposes[478] and a proportional distribution through proportional rates of reductions may be used as an objective criterion of balancing the protection of the restricted pensioners' right with the need to protect the public interest of the sustainability of public finances and public pension system.[479] Therefore, the existing and future legal positions of the pensioners are protected under the right to equality, only once the above three prerequisites are fulfilled.

Furthermore, the right to equality provides a fundamental principle and rule functioning as a balancing concept of justice,[480] especially in cases of conflict between subjective rights essential for the organisation of a judicial state.[481] As a principle, it has supremacy over any state law.[482] The principle of equality must be understood as "*appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying this clause fully as law must be an activist*

472 Council of State, Judgment No. 2527/88, Judgment of 17 July 2006, No. 707/2006; Judgment of 02 June 2009, No. 527/2009.
473 Court of Audit, Judgment of 30 May 2002, No. 678/2002.
474 Council of State, Judgment of 15 January 2007, No. 127/2007, (Plenary Session), Judgment of 27 November 2008, No. 3487/2008, (Plenary Session), Judgment of 25 June 2010, No. 2199/2010, Judgment of 30 June 2010, No. 2298/2010.
475 *Venizelos,* The Public Interest and the Constitutional Rights' Restrictions, p. 157.
476 Council of State, Judgment of 10 January 2000, No. 26/2000.
477 Aeropagus (Plenary Session), Judgment No. 1808/86; Court of Audit, Judgment No 1938/09.
478 *Dagtoglou*, ToS 1986, p. 427; *Manitakis*, ToS 1978, p. 444; *Theoharopoulou*, The Right to Equality to Public Charges and the Liability of the State, p. 10.
479 *Antoniou*, The Right to Equality Within and Over Law, p. 97.
480 *Von Lewinski,* Öffentlichrechtliche Insolvenz und Staatsbankrott, p. 353.
481 *Antoniou*, The Right to Equality Within and Over Law, p. 91.
482 *Manitakis,* ToS 1978, p. 440.

court, in the sense that it must be prepared to frame and answer questions of political mortality."[483]

The right to equality does not provide the individual a subjective right to a social security benefit.[484] However, the right to equality may provide protection to pensioners' existing and future legal positions, since it plays an important role by reforms of social insurance systems.[485] In social insurance law, the right of equality is of primary importance in the field of shaping social security rights, despite the fact that it does not preclude the legislature from amending the public pension system and the amount of the paid contributions.[486]

Another illustrative example showing the important role of the right to equality in cases of public pension reforms is the pension bill No. 2084 of 1992. The reform of a pension system inevitably introduces differentiations between the individuals that fall under the personal scope of the new pension law and those that continue to fall under the personal scope of a previously more favourable pension law. The Law No. 2084 of 1992 treated differently the prospective pensioners dividing them to the "*old*" and "*new*" employees. "*Old*" were the employees that entered the labour market before the 1st of January 1993 and "*new*" were the ones that entered the labour market after that date. In this way, stricter conditions for a pension entitlement were introduced for the "*new*" employees, while the "*old*" employees could enjoy the more favourable regulations. For example, the retirement age of the "*new*" employees was set at the age of 65 years, while in certain cases the "*old*" employees could retire earlier. Namely, civil servants appointed before the 31th December 1982 that would retire before the 31th December 1997 could retire at the age of 55 years (males) and 53 (females),[487] or women that entered the labour market before the 31th of December 1992 could retire at the age of 60 years.

483 *Dworkin*, Taking Rights Seriously, p. 147.
484 *Stergiou*, EDKA 2012, p. 322.
485 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, 2010, p. 116.
486 Council of State, Judgment of 23 October 2014, No. 3663/2014, at para. 10.
487 Explanatory Report on Law No. 2084 of 1992 of 31 August 1992, p.1.

2. The Principle of Non-Discrimination

The principle of non-discrimination has to be regarded as being part of the general overarching principle of equality, which in turn encompasses age equality.[488] Of particular importance in cases of public pension reforms, is the age equality and this because the Greek legislature introduced a number of measures that treat differently pensioners of a particular age due to the actual age of the pensioners concerned or due to characteristics associated with the age. For example, the legislature introduced upper age limit which influences the termination of an employment relationship.[489]

At international level, the international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights do not explicitly mention "*age*" as a prohibited ground of discrimination. Besides, the ECHR prohibits in Article 14 discrimination in the enjoyment of Convention rights and entails a general prohibition of discrimination in Article 1 of the Twelve Protocol. The prohibition of discrimination in Article 14 is stipulated in the following terms: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". Article 2 of the Twelve Protocol likewise indicated a general, open model of non-discrimination clause: "*The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1*".

Article 14 is expressly to the prohibition of discrimination in the enjoyment of the rights set forth in the Convention.[490] "*Article 14 complements the other substantive provisions of the Conventions and the Protocols. It has not independent existence since it has effect solely in relation to the*

488 *Hack*, Taking Age Equality Seriously: The Example of Mandatory Retirement, p. 78.

489 For more information see p. 181 ff.

490 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 35.

enjoyment of rights and freedoms safeguarded by those provisions. Although the application of article 14 does not necessarily presuppose a breach of those provisions, and to this extent it has an autonomous meaning, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter".[491] This argument leads that Article 14 has an autonomous meaning but accessory scope. The need for an independent right in an effort to strengthen the conventions' protection of non-discrimination, the scope of protection of article 14 is expanded in Article 1 of the Twelfth Protocol.

The principle of non-discrimination on the grounds of age has been expressly manifested as a principle of the European Law in the Employment Equality Directive No. 2000/78/EC. The Employment Equality Directive establishes a general framework for equal treatment in employment and occupation and offers a minimum protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation (Article 1). The directive distinguishes between direct and indirect discrimination (Article 2). One is subject to direct discrimination, when an individual is obviously treated less favourably than another because of the possession or lack of a characteristic, such as age, which the other does not possess.[492] In furtherance, one is subject to indirect discrimination when a provision, criterion or practice seems to be neutral but in fact, it leads to discrimination, as only a small proportion of the population or only a specific group can satisfy the requirement of this provision, criterion or practice.[493] At the same time, the Employment Equality Directive provides that a difference of treatment may be justified when the objective is legitimate and the requirement is proportionate (recital 23, Article 4). In other words, a difference in treatment based in such characteristics basically constitutes discrimination, which is lawful as long as it can be justified within the terms of Article 4. The Employment Equality adopts the possibility of justifying direct discrimination on grounds of age. Article 6 provides a general and open-ended defence of objective justification for direct discrimination on grounds of age. According to Article 6(1) of the Direc-

491 ECtHR, *Rasmussen v. Denmark,* Judgment of 11 January 2006, Appl. Nos. 52562/99 and 52620/99. at para. 29.

492 Article 2(2a) of the Directive 2000/78/EC. See also CJEU, *Seda Kücükdeveci v Swedex GmbH and others*, C-555/07, Judgment of 19 January 2010, EU:C:2010:21, at para. 29.

493 Article 2(2b) of the Directive 2000/78/EC.

tive, which finds application on pensions-related issues of the private sector, are strongly linked with employment and occupation, a different treatment on grounds of age shall not constitute discrimination, if the different treatment is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In addition, Article 6(2) provides that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age. As a consequence, the wording of Article 6 leads to a loose application of the general principle of non-discrimination on grounds of age, as the "*margin of discretion*" given to the States is extremely wide.

At national level, the principle of non-discrimination on the grounds of age or any other grounds, such as sex, race and religious has not been entrenched in the Greek Constitution. The main statutory instrument that addresses the principle of non-discrimination and particularly the age discrimination is Law No. 3304/2005, which transferred the Directive No. 2000/78/EC in domestic law.[494] However, the principle of non-discrimination on the grounds of age may be derived from Article 4(1) of the Greek Constitution.[495]

In sum, the right to non-discrimination on grounds of age may potentially provide protection to the existing and future legal positions of the pensioners', when the right to non-discrimination finds application, unless the age discrimination is justifiable. The justification of age discrimination may take peculiarities of age-related aspects into concern and include at the same time the applications of general standards of justification, such as the application of a proportionality test.[496] Namely, the discriminatory measure must pursue a legitimate aim and be applied proportionally.

494 The Law No. 3304 of 2005, Official Gazette of the Hellenic Republic 16/A/27.01.2005 transferred the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

495 Council of State, Judgment of 30 April 2013, No. 1706/2013.

496 *Schlachter*, in: *Schlachter* (ed.), The Prohibition of Age Discrimination in Labour Relations, p 39.

IV. The Right to Social Security

Following, I describe the legal provisions that protect the right to old-age pension benefits in terms of social protection. Social protection is perceived here in a broad sense, encompassing social security rights of the pensioners. The social security rights are to be accorded as fundamental rights being in the same level of importance and protection in the legal order as is afforded to civil and political rights.[497] The right to social security includes contributory, non-contributory and combined allowances related to certain risks, such as: sickness, disability, maternity, family, unemployment and old-age.[498] The right to social security is protected under international law (IV.1) as well as under the Greek Constitution (IV.2).

1. The Right to Social Security under International Law

The right to social security draws its rules from a number of international treaties and instruments, which allow for the protection of the right to social security and require the state to establish a social security scheme that is accessible to everyone as well as to maintain its sustainability and promote the level of protection.[499] Certain international treaties provide that each Contracting State must ensure their residents have access to a social security scheme. Such instruments are the Universal Declaration of Human Rights (hereinafter: UDHR) of 1948, the International Covenant of Economic, Social and Cultural rights (hereinafter: ICESCR) of the United Nations (hereinafter: UN) of 1966, the European Social Charter (hereinafter: ESC) of 1961, and the European Code of Social Security (hereinafter: ECSS) of 1964. Moreover, the international minimum standards of Convention No. 102 of the International Labour Organization (hereinafter: ILO) as well as the Invalidity, Old-Age and Survivor's Benefits of ILO Convention No. 128,[500] which were adopted by the ILO and the Council

497 *O'Connell,* Vindicating Socio-Economic Rights: International Standards and Comparative Experiences, p. 179.

498 ESC: Committee of Independent Experts, Council of Europe Publishing 1996, Conclusions XIII-4, p. 35. Retrieved September 2014 from http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIII4_en.pdf.

499 *Eichenhofer,* Soziale Menschenrechte im Völker,- europäischen und deutschen Recht, p. 136.

500 The ILO Convention No. 128 has not been ratified by the Greek Parliament.

of Europe, also fall under this category. Some of the treaties have introduced individual, as well as collective, mechanisms and procedures to ensure that the right to social insurance is correctly implemented at a national level.

a) The International Treaties (A Normative Description)

aa) Universal Declaration of Human Rights

Article 22 of the UDHR states that "*Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*" The UDHR clearly promotes the right to social security and consequently the right to social insurance, whilst nonetheless making it dependent upon the financial disposal of the state. Article 22 UDHR constitutes a general principle of international law[501] and forms a recommendation for the Contracting States to protect the right to social security.[502]

bb) International Covenant of Economic, Social and Cultural Rights

The ICESCR of the UN of 1966 states in Article 9 that "*The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance.*" Greece accessed the ICESCR in 1985 and ratified it by Law No. 1532 of 1985.[503] Article 9 of the ICESCR develops the right to social security recognising further the right to social insurance. It requires the Contracting States to provide their citizens with social insurance protection against the risks of old-age, maternity, disability, unemployment, sickness etc. Different to the UDHR, the ICESCR is legally

501 *Brownlie*, Principles of Public International Law, p. 559.
502 *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 308.
503 Law No. 1532 of 1985, Official Gazette of the Hellenic Republic 45/A/19.03.1985.

binding and thus the states that have signed and ratified it are obliged to implement the Covenant and disapply any contradictory domestic law.

According to Article 16, the Contracting States are obliged to submit regular reports, within two years after ratifying the Covenant and thereafter every five years, on how they have implemented the rights protected by the ICESCR as well as which measures they have undertaken to make progress in achieving the implementation of ICESCR. In addition to the compulsory report of the Contracting States, the Optional Protocol (GA resolution A/RES/63/117), adopted on the 10th of December 2008, introduced an extra procedure for individual complaints. However, Greece has not signed and ratified this Optional Protocol yet. Besides the compulsory and optional reports, a Committee on Economic, Social and Cultural Rights (hereinafter: CESCR) has been established under the Economic and Social Council Resolution 1985/17 of 28 May 1985. The main task of the CESCR is the monitoring of the implementation of the ICESCR by the Contracting States as well as the interpretation of the provisions of the Covenant known as general comments.

Regarding the effects of the austerity measures on economic, social and cultural rights, the CESCR stated that the respect of the right to social security takes priority in law and policy, and that a lack of financial resources cannot serve as a general excuse for the non-fulfilment of the Covenant's obligations.[504] The Committee pointed out that the realisation of the right to social security should not be neglected, despite the financial implications that it causes for the state[505] and that "*State Parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreement and other international measures*".[506] The CESCR's statement can, however, not be enforced at national level, on the grounds that its statements do not constitute a legally binding instruments but to recommendations to the contracting states.

504 *UN*(2008), at para. 3.
505 *Ibid,* at para. 40.
506 *Ibid*, at para. 58.

cc) European Social Charter

The ESC of 1962 guarantees in Article 12 the right to social security. More specifically, it provides that "*With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: 1. to establish or maintain a system of social security; 2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security; 3. to endeavour to raise progressively the system of social security to a higher level; 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a. equal treatment with their own national of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties*."

Greece signed the ESC in 1961 and ratified it two decades later by Law No. 1462 of 1984.[507] It is thus legally binding and creates objective obligations on Greece. Article 12 of the ESC guarantees the right to social security to all individuals living in the territory of the Contracting Parties. Article 12 refers only to the right to social insurance, since the right to social assistance is explicitly guaranteed in Article 13 of the ESC.

Article 12(2) of the ESC provides that the Contracting Parties are obliged to maintain a level of social insurance protection that is at least equal to the minimum level of protection required for the ratification of the ILO Convention No. 102, concerning the minimum standards of social security. This, consequently, results in the ESC being more specific regarding the minimum level of social insurance that the State Parties are obliged to maintain and guarantee in comparison to Article 9 of the ICESCR which is more general.

507 Law No. 1462 of 1984, Official Gazette of the Hellenic Republic 90/A/16.06.1984.

The ESC of 1961 establishes a supervisory mechanism through the European Committee of Social Rights (hereinafter: ECSR). The ECSR adopts conclusions after examining whether the Contracting States' social legislation stays in conformity with the Charter by taking into consideration the regular reports submitted by the Contracting States. In cases where the ECSR concludes that a Contracting State does not comply with the ESC, then the Committee of Ministers may address a recommendation to that State. Apart from the reporting procedure through the Contracting States, the ECSR may take decisions through the system of collective complaints, which was introduced by the Additional Protocol of 1995. The latter was signed and ratified by Greece in 1998 by Law No. 2595 of 1998[508] and provides that the national trade unions and employers' organisation are entitled to submit complaints to the ECSR, when they believe that the Contracting State concerned violates the ESC.

dd) European Code of Social Security

As well as the ESC, the ECSS is also one of the legal instruments of the Council of Europe. Its aim is to set the minimum standards in the social security field. It obliges the Contracting Parties, in a sense, to provide their residents with at least the minimum social standards. Greece signed the ECSS in 1977 and ratified all parts of the ECSS in 1981 by Law No. 1136 of 1981,[509] except from Parts IV and VII relating to unemployment and family benefits respectively.

Part V concerns the minimum requirements for old-age pension benefits. More specifically, Article 26 provides that the prescribed age shall not exceed 65 years, or shall not exceed an age whereby the number of residents having attained that age is less than 10 percent of the number of residents under that age. Furthermore, Article 29 provides that the qualifying period shall be 30 years of contribution or employment, or 20 years of residence, while the minimum period of contributions shall be 15 years. Moreover, the minimum replacement ratio for a man with a dependent wife may be at least 40 percent of the average wage of a skilled adult man-

508 Law No. 2595 of 1998, Official Gazette of the Hellenic Republic 63/A/24.03.1998.

509 Law No. 1136 of 1981, Official Gazette of the Hellenic Republic 61/A/13.03.1981.

ual male employee. The total amount of the percentage shall be indicated according to the previous earnings of the beneficiary when the latter has completed at least 30 years of contribution or employment or 20 years of residence (Article 29). The amount of old-age benefits shall be reviewed in accordance with any substantial changes in the cost of living (Article 65).

The Contracting States are obliged to report to the Secretary General of the Council of Europe regarding the adopted national legislation and the steps undertaken to comply with the minimum standards established in the ECSS. Next, the reports are sent to the ILO Committee of Experts on the Application of Conventions and Recommendations and afterwards they are forwarded to the Committee of Ministers of the Council of Europe and to the Committee of Experts on Social Security. The Committee of Ministers decides whether the Contracting State has fulfilled its obligations. In case of non-compliance with the ECSS, no direct sanctions are imposed, only a political debate ensues.

The Resolution of the year 2012 on the application of the ECSS states that the Committee of Ministers requires the Greek government to undertake the necessary actuarial studies, "*drawing a line alerting the government to conditions which might lead to the possible violation of the minimum international social security standards…*"[510] Moreover, the Committee of Ministers pointed out that the reduction of many social security benefits creates the risks of undermining the application of all accepted parts of the ECSS, and that the Greek government must reduce the benefit in an effective and just way, namely: " …

- the cuts in benefits, like their costs, shall be borne collectively, shared equitably among the members of society in a manner which avoids hardship to persons of small means and takes into account the economic situation of the country and of the classes of persons protected (Art. 70 par. 1 of the ECSS)

- the cuts in benefits shall not result from the unilateral withdrawal of the State or of employers from the financing of benefits, thus leaving the employees protected to bear more than 50 % of the total of the financial

510 *Committee of Ministers*, Resolution CM/ResCSS (2012)8 on the application of the European Code of Social Security and its Protocol by Greece (Period from 1st July of 2010 to 30th June of 2011). Retrieved September 2014 from https://wcd.coe.int/ViewDoc.jsp?id=1970639&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

resources allocated to the protection of employees and their families (Art. 70 par. 2 of the ECSS)

In addition, the Resolution of the year 2013, the Committee of Ministers invited the Government of Greece: *"...b.... to urgently assess past and future social austerity measures in relation to one of the main objectives of the Code, which is the prevention of poverty..."*[511]

ee) ILO Convention No. 102

The ILO Convention No. 102 functions as a guide to the construction of the national social security systems and thus the national rules may be assessed in compliance with the international norms during legislative process.[512] Greece signed and ratified the ILO Social Security (Minimum Standards) Convention No. 102 in 1955 by Law No. 3251 of 1955.[513] The ILO Convention No. 102 establishes the principles needed to secure the supply of resources and ensure the international labour social security minimum standards that should be reached by the Contracting States. There are two main principles emphasised in the ILO Convention No. 102: the principle of financial solidarity and the principle of state responsibility.[514] The principle of financial solidarity indicates that contributions or taxes of benefits shall be collected in a way to "… *avoid hardship to persons of small means*".[515] The principle of general responsibility of the State requires that the state shall take measures to ensure the provision of the benefits.[516] This implies that the state must supervise the administrative social security institutions, ensure a balance between the resources

511 *Ibid.*

512 *Dijkhoff*, in: *Becker / Pennings / Dijkhoff* (eds.), International Standard-Setting and Innovations in Social Security – The Cases of Czech Republic and Estonia, 2013, p. 67.

513 Law No. 3251 of 1955, Official Gazette of the Hellenic Republic 140/A/02.06.1951.

514 *Dijkhoff*, International Social Security Standards in the European Union – The Cases of the Czech Republic and Estonia, pp. 34-35.

515 Art. 71(1) of the ILO Convention No. 102.

516 Art. 71(3) of the ILO Convention No. 102. The later article provides that the state "*shall accept general responsibility for the due provision of the benefits provided*".

and benefits whilst making sure that actuarial studies and calculations are made periodically.[517]

The international labour social security minimum standards are indicated in Articles 25 to 30 in combination with Articles 65 to 67. They present the minimum objectives concerning the percentage of the covered population, the level of minimum benefits in old-age as well as the requirements for an old-age pension entitlement. By and large, Convention No. 102 proscribes the same level of minimum benefits in old-age, and the same requirements for an old-age pension entitlement; the provisions of which have been described above. The ILO Constitution deepens the relationship between the flexibility of the minimum social standards and the special economic conditions of the Contracting State (Art. 19 (3)).

Three supervisory mechanisms have been established in the ILO Convention.[518] First of all, a provision for regular supervision is established (Art. 22 of the ILO Convention). Each Contracting State is obliged to regularly report the measures it has adopted to implement the Convention. The national reports are examined by the Committee of Experts on the Application of Conventions and Recommendations. The latter then submits an annual report to the International Labour Conference. The Committee on the Application of Standards, if it believes it to be necessary, recommends the Contracting State to take essential corrective steps. Secondly, the representation procedure is established (Art. 24 of the ILO Constitution). Representatives of employers' or workers' associations may present reports to the ILO Governing Body reports, setting out any concerns that the Contracting State involved is in violation of the Convention. Thirdly, the complaint procedure is established (Art. 26 of the ILO Constitution). Namely, a Contracting State or the Governing Body may address complaints against another Contracting State. However, none of the aforementioned mechanisms impose sanctions on the Contracting State. Only the Governing Body, according to Article 33 of the ILO Constitution, "*... may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith*".

After the outbreak of the global financial and economic crisis in late 2007, the ILO highlighted the impact that the financial and economic cri-

517 *Dijkhoff*, International Social Security Standards in the European Union – The Cases of the Czech Republic and Estonia, p. 35.

518 A special procedure for violations of freedom of association is also established.

sis had on the international social minimum standards in social security.[519] The ILO stated that austerity measures are actually disincentive to economic growth and thereby hamper progressive realisation of economic and social rights.[520] The ILO argues that fiscal austerity has failed to achieve its initial aim, namely the reduction of fiscal deficit. More specifically, its analysis showed that fiscal austerity only reduces debt on a short-term basis, whilst in the long run debt levels begin to rise again due to lower public investment, which in turn has devastating consequences on productivity and employment.[521]

In the report on the ILO High Level Mission to Greece, initiated by the GSEE, the ILO supervisory bodies concluded that the impact of pension reform on poverty levels, as well as the sustainability of the social security system in the light of the wage and employment policies, could not be specified, since data relating to these questions is not available at the level of the actuarial authority or the Ministry of Labour and Social Security.[522] The Minister of Labour and Social Security supported that the pension replacement rate has not fallen below the level set by the ILO Convention No. 102, since minimum pensions as well as other benefits granted to vulnerable groups of pensioners have not been affected, while medium-income pensioners with pension up to 1,000 Euros per month have either not been affected by the cuts in main pensions or their income has undergone only a slight reduction not exceeding five percent.[523] In addition, the ILO reported that the Greek government must *inter alia "... (4) Determine the most rapid scenarios for undoing certain austerity measures and returning disproportionately cut benefits to the socially acceptable level..."*[524]

b) The Right to Social Security as an Objective Right in International Law

The aforementioned international treaties require form the Contracting States to provide their citizens with social protection against the risks of

519 *ILO*(2011) ILC.100/VI.
520 *ILO*(2012).
521 *ILO*(2012), p.69.
522 *ILO*(2011a), at para. 323.
523 *ILO*(2013) ILC.102/III(1A), p. 765.
524 *ILO*(2014), p. 518.

age and to maintain a level of social protection that is at least equal to the minimum international standards of social security. On the one hand, at international level, the right to social security belongs within the spectrum of "*positive rights*" and contain programmatic instructions insurance because of the vague and general normative contents that they contain.[525] They oblige the state to take positive action and give the state a margin of appreciation regarding the construction and extent of the protection. In addition, the aforementioned international treaties promote the progressive improvement of the social security schemes, and thus the public pension system. Progressive realisation can be seen in positive terms in light of anticipating ever-increasing possibilities as well as in negative terms as some kind of delay on the full enjoyment of each individual of his or her rights.[526] Namely, the pensioners should enjoy the right to progressive improvement of the public pension system through the provision of better and more adequate pension benefits. More specifically, Article 12(3) of the ESC provides that social security should be progressively brought up to a higher level and Article 2 of the ICESCR "*promises*" the progressive realisation of economic, social and cultural rights. The latter provision indicates that the ICESCR defines specific and immediate obligation for the Contracting States to progressive realisation of the rights guaranteed in the Covenant.[527] However, the aforementioned international treaties cannot be included to the injunction of the legislature to the continuous progressively promotion of the social security schemes. This is because the social policy of each Contracting State is strongly inter-connected with the available financial resources of the state. For example, the sustainability of public finances demands in cases of financial crisis a sort of retrogression of the public pension system, by reducing the amount of the pension benefits, or the increasing of the retirement age and the years of service. The ECSR examining separately each case on the basis of evidence given by the Contracting Parties has considered that, principally, due to the close link between economic and social rights, the consolidation of public finances, in

525 *De Wet*, The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa, p.1.

526 *Johnstone / Amundadottir*, International Journal of Human Rights and Constitutional Studies 2013, p. 12.

527 *Ibid.*

order to ensure the sustainability of the social security system, is not necessarily incompatible with Article 12(3).[528]

The Committee of Economic, Social and Cultural Rights has noted that "*... the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective... which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.*"[529] While it seems that the Committee has taken some steps to prohibit retrogressive measures, the conception of retrogressive measure remains murky, since the Committee did not attempt to define when such a measure might be permissible in terms of concrete examples.[530]

On the other hand, although the aforementioned international treaties belong to the spectrum of positive rights and provide the Contracting States a wide spectrum to act, the Contracting States are obliged to provide a certain level of social protection that corresponds to the detailed minimum standards of social security. This is because the aforementioned international treaties (except from the UDHR) constitute legally binding international treaties. The Contracting States are obliged to respect them, once they have signed and ratified the treaties according to national law. The Greek legislature ratified the aforementioned international treaties, as required by the constitutionally established procedure described in Article 28 of the Greek Constitution. According to this constitutional provision, the international treaties prevail over any contrary domestic law post rati-

528 *Samuel,* Fundamental Social Rights – Case Law of the European Social Charter, p. 292; *Eichenhofer,* Soziale Menschenrechte im Völker,- europäischen und deutschen Recht, p. 135.

529 *CESCR*(1990), at para. 9.

530 *Nolan / Lusiani, / Courtis*, in *Nolan* (ed.), Economic and Social Rights after the Global Financial Crisis, p 121.

fication,[531] apart from the Constitution, which enjoys superiority above any ratified international treaty.[532] In this sense, public administrative bodies and thus both judicative and executive power are obliged to set aside domestic measures and legislation that contradict ratified international treaties and the Greek state is obliged to reform its public pension system in conformity with the aforementioned international provisions. Therefore, the aforementioned international minimum standards of social security must be respected in the reform process taking place in Greece. The pensioners (either prospective or current) may theoretically use as legal basis the right to social security before the courts and demand from the state the minimum requirements for old-age pension benefits, as regulated in the ECSS and ILO Convention No. 102 as well as the progressive improvement of the public pension system.

The problem of the aforementioned international treaties lies in their inability to be enforced. Although some of the aforementioned international treaties have introduced individual, as well as collective, mechanisms and procedures to ensure that the right to social security is correctly implemented at a national level, in reality, they are a tool of political pressure and are not able to guarantee their enforcement.[533] It is disputable thus whether the pensioners' claim may be successful. In practice, the national courts decide whether a provision provides justiciable rights.[534]

More particularly, a series of Greek collective complaints challenged, before the Committee, the pension reductions undertaken by the Greek state after the crisis. The Committee decided that successive pension reductions were not compatible with the ESC, on the basis of the right to social insurance guaranteed in Article 12(3) that promotes the progressive improvement of the right to social security because of the accumulative reduction; while separately the pension reduction were held as compatible to

531 Art. 28(1) provides that: "*The generally accepted rules of international law and international treaties, as from their ratification by statute and from their coming into force under the conditions of each of them, shall constitute an integral part of Greek domestic law and shall prevail over any contrary statutory provision*".

532 *Venizelos*, Lessons of Constitutional Law, pp. 146-148.

533 *Schneider*, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte, p. 49.

534 *Gomez Heredero*, in: *Pennings* (ed.), International Social Security Standards: Current Views and Interpretation Matters, p.59.

the ESC.[535] However, the Greek courts did not declare that the administrative acts which perpetrate accumulative pension reductions in current pensioners' old-age pension benefits that were introduced after the publication of the above decisions of the Committee, are contrary to Article 12(3).[536]

Therefore, although the Greek courts are obliged to apply Article 12(3) of the ESC directly in domestic law, they failed to do so. The Greek courts, although they do recognise the international treaties' prevalence over domestic law, yet tend to consider them as non-self-executing treaties.[537] The phrase "*non-self-executing treaties*" means that the obligations and duties introduced by the treaties are not legally binding until the introduction of respective legislative measures.[538] As a result, the right to social insurance at international level may not constitute a legal basis for the prospective and current pensioners and provide enforceable rights to prospective and current pensioners so that the latter may claim pension benefits of a specific form or amount or that the state shall abstain from any action that lead to retrogression of the public pension system. Last but not least, it may not provide them with a material, constitutional right on which to found a claim to progressive improvement of the public pension system, i.e. by claiming for less stringent requirements to an old-age pension benefit entitlement or for the stability of the level of the already legislatively vested old-age pension benefits.

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535 ECSR, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Decision of 22 April 2013, Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Decision of 22 April 2013, Complaint No. 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P) v. Greece*, Decision of 22 April 2013, Complaint No. 78/2012; *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, Decision of 22 April 2013, Complaint No. 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Decision of 22 April 2013, Complaint No. 80/2012.

536 I.e. Council of State (Plenary Session), Judgment of 17 March 2016, No. 734/2016.

537 Council of State, Judgment of 20 March 1995, No. 1158/1995; Judgment No. 2398/1992. The Council of State ruled that the minimum standards set in the ECSS cannot be applied directly in domestic law without prior specification by the national legislature.

538 *Katrougalos*, Institutions of Social Policy and Protection of Social Rights at International and National Level, p. 40.

2. The Right to Social Security under the Greek Constitution

The Greek Constitution plays an important role in the structure and design of the Greek social security system. Greece is a social state and its social policy has a constitutional foundation. Alongside this, the Constitution obliges the state to undertake the appropriate measures for the social protection of the elderly. The right to social security is protected in the Constitution by both Article 21(3) which promotes the right to social assistance and is thus applied in social assistance cases, and Article 22(5) which promotes the right to social insurance and is thus applied only in social insurance cases with a certain contributory character.

a) The Constitutional Provisions

aa) The Right to Protection of Old-Age

The protection of the elderly is promoted by Article 21(3) of the Greek Constitution. The Greek Constitution allows for a number of social rights in Article 21(3). These include *inter alia*, the right to the protection of family, marriage, motherhood and childhood, the right to the protection of the vulnerable population, such as families with many children, windows and orphans, the old-aged, the young and the disabled; as well as the right to the provision of housing. Article 21(3) states that "*The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old-age, disability and for the relief of the needy.*" From this constitutional provision, it derives that the state is obliged to provide social assistance, in form of benefits in cash or kind, in case of occurrence of the social risk of old-age.

Article 21(3) is a programmatic provision for the state and does not provide a justiciable right. Namely, the elderly may not raise before the court the Article 21(3) as legal basis, in order to claim specific social benefits for the protection of old-age. However, Article 21(3) may provide the elderly with the right to demand the state to guarantee their minimum existence. In this sense, the Article 21(3) protects the right to social assistance. The legislature is prohibited to deprive the individuals from the social benefits it has already provided through prior administrative specification, when this would endanger the minimum decent life and would not allow

them to lead a decent life and participate actively in public, social and cultural life.[539]

Last but not least, Article 21(3) may not be used as legal remedy by current or prospective pensioners but only by uninsured elderly, despite of the fact that the latter constitutional provision obliges the state to protect *inter alia* the old-age. This is because Article 21(3) does not find application in social insurance cases, but only in social assistance cases. The social insurance cases have a contributory character which is characteristic of the Greek public pension system. The Greek public pension system as an institution is protected by Article 22(5) of the Greek Constitution. Therefore, in cases of benefits with contributory character, the Article 22(5), described below, must find application.

bb) The Right to Social Insurance – Article 22(5)

The wording "*social security*" is not referred to in the text of the Constitution like as in the international treaties. Article 22(5) of the Greek Constitution guarantees the right to social insurance. It obliges the state to undertake the appropriate measures for the protection of the social insurance of the working population. Aim of establishing a social insurance scheme constitutes the protection of the working population from a number of social insurance risks, such as sickness, disability and old-age, since these risks may result in the individuals' suffering a lower standard of living conditions.[540]

The phrase "*working population*" distinguishes the Article 22(5) from Article 21(3). Article 22(5) refers only to the individuals that are economically active and have paid contributions to the social insurance system via their employment, while Article 21(3) protects the elderly that have not contributed to the public pension system or have not contributed the minimum service required for a pension entitlement.[541]

539 *Tsatsos*, Constitutional Law-Part C: Fundamental Rights, p. 207.

540 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

541 Exceptionally the Special Highest Court (AED) of Article 100 of the Greek Constitution ruled that civil servants are excluded from the personal scope of this constitutional provision, since it considered their benefits as an effect of their service for the state. See Special Highest Court, No. 16/1983.

Article 22(5) acknowledges the constitutional guarantee of social insurance as an institution.[542] It guarantees the existence of a public pension system that protects the social risk of old-age that is accessible to everyone. Core elements of the Greek public pension system as an institution are its universality, its public and obligatory character, the protection of social insurance capital, the promotion of social insurance, the principle of social solidarity, the principle of equivalence between contributions and benefits as well as the state's participation and guarantee in the financing of the institution.[543] Against this background, the Constitution guarantees the existence of a social insurance scheme that should cover the social insurance security of the whole working population taking into consideration the protection of the social insurance capital, while the national legislature has the responsibility to establish and reform the social insurance system, in accordance to the changing social and economic conditions.

b) The Right to Social Security as an Objective Right

Article 22(5) and Article 21(3) are constitutional provisions mainly of programmatic nature since they provide general policies and guidelines to the legislature for the protection of the elderly.[544] The legislative power is obliged to design and implement the vague content of these constitutional provisions adopting the necessary laws. In this sense, the abstract notion of both articles gives a wide margin of appreciation to the legislature on the legal measures that should be undertaken for the social protection of the uninsured elderly (Article 21(3)) and the working population (Article 22(5)). Namely, the Greek Constitution provides a wide appreciation to

542 *Kremalis*, in: *Ruland / Von Maydell / Papier* (eds.), Verfassung, Theorie und Praxis des Sozialstaats, p. 442; C*ontiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 380.

543 *Chrysogonos / Kaidatzis,* EED 2010, p.869; *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 157; *Chrysogonos,* Civil and Social Rights, pp. 561, 568; *Contiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 385; *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 359.

544 Court of Audit (Plenary Session), Judgment No. 2457/2012. See also *Kremalis,* The Individual Right to Social Assistance, p.158; *Manesis*, Constitutional Law, p. 154.

the state to form their pension policy legislating the kind and the extent of the social insurance protection, i.e. by altering the method for calculating benefits and contributions or the eligibility conditions for a pension entitlement or reducing the amount of the already provided old-age pension benefits or establishing more favourable prerequisites to pension benefits for a specific group of the population. The legislature is, however, obliged by the Constitution to retain the compulsory character of the system, namely the social insurance obligation, whereby the contributions must be compulsorily paid either by the employee or employer. In addition, social insurance should be provided only by the state or by public entities.

The aim of a wide margin of appreciation, that the state enjoys through the aforementioned constitutional provisions, is the prospects, opportunity and flexibility for social protection to be adapted in the standing changing demographic and socio-economic situation of the state. A concrete and predetermined notion of the right to social security with reference to the aims and design of social policy is not acceptable in a democratic society, on the grounds that the enactment of social security benefits depends on the public resources[545] and thus over time it is possible that in a democratic process diverse perspective and priorities are set.[546] Otherwise, the financial capacities of the state would be set in danger.

Therefore, both articles provide an abstract notion of the right to social security and general guidelines to the legislature to establish a social insurance and social assistance scheme. As a result, the Article 21(3) and Article 22(5) may not provide the individuals with the right to claim for specific social benefits from the state and thus they do not provide with a subjective right in that sense. The content of both articles must be made first concrete and be realised through domestic laws.

c) The Right to Social Security as a Subjective Right

The aim of this part of the research is to analyse the possibility of regarding the right to social security as a subjective right, namely as an enforce-

545 C*ontiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 128; *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 101.

546 *Hamisch*, Der Schutz individueller Rechte bei Rentenreformen: Deutschland und Großbritannien im Vergleich, p. 242.

able right that pensioners may bring before the courts. Enforceability or justiciability of economic and social rights means the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial review at the domestic level.[547]

As it has been mentioned above, the right to social insurance may not be a useful legal tool to protect future legal positions of pensioners, on the grounds that the enactment of pension benefits depends on the financial resources of the state. However, in some cases, constitutional rights, like the constitutional right to social insurance, are binding upon the legislature irrespective of the economic situation of the state.[548] Under exceptional circumstances the right to social insurance may thus become a subjective right and provide a defensive justiciable right for pensioners.

The pensioners may use the right to social insurance as a legal basis to claim before the courts for the provision of pension benefits, when the legislative authority has already realised and concretely confirmed the content of Article 22(5). The right to social insurance should find application and protect existing legal positions of current pensioners, in cases where old-age pension benefits have already been allocated. In this case, the notion of social protection of the old-age is not general or vague as clear legal standards have been developed. The right to social insurance stops functioning as a programmatic and declaratory provision, but has constitutional value and may be invoked by the claimants as a legal basis on which to claim the unconstitutionality of their old-age pension benefits' reductions.[549]

This approach has been recently adopted by the Council of State. The Council of State gave a new dimension to the right to social insurance in its rulings concerning the last-round of old-age pension benefits reductions introduced by Law No. 4051 of 2012 and Law No. 4093 of 2012[550] as well as in its rulings concerning the reductions in old-age pension benefits

547 *Coomans*, Justiciability of Economic and Social Rights: Experiences from Domestic Systems, p. 4.

548 See for example the ruling of the Constitutional Court of Latvia, which used as legal basis the right to social insurance to declare the unconstitutionality of the old-age benefits reductions imposed within the framework of the financial facility agreement with IMF and other international creditors. Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01, at para. 24.

549 *Ibid.*

550 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015.

introduced by Law. No. 4024 of 2011.[551] Although in the case of the first-round of pension reductions the Council of State examined old-age pension benefits reductions on the basis of Article 1 of the First Protocol,[552] the same court applied, in its more recent jurisprudence, the social right to a pension deriving from the constitutional right to social insurance, as a legal basis in order to legally constrain successive post-crisis actions by the state. More particularly, the Council of State ruled that the constitutional right to social insurance guarantees that when the social insurance risk takes place (i.e. old-age) the individual has the right to claim from the public pension fund benefits that are able to secure satisfying living conditions, similar to the living conditions that the individual was enjoying prior to retirement, although the granted benefits are not required to correspond exactly to the amount of the paid contributions, nor to fully cover the loss of income. The court held that on the one hand, in times of financial crisis, Article 22(5) does not preclude the legislature from reducing current pension benefits, when the state is justifiably unable to provide adequate financing to the social insurance funds, and that it is not able to ensure their sustainability through other means (amendment of pension retirement requirements, more effective management of their assets, imposition of new special social contributions, increasing of the contributions). However, on the other hand, the court ruled that even under exceptional circumstances, the legislature may not freely reduce the social insurance benefits without limitation. Namely, the pension reductions must not violate the constitutional core of the right to social insurance. The core of the right to social insurance was defined by the court so that the pension reductions must not be so high that the pensioners cannot enjoy a dignified life, in the sense that the pensioners' physical sustenance, (nutrition, clothing, accommodation, basic household goods, heating, medical care) as well as their participation in their social life are ensured in a way that is closely reflective of the life that the pensioners were enjoying prior to their retirement.[553]

551 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2289-2290/2015.

552 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.

553 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015. At para. 7 of Judgment No. 2287/2015, the Council of State ci-

The court thus defined that the core of the right to social insurance is equal to the level of minimum-existence, as the latter was defined by the Federal German Constitutional Court. Indeed, the German Federal Constitutional Court in two recent cases provided a progressive interpretation of how the level of minimum existence should be defined.[554] The court ruled in both judgments that the social assistance benefits must secure the physical and socio-cultural minimum required for human existence. The first case concerns the unemployment benefits (Hartz IV benefits)[555], while the second case concerns the amount of cash benefits provided to asylum seekers.[556] The court dealt with the legal question whether these two social assistance schemes are compatible with the Basic Law (Grundgesetz). In both cases, the constitutional court ruled that these social assistance benefits schemes are not compatible with the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity (Article 1.1 of the Basic Law) in conjunction with the principle of the social welfare state (Article 20.1 of the Basic Law), because they do not cover the level of minimum existence. The latter derives from the above fundamental rights, which ensure to each person in need of assistance the material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life.

The Council of State is thus willing to apply the right to social insurance as the foundation of a legal claim if the legislature has drafted detailed provisions, even if this may have considerable financial implica-

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ted the judgment of the Federal German Constitutional Court of 09.02.2010,- 1 BvL 1/09-,-1 BvL 3/09-,-1 BvL 4/09-, Rn. 135).

554 BVerfG, 1 BvL 1/09, Judgment of 09 February 2010 (Hartz IV). English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html (Retrieved August 2016); BVerfG, 1 BvL 10/10, Judgment of 18 July 2012 (Asylum seekers benefits). English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html (Retrieved August 2016).

555 With effect from the 1st January 2005 the second book of the German code of social law (SGB II) guarantees basic provisions for employable persons and the persons living with them in a joint household. These benefits secure one's livelihood and benefits for accommodation and heating.

556 The Asylum Seekers Benefits Act, starting from the 1st November 1993, aims to provide its beneficiaries that do not have any assets of their own, existential benefits.

tions. This approach of the court promotes the importance and practical use of the social right to old-age pension benefits, which was disregarded in the past. The right to social insurance starts functioning as a subjective right being applied when the state deprives the individuals of the social benefits it has already provided through prior administrative specification. The justiciability of social rights is largely dependent on the existence of legislation that relates to the implementation of particular rights. Indeed, when ordinary law has already been implemented providing precise pension requirements and old-age pension benefits, even if the right to pension is of programmatic nature, the legislative measure which represents a backward step may be prohibited.[557] In this way, the legislature's freedom to shape legislation is limited.

The Council of State ruled that the state is not precluded from reducing the level of social protection that has already been established, but it is not entitled to refuse the enactment of the right to social insurance, if the level of the old-age pension benefits that has already been granted does not cover a certain minimum existence of the pensioners. In this sense, the core content of the right to social insurance that should be guaranteed under all circumstances is the level of minimum existence.

However, the core of the right to social insurance cannot be defined in accordance to the level of minimum sustenance. This is because the above case law of the Council of State concerned pension benefits and not social assistance benefits. In social insurance cases the contributory element is at hand and the right to social insurance may guarantee that the pensioners enjoy similar income with the one they had in average over their working life. This is poignant in pension issues where the pensioners have paid different levels of contributions and thus it would be not compatible with the right to social insurance to argue that all the old-age benefits may be diminished up to the same level of minimum existence, without taking into consideration the fact that different level of contributions have been paid. The function of the right to social insurance does not prevent a decline in the standard of living but excludes the aim of guaranteeing a secured minimum income. This is achieved through social assistance benefits. Besides, the Federal German Constitutional Court defined the level of minimum existence in social assistance cases and not in social insurance cases, where the element of equivalence prevails. Both judgments of the German

557 *Fabre,* Social Rights under the Constitution, p. 42.

Court can be situated in the context of the human right to social assistance and not to social insurance, on the grounds that both cases refer to social assistance benefits and not to pension benefits.

According to the theory of "*relative social acquis*", the legislature may reduce the achieved level of protection, but it may not introduce legal provisions that would lead to the revocation of the relevant right's substance.[558] Ripe for legal consideration is how the substance of the right is defined. Thesis of this book is that the minimum core of the right to social insurance is defined by the core elements of the social insurance institution. This means that the core element of the right to social insurance is abolished when one or more of the aforementioned core elements of the social insurance as an institution is/are defuted and totally disregarded. For example, core element of the right to social insurance is the principle of equivalence between the paid contributions and the received pension benefits. If, after successive reductions, the pension benefits have been reduced to such an extent that the final pension income does not correspond to the living conditions that the pensioner was enjoying before retirement, then the core of the right would be abolished. In this instance the core of the right to social insurance may be used as a subjective, justiciable right. This may happen, irrespective of whether the successive reductions amount to lower or higher level than the level of minimum existence. Therefore, the level of minimum-existence shall not play any role in defining the core element of the right to social insurance.

Last but not least, the Council of State recognised that Article 21(3) of the Greek Constitution in combination with the right to dignity protects further the minimum existence of the pensioners.[559] The court ruled that old-age constitutes a social risk that, according to Article 21 of the Greek Constitution, obliges the state to provide social protection to the elderly with the aim to ensure their minimum existence within the framework of Article 2 of the Greek Constitution, irrespective of whether contributions have been paid to the pension system or not. Again it is poignant to argue that pensioners, who have contributed the minimum required years of ser-

558 *Tsatsos*, Constitutional Law – Part C: Fundamental Rights, p. 207. For more information about the thesis of the Greek literature on the theory of "*relative social acquis*" see *Angelopoulou,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 152.

559 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015, at para. 7.

vice, may claim a guarantee of their minimum existence. In cases of low-income pensioners whose pension income does not cover their minimum sustenance, pensioners may use Article 22(5) to claim that their pension income has been diminished to the point where their current living conditions are not comparable to what they were enjoying prior to retirement. The protection from poverty and the provision of a minimum level of dignity in the life of elderly would need to be assured by the social assistance system guaranteed in Article 21(3). Article 21(3) may only be raised in cases of insufficient amount of income of the elderly, who have not contributed the required minimum years to the public pension system in order to acquire pension benefits (uninsured elderly). In these cases, Article 21(3) could provide a subjective right to the uninsured elderly claiming the guarantee of their minimum existence. What can be thus claimed is only the provision of social assistance benefits that covers the minimum existence through the adoption of a more adequate social assistance scheme.

B. Concluding Remarks

This chapter dealt with the question if and to what extent are the pensioners' legal position protected through legal provisions. It concluded that the future legal positions of the pensioners are not protected from any legal norm. This is because no legal norm has been found to be applied, in cases that the pensioners have not established rights. It is apparent that the right to social insurance theoretically protects the future legal position of the individuals to acquire pension benefits, but this right is recognised mainly as an objective right by the international and constitutional law, in the sense that the legislature is obliged to take positive action and ensure a progressive improvement of the social security system.

On the contrary, the protection of existing legal positions in pension law is achieved from constitutional provisions that may become enforceable if the pensioners challenge their rights' restrictions before the courts. The present chapter concluded that holder of the so-called established (or acquired) rights are in a situation which provides stronger protection than that of an insured who is still forming his contributory career or is waiting to achieve the pensionable age. The right to property, the principle of legitimate expectations, the right to equality and the right to social insurance may become enforceable in cases that the pensioners have established legal positions. The right to property provides legal protection, in cases re-

lating to pensioners that have already-acquired old-age pension benefits, having fulfilled all substantial and formal requirements concerned and satisfied the legal conditions laid down in domestic law for the grant of old-age pension benefits as well as to pensioners that have legitimate expectations based on the case law of the national courts to acquire old-age pension benefits. The expectations of the pensioners that are not mature and thus legitimate do not fall under the concept of possession within the meaning of Article 1 of the First Protocol. Therefore, the right to property is not applicable and unlikely to be of assistance to the prospective pensioners' case. This is because the scope of Article 1 of the First Protocol does not include expectations that are based upon a mere hope that the individual will retire at a certain age; it only includes expectations that are held as legitimate. Furthermore, the right to equality and the principle of legitimate expectations may potentially protect the pensioners' legal positions, when certain requirements are met, described above. Lastly, the right to social insurance may protect pensioners' established rights, in cases that legislative measures would endanger the level of living conditions that the pensioners were enjoying prior to retirement.

Chapter Four: The Public Interest in Times of Financial Crisis

The legal provisions analysed in chapter three may be preserved based on grounds of "*public interest*". The notion of "*public interest*" (or "*general interest*" or "*national* interest") is often used by the executive and legislative power to justify restrictive measures, especially those undertaken to deal with a situation of emergency (*actio pro salute publica*).[560] Public interest justification should allow the public authorities to restrict human rights and retract from any expectations that have been comprehended.[561] The *rationale* of this is the fact that the majority of human rights are not absolute but rather may be restricted for legitimate reasons of public interest.

The aim of chapter four is to focus on the public interest justification elements that have been taken into consideration, in times of economic and financial crisis, when there is an urgent need to balance the protection of the pensioners' rights with the need to reduce the public pension expenditures. More particularly, the present chapter revolves around the question of whether the aims of the public pension reforms introduced within the period 2010-2012 are legitimate grounds of justification.

The outline of the present chapter is as follows: Section A describes which state power is eligible to define and interpret the public interest pursued by the restrictive measures. This section is a necessary introductory point, so the reader may perceive the necessity of exploring the explanatory reports on the laws that introduced the reforms, as well as the respective case law on the interpretation of the "*public interest"* notion, in order to find out whether the aims pursued are legitimate. Following, section B examines whether the Greek financial and economic crisis should be held as a legitimate ground of public interest. This is assessed in order to identify the importance of the financial crisis and to what extent the financial crisis may justify retrogressive public pension reforms. Next, section C analyses the aims of the public pension reforms in the crisis period, which were offered by the Greek legislature as justification for the reforms and tries to

560 *Häberle*, Öffentliches Interesse als juristisches Problem: eine Analyse von Gesetzgebung und Rechtsprechung, p. 126.

561 *Craig,* Cambridge Law Journal 1996, p. 303.

find answers on whether these aims constitute legitimate grounds of public interest. In view of the close relationship between the reductions in the public pension expenditures and the public deficit, the Greek legislature considered the pension reforms and old-age pension benefits reductions as a means of safeguarding the sustainability of the public pension system (C.I), and the fiscal interests of the state (C.II), as well as the proper functioning of the EMU (C.III).[562] Lastly, the present chapter concludes with remarks on the effect of the financial crisis on the legitimacy of the pursued public interests (D).

A. Public Interest and the State Power

The notion of public interest is used to describe the genuine interests of the whole community, setting out the fundamental values of society.[563] It should be defined by the policies and choices of the executive and legislative power, with simultaneous respect for the general values of a democratic society, the national Constitution and the general principles of international law. Its identification should not be defined *a priori*,[564] but its meaning should be reflective of the constantly changing social and economic challenges,[565] therefore adjusting it to the needs of the society.[566] The public interest should be related to the organic and continually-developing genuine interests of the whole community. It is a general and open-tex-

562 In the academic debate, it has also been argued that the austerity measures undertaken in Greece had nothing to do with objective economic necessity, but instead were driven by an ideological and political project to further entrench neoliberal capitalism. See *O'Connell*, in: *Nolan / O'Connell / Harvey* (eds.), Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights, p. 61. However, the examination of this thesis is not subject of the present book.

563 *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, p. 30; *Bodenheimer*, in: *Friedrich* (ed.), The Public Interest, p. 211.

564 *Viotto*, Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 26.

565 *Giannakopoulos*, EfimDD 2012, p. 100; *Manitakis*, ToS 1978, p. 435.

566 *Vonk / Katrougalos*., in: *Vonk / Tollenaar* (eds.), Social Security as a Public Interest: A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State, p. 68-69; *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, p. 27; *Viotto*, Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 26.

tured legal doctrine, since its meaning is expressed in very broad and abstract terms.[567]

Each state-policy should be founded on the idea that it serves the socially manifested needs of society.[568] This is, however, somewhat illusory, since it is based on the unrealistic assumption that the public interest is equal to the sum of the interests of all individuals in the given society.[569] This is unrealistic, since any one individual can have antagonistic interests compared to the interests of other individuals, or of the community as a whole.[570] For instance, in times of economic and financial crisis, individuals with high-income that do not make use of social benefits will have an interest that the state will only undertake reductive measures in social insurance schemes, whereas individuals with low-income that do make use of social benefits may have an interest in some tax increase. More correct seems to be the thesis that the notion of public interest consists of whatever the democratically elected legislative and executive power identifies as a concern of public interest.[571]

The Greek constitutional organs eligible to specify the components of public interest are: the legislature, the elected government and the public authorities. The executive power defines the public interest in cases of draft legislation that increases public expenditures.[572]

The law is the official document, in which the legislature defines the policies that optimally serve the public interest. In most cases, however, the aim(s) of the adopted legislation is not referred to in the text of the legislation but in the accompanying explanatory report. Generally, the Greek Constitution does not expressly oblige the legislative power to justify the decisions of its policies, since it is assumed that the exclusive aim(s) of the state should be the fulfilment of the public interest.[573] However, Greek ju-

567 *Viotto,* Das öffentliche Interesse – Transformationen eines umstrittenen Rechtsbegriffes, p. 47; *Wyss,* Öffentliche Interessen – Interessen der Öffentlichkeit? – Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht, p. 16.

568 *Wyss*, Öffentliche Interessen – Interessen der Öffentlichkeit? – Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht, p. 17.

569 *Bodenheimer*, in: *Friedrich* (ed.), The Public Interest, p. 208.

570 *Chrysogonos*, Civil and Social Rights, p.89.

571 *Bodenheimer*, in: *Friedrich*, (ed.), The Public Interest, p. 209.

572 I.e. Art. 73(3) of the Greek Constitution provides that no law should be originated by the parliament when it results in expenditure or a reduction of revenues.

573 *Dagtoglou*, ToS 1986, p. 428.

risprudence[574] as well as the scientific parliamentary committee[575] held that the public interest should be explicitly referred to either in the text of the legislation or in the explanatory report, in which the aim(s) of the law must be justified comprehensively and in detail.

According to Article 74 of the Greek Constitution, every draft of law must be accompanied by an explanatory report before being introduced to the parliament. In the explanatory report, the legislative power analyses and clarifies the provisions of the bill. This process seems more appropriate, as in case of judicial review of the reasons of public policy, the judicative power can have a point of reference. Otherwise, the courts would have to assume the aim(s) pursued by the disputed measures deriving the aim(s) from the text of the legislation. This could result in the judiciary exceeding the limits of its power and violating the principle of the separation of powers, as foreseen in Article 26 of the Greek Constitution, as well as the principle of popular sovereignty guaranteed in Article 1(2) of the Greek Constitution.

The Greek courts are associated with the control of the legislative and executive power. This position is derived from the constitutional principle of the separation of powers. The principle of the separation of powers, as well as the principle of the rule of law, demands the courts to review the aim(s) of a certain provision. The importance of this principle is enormous, since it prevents arbitrary use of the legislative and executive power. In cases where the legislative or the executive powers do not act according to law, the judicative power (conducting judicial review) may provide a legal remedy by ensuring that the other two powers have acted both within their limitations and for reasons of public interest.

Furthermore, the notion of public interest may be judicially reviewed, on the grounds that the existence of a legitimate public interest is a prerequisite for the constitutionality of a statute enacted by the parliament. In Greece, the existence of a legitimate aim is examined by all national courts, since courts of all instances may review the constitutionality of a law.[576] Nonetheless, only the plenary session of the three Supreme Courts (the Council of State, the Court of Audit and the Aeropagus) may decide

574 Court of Audit, Judgment No. 1562/2005.

575 Report on Law No. 3845 of 2010 and Law No. 3847 of 2010, Official Gazette of the Hellenic Republic 67/A/11.05.2010, EDKA 2010, p. 386 and p. 399.

576 Art. 93(4) of the Greek Constitution: „*The courts shall be bound not to apply a statute whose content is contrary to the Constitution*".

definitively on the constitutionality of a provision.[577] In a situation of conflicting judgments relating to the constitutionality of a statute among the three Supreme Courts, a Special Highest Court is established to settle the controversies.[578]

The judicial review on the legitimacy of the aim(s) pursued is only marginal.[579] In order to determine whether the legislative power overstepped the bounds of its authority, the steps that the judicative power should take are as follows: at first instance, the judicative power defines which aim(s) is pursued by the legislature. The courts may not define the aim *de novo*, but rather they evaluate the arguments advanced by the legislative power as to why it applied the new policy. These arguments must be derived, as mentioned above, by the law or by the pre-legislative process for the enactment of the legislation. Secondly, the judiciary examines whether the aim(s) identified by the legislative power is legitimate. The courts examine namely whether the aim of the law is compatible with the constitutional provisions that guarantee the protection of constitutional rights.[580]

Public interest, as a legitimate aim for restriction of constitutional rights, must be either drawn from the text of the Constitution; or at least must not be contradictory to the constitutional provisions that guarantee the protection of rights.[581] Within the Greek Constitution, the notion of public interest is provided for by a number of constitutional provisions. Examples of such provisions are found in the following articles: Article 17 (protection of private property; expropriation),[582] Article 24 (protection of

577 Art. 100(5) of the Greek Constitution.
578 Its jurisdiction is described in details in Article 100 of the Greek Constitution.
579 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.
580 *Voutsaki*, ToS 1998, p. 406.
581 *Venizelos*, The Public Interest and Constitutional Rights' Restrictions, p. 208.
582 Art. 17(1): "*Property is under the protections of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest*" and para 2: "*No one shall be deprived of his property except for public benefit …*".

the environment)[583] and Article 106 (development of national economy).[584] Article 106(1) of the Greek Constitution provides that the notion of "*public interest*" may constitute *ratio* for legislative interference with the national economy in times of economic crisis. Furthermore, the term "*national interest*" is also referred to in Article 4(3),[585] Article 28(2)[586] and (3).[587] The above constitutional provisions, however, do not provide for that public interest may always *per se* prevail over certain constitutional rights.[588]

Last but not least, both the legislative and the judicative power should consider the reasons of public interest defined in international treaties and by the ECtHR, despite the fact that the national legislature has a broad margin of appreciation to additionally define other grounds of public interest. At international level, the notion of public interest is referred to in a number of treaties and instruments. Article 29 of the UDHR states that "… *everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing ... the public order and the general welfare in a democratic society*". Also, Article 31 of the ESC provides that "*The rights and principles set forth in Part I... shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society... for the protection of public interest...*" Both international treaties thus convey the notion of public interest as a justification for restrictions placed on the rights and freedoms which are guaranteed and specified in the text of the treaties.

The ICESCR as well as the ECSS and the ILO Convention No. 102 do not include a general clause that provides "*public interest*" as a factor used

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583 Art. 24(1): "*Alteration of the use of state forests and state forests expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy*".

584 Art. 106(1): "*In order to consolidate social peace and protect the general interest, the State shall plan and coordinate economic activity in the State, aiming at safeguarding the economic development of all sectors and the national economy*".

585 Art. 4(3): „*... Withdrawal of Greek Citizenship shall be permitted only in case of ... undertaking service contrary to national interest in a foreign country ...*".

586 Art. 28(2): "*Authorities…may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest ...*".

587 Art. 28(3): "*Greece shall freely proceed by law passed by an absolute majority of the total number of Members of the Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest*".

588 *Chrysogonos,* Civil and Social Rights*,* p.87.

for justification. The ICESCR refers to the notion of public interest only in Article 8, providing that the protection of public interest may allow a restriction on the right to form and join a trade union. The ECHR refers to the concept of "*public interest*" in Article 1 of the First Protocol. The aforementioned article allows the Contracting States to restrict the right to peaceful enjoyment of one's possessions on the grounds of general interest. This requirement is expressly stated in Article 1(1), 2nd sentence ("*in the public interest*") and paragraph 2 ("*in the general interest or to secure the payment of taxes and other contributions or penalties*"). A difference between the notions of public interest and general interest is not derived from the jurisprudence of the ECtHR.[589] Furthermore, while Article 1 of the First Protocol does not make any reference to the economic well-being of the state, the ECHR expressly provides for the economic well-being of the State as a ground of justification in Article 8 (Right to respect for private and family life). Moreover, Articles 6 and 9 of the ECHR (respectively covering the right to a fair trial and to freedom of thought) may be restricted in the interests of public order. From the above articles, it may be derived that the idea of "*public interest*" also appertains to the general common interest of increasing the welfare of society. The notion of "*general welfare in a democratic society*" and the notion of "*public order*" are recognised as legitimate grounds of public interest, and are thus eligible reasons to place limitations upon rights guaranteed in the treaties.

The ECtHR is bound to review whether the disputed restrictive measures pursue a legitimate aim(s) by interpreting the general norm of "*public interest*". Although the ECtHR is bound to make an inquiry into the facts with reference to the assessment of public interest made by the national authorities, the court allows a wide margin of appreciation to the Contracting States on evaluating the public interest pursued. The ECtHR has consistently ruled that specially in cases of economic and social policies, it is not in the position to substitute the national authorities and it is primarily for the states to determine what is in the public interest, since the notion of "*public interest*" is particularly extensive and the states are better placed than an international judge to determine public interest due to their

589 *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 876.

direct knowledge of their society and its needs.[590] This is because the notion of "*public interest*" must be determined on the basis of the specific social and economic needs of each state.[591] This has had the effect of the ECtHR failing to comprehensively define the notion of public interest in socio-economic cases. The ECtHR has only declared that it will not respect the legislative interpretations of the notion of public interest if that interpretation is manifestly without reasonable foundation.[592] For instance, the ECtHR reviewed the legitimacy of the aims pursued in the cases *Nencheva and others v. Bulgaria*[593] *and Kuznetsov v. Ukraine*.[594] The case *Nencheva and others v. Bulgaria* concerned the death of fifteen disabled children and young adults in a Bulgarian public institution for physically and mentally disabled young people. They died as a result of reductions in expenditures, sanctioned by the Bulgarian government during a severe economic, financial and social crisis between 1996 and 1997 as the municipal authorities were not able to cover the cost of food, medicine and heating. The ECtHR did not accept the harsh winter and the severe economic crisis as legitimate aims and found a violation of Article 2 of the Convention, which protects the right to life. In the case *Kuznetsov v. Ukraine*, the ECtHR found a violation of Article 3 of the Convention, which prohibits torture or any inhuman or degrading treatment, due to the conditions of the applicants' detention in prison. The ECtHR bore in mind Ukraine's socio-economic problems but it held that the economic problems and the lack of resources could not in any event justify poor conditions of detention and inhuman and degrading treatment.

590 ECtHR, *James and others v. UK*, Judgment of 21 February 1986, Appl. No.8793/79, at para. 46; *Valkov and others v. Bulgaria*, Judgment of 08 March 2012, Appl. No. 2033/04, at para. 91; *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. No. 27458/06, at para. 61; *Khoniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08, at para. 76.

591 *Arai-Takahashi,* The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, p. 157.

592 ECtHR, *James and others v. UK*, Judgment of 21 February 1986, Appl. No.8793/79, at para. 46; *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. No. 27458/06, at para. 61.

593 ECtHR, *Nencheva and others v. Bulgaria,* Judgment of 18 September 2013, Appl. No. 48609/06.

594 ECtHR, *Kuznetsov v. Ukraine*, Judgment of 29 April 2003, Appl. No. 39042/97.

B. The Financial Crisis as a Public Interest

The domestic financial and economic crisis has been used as a justificatory technique by the Greek state in a number of legislative explanatory reports. The legislative power used the words "*crisis*", "*unprecedented and extraordinary circumstances*" and "*national emergency*" in order to emphasise the severity of Greece's fiscal situation. It is of important interest, for the purpose of this book, to identify whether a financial and economic crisis may be a situation of public emergency to introduce retrogressive public pension reforms. If a financial crisis is regarded as a situation of public emergency, then a crisis could become a legitimate ground of public interest and excuse for the suspension of the Greek Constitution and derogation from constitutional rights.

There is no specific legal definition of public emergency.[595] The legal consequence of a case of public emergency is the temporary suspension of ordinary law, including the constitution. A legal state of emergency requires rapid and decisive responses that may temporarily prevent the ordinary legislative procedure from working as according to the Constitution.[596] Therefore, in cases where there is a situation of public emergency, the judiciary is less likely to comprehensively review the constitutionality of restrictive measures as the mere existence of public emergency gives rise to legitimate suspension of the usual constitutional regime.

In light of this, ripe for consideration is whether the Greek economic and financial crisis constitutes a situation of public emergency. The Greek courts have not explicitly set the boundaries of the notion of public emergency and therefore, it cannot acquire a more precise meaning through the Greek jurisprudence.[597] According to the Greek Constitution, under the notion of public emergency falls the emergency situation of war or of an armed group aiming to overthrow the democratic regime (Article 48 of the Greek Constitution). Both cases are regarded as emergency situations that may allow for the derogation from a number of constitutional rights. A severe financial and economic crisis is not foreseen in the Greek Constitution as a situation of public emergency.

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595 *Zwitter,* in: *Zwitter* (ed.), Notstand und Recht, p. 22.

596 *King*, Social Rights and Welfare Reform in Times of Economic Crisis, p. 4.

597 *Contiades / Fotiadou,* in: *Contiades* (eds.), Constitutions in the Global Financial Crisis*,* p. 35.

The notion of public emergency as a ground of justification for derogation is described in Article 15 of the ECHR. The latter article dictates that "*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation …"* In the case *Lawless v. Ireland*, the ECtHR defined "*public emergency*" for the purposes of Article 15, as "*an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed*".[598] In another case concerning the military junta in Greece (1967-1974), the European Commission of Human Rights identified four characteristics of public emergency: a. the emergency must be actual or imminent; b. its effects must involve the whole nation; c. the continuance of the organised life of the community must be threatened; and d. the crisis must be exceptional, in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health and order, are inadequate.[599]

The examination of whether there is a situation of public emergency is strongly connected with the political responsibility of the legislative and executive power.[600] The burden of proof whether a public emergency exists should be borne by the state.[601] In the *Lawless v. Ireland* case, it was allowed the state "*a certain margin of appreciation … in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with the exceptional measures derogating from its normal obligation under the convention*."[602] The states are, therefore, granted a so-called "*margin of appreciation*" in assessing whether a public emergency exists.

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598 ECtHR, *Lawless v. Ireland*, Judgment of 1 July 1961, Appl. No. 332/57, at para. 28.

599 It concerns the case of the Greek generals that overthrew democracy in 1961 derogating from the ECHR based on "*internal dangers which threaten public order*". *European Commission of Human Rights* (Plenary Session), Decision of 24 January 1968, Appl. Nos. 3321/67. See also *Nijhoff,* Yearbook of the European Convention on Human Rights: The European Commission and European Court of Human Rights – The *Greek Case (*1969), p. 94.

600 Council of State (Plenary Session), Judgment No. 2289/1987.

601 *UN*(2001).

602 *ECtHR*, *Lawless v. Ireland*, Judgment of 1 July 1961, Appl. No. 332/57, at para. 82.

To date, the Greek executive and legislative power has not declared the domestic financial and economic crisis as a situation of public emergency, in order to suspend ordinary law and the Greek Constitution. Also, the Council of State did not declare the financial and economic crisis of their countries and the EMU a situation of public emergency. Exceptionally, the minority opinion of the Council of State supported that the Greek economic and financial crisis constituted an exceptional case of emergency.[603] More specifically, in a case concerning the constitutionality of retroactive taxation, the minority of judges expressed the view that the present economic and financial crisis in Greece demanded the implementation of a new legal order functioning *contra constitutionem* that would allow retroactivity of taxation. Similarly, the argument that a severe financial crisis may fall under the notion of a situation of public emergency was also supported in the case of *CMS v. Argentine*.[604] More particularly, from the aforementioned case is derived that a financial crisis may be regarded as a situation of public emergency under extreme circumstances, and especially in cases of difficulties in fulfilling the international obligation of repaying international credits.

It has been suggested by a group of international experts who, in 1984, formulated a list of 76 principles concerning limitation and derogation provisions in the International Convention of Cultural and Political Rights, that economic difficulties cannot *per se* justify derogative measures.[605] The wording "*economic difficulties*" is not always identified with a severe fiscal crisis. Yet, the wording "*per se*" suggests that under specific circumstances a severe fiscal crisis may constitute a situation of emergency. Some financial crises may have the features of public emergency, but most do not.

During the Greek financial and economic crisis, the Greek state had to face a severe and exceptional situation. For this reason, in practice, the executive power and the competent authorities signed the loan agreements

603 See minority opinion of Council of State, Judgment of 09 March 2011, No. 693/2011. See also *Giannakopoulos*, EfimDD 2012, p. 105.

604 International Centre for Settlement of Investment Disputes, *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Decision of 12 May 2005. Retrieved February 2015 from http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

605 *UN*(1984). For more information see also *Gross / Ni Aolain,* Law in Times of Crisis: Emergency Powers in Theory and Practice, p. 251.

and then introduced emergency decree-laws into parliament for ratification, which included the draft of the relevant loan agreement as well as all the necessary measures that should be adopted within the framework of the loan agreement and only in one article.[606] By working this way, the legislative power actually ratified existing valid and operative agreements and was only called upon to ratify *de facto* established situations.[607] Moreover, the executive power made extensive use of the emergency instrument entitled "*acts of legislative content"*, which further reduced the role of the parliament.[608] In this sense, on the one hand, no great deal of legislative participation was witnessed, since the power of the executive was broadened in order to take the necessary measures for the application of the economic adjustment programme. However, on the other hand, it may not be argued that the Greek financial and economic crisis falls under the notion of public emergency merely because of the degradation of the role of the parliament and because of the extensive use of the "*acts of legislative content*". This is because the Greek Constitution was not suspended, nor was the legislative power prevented from adopting laws according to the ordinary constitutional law. In addition, the use of "*acts of legislative content*" constitutes a constitutional law-making procedure foreseen in Article 44(1) of the Greek Constitution.[609]

Furthermore, the Greek financial and economic crisis does not fall under the notion of public emergency, on the grounds that the crisis was not of temporary nature, like in usual cases of public emergency. The permanent nature of the Greek crisis is witnessed from that fact that during the crisis period most of the policies introduced (i.e. public pension reforms) were not temporary, but rather permanent and persisting long after the eventual economic recovery.[610] Reductions in old-age benefits as well as

606 See i.e. Law No. 4093 of 2012.

607 *Coutts / Sanchez / Marketou et al.*, Legal Manifestations of the Emergency in National Euro Crisis Law, p. 15.

608 *Ibid*, pp. 15-16.

609 Art. 44(1) of the Greek Constitution provides that "*Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session…*".

610 *Sanchez,* in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 119.

in other social security benefits is not exceptional, but instead a natural development of the social rights in the current social and economic order,[611] where the realisation of social rights is dependent on available resources of the state.

The more correct approach would be to argue that the Greek financial and economic crisis is a situation of urgency. The Greek financial and economic crisis was urgent, since the Greek crisis was exceptional, thus requiring serious and urgent response. Greece had to face such extreme fiscal needs after its restoration of democracy in 1974.[612] The exceptional pressure of the financial crisis and its distinctive element of the risk of economic collapse in case of disapproval of the international creditors to release the financial support made the fiscal crisis a special situation of urgency. The crisis derived from a financial disruption and shortage of financial resources. Greece was, to a great extent, dependent on external financial support and any complications with the next release of the financial assistance would have devastating economic consequences for the substance of the state, and thus for the whole population.

Therefore, against this background, the Greek financial crisis is not a legitimate ground of public interest able to justify restrictive measures, on the grounds that it is not a situation of public emergency. It constitutes a situation of urgency because of its distinctive elements, which were the urgent need for external financial assistance and the subsequent element of conditionality. The mere existence of a financial and economic crisis is not adequate and sufficient on its own to justify any restrictions to pensioners' rights; so a further examination of the reasons of public interest given to justify such reductions is considerably essential.

C. The Aims of the Public Pension Reforms

I. The Sustainability of the Public Pension System

One of the objectives of the Greek public pension reforms was the sustainability of the public pension system, which was endangered due to finan-

611 *O'Connell*, in: *Nolan / O'Connell / Harvey* (eds.), Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights, p. 70.

612 *Markantonatou,* Diagnosis, Treatment and Effects of the Crisis in Greece: A "Special Case" or a "Test Case", p.1.

cial adversities caused by the increased age of the population, as well as the high public expenditures on pension benefits.[613]

The demographic changes brought about the importance of the sustainability of the social insurance system which started to become underfinanced, since less labour force participants were contributing while the number of beneficiaries was increasing. The sustainability of the public pension system is important and necessary in order to guarantee that current and prospective generations will be provided with adequate pension benefits.[614] Sustainability is based on three principles: adequacy, financial sustainability and capability of adapting itself to economic, social and demographic changes.[615] Sustainability under financial terms (otherwise known as financial sustainability) is achieved by comparing the current financial situation of a social insurance scheme, including its expected future revenues, with its total financial obligations that are expected to occur in a certain period in the future. The expected future revenues and expenses are calculated according to actuarial studies, while various factors are taken into consideration, such as demographic changes.

The financial sustainability is also closely related to the intergenerational justice or "*social sustainability*".[616] The main challenges of the public pension reforms lie thus in ensuring the long-term financial sustainability of the public pension system as well as its "*social sustainability*". The "*social sustainability*" means that the aim of the pension reforms is also "*to underpin or restore expectations of secure and adequate pensions on the part of the current and potential beneficiaries*".[617]

Before the Greek financial and economic crisis, the Greek legislature had enacted a series of pension bills that reformed the public pension system, aiming at the sustainability of the public pension system, the adjustment to the demographic changes as well as the social intergenerational equality. For instance, Law No. 2084 of 1992 "*Reform of the Social Insurance System*" reduced the number of public pension funds and raised the retirement age.[618] In the explanatory report on this law, the legislative

613 *IMF*(2010) 10/110, p. 5.
614 *UN*(2008), at para. 11.
615 *Council*(2001).
616 *Hinrichs,* in: *Petersen / Petersen* (eds.), The Politics of Age: Basic Pension Systems in a Comparative and Historical Perspective, p. 119-120.
617 *Ibid*.
618 The Law No. 2084 of 1992 is cited in fn. 102.

power reported that aim of the law was to ensure the sustainability of the system as well as to minimise any social injustice among the generations. Furthermore, Law No. 2676 of 1999 "*Structural and Functional Reconstruction of the Social Insurance Funds and other Provisions*" established the public pension fund of the self-employed OAEE.[619] Its aim was to reduce the number of the self-employed public pension funds and merge them into one. According to its explanatory report, the great number of funds resulted in the emergence of inequalities between benefits and requirements to a pension entitlement, as well as high administrative expenses. Another illustrative example is Law No. 3655 of 2008 "*Administrative and Structural Reform of the Social Insurance System and other provisions*", which reduced further the number of the public pension funds.[620] The aim of this pension bill was the sustainability of the public pension system in view of strengthening its public, universal and compulsory character, its redistributive principle, the similar treatment of the individuals that paid similar amount of contributions as well as the preferential treatment of those individuals that were in need of financial assistance.

After the Greek financial and economic crisis, the aim of the public pension system's sustainability started playing a supplementary role, while the primary role was shifted to the sustainability of public finances, described below. However, the aim of sustainability still remained, since the sustainability of the pension system cannot be viewed separately from the sustainability of public finances given. For example, there are implications for the economy if there is social unrest due to inadequate pension benefits, or due to pension provisions that disregard the increasing ageing of the Greek population. The explanatory report on the Law No. 3863 of 2010, concerning the New Social Security System applicable to the private sector and self-employed, proscribed that the increased retirement age and the stricter calculation formula as well as the introduction of a solidarity contribution granted by pensioners that receive old-age pension benefit more than 1,400 Euros[621] had the aim of achieving the macroeconomic sustainability of the social security system.[622] This was motivated by the state's economic and social situation. In addition, the explanatory report on the Law No. 4093 of 2012 proscribed that the reductions in the old-age

619 The Law No. 2676 of 1999 is cited in fn. 232.
620 The Law No. 3655 of 2008 is cited in fn. 86.
621 Art. 38 of Law No. 3863 of 2010.
622 The Law 3863 of 2010 is cited in fn. 250.

pension benefits of the private sector pensioners was aimed at the sustainability of the pension system as well as the reduction in the public pension funds' deficit.[623]

Generally, the Greek courts had accepted the sustainability of the social insurance system as a legitimate public interest prior to the financial crisis,[624] as well as after it.[625] For example, the Council of State ruled in the past that the solidarity contribution levy introduced in 1992 (L.A.F.K.A.) on the old-age pension benefits' of the pensioners, was compatible to Article 22(5) of the Greek Constitution, as the latter constitutional provision guarantees *inter alia* the protection of the social insurance capital.[626] In addition, according to the same court, the principle of protection of the social insurance capital requires the continuance and sustainability of the social insurance system, so that both the current and future generations may enjoy adequate social benefits.[627] The Council of State has ruled that the state is not only obliged to found a mandatory social insurance scheme or establish social insurance funds, or monitor and manage their assets, but is also obliged to protect the social insurance capital; namely, the state is obliged to secure the sustainability of the social insurance system in favour of future generations, while its sustainability is secured through the adoption of proper legislation that protects and utilises the assets of the funds and their proper management; moreover, its sustainability is promoted through the amendment of pension retirement requirements, through the imposition of special social contributions and mainly through the financing of the funds from the state budget; the state is obliged to guarantee and ensure the adequacy of the social benefits and the sustainability of the funds as well as to cover their deficit, on the grounds that it is mandatory that the employers and employees pay social insurance contributions to the funds.[628] The Council of State continued arguing that, in times of

623 The Law 4093 of 2012 is cited in fn. 206.

624 I.e. Council of State, Judgment of 04 June 2007, No. 1613/2007; Judgment of 22 September 2008, No. 2522/2008.

625 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012; (Plenary Session), Judgment of 06 June 2014, No. 2115/2014; Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014; (Plenary Session) Judgment of 10 June 2015, Nos. 2287-2290/2015.

626 Council of State (Plenary Session), Judgment of 07 April 1995, No. 1461/1995.

627 Council of State, Judgment of 13 October 2014, No. 3410/2014.

628 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

exceptional and severe fiscal crisis it may emerge that the state is justifiably unable to provide adequate financing to the social insurance funds, and that it is also unable to ensure their sustainability through other means (amendment of pension retirement requirements, more effective management of their assets, imposition of new special social contributions, increasing of the contributions).[629] When this occurs, the right to social insurance (Article 22(5) of the Greek Constitution), within the framework of a mandatory social insurance system, does not preclude the legislature from readjusting the social contributions and benefits, reassessing the prerequisites for the entitlement of benefits or re-evaluating the percentage of the state to the financial contribution of the system,[630] as well as reducing current pension benefits.[631] In light of this, the Council of State ruled that the protection of the sustainability of the public pension system allows the legislature to reduce the already granted old-age pension benefits, in times of an exceptional financial crisis, when this crisis endangers the sustainability of the system.

Additionally, the Council of State gave priority to the general interest of the sustainability of the public pension system in comparison to the factor of the financial crisis. For example, the Court held that the reductions in old-age pension benefits introduced in the second year of the crisis, in 2011, are legitimate since they pursued the sustainability of the public pension system, on the grounds that the amount of pension benefits that was not provided to the pensioners did not flow into the state budget but remained property of the public pension funds, since it flew to a special account that would cover the deficit of the funds.[632]

The legitimate public interest of the sustainability of the public pension system has also been recognised by the ECtHR. The ECtHR ruled that measures aiming to ensure the financial balance and sustainability of a PAYG follow an objective which is in line with the public interest. The ECtHR ruled that a harmonised pension calculation, aiming at a balanced

629 *Ibid*.

630 Council of State, Judgment of 13 October 2014, No. 3410/2014, Judgment of 23 October 2014, No. 3663/2014.

631 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

632 Council of State, Judgment of 13 October 2014, No. 3410/2014.

and sustainable welfare system, pursued the public interest.[633] Last but not least, in the case *Valkov v. Bulgaria,* the applicants were retired pilots, whose old-age pension benefits were capped and could not exceed the maximum amount of the old-age pension benefits envisaged by law.[634] The ECtHR noted that the cap pursued a legitimate aim since "*the cap obviously results in serving for the pension system*".[635]

Therefore, the financial crisis and the conditionality imposed by the international creditors for pension reforms do not affect whether or not the sustainability of the public pension system is considered a legitimate public interest. In ordinary times as well as in times of financial crisis, the sustainability of the public pension system is held as a legitimate aim. The only difference is that, in times of crisis, the impugned pension reforms are directly related to the urgent need to balance not only the expenditures and revenues of the social insurance budget but also of the general public budget. More specifically, after the crisis, the need to ensure the sustainability of the public pension system became more urgent and strongly inter-connected with the aim of the fiscal interests of the state. This is because the sustainability of the public pension system is closely related to the overall economic situation of the state and its available resources. Changes to the social insurance budget have an effect on the balance of the entire public budget, for there are financial interconnections between these two budgets.

II. The Fiscal Interests of the State

The fiscal interests of the state are identified with financial sustainability and the improvement of public finances. Due to the urgent Greek financial and economic crisis, the focus has shifted from the sustainability of the public pension system to the fiscal interests of the state. Namely, the explanatory reports on the laws that introduced pension reforms and old-age pension benefits reductions, as well as the Greek economic adjustment

633 ECtHR, *Poulain de Saint Pere v. France*, Judgment of 28 February 2007, Appl. No. 38718/02; *Maggio and others v. Italy*, Judgment of 31 May 2011, Appl. Nos. 46286/09 etc..

634 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc.

635 *Ibid*, at para. 92.

programmes and the memoranda, took into account primarily the need to reduce public pension expenditures for the "*fiscal interests of the state*". The "*fiscal interests of the state*" were described in different ways, either as "*sustainability of public finances*", "*decline of public deficit*", "*decline of public expenses*", "*covering the lack of liquidity*", "*proper functioning of the state*". A more concrete meaning and context of the "*fiscal interests of the state*" has been given by the fiscal objectives mentioned in the first economic adjustment programme for Greece. More particular, the fiscal interests of the state were to be achieved through fiscal consolidation by decreasing public sector expenditures and improving the government's revenue-raising capacity.[636]

As described in chapter two, in all explanatory reports on the laws that imposed pension reforms and old-age pension benefits reductions, the legislature reported that the main and initial aim of the adopted relevant measures is the medium and long-term fiscal sustainability of the state. The threatening situation of Greece was characterised as a situation of national urgency that necessitated strict and rash pension reforms. Reducing the public pension expenditures generates savings in public sector expenditure and improves the government's revenue-raising capacity, achieving thus a balanced public budget. This aim was characterised by the legislature as a supreme national interest and not as a mere public interest. For example, according to the explanatory report on the Law No. 3833 of 2010 "*Protection of National Economy – Emergent Measures to Confront the Fiscal Crisis*"[637], the combat of the fiscal crisis constituted a historical and national responsibility. Besides, the legislature reported in the explanatory report on the Law No. 3845 of 2010 „*Measures for the Implementation of the Economic Adjustment Programme for Greece as was set in Agreement with the Member State of the EMU and the IMF*" that the measures were "*painful*", but necessary for the protection of the public interest, which under the present circumstances was identical to the national interest.

In light of this, ripe for legal consideration is whether the fiscal interests of the state may be considered as a legitimate public interest. This legal question is subject to judicial review. The courts' interpretation on the fiscal interests of the state as well as the depth of judicial review should depend upon the existence of a severe and urgent fiscal crisis as well as upon

636 *EU-COM*(2010) 61 final, p. 10.
637 Law 3833 of 2010, Official Gazette of the Hellenic Republic 40/A/15.03.2010.

Greece's obligation to address the demands of commitments to international creditors in return for financial support. These two factors should determine the legitimacy of the fiscal interests of the state as aim.

The ECtHR has delivered an extensive case-law on the issue of the fiscal interests of the state in cases concerning state's privileges in civil law procedure. More particular, the ECtHR held that the lower rate of interest in arrears owed by the state and public entities in relation to the rate of interest in arrears owed by individuals and private entities violates Article 1 of the First Protocol, on the grounds that "*the mere financial interests of a public corporation could not be considered as a public or general interest*."[638] The mere fact that such privileges were provided because of the status quo of the state was not sufficient in itself to justify the preferential treatment, since such privileges were not essential to the proper performance of public duties. Similarly, in the case *Varnima Corporation International v. Greece*, the Court ruled that the mere interests of the public treasury could not by itself fall under the notion of public interest.[639] The dispute in question concerned a rule setting a 20-years limitation period for claims of the state, while a private person's claim was time-barred after one year. The court held that the application of a 20-year limitation period for the state's claim against the applicant company was not justified by the need to ensure the efficient management of the public finances.

Yet, the ECtHR acknowledged in cases of tax liabilities and old-age pension benefits' reductions that the fiscal interests of the state constitute a legitimate aim. More particular, as far as the recovery of tax liabilities is concerned, the ECtHR acknowledged the effective recovery of tax-liabilities as a legitimate ground for restricting the freedom of movement guaranteed by Article 2 of the Fourth Protocol of the ECHR. In the case *Riener v. Bulgaria,* the Bulgarian public authorities imposed a travel ban on the applicant because of tax-debt until the payment of the debt.[640] The ECtHR considered that the non-recovery of tax liability may fall within the scope

638 ECtHR, *Meidanis v. Greece*, Judgment of 22 May 2008, Appl. No. 33977/06, at para. 31; *Zoumpoulidis v. Greece*, Judgment of 25 June 2009, Appl. No. 36963/06.

639 ECtHR, *Varnima Corporation International v. Greece*, Judgment of 28 May 2009, Appl. No. 48906/2006, at para. 34.

640 ECtHR, *Riener v. Bulgaria*, Judgment of 23 May 2006, Appl. No. 46343/99, at paras. 114-117.

of the requirements of *ordre public*.[641] The severity of the recovery of tax liabilities is also mirrored in the text of Article 1 of the First Protocol. The latter expressly foresees in paragraph 2 that the right to peaceful enjoyment of one's possessions may be restricted to secure the payment of taxes and therefore, according to the Convention, the recovery of tax liabilities falls within the norm of public interest.

In a more recent case, relating to the Hungarian financial and economic crisis of 2008, the ECtHR held that the "*sense of social justice*", in combination with the interest to distribute the public burden, satisfies the Convention's requirement of a legitimate aim, despite the open-textured nature of the aim.[642] More particularly, the applicant had 98 percent tax imposed on the upper bracket of her severance, and the Hungarian government pointed out that the circumstances of a deep world-wide economic crisis warranted additional burdens on individuals.[643] Similarly, in a Latvian case relating to the financial crisis in this country, the ECtHR declared that the reduction in paternity benefits pursued a legitimate aim, on the grounds that the aim was to re-establish a balance in the state social budget.[644]

Concerning the cases of old-age pension benefits' reductions, the ECtHR mostly accepted the proposed aim alleged by the legislative action. For instance, in the case of *Khoniakina v. Georgia,* the applicant had served as a judge and was entitled to life-long pension in an amount equal to the final salary, adjustable in line with changes in the salary scales of serving Supreme Court judges.[645] The adjustment clause was amended. As

641 In addition, the CJEU declared that the purpose of securing the payment of taxes is a legitimate aim in a case relating to restriction to the free movement of persons (see CJEU, *Aladzhov v. Zamestnik*, C-434/10, Judgment of 17 November 2011, EU:C:2011:750). However, the same court declared that restrictions to the free movement of capital cannot be justified by any overriding reasons of purely economic nature such as the need to preserve the cohesion of the tax system (see CJEU, *Staatssecretaris van Financien v. B.G.M. Verkooijen,* C-35/1998, Judgment of 06 June 2000, EU:C:2000:294, at para. 48) or the safeguard of the financial interest of the state (see CJEU, *Commission of the European Comminities v. Portugal*, C-367/1998, Judgment of 04 June 2002, at para. 52).

642 ECtHR, *N.K.M. v. Hungary*, Judgment of 14 May 2013, Appl. No. 65529/2011.

643 *Ibid*, at para. 28.

644 ECtHR, *Sulcs v. Latvia*, Decision of 06 December 2011, Appl. No. 42923/10, at para. 25.

645 ECtHR, *Khoniakina v. Georgia,* Judgment of 19 November 2012, Appl. No. 17767/08.

a result, the amount of the applicant's old-age pension benefit was reduced. The government used the justification of facing a budget deficit.[646] The ECtHR accepted the government's argument and regarded that the amendment pursued the aim of maintaining the sustainability of the public budget, which is a legitimate aim, thereby rationalising public expenditure.[647] Furthermore, in the case of *Lakicevic and others v. Montenegro,* the government suspended the old-age pension benefits of the applicants, on the grounds that they were working part-time.[648] The ECtHR accepted that the suspension pursued the legitimate aims of securing social justice and the state's economic well-being, on the grounds that the notion of "*public interest*" is extensive, in the sense that the decision to enact laws concerning pensions or welfare benefits involves consideration of various economic and social issues.[649] The aim of the state's economic well-being was also identified as a legitimate aim by the ECtHR in the case *Hoogendijk v. The Netherlands*.[650] In this case, the applicant lost her entitlement to disabled benefits because of the introduction of the "*income requirement*" as a new statutory condition for entitlement to such benefits. The ECtHR found that this measure pursued a legitimate aim for the purposes of protecting the state's economic well-being.

Taking into consideration the above mentioned ECtHR's jurisprudence, it appears that the ECtHR chose a different level of judicial activism, dependent on the importance and severity of the subject-matter at hand. Its judicial review ranged from a more rigid public interest review in cases of state's privileges in civil law procedure to a less intensive judicial activism in cases of social policy matters. In cases of recovery of tax-liabilities and old-age pension benefits' reductions, the ECtHR adopted a more conservative approach when determining the depth of its review, since they involve political, economic and social considerations.

The ECtHR' jurisprudence after the emergence of the Greek economic and financial crisis was also conservative in nature, giving strong weight

646 *Ibid*, at para. 62.
647 *Ibid,* at para. 76.
648 ECtHR, *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. Nos. 27458/06 etc., at para. 68.
649 ECtHR, *Lakicevic and others v. Montenegro,* Judgment of 13 March 2012, Appl. Nos. 27458/06 etc., at para. 61.
650 ECtHR, *Hoogendijk v. The Netherlands,* Decision of 06 January 2005, Appl. No. 58641/00.

to the existence of a severe fiscal crisis and the conditionality imposed by the international creditors. Both factors influenced the rationale of the ECtHR's jurisprudence underlying the idea of urgency. In the cases *Koufaki and ADEDY v. Greece*[651] and *Da Conceição Mateus and Santos Januário v. Portugal,*[652] the ECtHR had to decide on the restrictive measures that Greece and Portugal had to undertake in the framework of the implementation of the economic adjustment programmes imposed by the EU and the IMF. Both cases concerned the first round of reductions in the old-age pension benefits applied to public servants. In the Greek case, the applicants, an employee of the public sector and ADEDY, which is the civil servants' confederation, sought judicial review before the ECtHR for the reductions in the first applicant's remuneration and in the salaries and the pensions of the second applicant's members. The ECtHR, taking into consideration the decision of the Council of State,[653] ruled that the adoption of these measures were justified by the exceptional financial and economic crisis in Greece, which is unprecedented in the recent history of the country. Similarly, in the Portuguese case, the ECtHR accepted that the disputed austerity measures were justified because of the unprecedented financial and economic crisis, which was indicated by the fact that an economic adjustment programme of great magnitude had been put in place.

Turning now to the Greek jurisprudence, the Greek courts declared prior to the crisis that the mere fiscal interests of the state do not constitute a legitimate aim that could justify a restriction of a constitutional right.[654] More particular, the Court of Audit ruled that the unfavourable indexation of the old-age pension benefits of the pensioners employed in pedagogic institutes, which pursued the aim of a decrease in public expenses so that Greece may enter the EMU, did not pursue a legitimate aim; this was on the grounds that it exclusively concerned the fiscal policy and the fiscal interests of the country, which could not justify the restriction to Article 1

651 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 07 May 2013, Appl. Nos. 57665/12 etc.

652 ECtHR, *Da Conceição Mateus and Santos Januário v. Portugal,* Decision of 08 October 2012, Appl. Nos. 62335/12 etc.

653 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012.

654 I.e. Court of Audit, Judgment of 30 May 2002, No. 674/2002, Judgment of 19 January 2004, No. 27/2004; Council of State, Judgment of 12 October 2009, No. 3072/2009.

of the First Protocol.[655] Moreover, the Court of Audit did not accept the mere fiscal interests of the state as a legitimate aim in the case of reduction in the old-age pension benefits of the retired judges by altering the indexation of their pensions.[656] The Court held that the acknowledged claim of the pensioners to the indexation of their old-age pension benefits according to the increase of the salaries of their colleagues in service interferes with Article 1 of the First Protocol, and that interference was not justified on grounds of fiscal interests. This is because the necessity of fiscal interests as an aim set out in the explanatory report on the law was very general and indefinite, given that no actuarial, statistical and comparative data was mentioned that could explain and analyse the real occurrence of the state's fiscal interests. The necessity of actuarial data was also declared in the case of unfavourable indexation of the old-age pension benefits of the university professors, where the same court stated that a mere reference to fiscal interests of the state in the explanatory report was not adequate to justify reductions.[657]

Furthermore, the Greek jurisprudence ruled that the fiscal interests of the state may not constitute legitimate grounds of public interest, when no other reasons of public interest co-exist with such fiscal interests; the further reasons must also be derived from the text of the law itself or from the explanatory report. One illustrative example of this is the case law concerning the special contributions of pensioners that flowed into the public pension funds.[658] The special contributions were introduced by Article 20 of the Law No. 2084 of 1992 and were then increased by Article 26 of the Law No. 2592 of 1998.[659] These contributions were challenged before the Court of Audit. The judicial review of the Court of Audit was limited to the existence of a legitimate aim. The court took the aim defined by the legislature in the explanatory report on the Law No. 2084 of 1992 as reference point, since the explanatory report on the Law No. 2592 of 1998 did not make any reference to the aim pursued. The court held that the only aim derivable from the explanatory report was the fiscal interests of the state. The latter aim was not declared as legitimate ground of public inter-

655 Court of Audit (Plenary Session), Judgment No. 730/2006.
656 Court of Audit, Judgment No. 550/2000; Judgment No. 1317/2001.
657 Court of Audit, Judgment of 30 May 2002, No. 674/2002.
658 Court of Audit, Judgment No. 36/2006; Judgment No. 1562/2005.
659 Law No. 2592 of 1998, Official Gazette of the Hellenic Republic 57/A/18.03.1998.

est, since the fiscal interests of the state always exist in case of old-age benefit's reduction, while the existence of co-existing aims was rather essential. Although the legislature indeed defined certain co-existing aims of the measure, such as the maintenance of the favourable conditions for a pension entitlement,[660] the adjustment of the social insurance system to the new demographic and socio-economic changes as well as the sustainability of the social insurance system, the court, remarkably, did not accept that the introduction of the special contributions of pensioners pursued the sustainability of the pension system or the maintenance of the favourable conditions to pension entitlement as co-existing adequate legitimate aims.

After the emergence of the Greek economic and financial crisis and the signing of the first financial facility agreement with the international creditors, a shift of the Greek jurisprudence was witnessed. The financial crisis has brought the limitation of the public interest justification under review and has derogated from prior jurisprudence. This can be clearly witnessed in the case-law of Article 21 of the Code of Public Procedure, concerning the preferential treatment of the state towards individuals.[661] More particularly, before the crisis, the Council of State and the Court of Audit ruled that Article 21 of the Code of Public Procedure violated the right to equality as well as Article 1 of the First Protocol of ECHR.[662] Article 21 of the Code of Public Procedure provides that the rate of default interest payable by the state and public entities is four times lower than the rate of interest payable by private individuals and private entities. The Greek courts declared, before the crisis, that this differentiation in favour of the state could not be justified on the grounds of fiscal interests. However, after the outbreak of the financial and economic crisis, the Council of State declared that Article 21 was justified by the public-interest of ensuring the financial stability of the state. The court supported that the shift of its jurisprudence was due to the economic and financial circumstances that were different in relation to the situation of the public finances at the time

660 In particular, the maintenance of the required contributory period of 35 years.

661 Council of State, Judgment of 30 May 2011, No. 1620/2011.

662 Council of State, Judgment of 12 October 2009, No. 3072/2009, Judgment of 15 November 2009, No. 3713/2010; Judgment of 04 October 2010, No. 3098/2010; Judgment of 25 October 2010, No. 3431/2010; Judgment of 23 June 2011, No. 1880/2011; Judgment of 29 June 2011, No. 426/2011; Court of Audit (Plenary Session), Judgment of 02 February 2011, No. 192/2011; (Plenary Session) Judgment of 02 November 2011, No. 2812/2011.

of the publication of the previous jurisprudence. The court explained that under the new economic and financial circumstances, the financial stability of the state was not identical to the mere public fiscal interests, since the state had to face exceptionally high public deficit and debt; which was something unprecedented in the modern history of Greece. Along the same lines was the jurisprudence of the Aeropagus. The Aeropagus ruled that Article 21 of the Code of Public Procedure pursued the legitimate ground of public interest, which was the protection of the property of the state.[663] Aeropagus held that, protecting the public property, the state was able to fulfil its duty to serve its citizens. On the conflicting judgments of the courts before and after the crisis (Court of Audit[664] and the Aeropagus[665]) concerning whether the fiscal interests of the state constitute a ground of public interest in cases of preferential treatment of the state, the Special Highest Court declared the legitimacy of the aim, on the grounds that this provision aimed to ensure the financial stability of the state by reducing the public expenditures and thus decreasing the public debt.[666] Similarly, in another case, the Council of State declared as constitutional the yearly 6 percent interests rate on the debt of the social insurance funds, because this measure aims the achievement of an urgent public interest, which is the protection of the financial sustainability of the state and of the state's property in a broad sense and of the social insurance funds' in a narrow sense.[667] Therefore, under the new economic circumstances, the fiscal interests of the state were defined as an overriding matter of public interest.

The changes in the Greek jurisprudence can also be witnessed in cases concerning the first round of old-age pension benefits reductions. While the Court of Audit held before the crisis that the aim pursued by the old-age pension benefits' reduction to reduce the public expenses was not legitimate, since it concerns exclusively the fiscal policy of the country; under the newly economic reality, the Council of State held that the reduc-

663 Aeropagus, Judgment of 15 June 2010, Nos. 1127-1128/2010.
664 Court of Audit (Plenary Session), Judgment of 02 November 2011, No. 2812/2011.
665 Aeropagus Judgment of 15 June 2010, Nos. 1127-1128/2010.
666 Special Highest Court, Judgment of 13 December 2012, No. 25/2012.
667 Council of State (Plenary Session), Judgment of 06 June 2014, No. 2115/2014.

tions in the old-age pension benefits pursued a legitimate aim.[668] The court ruled that the improvement of public finances through the reduction in public debt constitutes a reason of public interest besides the sustainability of the social insurance funds. The court justified this shift by claiming that the first round reductions in old-age pension benefits introduced by Law No. 3845 of 2010 and by Law No. 3847 of 2010 did not aim to satisfy the mere fiscal interests of the state, but instead to confront the urgent fiscal needs of the country as well as protect against an eventual economic collapse, since according to the legislature the Greek state was not able to serve its public debt and this could lead to the state's insolvency.[669] Obliviously, therefore, after the economic and financial crisis, the Greek courts did not require the criteria of proving the fiscal interests through statistical data or the co-existence of other legitimate aims besides the fiscal interests of the country.

Therefore, the current interpretation of the notion of fiscal interests appears to be an insurmountable hurdle for the current pensioners claiming protection. Under a severe fiscal crisis and its distinctive element of external pressure for strict monetary and fiscal policies in return for financial support, the notion of public interest was interpreted more broadly by the courts than in relation to ordinary times. A similar shift occurred in the jurisprudence of the Supreme Court of the United States of America in the context of the severe economic crisis of 1929 and the New Deal under the presidency of Franklin Roosevelt. Namely, due to the economic crisis of 1929 there was a shift of the Supreme Court from the emphasis on freedom of property, which dominated the Supreme Court for the half century, to a highly regulated welfare state, with the aim that the USA would face and thus survive its recession.[670]

The severity of the financial crisis created a graduation in the severity of the aim of the fiscal interests of the state, influencing the process of reviewing whether this aim pursed constituted a legitimate ground of public interest or not. The financial crisis legitimised the fiscal interests of the state as an aim. In normal times, restrictive measures, such as old-age pen-

668 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at paras. 34 and 35; Judgment of 13 October 2014, No. 3410/2014.

669 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012; (Plenary Session), Judgment of 02 April 2012, Nos. 1283-1286/2012.

670 For more information about the New Deal, the shift of the jurisprudence and its connection with the Greek crisis see *Geropetritis,* EfimDD 2011, pp. 460-472.

sion benefits reductions, could not have been invoked to merely serve the fiscal interests of the state and purely economic ends. In times of crisis, however, the aim of protecting the fiscal interests of the state was not seen as a mere aim to ensure the sustainability of public finances, but rather as a superior and urgent national interest aimed at the avoidance of an economic collapse of the country. Therefore, the effort to avoid the economic collapse as well as the fact that the contested provisions of domestic law sought to fulfil the requirements of financial facility agreements constituted exceptional grounds of justification which amounted to a situation of urgency. These two influential factors rendered the crisis as a situation of urgency, resulting in the legitimacy of the fiscal interests of the state following the doctrine *salus patria suprema lex esto*.

III. The Proper Functioning of the EMU

Another aim of the old-age pension benefits reductions is to remedy the situation of excessive deficit by securing the proper functioning of the EMU.[671] The Council of State accepted that the old-age pension benefits reductions introduced by Law No. 3845 of 2010 constituted essential measures for the common interest of the Member States of the EMU, which is the fiscal stability and discipline in the EMU.[672]

The proper functioning of the EMU demands from its Member States fiscal discipline and decline of public deficit so that economic growth and fiscal stability can be achieved. In light of this, the main question is who is actually legally competent to prescribe that fiscal discipline and reduction of public deficit serve the proper functioning of the EMU.

The answer lies on the fact that all Member States of the EU are legally competent to decide collectively on this policy direction. Strict fiscal policies were prescribed to all the Member States of the EU by their signing of the Treaty of Lisbon. These fiscal policies are defined in the consolidated versions of the Treaty on European Union (hereinafter: TEU) and the TFEU. More specifically, the obligation of fiscal discipline and balanced public budgets is derived from Article 3 of the TEU that proscribes the objectives of the Union and in particular, Article 3(4) TEU proscribes that

671 See Explanatory Report on the Law No. 3833 of 2010.

672 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35; Judgment of 23 October 2014, No. 3663/2014, at para. 22.

"*The Union shall establish an economic and monetary union whose currency is the euro*". Besides this, according to Article 4(3) of the TEU, the Member States must respect the principle of loyalty and take any measures to ensure the fulfillment of the obligations arising from the treaties. Member States shall thus refrain from measures which could jeopardise the attainment of the union's objectives. In this framework, Article 119(1) of the TFEU indicates that the economic policy of the Member States must be conducted in accordance with the principle of an open market economy with free competition, while 119(3) of the TFEU proscribes that the coordination of economic policies is to be founded on stable prices, sound public finances and monetary conditions and a sustainable balance of payments. Furthermore, Article 126 of the TFEU demands that "*Member States shall avoid excessive government deficits*" and Article 136 of the TFEU proscribes budgetary discipline obligations. This broad rule is supplemented by the Fiscal Compact, which requires the Member States to keep sound public finances respecting their fiscal discipline in order to keep balanced (or in surplus) public budgets with a lower limit of a structural deficit of 0.5 percent of the gross domestic product at market prices, price stability, general government debt below 60 percent of GDP and low long-terms interest rates.[673]

Therefore, all Member States of the EMU are legally competent to prescribe the policy direction of fiscal discipline, while this policy consists of common interest of the Member States, on the grounds that the proper functioning of the EMU is an objective of the EU. What remains questionable is whether serving the common interest of the proper functioning of the EMU is a legitimate national interest.

Under the notion of national interest fall the policies and choices of the executive and legislative power of a nation[674] that respect the general values of a democratic society, the national Constitution as well as the general principles of international law. The national interest is a policy notion that is interrelated with the national identity and the constitutional identity. The notion of common interest has a broader meaning. It is used to describe the genuine interests of the whole community, setting the funda-

673 Art. 9 in combination with Art. 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

674 *Bodenheimer,* in: *Friedrich*, (ed.), The Public Interest, p. 209.

mental values in the society.[675] It shall be understood as "*a consensus according to which respect for certain fundamental values is not to be left to the free disposition of State, individually or inter se, but is recognised and sanctioned by international law as a matter of concern to all States*".[676]

Generally, it is not unusual for the common interest of the community to conflict with the national interest of the Member State. One of the regular defences advanced by the Member States facing an action brought against them for failure to comply with EU's common objectives consists of the invocation of national public interest. For example, in an action against Italy for failure to fulfill its obligations relating to the freedom to provide services, the CJEU did not accept Italy's attempts to justify certain national restrictions on the grounds that they were necessary for the national interest.[677] The CJEU accepts only the legitimacy of national interests that express the same policy objectives of the EU. The legal claim that these policies contradict the economic interests of the Member State has not been accepted by the CJEU, except in a number of cases. For instance, a Member State is allowed to restrict the free circulation of goods when this restriction pursued the national interest of tax control, protection of health and of the consumers.[678] Moreover, the Court has declared that restrictions on the free movement of capital (through direct investment by means of shareholding or the acquisition of securities on the capital market) is justified by the legitimate national interest of safeguarding energy supplies in the event of a crisis.[679]

In order to define the notion of national public interest, the Council of State extensively and pointedly made reference to the legislation of the EU regarding the fiscal stability of the EMU. In other words, the Court defined the notion of national public interest through the means of this normative pattern of the EU legislation. This was precipitated by the fact that Greece as a Member State of the EMU is legally bound to defined com-

675 *Bell*, in: *Brownsword* (ed.), Law and the Public Interest, 1993, p. 30; *Bodenheimer*, in: *Friedrich*, (ed.), The Public Interest, p. 211.

676 *Weiss,* in: *Fastenrath / Geiger / Khan et al.* (eds.), From Bilateralism to Community Interest, p.406.

677 CJEU, *Commission of the European Communities v. Italian Republic,* C-439/99, Judgment of 15 January 2002, EU:C:2002:14, at paras. 27,33,28.

678 CJEU, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, C-120/78, Judgment of 20 February 1979, EU:C:1979:42.

679 CJEU, *Commission of the European Communities v. Kingdom of Belgium*, C-503/99, Judgment of 04 June 2002, EU:C:2002:238, at para. 46.

mitments, such as the fiscal stability and growth of the EMU and is thus required to regard its own national policies as a matter of "*common interest*".

The EMU represents a notable example of common interest, due to the very idea of economic integration. The EMU has created endogenous interdependence among its Member States, which became stronger after the crisis.[680] The creation of the EMU involves itself a transfer of national sovereignty to the Union itself. For instance, the Member States can no longer determine their own interest rate or their exchange rate policy. Economic policies in the field of taxation, borrowing, social policy and privatisation of public property remain, generally, within the competence of the Member States, but these fields of policies are subject to constraints indicated by the fiscal objectives of the EU. For instance, excessive increase in the domestic public pension spending, which constitutes a large part of the public budget, could endanger the proper functioning of the EMU. As the EMU has affected the core areas of its Member States, namely the monetary, fiscal and indirectly welfare policies, the proper functioning of the EMU has turned to depend on the diverging national public policies. Therefore, the common interest of the EU is strongly intercorrelated with the national interest, which is the economic growth of the domestic economy. The EMU seeks to encompass the national interests of its Member States collectively, seeking to protect mainly one of the common interests of the EU, which is the establishment of a successive economic and monetary union.

Against this background, Greece is legally obliged to respect and implement the common objectives, and therefore the strict and disciplined fiscal policies, of the EU and the EMU. The proper implementation of these objectives and policies constitutes a national, legitimate public interest in times of economic and financial crisis. This is on the grounds that, by doing so, Greece will remain a Member State of the EMU and thus use the Euro as its national currency. The governor of the Bank of Greece supported the idea that the economic effects of Greece exiting the EMU would be devastating for Greece. Should there be an new national currency, it depreciate 60 to 70 percent which would lead to hyperinflation; while additional austerity measures would still be necessary, because Greece's tax revenues would fall short of its public spending, thus creating

680 *Schimmelfennig,* Journal of European Integration 2014, p. 329.

primary deficit.[681] Simultaneously, an exit of Greece from the EMU would jeopardise the proper functioning of the EMU and the national economy of the other Member States, while the international credibility of the Euro could also be undermined.[682] Therefore, the proper functioning of the EMU constitutes a national interest, and is therefore able to justify reductions to public pension expenditures. The severity and urgency of the financial crisis, as well as Greece's lack of liquidity and urgent need for external financial assistance, plays a strengthening role in this context. The fiscal crisis created stronger pressures on Greece to fulfil its commitments geared towards the proper functioning of the EMU. Fulfilling the commitments in a rigorous manner should be conceived as fulfilling a legitimate national interest in times of public urgency, as it would be in order for Greece to stay in the EMU and therefore avoid an unorderly and uncontrolled default.

D. Concluding Remarks

Chapter four concluded that the financial crisis does not constitute a legitimate ground of public interest but a crucial factor that influences the importance of other legitimate grounds of public interest. The financial crisis and its distinctive element of conditionality impose that the need for restrictive measures during economic recession and in times of austerity may legitimise and upgrade the severity of the aims pursued. The more severe the financial crisis is, the more crucial a role it has in justifying the severity and importance of the aims pursued.

Legitimate grounds of public interest of the Greek public pension reforms and old-age pension benefits reductions were primarily the fiscal interests of the state and secondly the sustainability of the public pension system and the proper functioning of the EMU. These aims were defined by the Greek legislature in the explanatory reports on the laws that introduced the relevant measures and they became also subject of judicial review. The Greek jurisprudence as well as the ECtHR exercised judicial deference because of the severe fiscal situation of Greece and because any active judicial review could have negative consequences on the economic

681 *Provopoulos, George*, The Drachmae would be like in Hell, Newspaper Kathimerini, 2nd of January 2012.

682 *Proctor,* European Business Law Review 2006, p. 934.

policy of the state. The Greek courts as well as the ECtHR declared the legitimacy of the fiscal interests of the State as an aim of pension reforms, on the grounds that under the recent circumstances the reductions in public pension expenditures do not constitute mere fiscal interests of the state but a superior national interest; this being the ability of the state to avoid eventual economic collapse, which identifies the financial crisis as a national crisis. The recent Greek jurisprudence is contradictory to previous domestic case law, according to which the fiscal interests of the state does not constitute a legitimate ground of public interest, unless there are co-existing aims as well as comprehensive actuarial studies and statistical data proving exactly what the public fiscal interests are. The recent jurisprudence of the ECtHR is in line with its previous case law relating to reductions in social benefits, on the grounds that the ECtHR has always allowed a wide margin of appreciation for the Contracting States to define what falls under the notion of public interest.

The fact that the fiscal interests of the state were declared a legitimate aim by the Greek courts after the Greek economic and financial crisis shows, to a great extent, that the financial crisis actually constitutes the decisive factor on the legitimacy of the aim pursued. The financial crisis was the reason behind re-interpretation of the notion of fiscal interests being able to transform the fiscal interests of a state into a legitimate national interest, while in ordinary times the fiscal interests would not have been held as a legitimate aim for the restriction of pension rights. This shift may also be explained from the fact that the Greek crisis was not a temporary and usual crisis, but an exceptional one. The intensive public urgency leads further to the thesis that in times of intensive public urgency, the fiscal interests shall be regarded as legitimate ground of public interest. Its importance is further strengthened by the urgent need for external financial support and the element of conditionality, on the grounds that this financial support is dependent upon the proper implementation of stringent national fiscal and monetary policies. Due to the element of conditionality of the financial facility agreements, the recourse to the financial facility agreements between Greece and its international creditors became an important influential factor in examining the legality of the pension reforms. Accomplishing the fiscal targets set in the financial facility agreements with the Member States of the EMU and the IMF was due to the state's liabilities towards its international creditors and it was considerably important since it secured the continuing of the financing and the release of the next instalments.

Therefore, during economic turmoil and with the emerging need for financial assistance, the same aim was interpreted differently as a reason of public interest. They transformed the improvement of the public finances from mere fiscal interests to a national interest, vital for the substance of the state.

The same was observed in the case of the proper functioning of the EMU. In times of fiscal crisis that could put the EMU in jeopardy, it became an urgent and intensive need to undertake retrogressive pension reforms so that the proper functioning of the EMU is ensured. The imminent crisis and economic collapse of the EMU created stronger pressure on the domestic legislature. The domestic legislature felt more pressure on ensuring the proper functioning of the EMU in times of fiscal crisis, since this may protect against the economic collapse of the EMU and also the economic collapse of the Member State itself. Therefore, the identification of the common interest with the national interest was strengthened in times of urgent fiscal crisis, making the pursuit of the common interest a legitimate public interest.

The sustainability of the public pension system was also given exceptional gravity by the two factors of the financial crisis and the conditional external financial assistance, making the need to ensure the sustainability of the public pension system incredibly urgent. In this way, pension reforms ensuring the sustainability of the system became more than necessary. However, both factors did not play any role on whether the sustainability of the public pension system constitutes a legitimate aim or not. Prior to the crisis as well as after it, the Greek jurisprudence as well as the ECtHR's case law declared the legitimacy of the sustainability of the public pension system as a legitimate ground of public interest.

Chapter Five: The Principle of Proportionality as a Balancing Concept in Case-Studies of Pension Reforms

The aim of the present chapter is threefold: (a) to examine the legality of public pension reforms in restricting the pensioners' rights in times of financial crisis; (b) to draw conclusions concerning the effect of the financial crisis on the level of judicial protection granted to the pensioners' rights (is their judicial protection decreased in times of sovereign crisis?) and (c) to articulate a common model for the enjoyment of pensioners' rights in times of financial crisis. The common model is contextualised in terms of providing exactly the constitutional principles, standards and rules on dismantling the pensioners' rights in times of financial crisis that the legislature and the policy makers must respect and take into consideration when pension reforms are introduced and the old-age pension benefits are reduced due to lack of public resources.

To address comprehensively the aims of the present chapter, I chose the methodology of the case-study analysis. The case-studies presented contain a real situation and are deliberately chosen as examples of broader phenomena. In this way, the case studies make a contribution to a general knowledge of how to reform legal pension systems in times of financial crisis. One practical advantage of conducting a case study is that there is sure to be some interest in the findings for the reader. Using case studies as examples for reviewing the legality of public pension reforms in times of financial crisis, the reader may better understand how and what should be examined (applied legal provisions, aims pursued, and the principle of proportionality) in cases of pension reforms. So, by analysing the legal problems in this way, the issues may be better conceived by the reader and may help them to draw conclusions about the legality of the reforms. This is because the reader acquires sufficient information to understand problems and issues emerging through pension reforms by reading specific cases. Moreover, in the chosen case-studies the development of the case law is presented and so the development of judicial protection and the role of the financial crisis in this development can be witnessed. Lastly, from the whole case-studies it can be derived a common model that the legislature must respect when pension reforms are introduced. Unlike other disciplines, in law there is not a mathematical or statistic model to underpin our

research on the legality of pension reforms. However, through the methodology of case-studies, it is possible to articulate a common model by inspecting cases that cover a wide spectrum of reforms and draw analogies among the cases themselves. In consequence, a comparative analysis among the case-studies does not relate the cases to abstract theory, but simply enables the drawing of conclusions on how pension reforms must be introduced in order to be legal.

Against this background, chapter five is structured as follows: Section A provides general information on the principle of proportionality, which is a necessary introductory point for the case-studies. The chosen case-studies involve the use of the principle of proportionality as a balancing factor, in order to balance the urgency of pension reforms in times of financial crisis with the need to protect pensioners' rights. This is because the principle of proportionality provides an excellent guidance as to how the public pension reforms should be introduced. It assesses whether the way in which the reforms were adopted results in a proportional balance between the pursued public interests and the pensioners' rights. Next, section B examines the public pension reforms introduced in the period 2010-2012 in three different categories of case-studies: B.I concerns the old-age pension benefits reductions, in which the restriction of the right to property is examined; B.II concerns the reductions in pension benefits of high-income earners, in which the legality of the interference with the principle of equivalence is examined; and B.III refers to age discrimination cases, concerning measures of public pension reforms that caused a discriminatory effect, and so the principle of non-discrimination is examined. Lastly, the present chapter ends in section C with concluding remarks. It provides a thorough, overall view of the legality of pension reforms in times of financial crisis, which derives from all case-studies. In that context, the judicial development on the protection of the pensioners' rights is integrated.

A. The Principle of Proportionality

Justice and legality of legislative measures arise in the form of weighing the various concurring and conflicting elements of a case according to law and the Constitution. This means that the conflicting interests and competing principles are evaluated in such a way so that they find their best possible treatment and so, individuals must obtain the right proportion of

treatment they legally deserve.[683] A balancing or weighing process among different legal interests and object requires specific evaluation of all relevant normative and factual elements of a case in order to subsequently balance each of them.[684] These elements constitute the primary material of the reasoning on justice matters. After discerning the relevant elements of a case, then the legislative and judicative power should weigh them according to values of justice.[685] It is for the national authorities and the courts to accord the best possible treatment of the legal interests in collision by the best possible ordering of the values in interaction which come into play.[686] In this point, the principle of proportionality plays a major role. Legislating of judging are conscious human actions which as such entail the requirement of rationality of the means to the objective pursued.[687] Proportionality is a rule of rational behavior.

The principle of proportionality is a legal method used to review and control the constitutionality of the legislative and administrative measures by the courts. "*References to balancing or proportionality in judicial opinions figure in a context of legal argumentation in order to argue for or against a particular legal outcome, a specific doctrinal position or a more general understanding of the role of law and courts in society"*.[688] In other words, it is based upon the idea of rebalancing the interests made by the legislature and the administrative authorities. In addition, it is a kind of test with various parameters that determined the courts as to the circumstances in which it is permissible to limit rights.

The principle of proportionality requires a balancing test between the need to protect individual constitutional rights and the benefits of the restriction of those rights for the need to protect wider general interests.[689] Through the principle of proportionality the judicative power performs a balancing act whilst reviewing the legislative measures and therefore, it gains an important role in the final ruling of the constitutionality of the re-

683 *Sarmas*, The Fair Balance: Justice as an Equilibrium Setting Exercise, p. 148-149.
684 *Ibid,* p. 125.
685 *Ibid,* p. 140.
686 *Ibid,* p. 150.
687 *Ibid,* p. 133.
688 *Bomhoff*, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse, p. 21.
689 *Krause*, in: *Eide /Krause / Rosas* (eds.), Economic, Social and Cultural Rights: A Textbook, p. 154.

strictive measures. There are two main schools of thought that influenced the development of this principle: a. the principle of retributive justice (*justitia vindicativa*) and of appropriate distributive justice (*justitia distributiva*) and b. the notion of the liberal state, which holds that the state should restrict itself for the promotion of individual freedoms.[690]

The principle of proportionality has been primarily developed in German jurisprudence concerning the German administrative and constitutional law and from German origins, it has been expanded across Europe as well as across the countries with common law system (i.e. UK, Canada, South Africa, New Zealand) becoming a dominant tool for the judiciary to manage conflict between individual rights and public interests.[691] In German law, the principle of proportionality involves three steps.[692] The first step concerns the question of whether the measure is suitable for the achievement of this legitimate purpose. The second step concerns the necessity of the measure. In that step, it is examined whether the same legitimate purpose could be achieved by other, less restrictive means. The last stage concerns the principle of proportionality in a narrow sense. Not least because of the weak criterion of necessity, proportionality has taken on particular significance in the narrower sense.[693] It concerns the weighing between the need to protect the confidence of the holder of a right and the significance of the general interest.[694]

The ECtHR has developed the "*fair balance test*", in order to review whether the measures of the authorities of the Contracting Parties are compatible with the ECHR.[695] The "*fair balance test*" is inherent in the whole of the Convention.[696] It derives from the concept of democracy and the rule of law, which is a foundational value of democratic societies.[697] The

690 *Schwarze*, European Administrative Law, p. 679.
691 *Stone Sweet / Mathews,* Columbia Journal of Transnational Law 2008, p. 75.
692 *Becker / Hardenberg,* in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 112-113.
693 *Ibid*, p. 113.
694 BVerfGE 69, 272, 310.
695 For the historical development of the principle of proportionality by the ECtHR see *Rupp-Swienty,* Die Doktrin von der Margin of Appreciation in der Rechtssprechung des Europäischen Gerichtshofs für Menschenrechte, pp. 19-23 and 31-37.
696 *Christoffersen*, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, p. 31.
697 *Ibid*, p. 195, 197.

ECtHR provides that a fair balance should be kept between the general interests of society and the need to protect the human rights guaranteed in the Convention.[698] In this regard, the achievement of a fair balance requires an approach based upon considerations of proportionality. The requirement that there must be a reasonable relation of proportionality between the means employed and the aim sought to be realised is expressed by the notion of a "*fair balance*".[699] This balance is kept when the individual does not bear an excessive and disproportionate burden.[700]

The ECtHR has not specified under which circumstances an individual bears an excessive and disproportionate balance in cases of social benefits reductions. It is ripe for legal consideration whether an excessive balance takes place when a reduction of a social benefit is too high; do the level of reduction does not lead to an excessive burden because of the character of the social security system that is influenced by social and fiscal policy as well as by financial considerations.[701] When applying the fair balance test, the ECtHR concedes a wide margin of appreciation to a state. For example, in *Koufaki and ADEDY v. Greece*, the reduction in the value of pension benefits adopted in response to Greece's economic crisis was held to comply with Article 1 of the First Protocol taking into account the respondent state's wide margin of appreciation.[702] However, the ECtHR has declared in some cases that a fair balance has not been struck, taking a number of factors into account. Delay, unpredictability and inconsistency in the exercise of the state's power to interfere with rights have all been evidence that the measures adopted by the state have led to a disproportionate interference with rights.[703] For example, in *Klein v Austria*, the ECtHR held that the fair balance requirement was not met when a lawyer forfeited his entitlement to an old-age pension, to which he had contributed for

698 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. No. 2033/04 etc., at para. 91.

699 *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 14.

700 *Grabenwarter / Pabel*, Europäische Menschenrechtskonvention, p.507.

701 *Schmidt*, Europäische Menschenrechtskonvention und Sozialrecht, p. 97.

702 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 7 May 2012, Appl. Nos. 57665/12 etc.

703 I.e. ECtHR, *Klein v Austria,* Judgment of 3 June 2011, Appl. No. 57028/00. See also *Harris / O'Boyle / Bates,* Law of the European Convention on Human Rights, p. 884.

many years, when he lost his right to practice law because of bankruptcy proceedings against him.[704]

As far as the disproportionate burden is concerned, the principle of reasonableness is applied. Namely, if the Court finds that a reasonable balance has been kept by the national authorities then it is considered that the national authorities have acted within their power.[705] An unreasonable balance exists when the right of the individual to derive benefits from the social security system is restricted in such a manner that it results in the impairment of the essence of his or her pension rights,[706] or unreasonableness may be declared, for instance, when the minimum existence's limit has been exceeded.[707]

However, in social policy cases and especially when the ECtHR comes to decide upon reductions in social benefits because of financial difficulties of the state, the Court rarely finds an unreasonableness in the undertaking of the measure. It exercises loose judicial scrutiny by providing a wide margin of appreciation to the states. In that context, the ECtHR provides the Contracting States a wide margin of appreciation concerning the review of the general interest and the balancing process[708] as well as in evaluating the consequences of the restrictive measures.[709] The margin of appreciation provided by the ECtHR to the national authorities takes the

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704 ECtHR, *Klein v Austria,* Judgment of 3 June 2011, Appl. No. 57028/00.

705 *Arai-Takahashi*, The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR, p. 14.

706 ECtHR, *Asmundsson v. Iceland*, Judgment of 12 October 2004, Appl. No. 60669/00, at para. 39; *Wieczorek v. Poland*, Judgment of 08 March 2010, Appl. No. 18176/05, at para. 75.

707 For instance, in the case *Da Conceiçao and Santos v. Portugal*, the ECtHR declared that a total deprivation of entitlement resulting in the impairment of the essence of the right would lead to a disproportionate and excessive burden. See ECtHR, *Da Conceiçao and Santos v. Portugal*, Decision of 08 October 2012, Appl. Nos. 62235/12 etc., at para. 24.

708 ECtHR, *Handyside v. UK*, Judgment of 07 December 1976, Appl. No. 5493/72, at para. 48. In this case, it is formulated at para. 48 that: „*... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity in this context. Consequently, Article 10 § 32 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislature ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply laws in force*". See also *Schmidt*, Europäische Menschenrechtskonvention und Sozialrecht, p. 91.

709 ECtHR, *Agosi v. UK*, Judgment of 24 October 1986, Appl. No. 9118/80, at para. 52: "*In determining whether a fair balance exists ... the State enjoys a wide mar-*

form of a legal discretion which recognises that the state is better qualified to appreciate the particular situation,[710] given that "*in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the determination of the domestic policy-maker should be given special weight*".[711] Moreover, the Court does not evaluate whether the measures undertaken were the least restrictive measures available.[712] Therefore, the fair balance test provides less effective judicial review, taking into consideration the wide margin of appreciation that the national authorities enjoy. The approach of the ECtHR, that the restrictive measures of the national authorities remain with their discretion unless it is manifestly without a reasonable foundation, leads to the lowest level of judicial scrutiny and the principle of proportionality is thus devalued.

In Greek law, the principle of proportionality is foreseen and guaranteed in Article 25(1) of the Greek Constitution. It sets out the legal framework for constitutional rights' restrictions. It provides that the legislative power may restrain the constitutional rights, having a wide margin of appreciation for discretion and balancing of interest, but it must adopt such laws that are proportional to the aim pursued, that must be of public or social interest. According to the Council of State, the constitutional principle of proportionality demands that the legislative measures should be suitable

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gin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question".

710 *Brownlie*, Principles of Public International Law, p. 575.

711 ECtHR, *Hatton and others v. UK*, Judgment of 08 July 2003, Appl. No. 36022/97, at para. 97; *Valkov v. Bulgaria*, Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 92.

712 I.e. ECtHR, *Mellacher and others v. Austria*, Judgment of 19 December 1989, Appl. Nos. 10522/83 etc., at para. 55: "*The 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 legislative discretion should have been exercised in another way …*". Exceptionally, the ECtHR introduced in the case *Hentrich v. France*, Judgment of 03 July 1995, Appl. No. 13616/88, at para. 47 the doctrine of the less restrictive alternative:"*the state had other suitable methods art its disposal for discouraging tax evasion … for instance take legal proceedings to recover unpaid tax and, if necessary, impose tax fines*".

and necessary for the aim pursued.[713] After the revision of the Greek Constitution in 2001, a third dimension was added to Article 25(1), namely, the "*stricto sensu proportionality*" or the balance between benefits and costs. The latter indicates that the more serious a restriction of an individual right is, the more severe the legitimate aim that it pursues should be.[714] Against this background, according to the recent Greek jurisprudence, the constitutional principle of proportionality demands that the legislative measures must be suitable and necessary to achieve the legitimate public and social interest, while at the same time they must not be disproportionate in a narrow sense with the aims pursued.[715]

Under the term of suitability, it is examined whether the respective measures were rationally related to the objectives of the legislature and could, at least on a theoretical level, achieve these objectives.[716] Proportionate lawmaking turns of efficiency on the choice of means, on the adoption of some plan of action that is capable of securing the ends for which one acts.[717] The empirical assumptions refer to the reliability or certainty of knowledge.[718] As a rule, the question of suitability is answered in the affirmative, when the measure may profoundly achieve the legitimate aims pursued except in cases where the legislature does not reflect "*a genuine concern to protect the public interest(s) in a consistent and systematic manner*".[719]

Under the term of necessity, it is examined whether any less restrictive measure was available in order to achieve with the same efficiency the legitimate aims pursued. In order to assess whether there were less restrictive available measures equally able to achieve the aims pursued, it has to

713 Council of State, Judgment of 18 September 2006, No. 2478/2006; (Plenary Session), Judgment of 04 November 2005, No. 3665/2005; Judgment of 25 February 2002, No. 534/2002.

714 *Chrysogonos*, Civil and Social Rights, p. 91-92.

715 See also Council of State, Judgment of 01 April 2002, No. 1006/2002; Judgment of 19 August 2003, No. 2110/2003; Aeropagus (Plenary Session), Judgment of 08 January 2003, No. 26/2003; Judgment of 20 February 2003, No. 10/2003.

716 Council of State, Judgment of 19 August 2003, No. 2110/2003.

717 *Ekins*, in: *Huscroft / Miller / Webber.* (eds.), Proportionality and the Rule of Law, p. 348.

718 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 11.

719 CJEU, *Criminal Proceedings v. Piergiorgio Gambelli and others*, C-243/01, Judgment of 06 November 2003, EU:C:2003:597.

be determined whether the domestic legislature had considered possible alternatives.

Lastly, under the term of proportionality in a narrow sense, it is examined whether the legitimate aims were more significant than the detriment to the right of the individual. One way of understanding proportionality analysis in the narrower sense is as imposing a "*rule of weight*" on the process of evaluating competing interests.[720] The element of proportionality in a narrow sense lies on the idea that if the benefits resulting from the restriction of the individual rights outweigh the cost, then the restrictive measure is economically and socially justified.[721] For the outcome of the proportionality sense in a narrow sense two elements play important role: the intensity of interference of the restricted individual right and the severity of the legitimate aim. When the interference is serious and the importance of the legitimate aim is light or moderate, then the restrictive measure is not proportional in a narrow sense and the principle of proportionality is violated. If both are serious then it is assessed in the third step whether the interference of the right is more serious than the importance of the legitimate aim pursued.

B. Case-Studies

The case studies presented are divided into three categories: reductions in old-age pension benefits, reduction in pension benefits of high value, and age discrimination cases. The precise reason for choosing these three different categories of case-studies is that they reflect three different legal norms: the right to property, the right to social insurance and the right to non-discrimination. In this way, these three categories of case-studies cover all important questions concerning the legality of public pension reforms. Namely, that the legislature must introduce pension reforms whilst respecting that the pension benefits are possessions (first category), whilst also respecting the principle of equivalence between the paid contributions and the pension benefits (second category) and also avoiding discriminatory measures (third category). Initially, each case-study identifies the legal problem to be solved. Then, the legal provision applied inherently in the

720 *Schauer*, in: *Huscroft / Miller / Webber* (eds.), Proportionality and the Rule of Law, p. 178.

721 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 614.

cases is examined. Next, the principle of proportionality is applied in order to balance the pensioners' rights with the need to introduce the specific reforms in times of financial crisis. By doing this I seek to deepen the understanding of the balancing process. Lastly, each case-study ends with problems and points for discussion documenting the results and ideas.

I. Reductions in Old-Age Pension Benefits

1. Reductions in Current Pensioners' Pension Benefits

The old-age pension benefits of the current pensioners were reduced progressively and gradually through a number of legal provisions within the crisis period 2010-2012, as specified in chapter two.[722] In addition, the Greek legislature introduced retrospective reductions in old-age pension benefits, as they were operating before they entered into force in the Official Gazette of the Hellenic Republic.[723]

The reductions in the amount of the old-age pension benefits received by current pensioners' seem to amount to an interference with their possession. This is because pension reductions undermine the initial property status of the current pensioners by limiting the amount of their old-age pension benefits. As a consequence, questionable is whether the right to property is violated. To decipher the answer to this, firstly, it is addressed whether the right to property finds application. Namely, it is examined whether the current pensioners' old-age pension benefits fall under the concept of possession within the meaning of Article 1 of the First Protocol. If so, then, the legality of the restriction on the right to property in times of financial crisis is examined. For this examination, the principle of proportionality is used as a balancing concept. It is analysed whether the

722 I.e. Art. 3(10) and (14), Law No. 3845 of 2010; Art. 38, Law No. 3863 of 2010; Art. 44(11), Law No. 3986 of 2011; Art. 2(14a), Law No. 4002 of 2011; Art. 1(10a), Law No. 4024 of 2011; Art. 1, Law No. 4051 of 2012; Art. 1(B and IA), Law No. 4093 of 2012; Art. 1, Law No. 3343 of 2015.

723 I.e. Law No. 4002 of 2011 was published in the Official Gazette on the 22th August of 2011, while in Article 2(13) and (14), it was stated that the old-age pension benefits would be reduced retrospectively from the 1st August of 2011 onwards. Moreover, the Law No. 4151 of 2013 was published in the Official Gazette on the 29th April of 2013 and adopted the old-age pension benefits reductions from the 1st August 2012 onwards.

restrictive measure fosters a suitable and necessary solution to achieve the aims pursued (as described in chapter four) and whether this solution is proportional in a narrow sense with the aims pursued outweighing the public interests.

a) Application of the Right to Property

As described in chapter three, the right to a welfare benefit can be considered as a "*possession*" for the purposes of Article 1 of the First Protocol, in cases in which the beneficiaries have satisfied the legal conditions for the grant of the welfare benefit.[724] This was also recently ruled by the ECtHR in the case *Koufaki and ADEDY v. Greece.*[725] In that case, the ECtHR stated that the additional bonuses' abolishment (Christmas-, Easter- and holiday bonuses) introduced in Greece for pensioners under 60 years old, and the reductions in these additional bonuses for pensioners aged over 60 years old were considered to fall under the concept of "*possession*" of Article 1 of the First Protocol of the ECHR.

Besides, the Court of Audit in another case found the civil servants' old-age pension benefits to fall under the concept of possession of Article 1 of the First Protocol, on the grounds that they sufficiently acquired pension rights under domestic law.[726] This ruling concerned the L.A.F.K.A-case law (Logariasmos Allilegiis Foreon Koinonikis Asfalisis – Solidaridy Fund of Social Insurance) and constitutes an important step towards the recognition of the broad protection of old-age pension benefits under Article 1 of the First Protocol. The Court of Audit had to make decisions on reductions in the old-age pension benefits. In 1992, the Greek parliament adopted the Law No. 2084 of 1992, which *inter alia* introduced the solidarity fund L.A.F.K.A., with the aim of providing financial support to the social insurance institutions with financial deficits (Art. 67, Law No. 2084 of 1992). Financial sources of L.A.F.K.A. were *inter alia* special contributions of current pensioners' main and supplementary old-age pension benefits (Art. 60, Law No. 2084 of 1992). As a result, the old-age pension

724 ECtHR, *Rasmussen v. Poland*, Judgment of 28 April 2009, Appl. No. 38886/05, at para. 71.

725 ECtHR, *Koufaki and ADEDY v. Greece,* Judgment of 7 May 2012, Appl. Nos. 57665/12 etc.

726 Court of Audit, Judgment of 19 January 2004, No. 27/2004.

benefits of the current pensioners were reduced between 1 and 5 percent. The Court of Audit ruled that the introduction of this special contribution on civil servants' pension constituted a restriction of Article 1 of the First Protocol. Also, in a number of cases relating to unfavourable pension indexation of retired judges[727] and civil servants,[728] the Court of Audit ruled that the entitlement to an increased old-age pension benefit, reflective of the general monetary increases awarded to their colleagues in service, fall under the scope of application of Article 1 of the First Protocol. This is because this entitlement is an acquired right of the already retired judges and civil servants.

Subsequently, the old-age pension benefits of the current pensioners should be regarded as falling under the concept of possession within the meaning of Article 1 of the First Protocol. This is because the old-age pension benefits have already been defined and granted to current pensioners. The case under consideration is not related to cases where the state has a general obligation to provide old-age pension benefits of an adequate amount and the pensioners have a general expectation of a social benefit. In the case under consideration, the pensioners were already allowed the provision of a welfare benefit of a particular amount. The old-age pension benefits of the current pensioners were asserted under domestic legislation that stood at the time of their retirement. The old-age pension benefits had already been defined and calculated by the administration of the public pension funds, and the current pensioners had already fulfilled and satisfied all the necessary conditions required for a pension entitlement. Therefore, their right to the pension entitlement had already been realised and they had an established legal position creating a proprietary interest falling within the ambit of Article 1 of the First Protocol.

b) Reviewing the Proportionality of Pension Reductions

The right to peaceful enjoyment of the current pensioners' possession may be justified, if the principle of proportionality is fully respected. What is required is that the restrictive measure is adopted and applied according to the principle of proportionality. Namely, the pension reductions must be

727 Court of Audit (Plenary Session), Judgment No. 18/2004.
728 Court of Audit, Judgment of 30 May 2002, No. 674/2002.

suitable and necessary to achieve the aims pursued and there is a proportional balance (in a narrow sense) between the need of the protection of the individual right and the demands of the public interest. In this way, the principle of proportionality provides an excellent legal tool in order to examine the reduction in the old-age pension benefits of the current pensioners. It assesses how the legislature should introduce restrictive measures so that there is a proportional balance between the pursued public interests under the view of the financial and economic crisis and the right to property.

In the following part of this research, it is examined whether the current pensioners' old-age pension benefits reductions were suitable, necessary and proportional in a narrow sense to achieve the legitimate aims of the sustainability of public finances and public pension system, as well as of the proper functioning of the EMU. If the restrictive measure did not satisfy at least one of the three elements of the principle of proportionality, then the restrictive measure in question was not applied according to law. The following assessment is based on the socioeconomic conditions, the suitability and the impacts of the relevant reductions and the existence of less restrictive measures with equivalent effect.

aa) Suitability

The suitability of the measure is the first element that is subjected to the proportionality test. Under the element of suitability, it is examined whether the restrictive measure is reasonably related to the aims pursued and could, at least on a theoretical level, achieve these objectives.

On the one hand, the reduction in the old-age pension benefits of the current pensioners may reasonably achieve the sustainability of public finances as well as the sustainability of the public pension system, and subsequently the proper functioning of the EMU. This is because the old-age pension benefits reductions may reduce public expenditure on pensions and the expenses of the public pension funds. Consequently, the reduction in the public expenditures leads to reduction in the public deficit. The old-age pension benefits reductions of the current pensioners are directly related to the urgent need to balance the expenditures and revenues of the public budget and of the budget of the public pension funds, since the impugned provisions have a strong impact on the macroeconomic balances. Changes in the social insurance budget have an effect on the balance of

the entire public budget, due to the expenses of the social insurance funds being calculated in the expenses of the public budget, irrespective of the fact that the social insurance funds constitute legally independent public bodies.[729] The proper functioning of the EMU could also be reasonably achieved, since the public deficit would be decreased and the low public deficit constitutes one of the targets set for its proper functioning. Indeed, the result of the pension reductions in terms of sustainability of the public pension system show a decreasing trend for the public pension expenditures, which are projected to be reduced by 1.9 percent by the year of 2060.[730]

In that sense, the Constitutional Court of Latvia, deciding on the reductions in the public old-age pension benefits under the framework of its fiscal crisis and its commitment to the European Commission and the IMF, held that the reductions in the old-age pension benefits were suitable on the grounds that they may make it possible to balance the state budget.[731] Similarly, the Council of State ruled in its judicial ruling No. 668/2012[732] that the pension reductions are suitable to combat the crisis, given that it may contribute to a short-term reduction to the public deficit and improve the public finances in the long-run.[733] This judicial ruling concerned the first round of pension reductions that were introduced by Law No. 3845 of 2010 within the framework of the first Financial Facility Agreement accompanied by the first economic structural programme signed on May 2010. As it has been advocated above, in chapter two, the Law No. 3845 of 2010 reduced the Christmas-, Easter- and holiday bonuses for pensioners above the age of 60 years and abolished these additional bonuses for pensioners under the age of 60 years.

However, on the other hand, there is a widespread belief that the continuous fiscal retrenchment may not be a suitable remedy for a mass of debt, since it deteriorates economic growth.[734] The real GDP growth becomes

729 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.
730 *Simeonidis*, Social Protection and Labour 2016, p. 21.
731 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 29.2.
732 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.
733 *Ibid*.
734 *Deutschmann*, Economic Sociology_The European Electronic Newsletter 2011, p. 19.

lower, because the austerity policies "*contributed to depress aggregate demand growth*".[735] In this regard, the Council of State declared in the judicial ruling concerning the last-round of pension reductions, introduced in 2012 by Law No. 4051 of 2012 and No. 4093 of 2012[736] as well as in 2011 by Law No. 4024 of 2011[737] within the framework of the Second Financial Facility, that the respective restrictive measure proved unsuitable to achieve the improvement of public finances. This is because the same restrictive measure had been undertaken numerous times in the past in order to achieve the same aim, without success as the economic recession of the state continued growing.

Two different arguments can be thus observed in the jurisprudence of the Council of State. At the start of the Greek financial crisis, the court held the measures to reduce the public debt and deficit to be suitable, but two years after the wake of the crisis the same court ruled that the pension reductions were no longer suitable, since they had been used already and had failed to achieve the aims pursued. The argument of the Council of State in its first ruling, and the judicial ruling of the Constitutional Court of Latvia appear to be the more legally correct in their nature. When assessing whether the criterion of suitability has been achieved, it is not assessed whether the aims were previously advanced. The criterion of suitability only requires some degree of effectiveness, in the sense that there is some reliable empirical evidence that supports its ability to achieve the aims pursued.[738] The legislature enjoys thus the benefit of the doubt in this step of suitability determination, since the requirement of achievement of the aim could lead to a paralysis of the legislature.[739] In times of financial and economic crisis, and extremely limited financial resources, the benefit of doubt becomes more important. This is because in times of crisis there is greater empirical uncertainty about the results of the empirical assumptions. The outcome of the suitability test should thus depend on the reliability of the respective empirical assumptions.

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735 *Andini / Cabral,* IZA Policy Paper 2012, p. 5,7.

736 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015.

737 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2289-2290/2015.

738 *Christoffersen,* Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, p. 166.

739 *Gerontas,* EfimDD 2012, p. 722.

On the grounds that the outcome of the suitability test depends on the reliability of the respective empirical assumptions and some degree of effectiveness, for the suitability of the old-age pension benefits reductions to be confirmed, the legislature should define and evaluate the potential decrease in the public expenditures on pensions in GDP percent. The theoretical predictions of empirical evidence should be mentioned either in the text of the law or in its explanatory report. However, the Greek legislature did not empirically support the effectiveness of the restrictive measures, apart from the first round of pension reductions. The legislature specifically referenced the decreasing of the public deficit only in the explanatory report that introduced the first round of pension reductions; while in the other explanatory reports, there was no respective reference. More particularly, in the explanatory report on the Law No. 3845 of 2010, which was adopted within the framework of the First Economic Adjustment Programme for Greece, it was stated that the cuts to the sector wage bill, to pensions and a further increase to Value Added Tax (hereinafter: VAT) would assure a fiscal deficit of 8.1 percent of GPD by 2010; which would be a drop below 3 percent of GDP by 2011 and 11 percent by 2013. The legislature specified thus its expected empirical benefits, holding the pension reductions as a part of a general package of austerity measures. The public deficit reduction in GDP percent was specified with regards not only to the suspending of old-age pension benefits but to the overall general austerity policy and the structural reforms adopted in the context of the economic adjustment programme for Greece. In the other explanatory reports, the legislature merely referenced the general need to reduce the public deficit. For example, in the explanatory report on Law No. 3863 of 2010, it was only stated that the financing of the social insurance funds by the public budget was over 17 billion Euros that corresponded to 7.55 percent of GDP, and that should be reduced. The actual target of the reduction was not mentioned. Yet, a general reference to the economic difficulties of the state and the need to reduce the public deficit does not lead to a transparent exercise of the legislative power, while what is needed is a plausible assessment of the expected benefits.[740]

A plausible assessment of the impact of the respective measures was stated in more detail in the Economic Adjustment Programmes for Greece, and in the MTFS. For example, in the MTFS 2012-2015, the Greek gov-

740 *Becker,* ZVerWiss 2010, p.591.

ernment mentioned that the aim of the measures adopted by the Law No. 3986 of 2011 was the reduction of the general government deficit from 7.5 percent of GDP in 2011 to 2.6 percent of GDP in 2014.[741] One more example lies in the law No. 4051 of 2012, that introduced the old-age pension benefits reductions, as well as reductions to public salaries and to the administrative expenses. In the explanatory report on the Law No. 4051 of 2012, which was adopted in the framework of the Second Financial Facility Agreement between Greece and the Troika, no reference to empirical benefits was made. Yet, the European Commission on the Second Economic Adjustment Programme for Greece described that the programme was anchored on the objective of reaching a primary deficit of 1 percent of GDP in 2012 and a primary surplus of 4.5 percent of GDP in 2014.[742] Lastly, in the explanatory report on the Law No. 4093 of 2012, which was adopted within the framework of the MTFS 2013-2016 as well as of the Second Economic Adjustment Programme for Greece, it was mentioned that the aim of the measures was the primary surplus of the general government, while in the MTFS 2013-2016, it was specified that the aim was the primary surplus of the general government corresponding to 4.5 percent of GDP in 2016.[743]

What is questionable is whether the legislature can prove the suitability of a restrictive measure by providing the relevant empirical evidence in documents that were not issued by the legislature itself. This may be permissible considering the fact that there was a strong interconnection between the First or the Second Economic Adjustment Programme and the MTFS and the laws that adopted the restrictive measures. This is because, as it has been advocated in chapter one, the respective economic adjustment programmes were incorporated by the respective national laws that introduced the restrictive measures. Namely, the plausible empirical assessment in the documents, within the framework of which the laws were adopted, may be held as adequate documents that justify the suitability of the restrictive measures.

741 *Hellenic Republic*(2011a).
742 *EU-COM*(2012a) 94 final.
743 *Hellenic Republic*(2012).

bb) Necessity

The second step of the proportionality test concerns the criterion of necessity. It should thus be examined whether a less restrictive measure was available or at least whether the legislature did consider less restrictive measures to achieve, with the same degree of efficiency, the legitimate aims pursued.

The jurisprudence of the Council of State on the necessity of the old-age pension benefits reductions is not consistent. At the start of the Greek financial crisis, the Council of State declared that the first round of old-age pension benefits reductions is necessary on the grounds that the legislature had also undertaken other measures to decrease the public deficit and not only the reductions in old-age pension benefits.[744] The argument made by the claimants, that the same ends could have been achieved with less restrictive means, was thus not accepted. Similarly, the Council of State supported also that the second round of pension reductions was necessary, because the political aim of reducing the social public expenditures, could not have been achieved by choosing a less restrictive alternative measure since the further financing of the system would burden the rest of the population through further taxation.[745] By taking this approach, the court appeared satisfied from the fact that the pension reductions constituted part of a wider package of measures of economic policy and structural reforms.

However, the fact that the reductions in old-age pension benefits formed a part of a much wider legislative reform does not mean that the second step of proportionality should be left beyond judicial evaluation.[746] The court is still obliged to examine the necessity of the specific measures in question according to Article 25(1) of the Greek Constitution. This was supported by the Council of State concerning a case of reductions in the public salaries and old-age pension benefits of the retired officers and serving members of armed military and security forces that were adopted

744 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.

745 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014. In these cases, the Council of State remained stable to its previous jurisprudence and ruled the proportionality of the pension reductions introduced by Law No. 4024 of 2011 within the framework of the MTFS 2012-2015.

746 *Contiades / Fotiadou*, in: *Contiades* (ed.), Constitutions in the Global Financial Crisis, p. 33.

in 2012. In this case, the court ruled that the restrictive measures in question could not be justified simply on the grounds that they constituted part of a wider programme of fiscal consolidation, since this was a necessary but not adequate condition.[747] Similarly, the Council of State held that the last round of pension reductions were not necessary, since the legislature did not conduct a well-established study to examine the possibility of less restrictive measures.[748] The court supported that the absence of such an analysis may be justified in exceptional circumstances, such as when there is an imminent threat of an economic collapse of the country and the respective measures are adopted to prevent this threat. According to the court, under these exceptional circumstances, it is sufficient for the legislature to show that a severe threat exists and that there is a need for these specific measures to be adopted for the immediate confrontation of the exceptional situation; on the condition that the measures are not reasonably unsuitable and unnecessary and that there is no profound evidence that the pensioners are overburdened. Nevertheless, according to the same court, in the case of the last round of pension reductions the legislature had the time to conduct a well-established study, given that the insolvency of the state was not as imminent as it was in the beginning of the financial crisis and during the first round of pension reductions. In other words, the fundamental and basic measures of confronting the fiscal crisis had already been designed and undertaken in 2010, when the crisis broke out, and thus the legislature was not justifiable in failing to conduct a well-established analysis on possible alternative solutions because there was lack of time. Along the same line of argument there is also the decision by the Constitutional Court of Latvia, which held that the old-age pension benefits reductions were unnecessary on the grounds that the Cabinet of Ministers and the Saeima (the Latvian parliament) made hasty considerations about whether alternative measures were available.[749]

Although it seems that the jurisprudence of the Council of State has been totally changed in the course of the crisis, the court did not actually alter its jurisprudence by applying the element of necessity differently.

747 Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

748 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

749 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 30.2.2.

The court changed its prior jurisprudence on pension reductions by interpreting the element of emergency differently within the context of the new economic and financial situation of the state. As a consequence, the level of the severity of the financial crisis led to different outcomes. The court linked the necessity of a restrictive measure with whether the legislative power had the time to conduct a well-established analysis with respect to the pressure derived from the financial crisis, or whether it made superficial and hasty considerations concerning the extent of the reduction of the public deficit. It ruled that when the financial crisis is imminent and severe; the legislature is not obliged to conduct well-established studies before reducing pension benefits. This thesis leads arbitrarily to the conclusion that when there is an imminent financial crisis, no adequate alternative solutions may be carried out.

The Council of State moved away from this line of reasoning in another, more recent case concerning the reductions in lump sum benefits of the public sector adopted by Art. 2(6) of the Law No. 4024 of 2011 and Art. 1(IA.5) of the Law No. 4093 of 2012.[750] The Council of State ruled that the existence of an imminent financial crisis is immaterial as the conduction of actuarial studies is only deemed necessary and essential when the legislature reduced the pension benefits in favour of the sustainability of the public pension fund, whilst the conduction of actuarial studies are not necessary when the national legislature plans to introduce measures of fiscal natur.

Indeed, due to the high economic recession and the emergent pressure by the international creditors, any measure aimed at the decrease of the public deficit in the short term would appear to be carried out in a manner that was not thoroughly considered. For it is simply impossible for the legislature to carry out well-considered and well-analysed alternative solutions under pressure of time, without previous extensive economic and social research. However, the omission of the state in deciding to not search for alternative measures due to a lack of time, or because of the fiscal nature of the respective measures, should not be justified under extreme circumstances of a serious economic and financial crisis and the emergent need for financial support. The legislature was obliged to conduct a well-established analysis on the necessity and the extent of pension reductions before the wake of the financial crisis. According to Article 106(1) of the

750 Council of State (Plenary Session), Judgment of 17 March 2016, No. 734/2016.

Greek Constitution, the state shall plan and coordinate economic activity with the aim of safeguarding the economic development of all sectors of the national economy. This article thus obliges the legislature to conduct a specific, well-established and scientific analysis in order to plan the economic activity of the state, regardless of the fact whether the state faces a financial crisis or not. This obligation on the state derives not only from the Greek Constitution but also from Article 126 of the TFEU that demands that "*Member States shall avoid excessive government deficits*" and Article 136 of the TFEU that proscribes budgetary discipline obligations. Therefore, the obligation of the state to search for alternative measures in order to avoid excessive public deficits pre-existed the financial crisis and thus the legislature is not excluded from its obligation to conduct well-established studies.

Against this background, the reductions in the old-age pension benefits of the current pensioners introduced in the first, second and third round of the crisis are not necessary to achieve the aims pursued. This is because the legislature did not consider any less restrictive measures that could achieve the aims pursed with similar efficiency by conducting the necessary scientific research. The legislature should have conducted the appropriate well-established studies and considered alternative and less restrictive solutions before the crisis. The legislature is obliged, even in ordinary times, to carry out a comprehensively considered analysis of such major issues, taking also into consideration the fiscal imbalances on the public pension system and the demographical negative trends that pre-existed the crisis.

cc) Proportionality in a Narrow Sense

The third and last step of the proportionality test concerns the examination of the principle of proportionality in a narrow sense. In our case, the balance between the need to protect the right to peaceful enjoyment of possession of the current pensioners and the urgent need for ensuring the sustainability of the public finances and of the public pension system as well as the proper functioning of the EMU it is examined. In the following research, it is examined whether the importance of the legitimate aims pursued may outweigh the intensity of interference with the right to property. Namely, the proportional relationship is dependent on the proportionality between the way in which the reductions were introduced and the intensity

of the aims pursued. The assessment of the intensity of interference and of the importance of satisfying the legitimate aim is evaluated by a triadic scale with three levels: light, moderate and serious.[751] For instance, in cases of high amounts of reductions, which apply to a large part of population, the element of interference is serious. Therefore, the legitimate aims pursued must be also serious to be able to justify a severe interference with the right to property. This assessment is achieved by examining the particular characteristics of the situation and analysing how they are interrelating with each other.

The assessment of the intensity of interference with the right to peaceful enjoyment of the current pensioners' possession varies depending on the particular circumstances of the case and on the current pensioners' situation. The factors that are related to the severity of the restriction are those such as: the number of the persons affected, the duration of the restrictive measures, the level of the old-age pension reductions as well as the existence or not of counter-balancing benefits.

In the first year of the crisis, the legislature chose to abolish the Christmas, Easter and holiday allowances for all pensioners under the age of 60,[752] while in 2012, these additional bonuses were abolished for all pensioners, who receive old-age pension benefits irrespective of their pension income amount, apart from those who suffer from paraplegia and tetraplegia.[753] This restrictive measure has a broad scope, as it affects almost 90 percent of the population. The reductions of the second and third year of the crisis affected fewer pensioners. More particularly, the old-age pension benefits affected pensioners whose monthly amount of pension income did not exceed the amount of 2,500 Euros[754] or 1,400 Euros[755] or 1,700 Euros[756] or 1,200 Euros[757] or 1,300 Euros [758] or 1,000 Euros[759]. Therefore, it derives that the old-age pension benefits reductions affected all of the current pensioners who were receiving more than 1,000 Euros per month. To assess whether the old-age pension benefits reductions of the second and

751 *Klatt / Meister*, The Constitutional Structure of Proportionality, p. 78.
752 Law 3845 of 2010.
753 Art. 1, Law No. 4093 of 2012.
754 Art. 3(10), Law No. 3845 of 2010.
755 Art. 67, Law No. 3863 of 2010.
756 Art. 44(11), Law No. 3986 of 2011; Art. 2(14), Law No. 4002 of 2011.
757 Art. 1(10a), Law No. 4024 of 2011.
758 Art. 1, Law No. 4051 of 2012.
759 Art. 1(B and IA), Law No. 4093 of 2012.

third year affected an important percentage of the current pensioners, it is necessary to specify the number of the current pensioners imposed into sacrifices as a percentage of the total number of the pensioners that receive old-age pension benefits.

Reports concerning the number of pensioners of all public pension funds are not very comprehensive. A full statistic report for the entire Greek public pension system was first drafted in June 2013 and has since then been prepared on a monthly basis by the Ministry of Employment, Social Insurance and Social Assistance.[760] According to the first report of June 2013 the pensioners receiving old-age pension benefits amounting more than 1,000 Euros per month is 28.20 percent of the total number of pensioners, while according to the report of May 2014, the percentage was increased to 39.84 percent.[761] There is no comprehensive data for the years 2010, 2011 and 2012, when the old-age pension benefits reductions took place. However, taking into consideration the data from 2013 and 2014, it can be derived that the pensioners affected by the reductions correspond *circa* 30 percent of the total number of pensioners. The percentage is less than the half of the majority of the pensioners, but it still indicates the broad character of the measure.

Concerning the duration of the restrictive measure, it should be taken into consideration that the restrictive measure was not transitory. The legislature did not indicate that the reductions were applicable only within a specific period of time, like in the case of Portugal. In the case of Portugal, the Portuguese state reduced the public salaries and the old-age pension benefits only for a temporary period. The Council of State ruled that the first round of pension reductions was proportional, even if the undertaken measure was not temporary, because the aim of this measure was not only to temporarily confront the fiscal crisis but also to improve the public finances in the long run.[762] The criterion of the short duration of the measure's application was taken into consideration by the ECtHR, when the latter court examined the proportionality of public pension reductions introduced by the Portuguese state with the aim of reducing the public

760 *Hellenic Republic*(2013).
761 *Hellenic Republic*(2014a).
762 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.

deficit.[763] The ECtHR declared the affirmed proportionality of the aforementioned old-age pension benefits reductions, on the grounds *inter alia* that the restrictive measure was limited in time.[764] The fact that the Greek legislature did not specify whether the reductions have a temporary character indicates the permanency of the restrictive measure. The permanent character of the measure had negative consequences on the pensioners, producing continued and cumulative effects, setting the character of interference as severe.

Moreover, to determine the intensity of interference, the level of the old-age pension benefits reductions should also be taken into consideration. This criterion has been used by the ECtHR, in order to decide on the compatibility of the reductions with Article 1 of the First Protocol. The ECtHR has specified that pensioners do not suffer a disproportionate and excessive burden, at least to some extent, when they are not confronted with an actual decrease in their monthly payments and the level of decrease does not result in divesting the applicants of their only means of subsistence.[765] For example, in the cases *Asmundsson v. Iceland*[766] as well as *Bozic v. Croatia*,[767] the ECtHR found that the total deprivation of the applicant's entitlements leads to a disproportionate and excessive burden. The ECtHR will therefore declare disproportionality when a reduction leads to the total deprivation of the benefit or to the substantial divestment of the benefit. In a similar regard, the ECtHR has decided cases concerning reductions in public pensions and wages in times of financial crisis. More specifically, in the case of *Koufaki and ADEDY v. Greece*, the ECtHR considered that the reduction of the first applicant's salary from 2,435.83 Euros to 1,885.79 Euros was not of such a nature that it risked

763 ECtHR, *Da Conceiçao and Santos v. Portugal*, Decision of 08 October 2012, Appl. Nos. 62235/12 etc., at para. 28.

764 *Ibid.*

765 ECtHR, *Valkov v. Bulgaria,* Judgment of 25 October 2011, Appl. Nos. 2033/04 etc., at para. 97. In the case *Valkov v. Bulgaria*, the ECtHR declared that the applicants, being top earners among more than two million Bulgarian pensioners, could not be regarded as being made to bear an excessive and disproportionate burden as a result of the pension cap.

766 ECtHR, *Asmundsson v. Iceland*, Judgment of 12 October 2004, Appl. No. 60669/00, at para. 45.

767 ECtHR, *Bozic v. Croatia*, Judgment of 29 June 2006, Appl. No. 22457/02.

exposing her to subsistence difficulties incompatible with Article 1 of the First Protocol.[768]

With this regard, if one considers the old-age pension benefits reductions individually, the level the benefits were reduced was low and thus the level of interference is low or moderate. This is the case when we balance the loss of income of an individual position; for example, the case in respect of the reduction in the Christmas, Easter and holiday bonus. However, if we balance the overall losses of income by considering the total and final amount of reductions, the level of benefits was substantially high and thus the interference with the right to property is serious. This aspect was taken into account also by the ECSR, which decided that the separate reductions in old-age pension benefits, individually taken, may be recognised to be compatible with Article 12(3) of the ESC; but in individual cases, the cumulative effects of all these reductions detrimentally affected the standard of living for the pensioners, concerned, resulting in a significant degradation.[769] The Council of State took into consideration the respective decision of the Committee on the accumulative reductions introduced by the Greek legislature and ruled the constitutionality of the abolition and reduction in the additional bonuses of the current pensioners.[770] The court ruled that the Committee decided that only the accumulative reductions violate Article 12(3), while separate reductions are compatible with the charter, on the grounds that the separate reductions do not interfere with the substance of the right. For this reason the reduction and abolishment of the Christmas, Eastern and holiday bonus, examined separately from the other introduced following reductions, is constitutional.

With this in mind, the serious interference with the right to peaceful enjoyment of possession is affirmed on the grounds that the pensioners had their old-age pension benefits continuously reduced, while they were also confronted with increases of regular taxes as well as with the payment of

768 ECtHR, *Koufaki and ADEDY v. Greece*, Decision of 07 May 2013, Appl. Nos 57665/12 etc., at para. 45.

769 ECSR, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Complaint No. 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P) v. Greece*, Complaint No. 78/2012; *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, Complaint No. 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No. 80/2012.

770 Council of State, Judgement of 23 March 2015, No. 1031/2015.

new emergent taxes. For example, it should be taken into consideration the emergent tax on buildings powered by electricity,[771] the solidarity tax imposed on those having yearly income more than 12,000 Euros,[772] the fact that the tax free amount was reduced to 5,000 Euros of yearly income for those aged under 65 and 9,000 Euros for those aged over 65.[773] Furthermore, it should be taken into account that there had been a pay freeze of the old-age pension benefits for the years 2010-2014.[774]

The criterion of availability of compensation may also be used as a criterion for the examination of the intensity of the restriction. The ECtHR has assessed that a disproportionate burden was imposed when the applicants were not given the opportunity to claim for compensation.[775] In the context of our case, that jurisprudence means that the reductions in old-age pension benefits could have been rendered proportional, if counter-balancing benefits or compensation had been adopted. The Court of Audit has also previously declared that the introduction of direct counter-balancing financial assistance, to the current pensioners whose property is being restricted, is obligatory for the legislature.[776] Indeed, the criterion of compensation should play an important role in the examination of whether a measure is proportional or not. As counter-balancing financial benefits, the legislature could provide the pensioners with motivation to stay in employment rather than retiring, without using actuarial deductions of the pension income, in order to replace the loss of income as a result of the old-age pension benefits reductions. However, the legislature is not obliged to ensure a reimbursement to the pensioners in form of cash, since this would make little sense and would not have any effect on for the achievement of the reduction in the public deficit in times of economic and financial crisis and when the state is in a bail-out programme.

Therefore, the broad character of the measure, the fact that the interference with the pensioners' right was not limited in time, as well as the fact that the accumulative effect of the old-age pension benefits reductions

771 Art. 53, Law No. 4021/2011.
772 Art. 27, Law No. 3986/2011.
773 Art. 38, Law No. 4024/2010.
774 *IMF*(2010) 10/110.
775 ECtHR, *Stran Greek Refineries and Andreadis v. Greece*, Judgment of 09 December 1994, Appl. No. 13427/87; *Holy Monasteries v. Greece*, Judgment of 09 December 1994, Appl. Nos. 13092/87 etc.
776 Court of Audit, Judgment Nos. 36/2006; 1562/2005; 27/2004.

were adopted within a short period of time all lead to a serious interference with the right to peaceful enjoyment of current pensioners' possession, having negative and crucial consequences on their lives. The lack of counter-balancing financial benefits is not particularly decisive in times of financial and sovereign crisis.

If we balance the reductions in old-age pension benefits individually, the interference to the right to property may be light or moderate. This is because they corresponded to a lower total amount of reduction. To assess whether the interference is light or moderate, other criteria must be taken into consideration. For example, if the pension benefits separately affected a low percentage of pensioners, then the interference is light and if the effects correspond to a large percentage of pensioners, then the interference is moderate.

The next step is to determine whether the importance of the legitimate aims pursued corresponds to the level of seriousness or not. The intensive financial and economic crisis, as well as the urgent need for financial support, constitutes two important driving forces that influence the balancing process of the principle of proportionality in a narrow sense. Conflicting international obligations may not claim primacy over human rights obligations, but they might have an impact on the application of the principle of proportionality, since they define the importance of the goals of the measures that need to be justified as proportional.[777] Namely, these two driving forces result in an intensive external pressure by the international creditors to reduce the public deficit and thus the reduction of the public pension expenditures took place rashly and in the short-term. To determine the severity of the legitimate aims pursued, the financial and economic crisis, the fiscal imbalances of the public pension system as well as the conditionality of the financial facility agreements between Greece and the Troika should be taken into consideration. Epistemic reliabilities, such as statistics, actuarial studies and reports from the Greek Government and the international creditors also play an important role.

As it was mentioned in chapter four of the present work, the Greek financial and economic crisis which emerged late 2009 must be held as exceptional and urgent. First of all, Greece could not find financing through its own resources or in the international markets and this made the crisis

777 *Goldmann,* in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 91.

incredibly serious and intensive. Secondly, the public pension expenditures were excessively high, which endangered the sustainability of the public pension system. The public pension expenditures on cash benefits for old-age and survivors' pensions was 11.9 percent of GDP, in 2007, and 14.1 percent, in 2010,[778] while it was projected that spending on pensions would have been increased by 12.5 percent by 2060 under unchanged pension policies.[779] By 2009, a third of total pension expenditures could not be covered by the contributions and had to be covered instead by direct government grants. This was the reason behind much of the government borrowing leading to the financial crisis of 2009.[780] Thirdly, Greece had to face, for the first time in its history, exceptional pressure from its international creditors. The Troika repeatedly demanded public deficit reductions in return for financial support. In the context of the bilateral loan facility agreements signed on May 2010 and March 2012 between Greece and the Member States of the EMU, as well as the financial facility agreements with the IMF, the financial support was conditional upon successful implementation of the economic and financial policies that Greece would be reporting in the memoranda. These policies should aim at a reduction in the public sector expenditures and the improvement of the government's revenue-raising capacity; reforming the pension system and strengthening the fiscal network.[781] For instance, Greece, in conjunction with the international creditors, agreed that the general government deficit should be reduced to 3 percent of GDP by 2014,[782] while public expenditures cuts should be equivalent to 7 percent of GDP.[783] Because of the strong intercorrelation of the public deficit reduction with the reduction in the public pension expenditures, the reduction in the old-age pension benefits constituted an indirect conditionality criterion for the release of the financial assistance by the international creditors. If the fiscal targets for a public deficit reduction were not achieved, the Troika would be allowed to withhold the release of the financial support in instalments, after monitoring the programme in quarterly reviews through updated forecasts and with

778 *EU-COM*(2010) 61 final, p.21.
779 *Ibid*.
780 *Tinios,* KAS 2016, p. 04.
781 *EU-COM*(2010) 61 final, p. 14.
782 *IMF*(2010) 10/110.
783 *EU-COM*(2010) 61 final, p. 14.

respect of quantitative performance criteria.[784] A disapproval of the next release of the financial assistance would have devastating economic consequences for the substance of the state and thus for the whole population.

In light of the above, the two above described factors, namely: the severe financial crisis and the high public pension expenditures in combination with the exceptional pressure for financial support; erodes the principle of proportionality in a narrow sense making the severity of the legitimate aims pursued serious enough to be able to outweigh even the serious interference of the old-age pension benefits reductions. Namely, the risk of the economic collapse of Greece that would result from the disapproval of the international creditors to release the financial support makes the Greek economic and financial crisis a special situation of urgency, which may justify even serious interferences with the right to peaceful enjoyment of one's possession.

However, the element of the urgency of the crisis did not have the same level of intensity in all cases of old-age pension benefit reductions. A distinction should be made between the old-age pension benefits reductions introduced in the first year of the crisis (in 2010) and those introduced in the second (in 2011) and third year of the crisis (in 2012). The severity of the economic and financial crisis was far stronger in the case of the first-year reductions. The first-year reductions were undertaken under the emergent need to avoid the insolvency of the state. Greece has had to face severe fiscal imbalances. The gross government debt reached 115 percent of GDP and the net external debt almost 100 percent of GDP, while the general government deficit was 13.6 percent in 2009.[785] During this foundational reality, Greece had to avoid an imminent economic collapse of the country as well as an exit from the EMU, alongside staying on track with the First Economic Adjustment Programme. The aim of this first round of reductions was therefore not the mere reduction of the public deficit but the "*financial rescue*" of the state itself. In other words, despite the fact that the reduction to the old-age pension benefits was regarded as a measure for the sustainability of the public finances, this measure was not primarily taken because of financial reasons, but for the rescue of the state itself. The state undertook restrictive measures to fulfil its obligation towards its citizens to safeguard its existence, not only to overcome eco-

784 *Ibid,* p. 30.
785 *EU*-COM(2010) 61 final, p. 4; *IMF*(2010) 10/110.

nomic difficulties. The sustainability of the public finances was identified thus as a superior and urgent national interest precipitated by the emergent financial needs of the country and its lack of liquidity. This was made mainly obvious in the explanatory report on the laws that introduced the initial pension reductions. In the explanatory report on the Law 3845 of 2010, the legislature classified the public interest as national interest, using this to certify the importance and emergency of the economic situation of the country. In addition, the Council of State based the constitutionality of the initial pension reductions (reductions in the Christmas, Easter and holiday bonuses) on the overarching nature of public interest because of the urgent and difficult economic situation of the state.[786] In furtherance, an imminent and present exit from the EMU was more intensive in the first year of the crisis, making the legitimate aim of the proper functioning of the EMU rather serious.

As it was mentioned in chapter four, the lack of liquidity of the state and the subsequent need for the proper implementation of the agreements so as to secure the release of the external financial assistance were also repeatedly emphasised in the explanatory reports on all statutes that introduced reductions in the second and third year of the crisis. Indeed, in the second and third year of crisis Greece had to reduce its public deficit to combat the on-going economic recession and secure the further continuance of the financing by the Troika. More particularly, the old-age pension benefits reductions introduced in the second year of the crisis were undertaken for the proper implementation of the MTFS 2012-2015, while the reductions adopted in the third year of the crisis were undertaken for the proper implementation of the MTFS 2013-2016, the Second Economic Adjustment Programme and the Second Memorandum of Understanding signed on March 2012.

However, the level of severity of the legitimate aims was not the same as it was in the first year of the crisis. The Council of State, in its decision about the constitutionality of the last-round of old-age pension benefits undertaken by Law No. 4051 of 2012 and 4093 of 2012 ruled that the public interest was not as intensive as it was in the case of the initial reductions of the Laws No. 3833 of 2010 and 3845 of 2010 which were under-

786 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012. See also *Yannakourou*, in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 22-23.

taken to avoid the insolvency of the state.[787] Namely, the Council of State ruled that the reductions in the old-age pension benefits introduced in the year of 2012 were unconstitutional, since the fiscal interests of the state were no longer peremptory.

The risk of the state's default was imminent in the year of 2010, while, in the second and third year of the crisis, the economic collapse of the country as well as its exit from the EMU was not so imminent, since a solution for Greece has already been found at a European level as an economic adjustment programme had been put into place. This can be derived from the statement of the Eurogroup dated 21 February 2012, when it committed to provide adequate support to Greece during the life of the programme and beyond, until Greece should regain market access.[788] Therefore, the intensity of the legitimate aim changed during the course of the reductions in old-age pension benefits reductions. In the case of the reductions introduced in the second and third year of the crisis, the mere reason of securing the continuance of the external financing constitutes a less intensive legitimate aim in comparison to the avoidance of the economic collapse of the country in the first year of the crisis, since the latter was rather imminent.

With this in mind, the balance between the urgent need to reduce the public deficit, the sustainability of the public pension system and the proper functioning of the EMU with the reductions undertaken in the beginning of the crisis (the reduction or abolishment of Christmas, Easter and holiday bonuses) is proportional, because the intensity of the legitimate aims pursued was serious enough to outweigh moderate interference with the right to peaceful enjoyment of the current pensioners' possession. The interference is moderate despite of the fact that a large percentage of the pensioners were affected (90 percent of the current pensioners were affected). The interference is moderate because the reductions corresponded to a low amount of reductions concerning a yearly income, as opposed to a reduction of more frequently provided allowance.

Concerning the old-age pension reductions introduced in the second and third year of the crisis, if we take into consideration the overall loss of

787 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015. See also Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

788 Eurogroup Statement of the 21st of February 2012. Retrieved November 2014 from http://ec.europa.eu/danmark/documents/alle_emner/okonomisk/greece.pdf.

pension income through the cumulative reductions over the period of the crisis (2010-2012), it becomes apparent that the reductions are not proportionate. The accumulative effect of a number of old-age pension benefits reductions introduced in the second and third year of the crisis should be considered as a serious interference with the right to peaceful enjoyment of possession. This is because they resulted in a higher amount of loss of income and affected a moderate percentage of the pensioners (30 percent of the current pensioners were affected), while the intensity of the legitimate aims pursued was rather moderate, since the financial crisis in its second and third year of existence was not as urgent and imminent as it was in the first year. Therefore, the importance of the legitimate aims pursued was not serious enough to justify the serious interference with the right to peaceful enjoyment of the current pensioners' possession. However, if we take the reductions in pension benefits undertaken in the second and third year of the crisis into consideration individually, the balance may be held as proportional. This is because each pension reduction may lead to low income losses, while the legitimate aims pursued are moderate. For instance the interference with the right to property of the 6 percent reduction of old-age pension benefits amounting to between 1,700.01 Euros and 2,300 Euros[789] is light, since the amount of reduction is low while it affected a low percentage of current pensioners (14,8 percent of the current pensioners were affected).[790]

From the above, it is obvious that for a proper application of the principle of proportionality in a narrow sense, every further reduction in old-age pension benefits requires a further serious explanation that the reductions were proportional to achieve the aims pursued. Therefore, if there is to be further old-age pension benefits reductions affecting an even wider scope of the population, then the crisis should be more present and exceptional.

c) Respecting the Principle of Legitimate Expectations (Protection of Confidence)

Besides the fact that the reductions in current pensioners' old-age pension benefits must be reduced according to the principle of proportionality, the

789 Law No. 4002 of 2011.
790 *Hellenic Republic*(2013).

legislature is obliged also to respect the expectations of the current pensioners that their possession is protected, specifically their already allocated pension benefits. As it was described in the previous section, the current pensioners have acquired pension rights, since their old-age pension benefits, that fall under the concept of property, have been allocated by the administration through lawful administrative acts, providing clear details on the amount of pension payments to be made, according to the pension legislation that was in issue at the time of their retirement.

The essential function of the right to property is also to grant the citizen legal security with regards to goods protected under the right to property and to protect the confidence in property which is shaped by the constitutional law.[791] In this respect, the principle of legitimate expectations (or else the principle of protection of confidence) must take an autonomous shape, in regard to being separate from the property positions in property law.[792]The principle of legitimate expectations requires the striking of a balance between the need to protect the current pensioners' expectations that their old-age pension benefits would not have been reduced and the public interest at stake, which required the existing regulation to be changed.[793]

On the one hand, the pensioners should have planned their economic affairs with the reservation that their pension benefits may be reduced expecting changes in the law. They cannot argue that their reliance on pension legislation is sufficient, since the state has never claimed that pension law will not change. In addition, the principle of legitimate expectations does not provide any absolute right of continuance.[794] The beneficiaries cannot ignore the possibility that the rights which are in the process of being accrued to them may change over the lifetime, with regard to the fact that the right to a pension is strongly dependent on the available financial sources of a state.[795] They should be aware of the fact that the legislature

791 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 106.

792 *Ibid*.

793 *Lazaratos*, DtA Special Edition 2003, pp. 137-138; *Manitakis,* EfimDD 2009, p. 93; Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01,at para. 32.

794 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 118.

795 *Losanda / Menendez* (eds.), The Key Legal Texts of the European Crises – Treaties, Regulations, Directives, Case Law, pp. 704-705.

is allowed to change the pension system in accordance, for instance, to the economic and demographic challenges.

Furthermore, on the one hand, the pensioners could have predicted that the amount of their benefits is not absolute, since also in the past, already allocated pension benefits have been reduced. In a series of the Council of State's decisions, the court declared that reductions in old-age pension benefits were lawfully applied by the public entities.[796] Moreover, the existence, or absence, of a consistent system of administrative practice precedent must also be examined in that context. A series of administrative and legal practices show various instances of reductions in welfare benefits. In the past, the social legislature and administrative authorities reduced old-age pension benefits that had already been allocated. For instance, according to Article 67 of the Law No. 2084 of 1992, the amount of already granted old-age pension benefits was subject to future changes. Furthermore, under Article 2 of the Law No. 1276 of 1982,[797] all old-age pension benefits of typographers and graphic artists granted before the enforcement of the above legislation were amended according to the new unfavourable legislation.

However, on the other hand, the possibility of a general predictability of social security changes is not adequate and sufficient on its own to justify any reductions in social benefits. There is the need of the pensioners to plan their economic affairs and needs in reliance on the amount of the already allocated pension benefits. Therefore, it is rather essential for the legislature to strike a faire balance.

Next, a further examination of the reasons, that are regarded as grounds of justification.[798] To proceed further in a balance of proportionality, it should be specifically examined whether the expectations of the current pensioners that amendments of their old-age pension benefits' level would

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796 Council of State, Judgment of 22 April 2003, No. 1077/2003; Judgment of 23 May 2005, No. 1580/2005; Judgment of 07 July 2005, No. 2166/2005; Judgment of 13 March 2006, No. 734/2006; Judgment of 08 May 2006, No. 1306/2006; Judgment of 04 July 2006, No. 1967/2006; Judgment of 25 September 2006, No. 2573/2006; Judgment of 27 November 2006, No. 3470/2006; Judgment of 03 July 2007, No. 1931/2007; Judgment of 03 December 2007, No. 3410/2007; Judgment of 20 February 2008, No. 660/2008.

797 Law No. 1276 of 1982, Official Gazette of the Hellenic Republic 100/A/24.08.1982.

798 *Schlenker,* Soziales Rückschrittsverbot und Grundgesetz – Aspekte verfassungsrechtlicher Einwirkung auf die Stabilität sozialer Rechtslagen, p. 208.

not have taken place is outweighed by the need to secure the sustainability of the public finances and the public pension system, as well as to reduce the public expenditures on pensions for the proper functioning of the EMU.

The legitimate aims pursued by the first round of pension reductions in 2010 are of high importance because of the severe and unexpected financial crisis and the urgent need for financial assistance. Therefore, in the first year of the crisis, the severity of the legitimate aims pursued may justify moderate or light interference with the expectations of the current pensioners that their property would not be reduced. The level of consistency and stability in the reductions in payments allocated to current pensioners is crucial in determining whether the interference with the principle of legitimate expectations is light or moderate. In our case, it seems that in the first year of the crisis the interference with the principle of legitimate expectations is light. This is because after the outbreak of the financial and economic crisis and after the agreement of the financial assistance between Greece and its international creditors in 2010, the old-age pension benefits were reduced only once. Therefore, the severe legitimate aims pursed may outweigh the light interference and thus the pension reductions introduced in 2010 are proportional, meaning that the principle of legitimate expectations is respected.

However, this was not the case in the respective years of 2011 and 2012. As advocated above, the severity of the aims pursed in the second and third year of the financial crisis is moderate. The interference, however, with the principle of legitimate expectations is severe. This is because the legislature continued reducing already granted pension benefits. The old-age pension benefits of the current pensioners were reduced within the period 2011-2012 six more times without prior notification and the current pensioners had to face the insecurity and unpredictability of the law. As a result, the pension legislation on the calculation of the old-age pension benefits was being constantly amended. Also, due to the fact that the duration of the financial crisis was unpredictable, the current pensioners were confronted with the insecurity that their old-age pension benefits may be reduced again in the future. However, the specific administrative acts, upon which the current pensioners' pension benefits were reduced, did not provide that these social benefits were subject to future amendments. Consequently, the current pensioners were not aware of the specific amount that they would acquire in the following months. This unstable situation that resulted from the financial crisis increased the insecurity and

unpredictability of the law and it became difficult for the current pensioners to properly administer and plan their financial affairs. For instance, they were not given the sufficient time and information to start investing in private pension funds. The enacted legislation could have provided adequate time and space for the pensioners to re-organise and prepare their lives for the period of the financial crisis. The confrontation of the financial crisis had been put on a track in the second and third year of the crisis and the financial crisis did not threat the existence of the state itself, while the legislature had the time to conduct actuarial studies and find other structural measures reforming the pension system in order to reduce the public deficit and the deficit of the public pension funds.

Important aspects that could lead up to a light or moderate interference with the protection of the principle of legitimate expectations in the second and third year of the crisis, and thus in the proportionality of the measure, are the predictability and the consistency in the exercise of the legislative power relating to the manner in which the reductions could have been implemented. The principle of proportionality could have been protected and duly respected, while the same aims could have been achieved, if the pension legislation had been put in place that would foresee a yearly reduction in the old-age pension benefits within a specific period of time. Namely, if the legislature had adopted the restrictive measures based on a yearly basis, the interference with the legitimate expectations of the current pensioners would have been light, since their old-age pension benefits would have been provided in a more stable and foreseeable way. By this way the public deficit and the deficit of the public pension funds could have been reduced in the short-term through a yearly reduction of the public expenditures on pensions, while the pension reductions would have been more predictable. Subsequently, the pensioners would have the opportunity to amend their circumstances in time, having the chance to reorganise their affairs and to implement alternative means of arranging their finances.

Therefore, the balance between the need to protect the current pensioners' expectations that their pension benefits would not have been reduced with the need to reduce the public deficit and secure the sustainability of the public pension system as well as the proper functioning of the EMU has be kept respecting the principle of proportionality in the first year of the crisis. This is because in 2010 the pension benefits were reduced only once, while the need to reduce the public deficit was imminent and urgent because of lack of liquidity. However, the principle of proportionality has

not been respected in the second and third year of the crisis because of the cumulative pension reductions. The continuous and unpredictable way of reducing pension benefits constitutes a severe interference with the principle of legitimate expectations, since the need to achieve the grounds of justification could be have achieved by reducing the pension benefits on a yearly basis. In this way, the current pensioners would not have been left uncertain as to the specific amount of old-age pension benefits that they should receive.

d) Respecting the Principle of Equal Contribution to Public Charges

Besides the principle of proportionality and the principle of legitimate expectations, the legislative branch has in principle the discretion to enact laws that impose reductions in old-age pension benefits provided also that the legislature upholds the constitutional principle of equal contribution to public charges. In times of financial and economic crisis, when the stability of the national economy is endangered, each population group, including the pensioners, are obliged to contribute to the confrontation of the crisis. This derives from the principle of equal contribution to public charges guaranteed in Article 4(5) of the Greek Constitution. As advocated in chapter three, Article 4(5) promotes the equal contribution as a general principle. It allows the state to impose to citizens financial contributions in order to stabilise the national economy in favour of the public interest. However, the principle at issue imposes that the Greek citizens are obliged to contribute to public charges, under equal terms, namely in proportion to their means. Namely, it requires that the pension reductions should not lead to an unequal distribution of effort excessively differentiated, and should be equal to the current pensioners' means. Therefore, the legislature is obliged to distribute the contribution to the public charges among the population in an equal way,[799] which means that the participation of all population groups must be equally divided among them.

Ripe for legal consideration is whether the cumulative reductions in the current pensioners' pension benefits contradicts the principle at issue, on the grounds that the group of the current pensioners have suffered a

799 *Antoniou*, The Right to Equality Within and Over Law, p. 77.

greater degree of social sacrifice in favour of the public finances and the social insurance capital than other groups of the population.

The Council of State held that any unequal burden placed on specific categories of pensioners, through excessive reduction in their social insurance welfare benefits contradicts the Greek Constitution.[800] It held that the principle of equal contribution to public charges constitutes a constitutional limit imposed on the legislature when the latter reduces pension benefits and may find application in cases of continuous old-age pension benefits reductions; namely, current pensioners should be subject to the same burdens as all other groups of the population, and should contribute equally to the public charges.[801] For instance, the Greek jurisprudence ruled that the reductions in the public salaries of the judges as well as the military officers and other uniformed groups, contradicted the principle of equal contribution to public charges, on the grounds that in times of continuing economic crisis, it is not permissible for the burden of public charges to be placed continuously on the same category of the population, namely on the public employees.[802] It seems that the Greek court kept the same line of arguments with the Portuguese Constitutional Court, which declared that the suspension of the Christmas allowance and holiday bonuses for employees of the public sector, and for those that receive old-age pension benefits from the public social security system, violated the constitutionally enshrined principle of equality that requires the fair distribution to public charges, because no similar reduction was made to private sector pensioners.[803] However, in that sense, the principle of equal contribution to public charges may become in times of crisis a problematic legal tool for pensioners. The legislature may reduce the benefits of everyone

800 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012. See also *Chrysogonos / Kaidatzis*, EED 2010, p.859. However, the Council of State did not declare any unequal contribution in its first ruling No. 668/2012, since, according to the court, equal burdens were introduced to all groups of the population and not only to pensioners.

801 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 37.

802 Special Court of Article 88(2) of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013; Council of State (Plenary Session), Judgment of 13 June 2015, Nos. 2192-2196/2014.

803 Portuguese Constitutional Court, Judgment of 5 July 2012, No. 353/12. Retrieved February 2016 from http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html.

radically, including the private sector pensioners, without infringing the equality dimension. Yet, in this way, the principle of equal contribution to public charges may not constitute a legal tool for the protection of pensioners.

In order to examine whether the continuous reductions in the current pensioners' pension benefits violates the principle of equal contribution to public charges, it is important, for the legal scope of the issue, to define at first place whether the principle at issue finds application.

Similarly to the principle of equality, the principle of equal contribution to public charges is applied in relevantly analogous situations. The cumulative reductions in the current pensioners' pension benefits may introduce a certain level of differentiation. However, a differential treatment is permitted, as long as it corresponds to a difference in situations,[804] while a differential treatment is not permitted when there is a similarity in situations. Two or more categories are similar when the individuals, who belong in these categories, are under similar conditions.[805] However, the pensioners' conditions are not analogous to the conditions of other groups of the population. The fact that almost all groups of the population are affected by an economic and financial crisis does not mean that they are under the same or similar economic, working and living conditions. For instance, it is likely that those who are self-employed are in a better economic situation than the pensioners, and therefore less affected by the crisis. The self-employed is an economically active group of the population and may have greater chances on finding profitable occupation that may replace their loss of income, while the pensioners suffer a detrimental change to their finances not being able to find occupation besides retirement because of their healthy conditions or the trend of the labour market not to absorb old workers. Another example is that the pensioners are not under analogous situation with the farmers. The latter group does not have a consistent income as the pensioners do. Their earnings depend on weather conditions and the prices of their corps among other factors, which may be low in times of financial crisis. To this come that government subsidies are low when there is lack of public revenues.

In sum, the norm of the principle of equal contribution to public charges cannot be used as legal basis to those seeking legal avenues to

804 *Eichenhofer,* EJSL 2013, p. 171.
805 *Stergiou*, EDKA 2012, p. 327.

bring crisis-related challenges before courts. It is correct that in the context of the pursued economic and fiscal policy, the legislature should allocate the burdens of fiscal adjustment evenly upon all social groups, and avoid manifestly ill-proportionate encumbrance for specific groups. However, applying the principle of equal contribution to public charges in cases where the group of pensioners is compared with other groups of the population is legally ill-grounded. The

2. Reductions in Prospective Pensioners' Pension Benefits

The new pension legislation, as described in chapter two of this book, reduced the payment rates of the old-age pension benefits. The new, stricter eligibility requirements will result in the reduction of the duration of old-age pension benefit payments as well as the overall value of pensioners' future income. One example of the amendment to existing law is the increase to the age of retirement. More specifically, prior to the crisis, the pension age of men working in the private sector was 65 years, and for women it was 60 years. However, if they have completed a contribution record of 10,500 working days they could retire at the age of 58. The pension ages of civil servants and other privileged groups were much lower and diverse. However, after the crisis, Laws Nos. 3863 of 2010 and 3865 of 2010 set the pension age for all groups of the population at 65, and thus the pension age of civil servants was raised to 65 years. The increasing of the retirement age, that was introduced by Law No. 3863/2010 and 3865/2010 and published on the 15th and 20th of July 2010 respectively, is applied to all insured that fulfill all pension requirements after the 1st of January 2011. Subsequently, the increasing of the retirement age is not applied to the insured who have reached the retirement age according to the pension law in issue before the publication of the new pension law as well as to those insured that reached the more favourable retirement age until the 31st of December 2010, introducing in this way a six months transitional period. After two years, Law No. 4093 of 2012 raised the pension age even further for almost the entire economically active population from the age of 65 to the age of 67. The new age limits were adopted on the 12th November of 2012 and came into force after the 1st of January of 2013. Of significant interest is the fact that the two years increase to the age of pension eligibility (from 65 to 67) was legislatively passed with a

transitional period of two months (from the 12th November 2012 to the 31st December 2012).

In the following section, it is examined whether increasing the retirement age constitutes a restrictive measure resulting in reduction of property rights (a); and whether the legislature is obliged to introduce adequate transitional measures in order to protect the prospective pensioners' possession (b). The increasing of the retirement age was taken as an example of public pension adjustments, because it was introduced twice with overly short transitional measures providing subject for consideration.

a) The Increasing of Retirement Age as a Restrictive Measure

The disputed issue is whether the upward adjustment of the statutory retirement age is to be regarded as restrictive measure. On the one hand, the problem that arises by increasing the retirement age is that the prospective pensioners will be provided with old-age pension benefits for a shorter period of time which reduce the cash value of a prospective entitlement.[806] On the other hand, in spite of the fact that the heightening of the pensionable age decreases the duration of the old-age pension benefits and thus their value, the increasing of the retirement age cannot be linked to the right to property. This is because the pension age is not linked directly to the property of the prospective pensioners.

The prospective pensioners could have acquired property rights, if they could claim possession of legitimate expectations. However, as advocated in chapter three, it is unlikely that the prospective pensioners approaching the pension age have protected legitimate expectations to retire according to a previously obtainable and more favourable pension law, despite the fact that they may have contributed to the pension system over a long period. Unlike the case of current pensioners, who have fulfilled all pension requirements and thus have established property rights, the prospective pensioners have not fulfilled the pension requirements according to the pre-existing pension law but have premature legal positions; namely future property positions. The premature legal positions are thus not protected by the right to property. The prospective pensioners have not established pension rights according to the previous pension legislation, since they have

806 *Ruland*, DRV 1997, p. 104 f.

not reached the retirement age according to the pre-existing law before the publication of the new pension law. They do not rely thus on a lawful administrative act but on pension legislation that allowed the prospective pensioners to foresee themselves retiring at a specific age. Namely, their expectation to retire according to the pension legislation that would have been in effect, if the legislature had not adopted another, more unfavourable pension policy, is a mere hope to acquire pension benefits. However, as advocated in chapter three, expectation that is based upon a mere hope does not fall under the concept of possession within the meaning of Article 1 of the First Protocol and thus their future property positions do not deserve legal protection.[807]

Furthermore, the prospective pensioners cannot demonstrate that there is consistent prior case law of the national courts stating that pension bills are not subject to any change. As it has been advocated in chapter three, there is consistent national case law holding that the Greek legislature is allowed to adopt amendments to the substantive prerequisites required for a pension entitlement, or the formula of calculation that is applied to the labour force.[808] The Council of State has ruled that the legislature is allowed to alter the amount of old-age pension benefits in accordance with the conditions of that time[809] and that the legislature is not precluded from adopting measures in accordance with the current financial and social conditions; because if this were not so the result would be the substantial abolishment of the constitutionally guaranteed legislative power and its ability to plan the economic programme of the state.[810] In cases concerning unfavourable indexation of old-age pension benefits, the Council of State has continuously declared that the amendment of pension indexation for the future is not precluded.[811] Therefore, according to the Greek case

807 ECtHR, *Gratzinger and Gratzingerova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 39794/98, at para. 69; ECtHR, *Polacek and Polackova v. Czech Republic*, Decision of 10 July 2002, Appl. No. 38645/97, at para. 62.

808 Council of State, Judgment of 01 April 1993, No. 1740/1993, Judgment of 22 November 1999, No. 3739/1999; Judgment of 04 October 2000, No. 3127/2000; Judgment of 28 May 2001, No. 1867/2001, at para. 5.

809 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 34.

810 Council of State, Judgment of 13 October 2014, No. 3410/2014.

811 Council of State, Judgment of 22 November 1999, No. 3739/1999; Judgment of 05 December 2005, No. 4064/2005; Judgment of 14 January 2008, No. 158/2008, Judgment of 21 September 2009, No. 2685/2009.

law the legislature is allowed to alter the pension system i.e. by changing the method of calculating the benefits, or increasing the retirement age.

Illustrative of this approach is the case of an employee of the National Bank of Greece. She was a mother with underage children and would have been entitled to a pension under the previous pension regime after completing the contributory period of 15 years. Instead she would be able to retire after she had met the requirements of the new legislation (on reaching the age of 42 years).[812] The Council of State held that the applicant did not have a legitimate expectation to retire required under the old pension law. The Council of State held that the rise in the retirement age did not abolish any pension right, but only postponed the exercise of the pension right until the individual reached the new retirement age.[813]

Therefore, the prospective pensioners do not actually have a sufficiently legitimate expectation to successfully challenge the increase to the retirement age. The future property positions do not enjoy the protection of the right to property as established property positions do and so we cannot talk of interference with property rights. Subsequently, the reduction in the future property position of the insured does not constitute a restrictive measure.

The more correct thesis seems to be that the increasing of the retirement age is linked to the security function of the pension insurance, since it is more accurately said to be linked to the aim of the old-age pension schemes, which is to determine the age after which means cannot be acquired through work.[814] Indeed, the setting of age limits is constitutive for the question as to which age is commonly regarded as the point in the life-course where personal needs no longer have to be secured by way of a gainful occupation.[815]

The increasing of the retirement age may constitute a restrictive measure only in cases where the future beneficiaries have legitimate expectations, as advocated in chapter three. Namely, the pension value of current property positions is reduced and thus the increasing of the retirement age

812 Law No. 1976 of 1991, Official Gazette of the Hellenic Republic 184/A/4.12.1991.

813 Council of State, Judgment of 14 July 2006, No. 718/2006, at para. 8.

814 *Becker,* LVA Mitt. 2005, p. 238. A different approach has been stated by *Ruland*. See fn. 806.

815 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 112.

interferes with the property positions of the prospective pensioners only, when the latter have fulfilled the substantial requirements to a pension entitlement. More particularly, the prospective pensioners have legitimate expectations when they have reached the retirement age according to the pre-existing pension law and have generally fulfilled all requirements for a pension entitlement that was in effect before the publication of the law that amended the retirement age but have not applied and be provided with pension benefits before the publication of the new pension law. This group of prospective pensioners have established legal positions and thus mature expectations. Their expectations to retire according to the law in effect falls under the concept of possession, since their expectations to retire are not based on a mere hope. It concerns a legitimate expectation that fall under the scope of the right to property within the meaning of Article 1 of the First Protocol. Therefore, the expectation of this group of prospective pensioners must be protected by the legislature, because they have accomplished the prerequisites for pension entitlement and consequently they establish sufficient basis in national law, but chose to wok further instead of retiring.

The Greek legislature protected in our case the prospective pensioners' legitimate expectations and thus their property positions. The legislature correctly ruled that the new pension legislation is applied only to those insured who reach the retirement age after the publication of the new pension law. Namely, the new age limits introduced by Laws Nos. 3863 of 2010, 3865 of 2010 and 4093 of 2012 are applicable only to insured who have not reached the retirement age according to the pre-existing pension law until the 1st of January 2011 and the 1st of January 2013, respectively. In this way the insured who have reached the retirement age according to the pre-existing more favourable pension legislation may retire after these dates in accordance to the previous more favourable age limits. So, the insured that chose to work further even though they have fulfilled all pension requirements are protected. This legislative practice is legal and compatible with the constitutional provision of the right to property.

b) Do Prospective Pensioners have Legitimate Expectations that Transitional Measures will be introduced?

As it has been mentioned above, the retirement age was raised rather swiftly to the age of 65 in 2010 by Law No. 3863/2010 and then increased

from 65 to 67 by Law No. 4093/2012 within the transitional period of two months. Questionable is whether the prospective pensioners have a legitimate expectation relating to the manner in which the change was implemented, i.e. that a longer transitional period would have been put in place.[816]

In order to demonstrate that there has been a breach of their legitimate expectations that longer transitional measures would be introduced; the prospective pensioners must again demonstrate that their expectations are legitimate and, more particularly, that they relied on established case law. However, there is consistent previous case-law declaring that the non-introduction of a transitional period is lawful, and that the legislature is not obliged to introduce transitional periods for the protection of pension rights.[817] Thus, the pensioners' expectation will be met by claims that the expectation is a fetter on the wide margin of appreciation of the legislative power, and it is more difficult to recognise as legitimate the expectations of the prospective pensioners on the grounds that there is no specific case law which would appear to insist that some notice or transitional periods may be required in certain cases. In other words, if the expectations of the prospective pensioners to retire according to the pre-existing pension law were legitimate and thus protected under the right to property, then the legislature would be obliged to introduce transitional measures.

However, the consistent case law must be revised. The minority of the Council of State has held that the legislature is obliged to introduce transitional periods, so that individuals have the opportunity to adjust to their new economic situation.[818] This was also supported by the Court of Audit. The latter expressed the view in its advisory opinion for the Pension Bill No. 4093 of 2012 that the absence of transitional periods contradicts the principle of legitimate expectations (or protection of confidence).[819]

The prospective pensioners' expectation to retire under the previous and more favourable pension law should be protected through the introduction of transitional measures. Despite the fact that the expectations of the prospective pensioners are not legitimate, the legislature is still

816 For considerations on the same question see also *Dewhurst / Diliagka*, EJSS 2014, pp. 241-243.

817 I.e. Council of State, Judgment of 17 July 2006, No. 707/2006.

818 Council of State, Judgment No. 2346/1978.

819 Opinion of the Court of Audit on a draft law concerning the pension benefits of the public servants, 4th special sessions of the plenary, 31 October 2012.

obliged, not by the right to property but by the principle of legitimate expectations (or protection of confidence), to amend the retirement age through transitional measures. The main reason for this is that the legislature frequently amends and/or abolishes the existing legal order, while at the same time individuals have organised and planned their economic relationships and needs for the future based on specific legal situations and relationships,[820] but are then forced to reassess their plans in light of the pension reforms. This contradicts to the legal certainty that is derived from the principle of legitimate expectations (or protection of confidence). There has been some support for this in other jurisdictions. For instance, the Constitutional Court of Latvia ruled that the pension reductions did not comply with the principle of legitimate expectations, on the grounds that the legislature did not provide for the introduction of an adequate transitional period, which would have ensured a more reasonable balance between the confidence of the prospective pensioners and the public interest.[821]

In the case under consideration, the Greek legislature introduced too short transitional periods due to reasons of fiscal considerations, despite the fact that in the past the introduction of transitional periods was a legislative practice in cases of pension reforms.[822] The Greek legislature chose to introduce insufficient transitional periods (six and two months) so that a lower percentage of insured would be entitled to old-age benefits. Indeed, the urgent pressure of fiscal imbalances and the unsustainability of the public pension system constitute grounds of justification for insufficient transitional periods. However, the Greek legislature is still obliged to maintain a fair balance between the need to reduce the public deficit and the deficit of the pension funds with the need to guarantee a certain percentage of legal certainty and security to the prospective pensioners. The introduction of transitional periods constitutes a measure to keep a fair balance, while the financial crisis may not be a justification for the legislature not to respect the principle of legitimate expectations. The transitional measures could guarantee the legal certainty and predictability of the law,

820 *Tsatsos*, Constitutional Law-Part A: Theoretical Fundament, p. 231.

821 Constitutional Court of Latvia, Judgment of 21 December 2009, No. 2009/43-01, at para. 32.

822 For more details see *Angelopoulou,* in: *Becker / Pieters / Ross et al.,* (eds.), Security: A General Principle of Social Security Law in Europe, p. 180.

which is an essential characteristic of the principle of legitimate expectations, upholding the authority and the validity of the law.

It appears correct that the more unfavourable the new pension regulations are, the more adequate the transitional periods should be, so that the principle of the legitimate expectations is not excessively affected.[823] The introduction of transitional periods is essential so that the expectations of the prospective pensioners are not affected in a sudden and unexpected way.[824] If the law operates in this way, the prospective pensioners could be provided with the essential period of time to re-arrange their economic affairs to suit the new pension policy. This would allow the prospective pensioners to alter their current positions and prepare for a longer period at work.

In a democratic and social state, as Greece is, where rules are changed and have an impact on individuals' rights, there is a demand, in normal times as well as in times of a financial crisis, that provisions of social insurance are adopted in a stable and foreseeable way protecting so the pensioners' expectations; and thus the legislature may be legitimately expected to entertain the idea of the introduction of transitional periods or reasonable notice.[825] Legal certainty and predictability of law is very important in our modern society, so that citizens are able to rely on the constancy of a legal provision and plan with confidence their economic and social life. In this way, they may develop their personality under the rights granted by domestic law, while the financial crisis should not constitute an obstacle of legal certainty and predictability. Unexpected amendments and insecurity is permissible under the Constitution, but only under certain circumstances, such as in cases of war. However, as explained in chapter four, the Greek financial crisis constitutes an urgent situation which demands certain measures to be taken, such as the increasing of the retirement age for the reduction of the public deficit, but it does not constitute an emergent ground for derogation, thus suspending the Constitution and thus the constitutional principle of legitimate expectations (or protection of confidence).

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823 *Angelopoulou*, EDKA 2010, p. 911.
824 *Chrysogonos*, Civil and Social Rights, p. 565.
825 *Dewhurst / Diliagka*, EJSS 2014, pp. 241-243.

II. Reduction in Old-Age Pension Benefits of High Value

Up to this point, the old-age pension benefits reductions were challenged on the basis of constitutional provisions and principles, such as the right to property and the principle of legitimate expectations (or protection of confidence), which do not fall under the category of social rights. Under this section, the reductions in the old-age pension benefits are analysed on the basis of the social right to pensions.

The Greek legislature reduced the old-age pension benefits in accordance to their last gross pension income. The higher the pension income was, the more it would be reduced. As a result, the pension benefits of high value were reduced more than the pension benefits of low value. The reason for this was to protect the "*low-earnings*" pensioners accomplishing the principle of social solidarity. However, there are strong legal considerations that this legislative practice affects the principle of equivalence, which is a main characteristic of the Greek public pension system, deriving from the right to social insurance. To keep a proportional balance between these two principles is rather challenging. This is because it is difficult to differentiate between these two legal positions and difficult to clearly define their boundaries. Namely, on the one hand, the Greek legislature must protect the "*low-earning pensioners*" but on the other hand, the pension benefits should not be successively reduced to such an extent that the final pension income does not correspond to the level of living conditions that the pensioners were enjoying before retirement. In the following analysis, under B.II.1, it is analysed which legal position is protected in cases of reductions in pension benefits of high value; namely the principle of equivalence as an aspect of the right to social insurance. Then, under B.II.2, it is laid down that the principle of social solidarity is the main ground of justification for the different percentage of reductions in pension benefits. Lastly, under B.II.3, it is defined when the balance between the principle of social solidarity and the principle of equivalence should sway in favour of the one or the other principle. This is addressed by using two case-studies as examples.

1. The Principle of Equivalence as an Aspect of the Right to Social Insurance

The principle of equivalence implies that old-age pension benefits should be salary-related to the paid contributions.[826] Namely, there should be an assured equivalent relationship between the paid contributions and the provided benefits. It indicates that the level of benefits given to pensioners is to be applied unequally, on the basis of differing degrees of participation (through contributions) in the social insurance system. The higher the income or salary is, the higher the paid contributions should be and the higher the granted old-age pension benefits.

The principle of equivalence is a core element of the right to social insurance protected by Article 22(5) of the Greek Constitution.[827] This is because, firstly, the Greek public pension system aims to ensure that the beneficiary enjoys similar living standards before and after retirement.[828] Secondly, in the Greek public pension system, the old-age pension benefits are financed through the contributions of the employees and employers, and not through taxes. The Greek public pension system is built upon a tripartite basis, as explained in chapter two, while it is based on the PAYG system. The current employees finance the old-age pension benefits of the current pensioners according to their salary, while the old-age pension benefits of the current employees will be financed from the contributions of the future employees. Therefore, on the grounds that the pensioners have paid different rate of contributions, it is only just that they are provided with pension benefits equivalent to their paid contributions.

According to the Greek jurisprudence, the principle of equivalence does not, generally, enjoy constitutional consolidation.[829] Exceptionally, prece-

826 Council of State (Plenary Session), Judgment No. 2692/1993.

827 *Chrysogonos,* Civil and Social Rights, pp. 561, 568; *Contiades*, Constitutional Consolidation and the Fundamental Organisation of the Social Insurance System, p. 385; *Stergiou*, The Constitutional Consolidation of the Social Insurance System, p. 359; *Angelopoulou,* in: *Becker / Pieters / Ross et* al. (eds.), Security: A General Principle of Social Security Law in Europe, p. 157.

828 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015; see also *Stergiou*, EDKA 2012, p. 323.

829 I.e. Council of State (Plenary Session), Judgment of 27 November 2008, No. 3487/2008; Judgment of 28 September 2009, No. 2948/2009; Judgment of 10 June 2013, No.2266/2013; Judgment of 07 October 2013, No. 3412/2013; Judgment of 24 July 2014, No. 2646/2014..

dent in favour of the high-earning beneficiaries was created in a health care case[830] as well as in the case of the latest reductions of 2012.[831] In the health care case, the Council of State examined the granting of hospital and medical expenses to commercial naval officers. The social insurance fund of the navy covered 80 percent of the hospital and medical expenses of all the high-earning beneficiaries. This percentage is lower than the cover of hospital and medical expenses of the lower classes of naval crew that had proportionally contributed less. The court declared that an infringement of the constitutional principle of equivalence arose, due to the fact that a higher amount of social benefits for the same social risk was being granted to the beneficiaries that had paid less contribution to the fund, in comparison to those beneficiaries of the same fund that had paid higher contributions. In the case of the latest reductions of 2012, the Council of State gave a new dimension to the protection of the principle of equivalence. As advocated in chapter three, the court connected the principle of equivalence with the right to social insurance. The Council of State ruled that the right to social insurance guarantees a certain level of equivalence between the paid contributions and the provided pension benefits and the aim of this aspect of the right to social insurance is to ensure that the beneficiary enjoys similar living standards before and after retirement. Furthermore, the Court of Audit has also acknowledged that the principle of equivalence is a special characteristic of the public pension system.[832] More particular, the court noted that the reductions in the pension benefits of the public servants in 2012 have been introduced without respecting the equivalence between the salary of the public servants, when they were in service, and their final replacement rate, and as a result the characteristic of the pension system had been changed.

In sum, according to recent jurisprudence certain equivalence between the contributions and the old-age pension benefits has to be maintained. The legislature is allowed to reduce the already provided pension benefits, when it is comprehensively provided that in this way equivalent pension income to previous earnings is secured. Ripe for legal consideration is,

830 Council of State, Judgment No. 4837/1997.

831 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015.

832 Opinion of the Court of Audit on a draft law concerning the reductions in the pension benefits of the public servants introduced by Law No. 4093 of 2012, 3rd Special Session of the Plenary on 30.10.12.

when an equivalent pension income is secured and to what extent is the legislature allowed to reduce the pension benefits, so that the principle of equivalence is not affected. To keep the equivalent character of the pension benefits, the legislature should guarantee that the final pension income, as resulted after successive reductions, corresponds as far as possible to the level of living conditions that the pensioner was enjoying prior to retirement. In that context, the question of what falls under the term "*as far as possible*" remains open.

2. The Principle of Social Solidarity as a Ground of Justification

The aim of reducing the pension benefits of high value more than the pension benefits of low value is the protection of the "*low-earnings*" pensioners promoting the principle of social solidarity. The principle of social solidarity, besides the principle of equivalence, is another core element of the right to social insurance and the Greek public pension system. The Greek public pension system involves elements of solidarity. Its function was enacted in the 1950's to cover the risk of ageing through cash benefits and services. After the Second World War, key contributor to the Greek pension system became the principle of social solidarity, which can be witnessed through the social security bills No. 1846/1951 and No. 2698/1953[833] concerning the establishment of minimum pension income and No. 4169/1961, according to which farmers were covered through a compulsory scheme funded only through general taxation and not through contributions. Since the restoration of democracy in 1975, the elements of solidarity commanded further an important position in the Greek public pension system, providing a generous funding process and universal coverage. The state guarantees a fixed amount, not equivalent to contributions paid and the pension levels are not dependent on the range of insured persons or on the amount of contributions.[834] Furthermore, private sector employees would not be given lower old-age pension benefits payments,

833 Law No.2698 of 1953, Official Gazette of the Hellenic Republic, 315/A/10.11.1953.

834 *Börsch-Supan / Tinios,* in: *Bryant / Garganas / Tavlas* (eds.), Greece's Economic Performance and Prospects, p. 398.

even in the event that the employer did not make contributions that fully satisfied the legal requirements.[835]

Moreover, the principle of solidarity is an aspect of the principle of social state, which is promoted in Article 25(4) of the Greek Constitution. The latter constitutional provision indicates that *"The State has the right to claim of all citizens to fulfil the duty of social and national solidarity"*. Article 25(4) demands from the legislature to undertake general social policy measures, which promote the solidarity among pensioners and their social protection. Although the principle of social solidarity is an aspect of the principle of social state, its content may not be derived from the principle of social state. This is because the content of the principle of social state is general and vague.[836] The principle is too vague because the domestic courts have refused to engage with the principle over the years and generate jurisprudence. There is no case law that determines when the principle of social state is applied, so the content of the principle of social state cannot be derived from such. The Council of State displays a general prudence towards the principle of social state, and the national courts hesitate to resort to this principle, probably due to its general and ambiguous content.

The content of the principle of social solidarity may be derived from the Greek jurisprudence, since the latter has often resorted to the principle *a contrario* to the principle of equivalence. The Council of State has adjudicated that it is lawful for the legislature to financially burden those that receive the highest old-age pension benefits decreasing the gap between the pension benefits' level among the beneficiaries, in view of repairing social inequalities and elevating those less-advantaged in society, i.e. by setting upper limits on the amount of the old-age pension benefits.[837] In this way, the principle of solidarity indicates that the legislature is allowed, by virtue of the protection of the "*low-earnings*" pensioners to enact more favourable treatment for the economically weak persons that are socially

835 Art. 26(7), Emergency Law No. 1846 of 1951.

836 *Manitakis,* ToS 1993, p. 686.

837 Council of State, Judgment of 28 May 2001, No. 1867/2001; Judgment of 05 December 2005, No. 4064/2005; Judgment of 13 March 2006, No. 707/2006; Judgment of 16 February 2009, No. 527/2009, Judgment of 21 September 2009, No. 2685/2009; Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

insured[838] and thus the Greek legislature may maintain the level of the low-income old-age pension benefits at the expense of those that receive high-income old-age pension benefits. This is because the principle of social solidarity has to be understood in the terms of financial redistribution from richer to poorer contributors. Namely, the principle in question indicates that the pension reductions should not lead to an unequal distribution of effort excessively differentiated among the current pensioners and promotes the abolishment of social inequalities that lead to social injustice; as well as the optimum protection of individuals from cases that provoke economic difficulties.[839]

Against this background, the legislature is allowed to enact more favourable treatment for the economically weak of the social insured and has, principally, the discretional power to introduce the necessary legal acts and reduce the pension benefits of high value more than the pension benefits of low value in order to protect the "*low-earnings*" pensioners. This becomes even more intensive in times of financial crisis, when fiscal aims are in the spotlight, and the "*low-earnings*" pensioners are in greater need for financial protection. This is because the financial crisis tends to worsen income distribution,[840] while social security benefits act as an economic buffer during a recession or crisis.[841]

3. Proportional Balance between the Principles of Equivalence and Social Solidarity

The principle of social solidarity is accepted as justifying the differentiation between the reductions adopted in the "*low-earnings*" and "*high-earnings*" pensioners' benefits. Ripe for legal consideration is whether the pensioners' right to derive benefits from the principle of equivalence as an

838 Council of State, Judgment of 13 October 2014, No. 3410/2014.

839 *Stergiou*, The Constitutional Consolidation of the Social Insurance System, pp. 36-37.

840 *UNDP*, Income Inequality and the Condition of Chronic Poverty; 186 Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty Income Inequality and the Condition of Chronic Poverty, p. 186. Retrieved April 2014 from http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_SustainingMDGProgress_Ch6.pdf.

841 *ILO*(2001), p. 16.

aspect of the right to social insurance is proportional to the aim pursued by the legislature, namely to the protection of the "*low-earnings*" pensioners.

A proportional balance should be kept between the need to protect the principle of equivalence and the need to promote the principle of social solidarity. In order to assess how a proportional balance may be kept between these two principles, the proportionality test has to be conducted functioning as a balancing concept. The principle of proportionality contains in its notion the principle of equivalence, as it refers indirectly to a system of justice, while the principle of equivalence constitutes a measure of justice.[842] The principle of proportionality indicates that the measure has to be suitable, necessary and proportional in a narrow sense to the aims pursued by the legislature. The restriction of the right to social insurance is constitutional when these three prerequisites have been achieved by the legislature. Otherwise, the measure should be declared as disproportional and thus unconstitutional.

As it has been advocated above, the Greek public pension system is structured and functions on the combination of these two basic mechanisms, the solidarity agreements and an "*insurance relation*" implying the payment of contributions by the employed and the employers. Namely, the Greek public pension system aims solidarity in the society as well as to assure the funding of the system through a structure of correspondence between contributions and benefits. In that sense, the principle of equivalence and the principle of solidarity seem to lie uneasily with each other. On the one hand, the principle of equivalence aims to assure a proportional relationship between the paid contributions and the provided benefits securing to the beneficiary the same living standards before and after retirement. On the other hand, the principle of solidarity aims to decline the gap among the beneficiaries of the old-age pension benefits' level in view of repairing the social inequalities and upgrading the less-advantaged of the society.

The Greek Constitution does not explicitly provide which of these two principles has priority in the Greek public pension system. The latter is dependent on the social policy decided by the successive Greek governments. Generally, the balance between these two principles must sway in favour of the principle of social solidarity. This is because, as explained

842 *Hanau*, Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht, p. 98.

above, the principle of solidarity plays a primary role in the Greek public pension system while the role of the principle of equivalence is rather secondary. In addition, as it has been advocated above, the Greek jurisprudence, in most cases, gives priority to the principle of social solidarity. It is thus lawful that the equivalence principle deteriorates in order to promote the principle of social solidarity, and in order to justify the non-equivalence between the high levels of contribution with the lower amount of the old-age pension benefits.

For example, in 2010, the Greek legislature introduced a special solidarity contribution levy on the current pensioners' old-age pension benefits through Law No. 3863 of 2010. The aim of this extra solidarity contribution levy on the current pensioners' old-age benefits over 1,400 Euros was to decline the deficit of the social insurance funds for the sustainability of the public pension funds, since this special contribution flows into a solidarity fund AKAGE (Asfalistiko Kefaleo Allilegiis Geneon – Social Insurance Capital of Generation Solidarity). However, the aim of the process by which the contribution levy was imposed was the protection of the "*low-earnings*" pensioners. It was initially imposed on the primary public pensions amounting more than 1,400 Euros and it was later extended to the supplementary pension benefits.[843] More particularly, pensioners receiving old-age pension benefits between 1,400 Euros and 1,700 Euros contribute 3 percent of their pension; pensioners receiving old-age pension benefits between 1,700.01 Euros and 2,000 Euros contribute 6 percent of their pension; pensioners receiving old-age pension benefits between 2,000.01 Euros and 2,300 Euros contribute 7 percent of their pension income and pensioners receiving old-age pension benefits between 2,300.01 Euros and 2,600 Euros contribute 9 percent of their pension income. Moreover, the legislature introduced a further special contribution levy on the current pensioners' supplementary old-age pension benefits.[844] Pensioners receiving supplementary old-age pension benefits between 300,01 Euros and 350 Euros per month contribute 3 percent of their pension income; pensioners receiving supplementary old-age pension benefits between 350,01 Euros and 400 Euros contribute 4 percent of their pension; pensioners receiving supplementary old-age pension benefits between 400,01 Euros and 450 Euros contribute 5 percent of their pension income,

843 Art. 38(1), Law No. 3863 of 2010, as amended in Art. 44(10), Law No. 3986 of 2011.

844 Article 44(13), Law No. 3986 of 2011.

while those receiving supplementary old-age pension benefits between 450,01 Euros to 500 Euros contribute 6 percent of their pension income.

In this case, a differentiation leading to a greater burden on the shoulders of the "*high-earnings*" pensioners seems to be a suitable measure for the promotion of the duty of social solidarity. This is because the different, progressively imposed percentage of the solidarity contributions protects the "*low-earnings*" pensioners at the expense of those pensioners that receive high pension benefits. The legislature did not impose the special contribution levy on all main and supplementary old-age pension benefits, but only on the main pension benefits amounted more than 1,400 Euros per month and on supplementary pension benefits which amounted to more than 300 Euros per month and according to the last pension income. Moreover, the measure seems to be necessary, on the grounds that the legislature searched for the least restrictive measures. This is because only 20 percent of the pensioners were financially burdened, while 55 to 60 percent of the pensioners benefited from this measure.[845] Lastly, it has to be examined, whether the measure in question is proportional to the aims pursued, in a narrow sense. The interference with the right to social insurance, as understood within the confines of the principle of equivalence, is moderate, because only 20 percent of the pensioners had to contribute to the AKAGE. The aim of the measure was severe, on the grounds that the respective measure did not only aim for the protection of the "*low-earnings*" pensioners, but also aimed to ensure that any money saved would end up in the budget of the public pension funds. Reducing the deficit of the public pension funds is a severe aim in times of financial crisis, as during these times the financing of the funds by the state is limited and endangered. This could result in pension benefits being inadequate to cover pension demands, thus leading to a lower level of protection for the "*low-earnings*" pensioners

Therefore, the respective measure is proportional with the aim of protecting the "*low-earnings*" pensioners, on the grounds that the old-age pension benefits were reduced according to a progressive scale at the expense of the high value pension benefits, while at the same time all pensioners, including those with "*high-earnings*" were able to benefit from the measure. This is because the measure contributed to the sustainability

845 Council of State; Judgment of 23 October 2014, No. 3663/2014, at para. 22; (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015.

of the system meaning their pension benefits were secured even after being reduced. The pensioners will be in a slightly more favourable position if they are able to receive a reduced benefit, in contrast to the incredibly unpalatable position of having no pension benefit whatsoever.

Yet, the principle of equivalence should not be refuted at all under a defective conveyance of the solidarity principle in practice. The contributory character of the Greek public pension system should not be totally refuted and modified, even when the financial resources are limited and the need to protect the "*low-earnings*" pensioners in times of financial crisis is strong. Completely annulling the principle of equivalence is not lawful, since it constitutes a core element of the right to social insurance. In specific cases, where the element of personal contribution is very strong, the balance must sway in favour of the principle of equivalence. This is the case on the pension benefits reductions in the self-employed insured in the pension fund of OAEE.

In the OAEE case, the personal circumstances of the self-empolyed persons involved were highly relevant. This is because, unlike other public pension funds, self-employed persons were presented with the opportunity to choose the level of contributions they would pay towards their pension. This resulted in a differentiation in the amounts that would then be paid out in pension benefits. On the grounds that there is a strong connection with personal contribution to the OAEE fund, the right to equivalent pension benefits corresponding to the amount of the contributions made to the pension fund of the self-employed as well as to the period of time during which the contributions were paid deserves stronger protection than in the case of the solidarity contribution levy. The more the social insurance rights are given personal relevance by personal contributions on the part of the insured, the less freedom of discretion remains on the part of the legislature.[846]

The ECtHR ruled that the assessment of whether the essence of the right is impaired is dependent on how far the granted benefits are earnings-related. As a rule, the ECtHR held that national legislation which provides welfare benefits generates the right to possession when the individual satisfies all requirements, irrespective of whether the grant of the welfare benefits is dependent on the prior payment of social contributions to a

846 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 113.

social insurance fund or not.[847] In this sense, the paid contributions do not play any role in examining whether the social benefits fall under the protection of the Convention. However, the previously paid contributions play a decisive role in the examination of the proportionality of the restrictive measures.[848] In the assessment of the proportionality of the restrictive measure, the impairment or not of the essence of the right depends on the nature of the benefit taken away.[849] For instance, in the cases of *Domalewski* and *Skórkiewicz,* the ECtHR ruled that the deprivation of the applicants' special privileged status was proportional, as the applicants retained all the rights attached to their ordinary pension under the general social insurance system and consequently, the applicants' rights stemming from the contributions paid into the social insurance scheme were not infringed in a manner contrary to Article 1 of the First Protocol.[850] Furthermore, in the *Lazarevic* case, the ECtHR found out that there was no impairment of the applicant's pension rights, since there was no loss of a certain percentage of his pension that was connected with prior paid contributions into the pension scheme.[851] Therefore, according to the ECtHR's jurisprudence, the right to social benefits that are not earnings-related attract weaker protection under the Convention in relation to the right to social benefits that are strongly earnings-related.

Under the framework of the financial crisis and the external pressure that resulted in receipt of financial support the old-age pension benefits of the pensioners insured in the Greek self-employed pension fund O.A.E.E were also reduced.[852] In that case there was some disparity in the way old-age pension benefits reductions affected the OAEE pensioners, depending

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847 ECtHR, *Gaygüsüz v. Austria,* Judgment of 16 September 1996, Appl. No. 17371/90, at para. 41.

848 *Schmidt,* Europäische Menschenrechtskonvention und Sozialrecht, p. 98.

849 ECtHR, *Cichopek and others v. Poland*, Decision of 14 May 2013, Appl. No. 15189/10, at para.137.

850 ECtHR, *Skórkiewicz v. Poland*, Decision of 01 June 1999, Appl. No. 39860/98; *Domalewski v. Poland*, Decision of 15 June 1999, Appl. No. 34610/97.

851 ECtHR, *Lazarevic v. Croatia*, Decision of 04 May 2000Appl. 50115/99.

852 I.e. Law No. 4002 of 2011 reduced by 6 percent the old-age benefits that amounted over 1,700 Euros and by 8 percent the old-age pension benefits that amounted over 2,300 Euros. Moreover, Law No. 4024 of 2011 reduced by 20 percent the old-age benefits that amounted over 1,200 Euros and Law No. 4093 of 2012 reduced also by 20 percent the old-age benefits that amounted to over 3.000 Euro. An overview is presented in *Simeonidis / Diliagka / Tsetoura,* Journal of Social Cohesion and Development 2014, Appendix, Table 1, p.43.

on their contributory history. Calculations conducted found that those who contributed the maximum possible amount throughout their working lives saw their final benefits reduced 29 to 34 percent, while they paid about 200 percent more contributions to the public pension fund than those who contributed the minimum amount legally possible, who saw their final benefits reduced between 13 to 20 percent.[853] For 30 years of service, the insured persons, who paid the maximum contributions, paid 217 percent more contribution while receiving reductions 7.85 times greater to his standard of living. Respectively, for 35 years of service, the insured persons, who paid the maximum contributions, paid 209 percent more contributions and received 5.22 percent greater reductions to his standard of living; finally, for 40 years of service, the insured persons, who paid the maximum contributions, paid 219 percent more contributions than the insured who paid the minimum while receiving 3.37 percent greater reductions to his standard of living.[854]

As a result, there is a great difference between the paid contributions and the received old-age pension benefits. The insured persons of OAEE who had the foresight to contribute the maximum possible amount throughout their working lives saw their benefits being reduced by three up to almost eight times more than the old-age pension benefits of those who paid the minimum amount, and therefore supported the PAYG system less.[855] This practice resulted in a lack of equivalence between the maximum paid contributions and the final reduced granted old-age pension benefits.

It is questionable how the legislature may strike a proportional balance between these principles, and which certain criteria should be used so that both the low-income pensioners and the pensioners that contributed the maximum amount are proportionally protected. The correct thesis appears to be that the legislature should use the amount of the prior paid contributions as a criterion, in order to reduce the old-age pension benefits of the OAEE' pensioners and maintain a proportional balance.

With this regard, although the respective measure seems to be suitable to achieve the aim pursued, namely the protection of the "*low*-earnings" pensioners, it is not the least mild measure and thus necessary. The legisla-

853 *Simeonidis / Diliagka / Tsetoura,* Journal of Social Cohesion and Development 2014, p.36.
854 *Ibid,* pp. 32-33.
855 *Ibid,* p. 40.

ture could have maintained a proportional balance between the principle of equivalence and the principle of social solidarity, by decreasing the old-age pension benefits of the pensioners who contributed the maximum amount on the basis of the previously paid pension contributions, and by decreasing the old-age pension benefits of the pensioners that contributed the minimum amount on the basis of their last gross pension income. In this way the measure would be, on the one hand, in favor of the less-advantaged (low-earnings pensioners) allowing for the fulfillment of the social goals of the social insurance institution combined with the application of the social solidarity principle and on the other hand, it would provide the OAEE insured who chose to pay the maximum level of contribution an amount that is able to secure them satisfying living conditions; reflective of those which the individual was enjoying prior to the period of retirement.

Therefore, the protection of the "*low-earnings*" pensioners through different percentages of reductions in old-age pension benefits between pensioners who paid the maximum contribution and those who paid the minimum appears not to be proportional, since it is not necessary for the protection of the "*low-earnings*" pensioners as a milder alternative solution could be in place. The balance required by the principle of proportionality was unsettled because the pensioners who contributed the maximum had to face such higher reductions that in the end the equivalent character of the public pension system was modified, while this could have been avoided through the application of contribution-related criteria, as explained above. As a consequence, the second element of the principle of proportionality, the element of necessity, was not respected, and the way the old-age pension benefits of the OAEE pensioners were reduced is not proportional and therefore unconstitutional.

III. Age Discrimination Cases

Age discrimination is, generally, prohibited and can be justified, when a specific legislation exception or defence is invoked. Direct discrimination based on the nature of the concept of age is mostly more acceptable than other forms of direct discrimination, such as discrimination on grounds of gender, since "*age is not by its nature a suspect ground and age-based dif-*

ferentiation, age-limits and age-related measures are widespread in law and in social and employment legislation".[856]

Age-based differentiation and age-limits have been introduced by the Greek legislature when the latter reformed the public pension system and reduced the pension benefits after the financial crisis treating differently individuals based on the criterion of age. In the following research, two examples are analysed and examined: the mandatory retirement for public employees above the age of 55 and the abolition of Christmas, Easter and holiday bonuses for pensioners below the age of 60. To address whether these two reforms constitute lawful age discrimination or not, it is examined whether the different treatment is proportional to the aims pursued.

Accurately, the Advocate General Mazak noted in the *Age Concern England* case that "*age is fluid as criterion and for this reason it is difficult to draw a line when age limit is justified and when not"*.[857] The stages followed for examining the justification and thus legality of the above two case studies are similar. Firstly, it is examined which legal norms are applied. In the first case, the right to non-discrimination guaranteed under the Employment Equality Directive No. 2000/78/EC and the Greek law that transferred the directive in the national law is applied. The right to equality guaranteed under the Greek Constitution as well as the principle of non-discrimination guaranteed under Article 14 of the ECHR could also have been applied, since they govern the same factual situation. However, on the grounds that they constitute general principles governing general matters (*lex generalis*), application in this case should find a law that governs a specific subject matter (*lex specialis*), namely the Employment Equality Directive, since the latter is specifically for employment matters. In the second case, the right to equality guaranteed in the Greek Constitution and the right to non-discrimination guaranteed under the ECHR is applied. The Employment Equality Directive does not find application in this case, because it does not concern active public or private workers, but pensioners. Therefore, the reduction of pensioners' additional allowances does not fall under the scope of the directive. Secondly, the aims pursued by the restrictive measures are laid down. Lastly, emphasising the factual circumstance of each case-study, I examine the restrictive measure under

856 Opinion of Advocate General Mazak, delivered on 23 September 2008, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform,* C- 388/2007, EU:C:2008:518, at para. 74.

857 *Ibid*.

the aspect of the principle of proportionality. More specifically, it is examined whether the measures are suitable, necessary and proportional in a narrow sense to the aims pursued.

1. Mandatory „Pre-Retirement" Reserve Scheme

The Greek legislature introduced in 2011 a mandatory "*pre-retirement reserve scheme*". More particularly, all civil servants (with some exceptions)[858] were automatically dismissed once they had reached the age of 55 if they had fulfilled 35 years of service before the 31st December of 2013; once dismissed these civil servants were placed in a pre-retirement reserve scheme.[859] This means that their positions were annulled and the respective civil servants received 60 percent of their basic salary, minus all allowances. Any income earned from other professional activity in the private sector was deducted. Once they fulfilled the requirement for a full pension, they received old-age pension benefits. The suspension period was counted as a pension contribution period. This unique case of pre-retirement reserve scheme constitutes a method of enforcing mandatory retirement. The relevant legislation forced the civil servants to retire involuntary by use of age-based public policies. Ripe for consideration is whether this manner of dismissal, based on the criterion of age, constitutes justified direct age discrimination.

First of all, prior to any justification analysis, it has to be examined which legal norm finds application. In cases of mandatory retirement, the age limits constitute a condition that regulates the employment relationship as to when the employee has reached a certain chronological age the employment relationship is automatically terminated.[860] Therefore, the Employment Equality Directive No. 2000/78 must find application. The mandatory retirement falls under the scope of this directive, since according to article 3 of the Directive, the latter is applicable to all persons re-

858 I.e. teachers, doctors etc.

859 Article 33(1), Law No. 4024/2011. The measure in question has been declared unconstitutional by the Council of State. See Council of State (Plenary Session), Judgment of 18 January 2013, No. 3354/2013. The court held that the measure in question is contradictory to Article 103 of the Greek Constitution which promotes the proper functioning of public administration and to the constitutional principle of equality.

860 *Hack*, Taking Age Equality Seriously, p. 208.

garding the public as well as the private sector in relation to employment and working conditions, including dismissals. In addition, Article 4 of the Law No. 3304/2005, which transferred the Employment Equality Directive in domestic law, regulates that age discrimination provisions apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, access to all types of vocational training and working conditions (including dismissals and pay). Therefore, the respective case-study falls within the *ratione materiae* of the Employment Equality Directive.

Furthermore, besides the fact that the mandatory retirement is related to employment issues, it is necessary to identify that the respective measure constitutes direct age discrimination. In our case study, this is the case, on the grounds that the mandatory retirement provision of the Greek legislature operated through a difference in treatment based directly on the grounds of age. It tied the termination of the employment relationship directly to the criterion of age, namely to the age of 55. This constitutes less favourable treatment. Those civil servants whose employment contract terminates automatically upon reaching the age of 55 years are treated in a less favourable manner, on the grounds of age, than the younger civil servants are.

In the following, the key question is whether this direct age discrimination may be justified according to the Employment Equality Directive. The latter allows for the justification of direct age discrimination in the rubric of Article 6. The demarcation of valid from invalid differentiations based on age – that is justified from unjustified differentiations – is carried out by using the proportionality principle as a measurement tool.[861] In essence, Article 6 of the directive entails a proportionality analysis, because it demonstrates that the different treatment based on grounds of age must be objectively and reasonably justified by a legitimate aim, which is a characteristic of the principle of proportionality.[862]

With this in regard, the next step is to identify the existence of a legitimate aim that underlies the measure in question. The Employment Equality Directive does not indicate an exact delineation or definition of what constitutes a legitimate aim. The aims that are considered legitimate in the sense of Article 6 have in common that they are social policy objectives

861 *Ibid*, p. 88.
862 *Ibid*, p. 176.

such as those related to employment policy, the situation in the labour market or vocational training.[863] The CJEU has ruled in the past that the involuntary removal of an employee from the labour market, once he or she has reached the statutory retirement age, has been seen as a legitimate and proportionate measure achieving employment policies, such as the recruitment of new workers by means of better distribution of work between the generations, as well as the protection of public health.[864] However, in our case the aim of the relevant measure was not the replacement of older public servants with new ones, since their positions were annulled after they had been transferred to the mandatory pre-retirement reserve scheme. Therefore, the enacting age-discriminatory policy did not enforce the renewal of labour force, refraining from demeaning performance, and combating unemployment.

The aim of measure in question was the reduction of the general government employment.[865] In the explanatory report on the Law No. 4024 of 2011, the Greek legislature stated that the pre-retirement suspension of work aimed at a reduction to public expenditures and the shrinking of the public sector. According to the legislature, these aims could be achieved through a 40 percent reduction of the public salaries of those civil servants that were placed in the pre-retirement reserve scheme, as well as through the annulment of their positions. The pre-retirement reserve scheme was established under specific fiscal conditions, under which the country observed its commitments to lender-partners to reduce public expenditure, while the major benefit of this measure was that it may achieve this aim without causing upheaval in the lives of the personnel working in the public administration and the broader public sector.[866]

The aim of financial stability of public finances and the reduction in the public expenditures is not explicitly mentioned as a ground of justification for age discrimination neither in Article 6 of the Employment Equality Directive nor in Article 11 of the Law No. 3304/2005. However, the lists of

863 *Ibid*, p. 178.

864 I.e. CJEU, *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C: 2007:604; *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 05 March 2009, C-388/2007, EU: C: 2009:128; *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Judgment of 12 January 2010, C-341/2008, EU:C: 2010:4.

865 *IMF*(2012), p. 7.

866 *ILO*(2013), p. 109.

these articles are not exhaustive. In principle, budgetary considerations can influence the nature or extent of the undertaken measure.[867] Advocate General Bot argued that "*a discriminatory measure may be maintained even if it pursues new aims, in the light of developments in social, economic, demographic and budgetary conditions*".[868] Therefore, it has to be ascertained that the Employment Equality Directive does not preclude the Member States of EU from taking account of budgetary considerations. In our case, the severe fiscal conditions in the Greek economy, as well as its obligation to reduce the public expenditures in the short-term in return for financial support, legitimise the aim of the legislature to introduce direct age discrimination in order to reduce the public expenditures.

However, the fact that the direct age discrimination pursues a legitimate aim cannot justify on its own the sweeping use of age distinctions. The factor of the severe financial crisis and the emergent need for financial assistance may not always function as the only crucial factor that justifies discriminatory measures. The crucial factor is whether the discriminatory measure is compatible with the justification requirements in respect of the principle of proportionality. In cases of direct age discrimination, the legislature is required to establish a high standard of proof of the legality of the discriminatory measure. The legislature is namely obliged to respect the boundaries set by the principle of proportionality, which means that the legislature is obliged to use objective and proportional criteria in order to achieve the intended aims and at the same time to ensure the equal treatment of the civil servants.[869] The principle of proportionality clearly states that in addition to the existence of an objectively justified legitimate aim, the undertaken measure of achieving that aim must be suitable, necessary (in the sense that no other non-discriminatory or less discriminatory measure could achieve the same aim) and proportional in a narrow sense with the aims pursued.

Therefore, first of all, part of the proportionality assessment is that the measure has to be suitable to achieve the identified aims. This means it

867 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at paras. 73and 74.

868 Opinion of Advocate General Bot, delivered on 03 September 2009, C-341/2008, EU:C:2009:513, at para. 49.

869 Council of State, Judgment of 15 December 2005, No. 4237/2005; Judgment of 14 September 2010, No. 2747/2010; Judgment of 08 September 2011, No. 2597/2011; Judgment of 13 October 2011, No. 3226/2011.

has to be rationally linked to the achievement of the previously identified legitimate aim. In general, the CJEU stated that as regards the determination of the measures that are capable of achieving the legitimate aim, the Member States enjoy a broad discretion.[870]

The respective legislative measure proved not to be suitable to achieve the reduction of the public expenditures of the general government and shrink the public sector. The crucial element when someone examines the suitability of a measure is the relation of the respective measure to the effects of the measure under consideration.[871] The mere generalisation concerning the capacity of a specific measure is not enough to show that the aim of that measure is capable of justifying derogation from the prohibition of age discrimination, but plausible studies are necessary.[872] The legislature did not specify advantages of the measure in question in mathematical terms. Not to mention that, in practice, only about 1,000 civil servants were placed in the pre-retirement reserve.[873] The public expenditures were thus not reduced as much as expected. In addition, using a mandatory retirement age as an instrument in times of demographic changes is not a suitable measure to lead to a long-term sustainable overall economy. This is because the latter can be achieved with a sustainable social insurance system that has a strong foundation for a sustainable economy, due to the strong inter-correlation between these two fields. However, the measure in question burdened financially the public pension funds, since most of those that fell within the scope of the law opted for early retirement.[874] In view of the current financial situation; i.e. the demographical changes and the high deficit of the public pension funds, the mandatory retirement did not guarantee a sustainable public pension system and it is in the public interest to keep civil servants on rather that reducing personnel. The fact that the legislature considered only the reduction of public expenditures, which nevertheless was not achieved in an effective mat-

870 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 61; *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C: 2007:604, at para. 68.

871 *McColgan*, Discrimination, Equality and the Law, p. 123.

872 CJEU, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of 05 March 2009, C-388/2007, EU:C: 2009:128, at para. 51.

873 *Yannakourou,* Irish Employment Law Journal 2014, p. 37.

874 *Ibid*.

ter, resulted in the financial difficulties of the public pension system being disregarded. However, according to the economic perspective of age discrimination, the legislature must influence retirement habits by increasing the age at which a person will be entitled to a full pension, and not indirectly force the employees into early retirement.[875]

Furthermore, the measure in question must be necessary to the identified legitimate aim. The necessity analysis in essence means that it should be examined whether alternatives to an absolute age limit are available. In our case, the respective measure was not necessary to achieve the aims pursued, on the grounds that the chronological criterion was not on its own the less discriminatory measure to ensure the reduction of public expenditures. The legislature could have used less-discriminatory measures that would reduce the public expenditures and shrink the public sector by promoting a better functioning of the public administration. Reducing public spending may be achieved by a multitude of measures. What is objectionable about the mandatory retirement is that it treats the individuals differently with respect to chronological criteria, as opposed to a more complete assessment of individual characteristics.[876] An individual assessment of the civil servants' performance might likewise contribute to reducing the public deficit. Namely, the legislature could have placed the civil servants in the pre-retirement reserve according to civil servants' qualifications, capacities and performance. In this way the dismissal criteria would reflect to a greater extent the functional and organisational administration needs. Along this lines of argument, the Council of State ruled that the criteria chosen by the legislature to place the civil servants in the pre-retirement reserve scheme should have also been related with the functional and organisational needs of the public administration, on the grounds that the legislature is obliged by the Constitution to ensure an organised and effective public administration, so that the public services are provided to the citizens in the framework of a social state.[877] The criterion of age shows a failing of the obligation of the legislature to ensure a proper and effective public administration, as promoted by the Greek Constitution. The classification according to the chronological criterion is inaccurate, as

875 *Schlachter*, in: *Schlachter* (ed.), The Prohibition of Age Discrimination in Labour Relations, pp. 12-13.

876 *Wedeking*, Canadian Journal of Philosophy 1990, p. 328.

877 Council of State (Plenary Session), Judgment of 18 January 2013, No. 3354/2013; (Plenary Session), Judgment of 18 December 2014, No. 4602/2014.

on its own it is not capable of providing a rational correlation between advancing age and declining job performance. The respective measure precluded the proper and effective functioning of the public administration, since experienced and skilled staff had been forced to retire.[878]

Ultimately, in the final stage of the proportionality test it has to be examined whether the effects of the chosen measure are disproportionate or excessive in relation to the interests affected. Here, the competing interests have to be balanced again with each other. Predominately, the interests that have to be weighed against each other are the interests of the employees and the interests of the state.[879] It is a balancing act between the employees' interest not to be discriminated against on the grounds of age due to compulsory retirement and the reduction of the public expenditures.

On the one hand, the urgency of reducing the public expenditures and in particularly the pressure of achieving this aim constitutes a strong argument on overweighing the civil servants' right not to be discriminated against on the grounds of age. This is because in a different case the state may face problems of liquidity due to the denial of further instalments of financial assistance by the international creditors. However, in times of financial crisis, the particular attention must be paid to the participation of older workers in the labour force, so that the unemployment rate is not increased as well as to disincentives for early retirement. Increasing the unemployment rate is disproportional to the reduction of public expenditures and the state's economic well-being. Besides the promotion of employment, the promotion of early retirement may also not contribute to the reductions of public expenditures, on the grounds that the public pension expenditures will then be raised. With this regard, although the aim of reducing the public expenditures is *per se* in times of financial crisis a severe aim that could justify severe interference, in this case-study the measure in question did not reduce the public expenditures to a great extent while it increased the public pension expenditures, since it promoted early retirement at the age of 55. Therefore, the aim pursued is not severe but rather low or moderate. At least, there was not reference of reliable research finding and data available showing that the measure will have positive effects on the sustainability of the public pension fund.

878 *Yannakourou,* Irish Employment Law Journal 2014, p. 37.
879 *Hack*, Taking Age Equality Seriously, p. 181.

On the other hand, the civil servants are strongly affected by the age limit in terms of their right to non-discrimination. The interference with their right to non-discrimination is severe. First of all, this is because operating with the absolute mandatory retirement at the age of 55 that is considerably below the internationally applicable minimum standards is a measure that is very punitive for the individual civil servant. To discriminate merely on the basis that the older civil servants have reached a particular chronological age results in the diminishing of individuality and human dignity.[880] The older civil servants themselves may not participate in the economic, cultural and social life, while keeping older workers in the labour force properly promotes diversity in the workforce, which is an aim recognised in recital 25 of the Employment Equality Directive. Besides, the mandatory retirement age does not contribute to the realising of the older workers' quality of life of the workers concerned, in accordance with the concerns of the EU legislature set out in recitals 8, 9, and 11 in the Employment Equality Directive.[881]

Secondly, the interference with the right to non-discrimination is severe on the grounds that it interfered with the civil servants' self-fulfilment related to their expectation in continuing their working life. The CJEU has stressed that the prohibition of discrimination on the grounds of age must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the EU.[882]

In the Greek Constitution, the right of civil servants to work beyond pensionable age, which is the age that the employee is entitled to receive pension, does not find constitutional consolidation and thus the Greek Constitution allows for introducing enforced retirement. Namely, according to Article 103(4), the civil servants may be dismissed when they reach the pensionable age. However, in the respective case, the Greek legislature did not force the civil servants to retire once they have reached the pensionable age, but once they were close to this age. Namely, the respective legislation introduced a maximum age limit to terminate the employment

880 *Manfredi / Vickers.* Industrial Law Journal 2009, p. 344.

881 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 63.

882 CJEU, *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v. Land Hessen*, Judgment of 21 July 2011, EU: C:2011:508, at para. 61; *Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of 16 October 2007, C-411/2005, EU: C:2007:604, at para. 62.

relationship, while this defined maximum age limit differed from the pensionable age. In this sense, the expectation of civil servants to continue working has also been unexpected removed. The civil servants did not expect to retire in the age of 55, since this age limit was not the pensionable age of the public servants, even before the introductions of the new pension reforms of Laws Nos. 3865/2010 and 4093/2012.[883]

Therefore, taking into consideration the aforementioned, the mandatory retirement age of 55 is not proportional in a narrow sense, on the grounds that the aim pursued was moderate while the interference with the right to non-discrimination was severe. Therefore, the urgency of reducing the public deficit cannot be overweighed up against the right of the civil servants not to be discriminated based on the grounds of age. The measure in question is unconstitutional because it is not suitable, necessary and proportional in narrow sense to the aim pursed.

2. Abolition of Bonuses for Pensioners Below the Age of 60

The Greek legislature abolished for pensioners aged less than 60 years old the Christmas, Easter and holidays bonuses through the Article 3(10) and (14) of Law No. 3845 of 2010.[884] In this case-study, it can be witnessed a distinction on the grounds of age, namely a distinction between the pensioners above and below the age of 60. To proceed on the examination whether this distinction constitutes lawful age discrimination or not, firstly, it has to be clarified which legal norm finds application.

In this case-study, the Employment Equality Directive does not find application. This is because the age distinction does not concern public or private workers but pensioners. Distinctions among pensioners do not fall under the scope of the directive, since they do not relate to employment

883 The aim of reducing the public expenditures could have been balanced in this sense also with the right of the civil servants to exercise their right to work by applying as legal norm the constitutional right to work guaranteed in Article 22 of the Greek Constitution. However, since the sole application of the right to work would go beyond the age discrimination, this balance is not weighed up here.

884 Although this provision was amended in Law No. 4093 of 2012, which abolished the additional bonuses for all pensioners, the provisions of Article 3(10) and (14) of Law No. 3845 of 2010 are still of significant interest because of the special age differentiation that they introduced.

issues. For this reason, the legal norm should be found on the constitutional level or in the ECHR. On the constitutional level, there is no explicit protection against age discrimination or discrimination based on other grounds than age. However, Greece has manifested the general principle of equality in Article 4 of the Greek Constitution, which entails the right to non-discrimination. Furthermore, in this case-study the Article 14 of the ECHR and its supplement provision in Article 1 of the Twelfth Protocol of the ECHR find also application since both provisions set out a general prohibition on discrimination. Indeed, they do not refer expressly to the prohibition of discrimination on the grounds of age, but the non-exhaustive list leads to the approach that the prohibition of age discrimination is also included.[885] Besides, clearly the focus of this protocol is on human rights in the public sphere and not on relations between private parties.[886]

Therefore, the constitutional right to equality of Article 4(1) of the Greek Constitution as well the principle of non-discrimination guaranteed in the ECHR may be used as legal basis in this case. Article 14 of the ECHR finds application when differential treatment of persons is identified and the pensioners are in analogous or relevantly similar situations.[887] So, in order to evaluate whether these legal provisions find application, it must first be established that different treatment has taken place, that it is based on a certain badge of differentiation. The assessment of comparable or relevantly similar situations is a value judgment.[888] Certainly, the criteria on the basis of which similarities or dissimilarities are considered to exist and the corresponding badge of difference focus attention appropriately on the goals of equality provisions and the varying degrees of individual interests in being free from discrimination on basis of theses badges.[889] In this case-study, the measure in question introduced a direct different treatment among the current pensioners by using as criterion the chronological age, in order to abolish a pension benefit. It treated obvious-

885 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 38.

886 *Ibid.*

887 ECtHR, *National Union of Belgian Police v. Belgium*, Judgment of 27.10.1975, Appl. No. 4464/70, at para. 44. For a statement of the analytical approach that includes the analogous situation conditions see ECtHR, *Thlimmenos v. Greece*, Judgment of 06.04.2000, Appl. No. 34369/97, at para. 44.

888 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 128.

889 I*bid.*

ly less favourably the pensioners who were less than the age of 60 than the pensioners who were above the age of 60.

If the required difference is established, it should then be examined whether relevantly similar situations or (highly) relevantly different situations exist. Two or more categories are similar when the individuals, who belong in these categories, are under similar conditions.[890] The current pensioners are under similar conditions as they belong to the same group of the population and moreover, they have to face similar financial problems imposed by the financial crisis, namely the reductions imposed on their old-age pension benefits. Therefore, one could argue (albeit with reservation),[891] that the relevant current pensioners are in relatively similar situations. Hence, the constitutional right to equality and the principle of non-discrimination of Article 14 ECHR find application and may provide a legal remedy to current pensioners.

Next, it has to be examined whether this different treatment has objective and reasonable justification.[892] Such objective and reasonable justification exists if the difference of treatment pursues a legitimate aim and if there is a relationship of proportionality between the means employed and the aim sought to be realised. Namely, Article 4 of the Greek Constitution and Article 14 of the ECHR are violated when relevantly similar situations are treated differently while there is no objective and proportional justification.

The measure in question was seen by the Greek legislature to be a crucial solution to dealing with the increasingly costly public-financed social insurance system. In addition, the Council of State ruled that this measure pursued further the legitimate aim of providing the "*older*" pensioners more protection than the "*younger*" pensioners.[893] Generally, a legitimate aim can almost always be found and argued for, since governments can always claim good intentions and noble aims and the assessment of whether

890 *Stergiou*, EDKA 2012, p. 327.

891 This is because some pensioners may be in a different and/or better financial situation than the others and vice versa. See also the judgment of the Council of Audit (Plenary Session) No. 1938/2009 which declared that individuals insured in different pension funds do not fall under the same category.

892 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 35.

893 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 40; (Plenary Session), Judgment of 02 April 2012, Nos. 1283-1286/2012, at para. 34.

the aims pursued is legitimate only focuses on the aim in isolation.[894] Therefore, both aims seem to be legitimate.

In a further step, the public interests involved in the legitimate aims pursued should be weighed up against the private interest in the enjoyment of the right not to be discriminated against on the grounds of age. In order to assess the fit and harshness of the measure in question, it should be evaluate whether the differential treatment based on age was proportionally by reasons of public interest.[895] Namely, age distinction must be carried out within the limits of the principle of proportionality, since the legislature is not allowed to arbitrarily apply obviously unequal treatment. The principle of proportionality is essential to ensuring the boundary between the state's discretion to act, and the right of the individual not to be discriminated against.[896] In that context, following, it is examined whether the abolition of additional bonuses for pensioners aged below 60 years old is a proportional measure to the aims pursued, namely whether it is a suitable, necessary and proportional in a narrow sense measure to the aim of contributing to the sustainability of the public pension system and the protection of "*older*" pensioners.

First of all, the measure in question is suitable for ensuring attainment of the objectives pursued, since it genuinely reflects a concern to attain it in a consistent and systematic manner.[897] In any case, it does not call for assessment of whether the measure taken function conductive towards the attainment of that aim or whether the measure taken functions to the detriment of certain groups in society.[898] The discriminatory measure may reduce the public expenditures on pensions and thus deficit of the public pension funds ensuring in this way the sustainability of the system. It may diminish the deficit of the public pension funds, on the grounds that it achieved the reduction of the number of pensioners entitled to these pen-

894 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 43.

895 Council of State, Judgment of 10 January 2000, No. 26/2000.

896 *Ellis,* in: *Ellis* (ed.), The Principle of Proportionality in the Laws of Europe, p. 179.

897 In that context see also CJEU, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Judgment of 12 January 2010, C-341/2008, EU:C: 2010:4, at para. 53.

898 *Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights, p. 43.

sion benefits as well as it provided disincentives for early retirement.[899] Moreover, the respective measure is suitable to protect the "*older*" pensioners, on the grounds that the additional allowances for pensioners above the age of 60 were not affected.

Secondly, the chosen objective criterion for differentiation became a necessary legislative parameter. This is because the respective measure affected only a small part of the current pensioners and thus it can be regarded as the least discriminatory measure. According to the data of the Ministry of Employment, Social Insurance and Social Assistance, pensioners under the age of 60 constitute 15 percent of the total number of pensioners.[900]

Finally, the respective discriminatory measure appears to be proportional in a narrow sense with the aims pursued. In the context of the element of proportionality in a narrow sense, it is examined whether the importance of the legitimate aims pursued may outweigh the intensity of interference with the right of non-discrimination. Namely, the proportional relationship is dependent on the proportionality between the way in which the distinction based on the criterion of age was introduced and the intensity of the aim pursued. As advocated above, on the one hand, the intensity of the aim to reduce the public deficit and the deficit of the public pension funds was severe in the first year of the crisis, when the measure in question was introduced. On the other hand, the interference with the right to non-discrimination was moderate or light. In particular, application of this national legislation led to a situation in which all pensioners who have reached the age of 60, without distinction, could not receive additional bonuses, whatever their financial situation is. This classification based on age is reflective of some difference, having a fair and substantial relation to the aim of the legislation to reduce the deficit of the public pension funds and at the same time to provide more social protection to the "*older*" pensioners, so that all pensioners shall be treated alike.[901] The criterion of 60 concedes the idea that pensioners above the age of 60 may need more financial assistance than the pensioners aged below 60 years old. This is because "*younger*" pensioners have a greater chance than "*older*" pension-

899 Council of State (Plenary Session), Judgement of 20 February 2012, No. 668/2012, at para. 40.

900 *Hellenic Republic,* Ministry of Employment, Social Insurance and Social Assistance 2015.

901 See also *Abramson*, Missouri Law Review 1977, p. 39.

ers of finding an alternative occupation besides retirement, and this may replace their loss of income in spite of the fact that the pension benefits are reduced in case of employment in parallel with retirement. In this way, the "*younger*" pensioners may not suffer as detrimental a change to their finances as those who are "*older*". Therefore, the discriminatory legislation of abolishing the additional bonuses for pensioners aged less than 60 years old shall be declared as proportional and thus exceptionally allowed by reasons of public interest.[902]

C. Outcomes of the Case-Studies

The selected case-studies, that have been examined above, allowed conclusions to be drawn concerning the effect of the financial crisis on the development and level of judicial protection granted to the pensioners' rights; the importance of the right to social insurance that was emphasised after the crisis; and the criteria and principles that the legislature must take into consideration so that the pension reforms introduced in times of financial crisis are compatible with the principle of proportionality. The latter principle was used as a legal guidance as to how the public pension reforms are to be assessed. Following, these three outcomes are separately analysed.

I. The Decisive Role of the Financial Crisis on Judicial Development

De lege lata it may be ascertained that several of the public pension reforms and mainly the pension reductions, if viewed in light of the financial crisis and following a rigorous proportionality analysis, may be held as justified. This finding implies that an urgent economic and financial crisis plays a decisive role in the balancing process. Namely, the restrictive mea-

902 The minority opinion of the Council of State ruled that the criterion of age is discriminatory, since it does not define that pensioners over the age of 60 have increased needs of financial assistance in Christmans, Easter and holiday periods. According to the same opinion, the criteria that the legislature must take into consideration is not the criterion of age but the years of service and the amount of the paid contributions, on the grounds that actually these two criteria reflect the pensioners' contribution to the social insurance system. See Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 41.

sures may be deemed proportional in times of extreme financial crisis, while the same measures could have been deemed disproportional and thus unjustifiable in ordinary times. This is because the more important and pressing the social policies concerned are, the more necessary and inevitable is the retrenchment.[903] Therefore, the more intensive a crisis is, the more serious is the importance of the legitimate aims pursued that could overweigh and thus justify even severe interference with the pensioners' rights. *De lege ferenda* even in times of financial crisis it should be held as arbitrary to interfere with pensioners' rights, when certain requirements are met. The jurisprudence of the Council of State is an illustrative example of when the courts should show some reluctance to the decision of the legislature to interfere with pensioners' rights and when not, since it offered interesting and divergent rulings on this legal issue.

In the first ruling of the Council of State,[904] which concerned the pension reductions introduced in the first year of the crisis (in the year of 2010), the court operated weighing between the emergent need of reducing the public debt with the pensioners' property rights and declared the constitutionality of the pension reductions. The Council of State, in plenary session, demonstrated a wide reluctance to review the constitutionality of the first emergency measures undertaken within the framework of the first economic adjustment programme. It argued that the reductions in the pension benefits are constitutional because of the exceptional fiscal circumstances that the state had to face. The court held that the aim of the measures was not merely the fiscal consolidation of the state but the urgent need to tackle the difficult economic situation of the state and avoid its bankruptcy. Namely, because of the imminent character of the crisis the legislature was not obliged to evaluate the consequences of the measures on the pensioners' level of income as well as to limit the measures in time. In this way, the Greek jurisprudence took thus into account the new realities, declaring for the first time the confrontation of the crisis as a crucial factor in the balancing process.

The second wave of judicial rulings appeared in 2014. The Council of State remained stable to its previous jurisprudence and ruled the proportionality of the pension reductions introduced in the second year of the cri-

903 *Hay*, Journal of Social Policy 1998, p. 528.

904 Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012.

sis.[905] Similarly to its first judicial rulings concerning crisis-related pension reductions, the Council of State supported in the judicial rulings, which concerned the pension reductions introduced in the second year of the crisis (in the year of 2011), that the respective reductions were proportional, on the grounds that they pursued legitimate grounds of public interest and constituted part of a wider economic and structural programme for the fiscal consolidation of the state.

In contrast to the aforementioned judicial rulings, there was the ruling of the Council of State concerning the last round of pension reductions introduced in the third year of the crisis (in the year of 2012).[906] The court shifted its jurisprudence and gave more value to the non-emergency of the Greek financial crisis than the national authorities did, arriving at the conclusion that the pension reductions could not be justified. The main argument of the court was that the economic and financial circumstances were different in relation to the situation of the public finances at the time of the publication of the previous jurisprudence. Therefore, the court reassessed the severity of the aims pursued and the elements of the principle of proportionality under the newly economic circumstances. More specifically, the court ruled that generally, the state is allowed to reduce current pension benefits in times of exceptional and severe fiscal crisis as it may emerge that the state is justifiably unable to provide adequate financing to the social insurance funds, and that it is not able to ensure their sustainability through other means. Yet, the court argued that in the third year of the crisis the imminent threat of an economic collapse of the state was lacking and there was not an urgent need to immediately confront a sovereign crisis searching for international financial assistance, since an economic adjustment programme had already been put in truck and thus the initial basic measures of confronting the crisis had already been designed and undertaken. Subsequently, according to the court, the legislature had the time to conduct a well-established analysis that would ascertain and prove whether the measures were compatible with the Greek Constitution.

905 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

906 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2288/2015.

Against this background, the first judicial reasoning was based on the state of emergency doctrine.[907] The existence of such a severe financial crisis may be recognised by the judicative power that is giving weight to its existence, when it balances between the restrictive measures and the protection of rights.[908] In the aftermath of the crisis, restrictive measures in the field of pensions were also essential, due to the ongoing recession and Greece's need to reduce the public deficit and debt in return for financial support. However, in the third year of the crisis, the financial crisis was not extreme and was no longer so urgent that it threatened the sovereignty of the state, as was the case in the beginning of the crisis. This is because in the aftermath of the crisis, an economic adjustment programme had been put into place. The Greek state, as a bail-out country, could receive financial assistance to solve its high public debt problem, in return for undertaking the necessary measures to reduce its public deficit.

The shift in the Council of State's jurisprudence shows that the element of urgency is actually the key factor which influences the process of balancing, and consequently the level of judicial protection towards the pensioners. The judicial protection towards the pensioners does not depend on whether the state has to face a financial crisis, since it is often a phenomenon that the state faces economic difficulties due to high public debt, but it depends on the level of severity of a financial crisis. An effective judicial protection takes place when the financial crisis in not very severe and the state has already found other means of financing, such as borrowing from the ESM and the IMF. In that case, there is not an urgent need to reduce the public deficit and debt and therefore, the legislature is not allowed to restrict further the pensioners' rights, on the grounds that the state had the time to adopt other less restrictive measures that could achieve the same goals in the long-term.

Against this background, a financial crisis may not justify *per se* restrictions on pensioners' rights, but only when the element of urgency exists. Under the term "*urgency*" falls a financial crisis that is exceptional, imminent and able to put at stake the substance of the state leading the latter to its economic collapse. In addition, the emergent need for financial support by international creditors and the international pressure for reduction of the public deficit played the same decisive role besides an urgent financial

907 *Yannakourou,* in: *Kilpatrick / De Witte* (eds.), Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges, p. 22.

908 *King*, Social Rights and Welfare Reform in Times of Economic Crisis, p. 5.

crisis rendering the financial crisis to a situation of urgency. The element of urgency plays a decisive role in the balancing process undertaken through the element of proportionality. It upgrades the importance of the legitimate aims pursued (sustainability of public finances and public pension system) to the level of seriousness. As a result, the serious legitimate aims of public interest become able to outweigh even severe interference with fundamental human rights protected under national law. For instance, the urgent financial crisis of the year of 2010 upgraded merely fiscal interests of the state and the effort to overcome the high public deficit and the deficit of the public pension system to a national interest and as a consequence justified the restriction on the pensioners' right to old-age pension benefits imposed by the first pension reductions, in order to avoid the bankruptcy of the state. However, the same crucial factors may not upgrade the legitimate aim of public interest to the level of seriousness when a financial crisis is not urgent and the solvency of the state is not in imminent danger. Therefore, the economic and financial crisis, as well as the external pressure to decrease the public deficit in return for conditional financial support, played a central role in the review of the constitutionality of the restrictive measures that were undertaken in the beginning of the crisis; whereas both factors play a less important role on the constitutionality of the restrictive measures undertaken in the aftermath of the crisis.

Besides the element of urgency, another important element is the cumulative reductions in the current pensioners' benefits introduced during the crisis. The Greek courts did not examine the constitutionality of cumulative pension reductions, but only the constitutionality of each reduction separately. This happened because of procedural reasons, on the grounds that each time the claimants brought the reductions separately before the courts and not the reductions introduced by the legislature through all laws. Yet, it is important to also analyse this element. Namely, not only the urgency of a financial crisis, but also the continuous implementation of the same restrictive measure must play a crucial role in the balancing process and erode the principle of proportionality. The effort to overcome an urgent crisis may not erect insurmountable obstacles, when the legislature had been continuously introducing the same restrictive measure. The continuous introduction of the same measure shows the lack of suitability of the measure in question. Accordingly, the continuous pension reductions are unsuitable and thus not proportional. In addition, when the legislature introduces continuous pension reductions, then the interference with the pensioners' rights becomes more severe. The more severe the interference

is the more urgent, severe, present and exceptional the financial crisis should be, in order to outweigh the severe interference. This is because stronger arguments are needed in order to outweigh severe interference with pensioners' rights. However, the financial crisis did not become more severe in its third year, but the legislature continued reducing the pension benefits. For this reason, the balance between the legitimate aims pursued and the protection of pensioners' rights must be held as disproportional and thus unconstitutional, concerning the reduction introduced in the third year of the crisis.

Moreover, another interesting outcome is that the level of urgency of the financial crisis influenced also the level of judicial review. Generally, the judicative power may be more inclined to exercise restraint in judicial review concerning restrictive measures undertaken by the legislature as a democratically elected body, in order to avoid violating the principle of popular sovereignty as well as the principle of the separation of powers. This tendency becomes more intensive and extensive in cases of an urgent financial and economic crisis, when the courts take preference to exercising judicial self-restraint, rather than a more activist approach to judicial review.[909]

The Council of State proceeded to perform a marginal judicial review in the first judicial ruling No. 668/2012, merely accepting the aims as legitimate and proportional without examining deeply the proportionality of the measure. This is because declaring the measures that had been undertaken by the legislature, in order to overcome the crisis, unconstitutional would have serious economic and political implications at that time, which were heightened by the emergent need for financial assistance. Indeed, the court did not examine whether the old-age pension benefits reductions constituted the most suitable and the least restrictive measure, arguing instead that the restrictive measures constituted restructuring consolidation measures as well as part of a social insurance reform, which is part of a wider economic adjustment of the state in return for financial support through bilateral loans from the Member States of the EMU and from the IMF. In this way, the court opted for self-restrained judicial review. Yet, the fact that the legislature also adopted other restrictive measures to achieve the same aims does not release the court from the obligation to examine, comprehensively, the suitability and the necessity of the measures,

909 *Ktistaki,* EDKA 2012, p. 500.

as these are essential steps for the declaration of the legal implementation of the principle of proportionality. Obviously, due to the lack of technical knowledge and management experience in the developments of social policy issues, the court chose to avoid exercising judicial activism at the outset of the crisis, being deeply involved in a case with great budgetary and political implications. Similarly, the ECtHR exercised also a restraint judicial review in a case concerning the pension reductions introduced by the Greek legislature in the first year of the crisis.[910] The ECtHR accepted that in the area of pension legislation Greece enjoys a wide margin of appreciation and took into consideration the decision of the Council of State No. 668/2012.

On the contrary, the lack of the element of urgency led to active judicial review. In the ruling No. 2287/2015, the Council of State exercised an activist review by enquiring deep into the nature of the public interest choice which was under challenge.[911] Namely, the court gave in this ruling a greater dimension to the fiscal consolidation of the social insurance funds than the fiscal consolidation of the public finances, as it did in the ruling No. 668/2012. The court held it to be inadequate that the legislature chose to only consider the need for "*fiscal consolidation"*, while the mere reference to the "*adverse financial situation"* of the social insurance funds as the main reason for the problem was held as too vague, as the legislature referred to all social insurance funds. The court ruled that the respective measures were adopted under the revised view of the new pension system, where the state is not obliged to participate in the financing of the funds, so that the individuals are exclusively responsible for the sustainability of the funds, which is to be achieved mainly and exclusively by the mathematical actuarial relationship between benefits and contributions. Furthermore, the court applied the principle of proportionality more comprehensively than in the ruling No. 668/2012. More specifically, it ruled that the legislature should have evaluated the factors that provoked the problem of the sustainability of the social insurance funds (especially the devaluation of the funds' assets through the PSI of the Law No. 4050/2012[912] as well as the continuing recession and the following high unemployment rate), in

910 ECtHR, *Koufaki and ADEDY v. Greece*, Decision of 07 May 2013, Appl. Nos. 57665/12 etc.

911 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287/2015.

912 Law No. 4050 of 2012, Official Gazette of the Hellenic Republic 36/A/23.02.2012.

order to evaluate the suitability of the respective measures. Besides, it held that the legislature should have also comprehensively evaluated their necessity by searching for alternative measures and comparing the benefits and costs of such in relation to the pursued public interests (fiscal consolidation, sustainability of public social insurance funds and guarantee of adequate living conditions). However, in order to avoid any fiscal imbalances which may result from the unconstitutionality of the pension reductions, the Council of State ruled that its judgment would work retrospectively as well as prospectively only for the current claimants. Pensioners other than the claimants must thus bring an action before the administrative courts, so that the reductions imposed on their pension benefits can also be judged as unconstitutional. In this way, the court kept a proper balance between an active and more restraint judicial review. The court, on the one hand, did not refrain from declaring the unconstitutionality of the reductions since it felt that the government had not pursued legitimate aims and the measures in question were not proportional to the aims pursued; and on the other hand, the judicial decision would not possibly have any great consequences on the on-going political and economic developments.

In its rulings No. 2287-2287/2015 the Council of State acted thus in a legitimate manner and followed the correct course of action by not acting with restraint in cases of old-age pension benefits' reductions. The judicative power is obliged to exercise an objective review. If the judiciary does not exercise an objective review, implementing the law properly, then it has failed in its duty. The idea that a judge is not in a competent position to indicate, what the most appropriate and necessary restrictive measure may be, violates the core element of democracy which involves that the judiciary is custodians of law, even if the measure is a social policy measure. Of course, the court should take into consideration in the balancing process the element of a severe financial crisis, but the existence of a financial crisis (either severe or not) should not be a burden on the judicative power to examine properly, whether the pension reductions were suitable and necessary to reduce the public deficit and debt. The judicative power is obliged to take into consideration that the same measure had been undertaken also in the past, and whether the legislature examined less restrictive measures. Applying the rule that courts should not interfere with social policy choices would mean that the social rights would be left

without an effective remedy.[913] The depth of judicial involvement should depend upon the seriousness of the limitation of a right in the case at hand; the more serious a limitation, the more intense the review engaged by the courts should be.[914]

Last but not least, the financial crisis and the external pressure in return for financial assistance did not influence the development of judicial protection in cases of specific professions. The Greek courts provided a wide judicial protection to the special category of military officers, members of security groups and judges, even in times of financial crisis, on the grounds that these categories of professions enjoy specific peculiarities not recurring in other categories of public employees.[915] In these cases, the courts did not use the right to property or the right to social insurance as legal grounds, but instead focused only on the special characteristics of the respective professions, and their argument was based on a totally different legal basis. More particularly, the Council of State ruled that the pension reductions of the military in general and the members of the security corps, introduced through Law No. 4093 of 2012, were unconstitutional because the legislature did not keep a proportional balance between the principle of special salary conditions and the fiscal interests of the state.[916] According to the court, the legislature illegally relied exclusively upon a purely mathematical measure, namely the average reduction in public spending on pensions, ignoring altogether the importance of the constitutional function of the military and armed forces. According to the court, the legislature did not take into account the specific circumstances of their mission, the impact of the disputed cuts on their living standards and the possibility to adopt less restrictive measures that would have an equivalent effect, as provided by the principle of special salary conditions. The court stated that the armed forces must enjoy special treatment, which derives from a number of constitutional provisions, such as from the fact that the commander in chief on the nation's armed forces is the President of Republic (Art. 45), from the fact that they are deprived of the right to strike

913 *Poulou*, German Law Journal 2014, p. 1171.

914 *Rivers*, Cambridge Law Journal 2006, p. 177.

915 Special Court of Article 99 of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013; Council of State (Plenary Session), Judgment of 17 January 2014, No. 2192/2014.

916 Council of State (Plenary Session), Judgment of 17 January 2014, No. 2192/2014.

(Art. 23(2)) and they are not allowed to manifest favour for any political party (Art. 29(3)). From these provisions, it was argued by the court that the core competences of the armed forces fall within the state's authority and cannot in principle be delegated to private operators. In order to successfully fulfill their mission, the armed forces and the police are militarily structured, subject to strict chain of command, while their operatives are military personnel, placed under a specific authoritative status. Their official and non-official obligations justify numerous special human rights restrictions that apply for ordinary citizens, such as the absolute prohibitions of Articles 23(2) and 29(3) of the Greek Constitution mentioned above. Therefore, to counterbalance aforementioned circumstances, members of armed and security forces must enjoy special salary conditions. The principle of the special salary conditions and thus the principle of special old-age pension benefits conditions reflect an institutional guarantee, which seeks to ensure the effective fulfillment of their mission. The principle of the special salary conditions asserts that wages policies must be made with consideration of certain factors: such as the specific circumstances, the occupational hazards, the echelon and the prevention of corruption.[917]

In addition, the Special Court of Article 88(2) of the Greek Constitution decided that the reductions in public salaries of the judges are unconstitutional and its ruling was based on the following reasoning.[918] The court particularly ruled that pension or salaries reductions in the judiciary is contrary to the constitution because it posed a challenge to the judiciary's independence, whilst the judiciary is one of the three powers besides the executive and legislative power, whose independence is guaranteed in the Constitution. Reducing the public salaries of the third independent power without reducing at the same time and to the same extent the salaries of the other two powers is contrary to the separation of powers and the independency of the judicial power, which is guaranteed by high level of public salaries.

In light of this, it is not a convincing and reasonable statement that cutting old-age pension benefits of the judiciary and the military officers or

917 In so complying with the plenary session of the Council of State's ruling, the legislature abolished the provisions that reduced the monthly payments of the military and security corps foreseen in Law No. 4093 of 2012 through Art. 86(1), Law 4307 of 2014, Official Gazette of the Hellenic Republic 246/A/15.11.2014.

918 Special Court of Article 88(2) of the Greek Constitution, Judgment of 30 December 2013, No. 88/2013.

security crops is contrary to the constitution because of the special characteristics of each category. It is legally ill-grounded to protect the pensioners' right by not using the right to property or the right to social insurance in national restrictive social policies as a legal basis, but applying the principle of separation of powers or the right to fair trial or diverse constitutional provisions respecting the limitations on their rights. This might help to draw an unexpected conclusion that the judges did not rule objectively in their decisions. Objectivity in judicial review requires self-discipline, which means that the courts must refrain from imposing their own preferences about what the law should be and bear the responsibility to adhere to the meaning of the law, the facts of the case and deliver a logical conclusion.[919]

II. Enhancing the Right to Social Insurance

Before the financial crisis, social rights have been mainly used in a programmatic nature, while constitutional norms other than the right to social insurance are applied in order to oblige the state to perform concrete tasks in terms of the implementation of the right to a pension. In practice, property rights have served to ground social security rights claims, when the pensioners seek to challenge the state's responses affecting their right to a pension. The right to social insurance has only been of limited use to those seeking to advance social rights claims. This is because the right to social insurance as a positive social right is incapable of underpinning constitutional regimes, since it actually provides for affirmative action and does not provide the pensioners with the ability to claim pension benefits of a specific amount. However, this approach disregards the proper enforcement of the social right to old-age pension benefits.

After the financial crisis, a subjective dimension to the right to social insurance became absolutely essential, because of the continuous reductions in social insurance benefits. The social insurance benefits, such as the old-age pension benefits, are the obvious victims, triggered by the crisis, since they are directly dependent on economic resources of the state. The legislature chose to use fiscal consolidation measures several times to aim for the reduction in old-age pension benefits and therefore, their pro-

919 *Smith*, Judicial Review in an Objective Legal System, pp. 244-245.

tection was urgently needed. The jurisprudence of the Council of State offers interesting points to the subjective dimension of the right to social insurance.

While the Council of State, in its first judicial ruling No. 668/2012, applied the right to property as legal basis to pensioners seeking legal avenues to bring crisis-related challenges, the same court held that even if the pension system, in which individual has contributed mandatorily, give rise to acquired rights, the pensioners' rights should be protected not only along the lines of property protection but also from the right to social insurance.[920] This is a huge offer in the importance of the judicial protection provided by the social rights. Empirical research supports that those countries with constitutionally entrenched socio-economic rights and strong powers of judicial review have been shown to devote more on their national wealth towards the realisation of socio-economic rights; in contrast, countries lacking judicial review experienced lower levels of spending on social programs.[921]

The Council of State used the right to social insurance as a foundation for claims in cases of pension reductions that were introduced in the second and third year of the financial crisis.[922] The court refrained from applying the the right to social insurance in first instance cases of pension benefits reductions. The right to social insurance was therefore only applied by the court in cases of successive pension reductions. Profoundly, the court regarded that the extensive and continuous reductions interfered with the core of the right to social insurance. Departing from its lines of argument, the Council of State defined the content of the right to social insurance and its core as the following: on the one hand, the Council of State ruled that the old-age pension benefits should not correspond precisely to the amount of contributions paid, nor to recover the full loss of income. On the other hand, the Council of State ruled that this aspect of the right to social insurance is to protect the pensioners' right to receive pension benefits that depend upon an amount able to secure adequate living standards "*as far as possible*" closely to the income the pensioners were enjoying

920 Council of State, Judgment of 10 June 2015, Nos. 2287-2290/2015.

921 *O' Connell*, Vindicating Socio-Economic Rights: International Standards and Comparative Experiences, p. 7.

922 Council of State, Judgment of 13 October 2014, No. 3410/2014; Judgment of 23 October 2014, No. 3663/2014.

prior to retirement, while the level of minimum existence was set as the red line.

Correctly, the court ruled that the amount of pension benefits should not correspond to the total amount of pension contributions, since the latter occurs mostly in cases of private insurance, where the idea is that every insured person has a hypothetical, individual account in which the contribution will accrue. In the Greek public pension system, the balance between the contributions and the benefits is not the same as in private insurance. The amount of benefits and the amount of contributions may not be equal, given that they form part of a solidarity benefit system, which itself exists within a PAYG system. In addition, correctly the court ruled that the right to social insurance indicates that the old-age pension benefits should be of an amount that corresponds to the living conditions that the individual was enjoying whilst working. The Greek public pension system has a contributory character and its aim is to guarantee that the pensioners enjoy similar living standards to that which the individual was enjoying prior to retirement.

However, the Council of State was not very concrete on what falls under the meaning "*as far as possible*". This is because it is actually the legislature that holds the competence to define this. The judicative power is not competent to define how the equivalence between the paid contributions and the final pension benefits should be shaped. The judicative power is competent to define the core element of the right to social insurance; namely, to define when the old-age pension benefits no longer correspond to the living standards that the individual was enjoying before retirement. The Council of State failed defining the core element of the right to social insurance, while it ruled only the principle of minimum existence as a limitation on the legislature.[923]

The element of the principle of minimum existence does not belong as an element to the substance of the right to social insurance. This is be-

923 Similarly, the Council of State used the principle of minimum existence as a minimum line for pension reductions in the first ruling concerning pension reduction. It decalred that the reductions were proportional, on the grounds that the reduction and/or abolishment of the bonuses allowances did not lead to the total deprivation of the right to pension, because the Article 2 of the Greek Constitution, which guarantees the right to human dignity is not violated. The right to human dignity was not violated, since the claimants did not prove that these reductions would endanger their life or human dignity. See Council of State (Plenary Session), Judgment of 20 February 2012, No. 668/2012, at para. 35.

cause the reduction in all pension benefits to the same level disregards the fundamental contributory character of the system. The right to social benefits cannot be easily impaired in cases of pension reductions when there is a strong connection with personal earnings. Namely, the thesis that the pension benefits may be reduced to such an extent as long as they cover the pensioners' minimum existence contradicts the principle of equivalence, since not all pensioners have paid the same amount of contributions to the public pension system. The principle of the minimum existence must be applicable only in social assistance cases when the individuals have not paid any contributions to the social assistance system rather than in social insurance cases, where a certain level of equivalence must be respected.

Furthermore, the right to minimum existence may not to be taken into consideration in the balancing process of the principle of proportionality. Namely, it is not legally correct to rule that old-age pension benefits reductions are proportional, when the granted amount of benefits guarantees a level of minimum existence. This is because any untouchable core, such as the right to minimum existence, can hardly be assessed, when the constitutionality of pension reductions is examined using the legal tool of the principle of proportionality.[924] The latter principle outweighs different legally protected interests and the right to minimum existence should not be assessed as a protected interest because of its absolute character.[925] Besides, this approach is not helpful in addressing the legal position of those pensioners who have not reached the minimum existence threshold but suffer, however, disproportional losses of income and well-being through the crisis.[926]

A more accurate thesis would be that in cases of continuous pension reductions the right to social insurance as a social right to old-age pension benefits should be used as legal norm in order to legally constrain successive post-crisis actions and provide a subjective, enforceable right on the part of the state, when it becomes apparent that there is an absence of the element of equivalence. This is because the principle of equivalence is a core element of the constitutional right to social insurance. The principle of equivalence guarantees proportionality between the granted old-age

924 *Becker / Hardenberg*, in: *Becker / Pieters / Ross et al.* (eds.), Security: A General Principle of Social Security Law in Europe, p. 114-115.

925 *Ibid.*

926 *Bilchitz*, IJCL 2014, p. 710, 732.

pension benefits and the paid contributions. This means that the legislature must reduce the old-age pension benefits to such an extent that the final amount still corresponds to the pre-retirement living conditions of the pensioners.

What is ripe for legal consideration is when exactly the amount of pension benefits received corresponds to the pre-retirement living conditions. This is a matter of examination in accordance with the facts of the case at hand. The core of the right to social insurance should be defined *a posteriori* according to the circumstances of each case and not *a priori* by shaping general rules based upon assumptions and predictions. In other words, a general principle on when the principle of equivalence does not exist should be defined by the judicative power from the particular scenario at issue, based upon actual observation or upon empirical experiences and tailored to the known facts each time.

For example, the right to social insurance may be applied in the case of the self-employed of OAEE, where the principle of equivalence was disregarded. This is a special case, since there was a great divergence among the amount of paid contributions. The OAEE-insured could choose between paying the maximum contributing pattern (199,200 Euros accrued contributions) or the minimum contributing pattern (91,118 Euros accrued contributions).[927] On the grounds that this difference existed among the paid contributions, the old-age pension benefits of the OAEE-pensioners should have been reduced proportionally to their paid contributions. However, after successive reductions, the group of pensioners that paid the maximum contributions rates had their pension benefits reduced eight times more than the group of pensioners who paid the minimum contribution rates. For this reason the right to social insurance should be applied in this case, because the principle of equivalence had been disregarded.

With this in regard, the right to social insurance should also be applied in cases where other core elements of the right are infringed, such as the principle of the protection of social insurance in favour of the future generations. Namely, the judicative power should apply the right to social insurance when the sustainability of the social insurance system is infringed; for instance, when generous old-age pension benefits are provided. Again,

927 This amount of accrued contributions could be achieved for both cases (maximum and minimum contributing pattern) after 40 years of service. See *Simeonidis / Diliagka / Tsetoura*, Journal of Social Cohesion and Development 2014, p. 34.

the criteria for whether the sustainability of the pension system is infringed because of generous benefits provisions are to be examined by the courts *a posteriori* according to the data of the respective public pension funds.

III. Limits on the Interference with Pensioner's Rights

From the case-studies it can be derived that generally, in the area of pensions, states must enjoy a broad scope of discretion and therefore may legitimately yet unfavourably change the public pension system by reducing the amount of pension benefits normally payable to the qualifying population. This is in the interests of the improvement of the efficiency of the public pension system, including the social insurance system, and the adaptation of the public finances to new economic challenges, especially in cases of severe financial crises. Therefore, it may emerge that the states may justifiably restrict the pensioners' rights, in times of exceptional and severe fiscal crisis and in front of the danger of states' insolvency. This is because, in times of severe financial crisis, it may emerge that the state may not be able to provide adequate financing to the public pension system and ensure in this way its sustainability through other means. However, despite the fact that the states are justified to restrict the pensioners' rights, the legislature is not *per se* freely allowed to do so. The mere fact of restriction on pensioner's rights designed to ameliorate existing financial imbalances and the sustainability of public finances may not give rise to presumption of a justified restriction.

When a court examines an issue of justice, a solution should be found which is compatible with the overall framework of rules and principles that are proper to the legal order in which the court operates.[928] Although this doctrine seems to be too simplistic, in reality, proportionality issues raise many difficulties, since there are many compelling interests which interact demanding fair treatment or balance; on the one hand the private pensioners' interests that their pension benefits are not reduced and on the other hand, the public interest to avoid the collapse of the sustainability of the public pension system and control of public expenses by the state, in order to ensure sustainable public finances, sustainable public pension

928 *Sarmas*, The Fair Balance: Justice as an Equilibrium Setting Exercise, p. 140.

funds and the proper functioning of the EMU. Ripe for legal consideration is how a proportional balance may be kept between these compelling interests. Specifically, this is a question of what proportion of pension reductions, and to what numbers of pensioners, is proper and correct in order to save the state, the public pension system and the EMU whilst simultaneously avoiding a violation of the pensioners' rights to property or social insurance and equality? There are no easy answers to this question and this is indeed the main reason why proportionality issues on pensioners' rights were decided by the Council of State with a narrow majority.

The case-studies that have been analysed in the present chapter allowed for the drawing some answers and suggestions as to the paths which the pensioner' rights might be best protected in cases of public pension reforms in times of financial crisis. The conclusion is that there are previously utilized general and abstract pre-defined criteria which indicate when a proportional balance is achieved. More particularly, the present chapter concluded that in this balancing process, the legislature must respect some common rules and paths, which may appear to be decisive on the proportionality of the public pension reforms to the aims pursued. Namely, the pension benefits must affect as far as possible the lowest percentage of pensioners; the legislature must not introduce the same restrictive measures when the public finances and the finances of the public pension funds have not been improved at all or as much as expected; the pension reductions must be applied in a foreseeable way, the pension benefits must be reduced when it is comprehensively provided that it is only in this way that sustainability and equivalent pension income to previous earnings can be secured; and lastly the reductions are applied in a non-discriminatory manner.

Firstly and more specifically, it complies with the requirements of the principle of proportionality, when the pension reductions affect the lowest possible percentage of pensioners. This is because the interference in this case is not severe and may be outweighed by the highly important aim of ensuring the sustainability of the public finances and the public pension system in times of a severe financial crisis.

Secondly, the practice of the legislature to reduce the pension benefits on a continuous basis contradicts the principle of proportionality. This is because repeatedly having to apply the same measure in a continuous manner suggests the aim of that measure has not been met. Therefore, this proves that the respective measures were not suitable to achieve the aims pursued. Of course the element of suitability does not demand the achieve-

ment of the aims pursued, but when the same measures have been previously applied, without achieving the expected results, it appears counter-intuitive to apply the same measures again in the future to try to obtain the results they failed to achieve in the past. In the Greek case, despite the cumulative pension reductions, the public finances remained unsustainable, while the public pension system's sustainability was not ensured. This is due to the fact that the Greek legislature did not conduct well-established actuarial studies that stated if or how the state can contribute to the sustainability of the public finances and the public pensions funds,[929] showing to what extent and in which chronological period the pension benefits have to be reduced in order to achieve the aims pursued, and evaluating specifically the economic situation of each of the funds. In addition, the cumulative reductions did not contribute to the achievement of the aims pursued because they created a legal uncertainty, which resulted in many individuals opting for early retirement.[930] As a result, the public pension system was further financially burdened, due to the increased numbers of early old-age pension benefits applications. The cumulative reductions in the pension benefits of current pensioners should be permissible only when the financial crisis becomes more urgent and severe, and thus the exceptional financial realities require quick policy responses. In these cases, the severe interference with the pensioners' rights which resulted from the cumulative reductions may be outweighed by the aims pursued which became severe because of the exceptional circumstances. In sum, when the exceptional financial realities do not require quick policy responses, then pension reductions are proportional and thus constitutional, only when specific and well-established scientific research on the level of reduction has been conducted.

In addition, the cumulative reductions contradict the principle of legitimate expectations (or principle of protection of confidence). Respecting the principle of legitimate expectations also plays a decisive role for the proportionality of a measure. The latter principle promotes a certain legal certainty, so that pensioners are able to rearrange their finances and have the necessary time to find ways of replacing their loss of income. It indicates that the pension reductions may be proportional only when the legis-

929 Council of State (Plenary Session), Judgment of 10 June 2015, Nos. 2287-2290/2015, at para. 24.

930 See for example *Hellenic Republic*(2015a), p. 9. It is stated that the pensioners of IKA were increased at 49 percent in March of 2015.

lature ensures the predictability of the reductions through the introduction of a foreseeable rate reduction within a specific period of time (i.e. pension reductions on a yearly basis).

Furthermore, the legislature must reduce the pension benefits in accordance to the principle of equivalence. This may be the most challenging in comparison to the aforementioned rules. The legislature must balance the principle of equivalence as an aspect of the right to social insurance with the legitimate aim of protecting the "*low-earnings*" pensioners. On the one hand, the legislature should protect the "*low-earnings*" pensioners, which have mainly paid few and low value contributions. This is indicated by the principle of social solidarity, which promotes a certain financial redistribution among the pensioners. On the other hand, the contributory character of the system should not be refuted at all. The final amount of pension benefits should correspond to the living conditions that the individual was enjoying before retirement. This challenge can be confronted by reducing the old-age pension benefits of those pensioners who contributed the maximum amount on the basis of the previous granted pension contributions, and those pension benefits of the pensioners that contributed the minimum, on the basis of their last gross pension income. From a different perspective, ccontinuous reductions in pension benefits, which affect the equivalence between benefits and contributions, may undermine the credibility of the pension promises. This is because contributing to the public pension system divorced from any expectations of receiving an equivalent pension income after retirement. This could prove to be a disincentive to work more than the minimum contributory period and incite people to pay only the minimum contributing pattern to the public pension system. Introducing, however, a system that works in a way of respecting the principle of equivalence, the sustainability of the public pension system can be further ensured.

Last but not least, the old-age pension benefits reductions should not be applied in a discriminatory way. The legislature must reduce the old-age pension benefits using the criterion of age under specific conditions. For a high standard of proof of the legality of the discriminatory measures to be established, first of all, the different treatment must aim the reduction of the public deficit and the public pension funds and the ensuring of the financial assistance from the international creditors, because of urgent need for financial liquidity. Secondly, the criterion must be proportional to the aims pursued, namely the discriminatory measure must be fair and the least restrictive measure that could protect the social insurance capital's

sustainability and reduce the public pension expenditures. The proportionality of using age as criterion should be assessed according to the special characteristic of each case-study. For example, the measure of reducing to a greater extent the "*younger pensioners'*" benefits that the "*older pensioners'* benefits cannot be defined *a priori* whether it constitutes a discriminatory measure when pension benefits are reduced more for those that retired earlier than the pension benefits of those that retired later. On the one hand, this measure ensures a proper and sustainable functioning of the public pension system, since it provides a disincentive for early retirement to the future pensioners. However, on the other hand, the individuals that opted for early retirement legally exercised an individual choice which was provided to them by the legislature. The ex-post punishment of early retirement may be held as discriminatory and thus disproportional, if the criterion of age is close to the pensionable age of retirement. The main conclusion is that there are not in advance general and abstract pre-defined criteria which indicate when a proportional balance is achieved in cases of age discrimination cases. Using this approach, differential treatment would amount to direct age discrimination, if it resulted in exacerbated and perpetuated inequality *a posteriori* according to the individual circumstances and characteristics of each case.

In the end, it should be noted that the aforementioned rules indicating when the principle of proportionality is respected can be derogated from only when the Constitution is suspended. In a different case, there is no reason for the legislature to not comply with them.

Conclusion

The legality of public pension reforms is grounded in the lawful implementation of pension policies, which guarantees the sustainability of the public pension system and public finances as well as the protection of the pensioners' civil and social rights. Questions of legality arise as the sustainability of the public pension system and public finances is further endangered, in times of financial and economic crisis. It is undeniable that the financial and economic crisis brought attention to the correlation between the problem of sustainability of the public pension system (which pre-existed the crisis) and the sustainability of the public finances and *vice versa*. The Greek legislature adopted a procrustean solution to confront these two problems, by reducing the current pension benefits and introducing retrogressive pension reforms, thus affecting both the current and prospective pensioners.

My inquiry concentrated on the legality of the public pension reforms and reductions introduced in Greece as a first reaction to the Greek financial and economic crisis. The most important and pressing legal question, dealt with in this book, lies in the extent of the necessity and usefulness of this procrustean solution. The present book was confronted with this legal question, taking into regard the new and strong need to contain public spending. In light of the recent economic recession and alarming forecasts of rapidly increasing public pension spending, the sustainability of the public pension system dominated public debate and political discourse. This was the main focus of the Greek state, as well as the demands made by its international creditors namely by the other Member States of the EMU and the IMF. The adoption of pension reforms and old-age pension benefits reductions under the framework of the external financial assistance became besides the financial crisis a further pressing tool on the legislature to introduce restrictions on pensioners' rights. This book highlighted a number of pension reforms issues that have emerged after the crisis, and made some suggestions as to the legal recourse paths which the pensioner's rights may take, in order to develop a case against the restriction of their rights in times of financial and economic crisis.

Starting with chapter one, I attempted to explore the relationship between the financial and economic crisis and the retrogressive public pen-

sion reforms; challenging the often-made assumption that public pension schemes can be radically reformed in times of crisis, since in crisis periods the public opinion becomes very sensitive to the burden of pension expenditures on the public budget and thus it is more possible to accept sacrifices from their present income.[931] Obviously, sovereign public debt is one of the most effective tools to implement domestic economic and social policy.[932] The overall unsustainable economic situation of Greece and the urgent need for the reduction of public deficit led to strong pressures on the Greek state to adopt pension reforms as well as an easy and effective in short-term policy measure, as the old-age pension benefits reductions is. Even if Greece was not directly obliged to reduce the pension expenditures, it is impossible to consolidate public finances without touching upon the problem of sustainability of the public pension system. The element of urgency for public deficit reduction created further pressure on the Greek legislature to reduce public pension expenditures. Chapter two moved on to the public pension reforms adopted after the outbreak of the domestic financial crisis and the conditional financial facility agreements signed in the period 2010-2012. Chapter three laid down potential individual rights and principles that may protect the existing and future positions of the pensioners, and thus providing them with justiciable claims. Chapter four addressed the question relating to the role of the economic and financial crisis and the conditional financial assistance on the justification of the restrictions on the pensioners' legal positions. The financial crisis and its distinctive element of conditionality appears to play an important role on whether the aims of the legislature to improve the sustainability of the fiscal interests of the state and the public pension system as well as to ensure the proper functioning of the EMU are legitimate. The aims pursued by the legislature may acquire a special gravity through the urgent need of the external financial support. In chapter five, I concluded with some outcomes on the judicial protections of pensioners' rights in times of financial crisis and the new role of the right to social insurance as well as on recommendations for both the constitutional courts and national legislatures, concerning the proper legal reaction to public pension reforms being introduced, by using case-studies as examples.

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931 *Jallade*, in: *Ferge / Kolberg* (eds.), Social Policy in a Changing Europe, p. 44.

932 *Bohoslavsky / Cernic*, in: *Bohoslavsky / Cernic* (eds.), Making Sovereign Financing and Human Rights Work, p. 1.

In these concluding pages, I reflect on the relationship between the presented pension reform cases and my underlying analytical framework. In this thesis, it is argued that the recent domestic financial and economic crisis, as well as the stringent conditional financial assistance that Greece received by its international creditors, acted as the main driving force for sweeping cuts to public pension expenditures in order to face pre-existing problems, such as population ageing and the fiscal imbalances of the public pension funds. This argument has, primarily, obvious implications for the manner in which the Greek public pension system was reformed. The public pension reforms were introduced in a hasty manner, without prior conduction of actuarial studies which would clearly provide proof of some of the advantages of the pension reforms. The high public pension expenditures were dealt with through cost containment measures. The adopted pension reforms were not actually innovative but parametric. This is because, firstly, the reforms were based on the pre-existing PAYG system. Namely, the public pension system continues to be financed on a PAYG basis, the retirement age was increased, a less generous calculation formula and stricter link between contributions and pension benefits were introduced and the only innovation is the establishment of an almost universal flat-rate basic pension. At the same time the occupational and private pension schemes were not encouraged to function as a counterbalance to the income loss. These policies may put the future adequacy of pension benefits at risks, moving the negative impact especially younger generations (even for individuals with exceptionally continuous and long careers).[933] However, the real influence of the financial crisis and the subsequent financial assistance are more obvious on the reductions in payments of the current pensioners. This measure constituted the main rash reaction to the financial crisis.

Against this background, retrogressive public pension reforms seem to affect pensioner's rights. The legislature's obligation to adopt public pension reforms in accordance with the law needs to be fulfilled. I consider, firstly, that pensioners who have established legal positions should be in a situation that demands stronger legal protection than that of prospective pensioners, who are still performing their contributory career and have not contributed the substantial requirements to a pension entitlement. Secondly, the state is obliged, by a number of constitutional norms, to meet

933 *Natali / Stamati*, South European Society and Politics 2014. p. 236.

certain prerequisites in order to achieve the lawful implementation of pension rights. Namely, the present thesis concluded that the right to old-age benefits may be protected either as essential corollary of the right to property or through the expansive application of the principle of legitimate expectation, the principle of non-discrimination or through direct constitutional entrenchment of the right to social insurance. Thirdly, in terms of international law obligations, although Greece has ratified a range of instruments making provision for social rights, these rights may have little or no domestic impact. Greek jurisprudence has held that these international obligations must firstly be incorporated into domestic law, in order for them to be enforceable before the national courts. However, in terms of national law, a subjective dimension must be provided to the right to social insurance when the substance of the social insurance system, as an institution, is refuted.

In addition, I have argued that the aims of the reforms were: the reduction of the public deficit and creation of sustainable public finances, associated with a sustainable public pension system and the proper functioning of the EMU. I considered that the crisis and the conditional financial assistance are not the aims of the reforms but legitimised the aims of the fiscal interests of the state, which were not held as legitimate by the courts in the past. Due to the crisis and the conditional financial assistance, the concept of "*public interest*" was re-interpreted; the simple fiscal interests of the state to eliminate the public budget deficit and sustain public finances became a more important, national interest; one which may legitimately lead to intensive and radical reductions in the amount of old-age pension benefits. Moreover, they strengthened the severity and importance of the other two aims pursued (sustainability of public pension funds and the proper functioning of the EMU) setting them able to outweigh even severe interference with the pensioners' rights.

In addition, the present book concluded that public pension regulations are liable to changes and a judicial decision cannot be relied on as a guarantee against such changes in the future.[934] However, the state may not interfere with these rights in an arbitrary manner. The reductions in pension benefits induced by the financial crisis must be administered in a legal way. More specifically, in a manner that is balanced, equal and proportion-

934 ECtHR, *Sukhobokov v. Russia*, Judgment of 13 April 2006, No. 75470/01, at para. 26.

al amongst all pensioners, both current and future. Any such restrictions must be implemented according to the law; and in a way that complies with the requirements of the principle of proportionality. Namely, the legislature must take into account that a proportional relationship must be established between the importance of the legitimate aims pursued and the severity of the interference with the pensioners' rights. I considered a number of parameters, which the legislature must take into consideration separately or cumulatively when introducing restrictions on pensioners' rights. The criteria for pension reductions must be undertaken properly and comprehensively and in a non-discriminatory manner. The main challenge lies in ensuring the sustainability of the public pension system in the short and long-term; also taking into account the principle of protection of the sustainability of the public finances, while at the same time guaranteeing its adequacy and the compatibility with the protection of the pensioners' established rights.

New pension policy goals were being re-discussed between the new coalition Greek government and its international creditors in the year of 2015. More particularly, Greece signed a third financial assistance facility agreement with the ESM Board of Governors which works over three years (2015-2018).[935] On the 19th of August 2015, the Greek authorities signed, with the European Commission (on behalf of the ESM), a Memorandum of Understanding to specify the policy conditions.[936] The Third Economic Adjustment Programme for Greece aimed for a medium-term primary surplus of 3.5 percent of GDP to be achieved through a combination of reforms, including the reform of the pension system.[937] Due to the high unemployment rate and the fact that many individuals opted to retire early, the Greek authorities committed to properly implement the previous pension reforms, accompanied by the First and Second Economic Adjustment Programme and proceeded with further reforms to strengthen long-term sustainability targeted at making savings of 0.5 percent of GDP in 2015 and 1 percent of GDP by 2016.[938] Consequently, the Greek authorities reported on 19th August 2015 in the MoU for a three-year ESM programme, that Greece will adopt further pension reforms: "*a) specific de-*

935 The respective document can be retrieved from http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm.
936 *EU-COM*(2015).
937 *Ibid.*, p.5.
938 *Ibid*, p. 13.

sign and parametric improvements to establish a closer link between contributions and benefits; b) broaden and modernize the contribution and pension base for all self-employed, including by switching from notional to actual income, subject to minimum required contribution rules; c) revise and rationalize all different systems of basic, guaranteed contributory and means tested pension components, taking into account the incentives to work and contribute; d) the main elements of a comprehensive consolidation of social security funds, including the remaining harmonization of contribution and benefit payment procedures across all funds; e). The reforms will also reduce the overreliance on the pension system as a last resort income support for the working age population. That role will be taken up by the guaranteed minimum income scheme to be rolled out in 2016. A minimum income scheme is much better placed to support the participation in the labour market, notably through its link to active employment measures and support services."[939]

In light of this report, the Greek Minister of Employment, Social Insurance and Social Assistance established an Experts' Committee to propose a new social security system.[940] in general terms, the Committee proposed the unification of the diverse social insurance funds in one and set of unified rules, regarding entitlement conditions and contribution percentages, while a minority opinion suggested the existence of at least three social insurance organizations, due to professional and insurance particularities: one for dependent employees and workers, one for the self-employed, and one for farmers. In addition, the Committee proposed a PAYG system based on defined contributions supported by a minimum state pension and a new capital fund that should be built up from the state budget and the property of the social insurance funds in order to cover the system's deficit during the transitory period.[941]

In light of the committee's proposals and after long delegation period, the Greek legislature reformed once more the public pension system on

939 *EU-COM*(2015), p. 14.

940 Ministerial Decision, 37564/D910327/21.08.2015.

941 The Committee's proposal can be retrieved from http://www.opengov.gr/minlab/. For a description of the committee's proposal in English see *Kremalis*, Greek System of Social Security, Country Report No. 05/2016, Max-Planck Institute for Social Law and Social Policy.

May of 2016.[942] In general terms, the structure of the public pension system remained the same, based on a basic pension which is financed by the state, and a proportional pension which is financed by the funds in accordance with the paid contributions; whilst the pensionable age remains 67. The innovation of the new legislation is that it unified the diverse funds into one hyper-fund organisation, and equalised the rules for all insured. The unification of the system extends also to the subsidiary social insurance pensions. In addition, the legislature increased the years of minimum pensionable service for the establishment of a basic pension from 15 to 20 years, while the payable amount was increased from 360 Euros to 384 Euros. In addition, the accrual rates for the calculation of the proportional pension are changed from 0.8 – 1.5 percent to 0.77 – 2 percent. By doing this, the Greek legislature focused on rewarding the insured who contributed 40 years to the system.

According to experts, the 2016 pension reform is a step in the right direction, since "*it is actually an elaborate face-lift of the 2010 reform*"[943] which was described in the present book. It completes the organisational and administrative reconstruction of the Greek public pension system, by introducing a unified system of social insurance for the entire working population. The unification of the rules is, on the one hand, necessary for the rationalisation of the systems' functioning. Indeed, the extended fragmentation of the system created social inequalities among the working population, as it resulted in similar situations being treated differently. However, certain aspects of the 2016 pension reform may raise further questions of constitutionality. For example, the unification of the calculation system used to determined the amount of contributions for all of the

942 Law No. 4387 of 2016, Official Gazette of the Hellenic Republic 85/A/12.05.2016. In addition, indirect pension reductions of the current pensioners' old-age pension benefits were introduced also in the year of 2015 as a prerequisite for the sign of a third financial assistance within the framework of the ESM. More particular, the Law No. 4334 of 2015 "*Emerging Regulations for the Negotiations and Sign of Agreement with the European Stability Mechanism*", increased health contributions of pensioners from 4 percent to 6 percent on their main pension benefits and applied health contributions of 6 percent to supplementary pension benefits. In this way the nominal amount of the main and supplementary old-age pension benefits were further reduced by 6 percent. See Art. 1(31), Law No. 4334 of 2015, Official Gazette of the Hellenic Republic 80/A/16.07.2015.

943 *Simeonidis*, Social Protection and Labour 2016, p. 27.

working population, irrespective of their occupation, may raise the question of compatibility of the measure with the constitutional right to equality. This is because those such as self-employed persons and farmers are under substantially different legal, financial and situational conditions of employment and activity, when compared to the other employees. This issue, as well as further legal issues, shall be dealt with in the near future by the Council of State, which will carry out the challenging but necessary task of ensuring a balance.

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