ARTICLES
SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE EUROPEAN CITIZENS' INITIATIVE IN LIGHT OF THE EUROPEAN DEBT CRISIS: A GATEWAY BETWEEN INTERNATIONAL LAW AND THE EU LEGAL SYSTEM

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ABSTRACT: This *Article* first briefly examines the attempt made by both Member States and EU institutions to administer financial assistance to countries experiencing economic difficulties. The analysis will consider the legal and other experience of the "state rescue funds": notably the European Stability Mechanism (ESM). The *Article* especially analyses the *Pringle* judgment (Court of Justice, judgment of 27 November 2012, case C-370/12) offering an essential conceptual toolbox, useful to develop a better understanding of the Court of Justice's current interpretation of the "no bail-out clause" (Art. 125 TFEU), and more generally an overview of the Court's doctrine on sovereign insolvency. Following this line of research, the second part focuses on the judgment of the General Court of the European Union in the case *Anagnostakis v. Commission* (judgment of 30 September 2015, case T-450/12). Mr Alexios Anagnostakis − a Greek citizen − proposed the initiative "One million signatures for a Europe of solidarity" to the European Commission. The initiative sought "to establish in EU fundamental law the principle of the "state of necessity"; when the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable". In September 2012 the European Commission, pursuant to Art. 4, para. 2, let. b), of Regulation 211/2011, refused to register the proposal, based on a lack of competence. Mr Anagnostakis then brought an action of annulment before the General Court. Considering the *Anagnostakis* case, the *Article* finally suggests a new role for the EU judges, strictly connected to the right of initiative and the sovereign default issue.

KEYWORDS: sovereign insolvency – ESM – *Pringle* – *Anagnostakis* – ECI – state of necessity.

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I. Sovereign default: the same old story

In his book *The Economic Consequences of the Peace* − published after his resignation as British delegate to the Peace Conference of Paris − the economist John Maynard Keynes wrote: "The war has ended with everyone owing everyone else immense sums of money [...]. A general bonfire is so great a necessity that unless we can make of it an orderly and good tempered affair in which no serious injustice is done to anyone, it will, when it comes at last, grow into a conflagration that may destroy much else as well".[1]

In other words, Keynes suggested a restructuring mechanism for managing the debt crisis that had been provoked by the First World War. As is well known, the Keynes' report was rejected and the consequences of the peace (and the Peace Conference) were dramatic.

To illustrate some of the dominant trends in the contemporary debate, both political and legal, which are closely related to Keynes' proposal in a strict sense, we must begin from a definition of "sovereign default". In this regard, Gaillard affirmed:

> "States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as '*failed States*' or '*Etats sans gouvernement*'. [On the contrary] a '*sovereign default*' is defined as a state's failure to fulfil its financial obligations; such default can be viewed as a breach in the terms of the covenant between the lender and the borrowing state".[2]

The latter definition − which is the only appropriate one within the current analysis − is applicable to most default situations: it includes financial obligations between a state and both its private (e.g. banks) and public creditors (e.g. other states and international financial organisations).

In the first case (private creditors), the problems linked to an eventual breach of contract can be addressed through private international law (especially on the basis of "conflict of laws" reasoning);[3] in the case of relationships between states and between a state and other subjects of international law (e.g. international financial organisations), conflicts can instead be resolved according to the basic principles of the "law of treaties" (mainly the 1969 Vienna Convention, and the exceptions to the *pacta sunt servanda* principle).[4]

[1] J.M. Keynes, *The Economic Consequences of the Peace*, London: Macmillan and Co., 1919, p. 262.

[2] N. Gaillard, *When Sovereigns Go Bankrupt: A Study on Sovereign Risk*, Cham: Springer, 2014, p. 2.

[3] See, e.g., P. Franzina, *Sovereign Bond and the Conflict of Laws: A European Perspective*, in P. Nappi (ed.), *Studi in onore di Luigi Costato*, Vol. 2, Napoli: Jovene, 2014, p. 513 *et seq*.

[4] See C. Jochnick, *The Legal Case For Debt Repudiation*, in C. Jochnick, F.A. Preston (eds), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, Oxford: Oxford University Press, 2006, pp. 149-150.

However, the specific sets of rules attributed to these two aspects are rarely able to cover every sovereign default situation. Indeed, despite the fact that sovereign debt crises have been recurrent events over the past centuries, almost nothing has been done − within international law (especially the conventional one) − to manage with any degree of seriousness a "sovereign bankruptcy". History has shown us how deep the contradiction between social and factual reality and their consideration by the modern legal system can be.

In short, recent circumstances (notably the Argentine and the Greek defaults) have certainly revealed that the lack of global and/or regional mechanisms for orderly sovereign insolvency significantly compromises the debtors' and the creditors' interests.[5] This absence is the result of the intrinsic impossibility of an effective international legislator (in other words, a singular superior authority) and of the conventional *laissez-faire* approach to the international order (both economic and legal). The alternative to a general regime to regulate sovereign default, the "voluntary model", is typically presented as a pragmatic choice, resulting from the application of the criterion of efficiency, especially by those who would deny the former option.[6] For example, this criterion is the core standard for all proposals which exclusively suggest using special contractual clauses in sovereign bonds to implement (*ex-ante*) or control (*ex-post*) certain aspects of debt obligations, such as particular remedies against violations of their terms.[7]

It would appear obvious, however, that a purely voluntary approach cannot take into account all possible eventualities.[8] As one of the many examples, this model does not consider the heterogeneity of creditors (consumers and institutional investors, private and public claims), and it cannot be applied in those cases where the agreement is not a contract but a treaty between states or between a state and an international organisation. This problem is emphasised by the fact that, as anticipated above, sovereign default has proved to be a frequent phenomenon in both Western and non-Western economies, even if we only consider the nineteenth and twentieth centuries.[9] We cannot continue to respond to a phenomenon which has recurred for such a long period using a case-by-case method, which is what the voluntary approach boils down to.

[5] See M. DAMILL, R. FRENKEL, M. RAPETTI, *The Argentinean Debt: History, Default, and Restructuring*, in B. HERMAN, J.A. OCAMPO, S. SPIEGEL (eds), *Overcoming Developing Country Debt Crises*, Oxford: Oxford University Press, 2010, p. 179 *et seq.*; see also M. MEGLIANI, *Restructuring Greek Debt: Alternative Routes*, in *Legal Issues of Economic Integration*, 2017, p. 111 *et seq*.

[6] See S.L. SCHWARCZ, *Idiot's Guide to Sovereign Debt Restructuring*, in *Emory Law Journal*, 2004, p. 1189 *et seq*.

[7] See, e.g., S. LANAU, The *Contractual Approach to Sovereign Debt Restructuring*, in *Bank of England – Working Paper*, no. 409, 2011. It is a rather old approach: see F. MEILI, *Die Staatsbankrott und die Moderne Rechtswissenschaft*, Berlin: Puttkammer und Mühlbrecht, 1895.

[8] See A. BARDOZZETTI, D. DOTTORI, *Collective Action Clauses: How Do They Affect Sovereign Bond Yields?*, in *Journal of International Economics*, 2014, p. 286 *et seq*.

[9] See F. STURZENEGGER, J. ZETTELMEYER, *Debt Defaults and Lessons from a Decade of Crises*, Cambridge MA: MIT Press, 2006, p. 3 *et seq*.

There are, therefore, sufficient factual reasons convincingly to support legal arguments in favour of the development of an autonomous international, supranational or transnational legal regime.[10]

II. The European debt crisis: a first timid step towards a possible solution

On the basis of the recurring elements observed from history and applying the "institutional approach" (in other words, suggesting an international convention on sovereign insolvency), some restructuring models were originally proposed in the framework of the International Monetary Fund (IMF).[11]

The involvement of the IMF in state insolvency can be explained in two ways: *a*) over the last century the IMF has consolidated both theoretical and practical know-how, especially concerning balances of payment crises (Art. 5 of the IMF Agreement); and *b*) starting with the Mexican default of 1982, the IMF has intervened in cases of public default with both its financial and technical assistance, thereby expanding − through a customary technique − its areas of intervention.[12] Nevertheless, by continuing to argue in favour of a mechanism introduced by general and/or regional treaties, some scholars have developed quite original legal instruments and architectures, which in contrast exclude IMF involvement.[13]

Despite the presence of numerous and advanced proposals, the inability of the international community to agree on an essential structure has contributed to the continuation of the *status quo*, where public default is not regulated as a unitary, albeit complex, phenomenon but is left to the contractual power of each creditor to negotiate a hypothetical default properly in advance. As Silard correctly synthesised: "There are many explanations as to why the debt crisis developed [...] yet the fact remains that the debt crisis can be seen in retrospect as a crisis, not only of international finance, but also of the international legal system that was waiting to occur".[14]

A partial paradigm shift was realised during the early stages of the Eurozone crisis. The crisis, even though it was mainly caused by exogenous factors, has enormously improved the debate on EU economic governance, which until that point had been weak, to

[10] See, in particular, C.G. Paulus, *Should Politics be Replaced by a Legal Proceeding?*, in C.G. Paulus (ed), *A Debt Restructuring Mechanism for Sovereigns. Do We Need a Legal Procedure?*, London: Bloomsbury Publishing, 2014, p. 191 *et seq*.

[11] See M. Megliani, *Sovereign Debt: Genesis, Restructuring, Litigation*, Cham: Springer, 2015, p. 570 *et seq*.

[12] See B. Fritz-Krockow, P. Ramlogan, *International Monetary Fund Handbook: Its Functions, Policies, and Operations*, Washington DC: IMF Publications, 2007, p. 27 *et seq*.

[13] See H. Schier, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective*, Leiden, Boston: Martinus Nijhoff, 2007.

[14] S.A. Silard, *International Law and the Conditions for Order in International Finance: Lessons of the Debt Crisis*, in *The International Lawyer*, 1989, p. 964.

say the least, despite the fact that the EU economic and monetary policy competences had undergone the most radical changes over recent decades compared to other areas.[15]

The governance reform effort began in 2010, but the first amendment of the Treaties was enacted in 2011: using a simplified procedure, the European Council (Decision 2011/199/EU) modified Art. 136 TFEU and introduced a new paragraph (the third). The new rule affirmed that "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 modification was justified on the basis of two different kinds of reason: *a*) the new paragraph allowed for the creation of a regional and monetary-oriented restructuring mechanism; and *b*) the third paragraph formalised within EU law the "policy of conditionality", a practice which had begun in the 1980s.

The origin and the development of the "policy of conditionality" (or "conditionalities") is strictly connected to Art. 5, para. 3, let. a), of the IMF Agreement:[16] "The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund". As noted by Megliani:

> "Towards the end of the 1980s, the policy of conditionality broadened in scope so as to encompass structural reforms to be implemented by the countries drawing on resources. In this respect, it is important to stress that, unlike the Articles of Agreement of the IMF do not establish a clear prohibition on interference in the domestic sphere of member States, with the result that conditionality may lawfully affect the choices of political economy in these countries". [17]

This IMF doctrine was thoroughly tested in the context of the 1982 Mexican default, and conditionalities were included in the IMF order from that moment on, specifically through a series of executive decisions which modified the Bretton Woods IMF Agreement.

That said, the attempt made by the EU institutions to assist countries experiencing economic difficulties financially was inspired by IMF practice, and this attempt finds its final expression in the European Stability Mechanism (ESM).[18]

The ESM was juridically created by emulating the Washington Monetary Fund:[19] it is founded by a special international agreement signed on 2 February 2012 by the mem-

[15] See M.J. Dedman, *The Origins and Development of the European Union 1945-2008: A History of European Integration*, London, New York: Routledge, 2010, p. 82 *et seq*.

[16] See M. Guitián, *Conditionality: Past, Present, Future*, in *IMF Staff Papers*, no. 4, 1995, p. 792 *et seq*.

[17] See M. Megliani, *Sovereign Debt*, cit., p. 131.

[18] See A. Iannì, *L'insolvenza sovrana come fenomeno di mutazione giuridica imposta. Le politiche di "condizionalità"*, in *Diritto Pubblico Comparato ed Europeo*, 2016, p. 735 *et seq*.

bers of the currency union, which is formally separated from the European Treaties. In other words, the ESM Treaty can be considered as a clear example of the "intergovernmental method" and therefore a slowdown of the "federalist" integration process.

In any case, like the IMF: *a*) the ESM institution is an international public subject with legal personality based in Luxembourg; *b*) voting power depends on each members' *quota*, which is determined by the capital transferred from each Member State to the general common fund; and *c*) access to financial assistance depends on a programme negotiated between the State-debtor and an administrative organ of the ESM institution ("Board of Governors").

As a further proof of the close relationship with the IMF, it is sufficient to recall the first paragraph of Art. 12 of the ESM Treaty, which is explicitly dedicated to conditionality: "If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions".

In addition, it can be noted that the similarities between the IMF and the ESM were implicitly expressed by the Court of Justice in the *Pringle* case.[20] As is well known, the case invited the Court to examine the compatibility of the ESM Treaty with EU law, especially with regard to the so-called "no bail-out clause" (Art. 125 TFEU).[21]

With respect to the compatibility of the mechanism with Art. 125 TFEU, the Court argued that: "Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy" .[22] The system rests on the conditionality mechanism, resulting from this provision and the ESM's practice. The Court considered conditionality the element which ensures the compatibility between EU primary law and the new mechanism (particularly as regards its "economic governance").

The 2012 decision opens itself to several criticisms which are briefly exposed below. First, the argument that the Court in *Pringle* limited itself to providing a strictly literal interpretation of the Treaties must be rejected: for instance, even if the Court connected the conditionality criterion to Art. 125 TFEU, it must be noted that the text of the article does not mention this criterion as a requirement for granting financial assistance.

[19] See, in particular, E. DE LHONEUX, C.A. VASSILOPOULOS, *The European Stability Mechanism before the Court of Justice of the European Union: Comments on the Pringle Case*, Cham: Springer, 2014, p. 35.

[20] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[21] E. DE LHONEUX, C.A. VASSILOPOULOS, *The European Stability Mechanism before the Court of Justice of the European Union*, cit., pp. 1-8.

[22] *Pringle*, cit., para. 137.

Moreover, when focusing on the comparison between the IMF and ESM and analysing certain questions that the judgment addressed, it can be observed that the Court's interpretation of: *a*) Art. 136 TFEU "confirms that Member States have the power to establish a stability mechanism. [...] That amendment does not confer any new competence on the Union";[23] and *b*) Art. 125 TFEU implies a strict ban and at most "does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy".[24]

Therefore, according to the Court, the ESM can be considered as a special instrument established outside EU law, exclusively reserved to the States parties, and strongly dependent on the principle of conditionality.

It is certainly possible to agree with the Court's reconstruction from a certain perspective: the ESM cannot be considered as a general restructuring mechanism. Indeed, the Treaty does not explicitly include: *a*) a set of rules for how to solve conflicts between debtors and creditors and among the creditors themselves (e.g. norms about the ranking and priority of creditors); *b*) a set of rules for all jurisdictional features (e.g. is the Court of Justice competent in cases concerning the assisted state and its private creditors?).[25]

At the same time, still analysing the *Pringle* case, some doubts remain about the interpretation of Art. 125 TFEU. A literal interpretation of this article does not permit recognition of any references to conditionality and consequentially, it does not seem correct to exclude completely – as the Court did – a system founded on different principles from conditionality (e.g. solidarity, mutual aid or the best interests of the population).[26]

As argued by some scholars,[27] the Court has created conditionality as a new *super*-principle of EU constitutional law, introduced in part at least by the Court applying a variant of the teleological approach:[28] in *Pringle* the Court ruled with only respect for the financial stability of the Eurozone in mind, excluding other relevant interests, factors and implications. The Court thus seems intent to mask some of its own decisions behind interpretative practices: decisions which, although they cannot properly be described as *political* decisions, can still be described as well-defined *policies*[29] (in particu-

[23] *Ibid*., paras 72-73.

[24] *Ibid*., para. 137.

[25] See C.G. PAULUS, I. TIRADO, *Sweet and Lowdown: A 'Resolvency' Process and the Eurozone's Crisis Management Framework*, in *Law and Economics Yearly Review*, 2013, p. 504 *et seq*.

[26] See A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 121 *et seq*.

[27] See F. LOSURDO, *Lo stato sociale condizionato*, Torino: Giappichelli, 2016, pp. 55-61.

[28] See P. CRAIG, *Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 3 *et seq.*

[29] See M. DAWSON, *The Political Face of Judicial Activism: Europe's Law-Politics Imbalance*, in M. DAWSON, E. MUIR, B. DE WITTE (eds), *Judicial Activism at the European Court of Justice*, Cheltenham: Edward

lar, market-oriented policies).[30] The Court's doctrine is clearly defined: it was meant to equalise sovereign and commercial debt[31] – which is both economically and legally hazardous – as subsequently demonstrated by the evolution of the Eurozone crisis. The bankruptcy of a Member State cannot be compared to business insolvency, including because it can impact on the stability of EU integration.

III. The European Citizens' Initiatives: an introductory overview

Bearing *Pringle* in mind, we will now focus on the judgment of the General Court of the European Union in the case of *Anagnostakis v. Commission*[32] − since both judgments consider the possibility of a jurisdiction to handle state insolvency within the EU law − starting from the general features of the "European Citizens' Initiative" (ECI) which played a key role in this case.

As is probably well known, the ECI was introduced during the drafting of the Lisbon Treaty to provide a new instrument for democratic participation through which every European citizen possesses the right to seek legislative reform of secondary EU law.

All initiatives are addressed to the European Commission: "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[33]

Even before the adoption of the new Art. 11 TEU,[34] on 7 May 2009 the European Parliament adopted a resolution "requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the

Elgar, 2013, p. 11 *et seq.* For observations on the difference between politics and policies in judicial decision making, see, e.g., B.W. Joondeph, *The Many Meanings of Politics in Judicial Decision Making*, in *University of Missouri-Kansas City Law Review*, 2008, p. 347 *et seq*.

[30] See in this regard, *Pringle*, cit., para. 135, and G. Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 635 *et seq*.

[31] For a critical account of this view, see A. Somma, *Biopolitics of Transnational Private Law – Sovereign Debt Crisis, Market Order and Human Rights*, in *German Law Journal*, 2012, p. 1568 *et seq*.

[32] General Court, judgment of 30 September 2015, case T-450/12, *Anagnostakis v. Commission*.

[33] Art. 11, para. 4, TEU. See e.g., M.S. Ferro, *Popular Legislative Initiative in the EU: Alea Iacta Est*, in *Yearbook of European Law*, 2007, p. 355 *et seq*.

[34] See J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 133 *et seq*.

citizens' initiative",[35] and on 11 November the same year, the Commission issued a Green Paper on this point.[36]

The Commission, quite enthusiastically, described the new instrument as a tool "to reinforce the democratic fabric of the European Union", as well as one of the most innovative steps introduced by the Lisbon reform process.[37]

The outcome of the combined development of the guidelines provided within the Resolution and the Green Paper was the adoption of Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative. The solution laid out in the Regulation is a hybrid between the more traditional referendum-based mechanisms and more proactive popular initiative instruments.[38]

Citizens' initiatives must be supported by at least one million eligible signatories from at least a quarter of all the Member States,[39] meaning that the quantitative threshold for support is high, and its qualitative aspect is that this high number must be diverse among the Member States.[40]

The procedure for successfully submitting an initiative is divided into five steps: *1*) formation of the body promoting the initiative; *2*) registration of the proposed initiative; *3*) collection of statements of support; *4*) verification and certification by Member States of the statements of support; and *5*) submission of a citizens' initiative to the Commission.

The promoters of the initiative must form a committee of at least seven persons who are residents of at least seven different Member States,[41] and each committee can designate a representative who acts as its interlocutor with the institutions ("the contact person").

Once a committee is formed, the proposal is transmitted to the Commission, but it is not necessary for the proposed initiative to have the form of a legislative act at this stage. It is however required that the proposed initiative clearly defines its subject matter and its objectives.[42]

Once the proposed initiative is registered with the Commission, the latter must verify that the following conditions are met:[43] *a*) "the citizens' committee has been formed

[35] European Parliament Resolution P6_TA(2009)0389 of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative.

[36] Commission, *Green Paper on a European Citizens' Initiative*, COM(2009) 622 final.

[37] *Ibid.*, p. 3.

[38] See G. Bordino (ed.), *A New Right for Democracy and Development in Europe: The European Citizens' Initiative (ECI)*, Brussels: Peter Lang, 2015.

[39] Arts 6 and 7 of Regulation 211/2011, cit.

[40] See M. Dougan, *What Are We to Make of the Citizens' Initiative?*, in *Common Market Law Review*, 2011, p. 1807 *et seq*.

[41] Art. 3 of Regulation 211/2011, cit.

[42] *Ibid.*, Art. 4.

[43] *Ibid.*, Art. 4.

and the contact persons have been designated"; and *b*) "the proposed citizens initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties".[44] If the Commission considers that these conditions are met, the proposed initiative is *officially* registered and made public. From that moment, at least one million valid statements of support must be submitted within 12 months.[45]

Once the term for the collection of the statements of support has expired and if the requirements are met, the initiative is *finally* submitted to the Commission: at this stage, the organisers have the option to explain in detail the content of the initiative either before the Commission directly or in the context of a public hearing before the European Parliament.[46] In this context, the European Commission may express its political considerations as well as its evaluations on the legality of the proposed initiative. The Commission must also identify the actions needed: for example, it might indicate which secondary act is the most appropriate to achieve the initiative's objective (e.g. a directive).

A formal interpretation of the provisions clearly suggests that the Commission has no duty to convert a proposed initiative into a legislative act. On this point, the Regulation provides that: "Where the Commission receives a citizens' initiative [...] within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action".[47] In this regard, the majority of scholars agree that "[t]he decision as to whether and how follow up an initiative is a matter of discretion and political opportunity for the Commission. It is not likely to be reviewed by the European Court".[48]

In other words, the Commission has the power to end a proposed initiative procedure when it exceeds the Commission's competences, but it does not have this power if it only considers it more convenient to legislate by ordinary procedure than to continue with a citizens' initiative: if it refrained from action for this reason, the Commission would violate Regulation 211/2011 and could be sanctioned by the CJEU.[49]

[44] *Ibid.*, Art. 4, para. 2, let. b).

[45] *Ibid.*, Art. 5, para. 5.

[46] *Ibid.*, Arts 10 and 11.

[47] *Ibid.*, Art. 10, para. 1, let. c).

[48] C. RAFFENNE, *The European Citizens' Initiative: The Influence of Anglo-American Governance Ideology on Recent EU Institutional Reforms*, in E. AVRIL, J.N. NEEM (eds), *Democracy, Participation and Contestation: Civil Society, Governance and the Future of Liberal Democracy*, London, New York: Routledge, 2015, p. 158. For a general overview, see N. VOGIATZIS, *Between Discretion and Control: Reflections on the Institutional Position of the Commission within the European Citizens' Initiative Process*, in *European Law Journal*, 2017, p. 250 *et seq*.

[49] See J. ORGAN, *Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals*, in *European Constitutional Law Review*, 2014, p. 422 *et seq.*

In light of the above, the citizens' initiative instrument can be described as an example of "weak co-governance", which is typical of the European architecture.[50]

IV. The *Anagnostakis* case

On 13 July 2012, the Greek citizen Alexios Anagnostakis, an activist campaigning against the European mechanisms employed during the Hellenic crisis, promoted a citizens' initiative entitled "One million signatures for a Europe of solidarity" for the introduction in EU law of the "principle of the 'state of necessity'", arguing that "when the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable".[51]

However, in a Decision adopted on 6 September 2012, the Commission refused to register the proposed initiative "on the ground that the ECI manifestly fell outside the scope of its powers to submit a proposal for the adoption of a legal act of the Union for the purpose of implementing the Treaties".[52]

Mr Anagnostakis appealed the Commission's decision before the General Court requesting: *a*) for the Decision to be annulled; and *b*) an order requiring the Commission to register the contested initiative.[53] In support of his claims, the applicant alleged "infringement of Art. 122, para. 1, TFEU, of Art. 122, para. 2, TFEU, of Art. 136, para. 1, let. b), TFEU and of rules of international law".[54]

Before proceeding with consideration of the Court's reasoning, it is appropriate to recall the first two paragraphs of Art. 122 TFEU which provide:

> "1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
> 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken".

[50] See A. Somma, *Soft Law sed Law. Diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti*, in *Rivista ritica del Diritto Privato*, 2008, p. 437 *et seq*.

[51] Commission, European Citizens' Initiative, Official Register, *One million signatures for a Europe of solidarity*, ec.europa.eu.

[52] *Anagnostakis v. Commission*, cit., para. 4.

[53] *Ibid.*, para. 6.

[54] *Ibid.*, para. 10.

The first paragraph of Art. 136 TFEU establishes that: "In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro".

In this respect, it must not be forgotten that the first two paragraphs of Art. 122 TFEU seem to establish a *solidarity principle* that could offer the grounds for an exceptional departure from the general ban on government bail-out established by Art. 125 TFEU (the "no bail-out" clause). Despite the lack of academic consensus on this point,[55] it can be noted that the fact that the Treaty refers to the economic necessity somehow recalls the idea of "state of necessity" in traditional international law.[56] Such a view is especially corroborated by the reference to "exceptional occurrences" beyond the control of the state found in Art. 122, para. 2, which could be considered as a common element shared by Art. 122 and some international rules. In this latter regard, it may be here recalled Art. 25 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts, in which has been provided that "necessity may not be invoked by a State as a ground for precluding wrongfulness if [...] the State has contributed to the situation of necessity".

However, from this argument it is not possible to infer that Art. 122 of the Treaty, by implicitly applying the concept of state necessity in international law, would have provided a general clause according to which the state of ("economic") necessity is a possible ground for legally justifying a condition of state default.

Firstly, if one agreed on the existence of this (hypothetical) general clause, it would neutralise the core set of systems found in the Treaties according to which the financial assistance must always be considered *exceptional*: in other words, such a clause would neutralise Art. 122 itself.

Secondly, the logic of Art. 122 is not to legitimise the unilateral writing off of debt by the Commission, but rather to allow the Commission to trigger action from the Council to grant *extraordinary* and absolutely *temporary* support to the applicant state, which seems deeply distant from the durable financial crisis that normally occurs during a default.

On 30 September 2015, the General Court therefore rejected Mr Anagnostakis's application for the following reasons: on the basis of Art. 122, para. 1 the General Court found that the rule

[55] See K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, New York: Cambridge University Press, 2014, p. 139.

[56] See R. Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, in *Yale Human Rights and Development Journal*, 2000, p. 1 *et seq*.

"indicates that such measures must be founded on assistance between the Member States. That being so, Article 122(1)TFEU cannot, in any event, constitute an appropriate legal basis for the adoption in EU legislation of the principle of a state of necessity, as conceived by the applicant, in accordance with which a Member State would be entitled unilaterally to decide not to repay all or part of its debt because it is confronted with severe financing problems".[57]

Moving to the second paragraph of the same article, the General Court held that:

"It has already been held that Article 122(2) TFEU enables the Union to grant *ad hoc* financial assistance to a Member State, subject to certain conditions. It cannot, on the other hand, justify the introduction into the legislation of a mechanism for the abandonment of debt, such as the applicant proposes, if for no other reason than because such a mechanism would be general and permanent (see, to that effect, judgment in *Pringle*)".[58]

In other words, the General Court confirmed the groundlessness of a comparison between the exceptional measures provided by Art. 122 and the economic necessity.

Furthermore, the introduction of the economic necessity into the European legal framework by way of a citizens' initiative would entail the possibility for all Member States to reduce their debts against their public and private debtors. On this point, the Court clarified that:

"Even if […] the principle of the state of necessity, as conceived by the applicant, could be classified as financial assistance within the meaning of that provision, the adoption of that principle could not be regarded as a measure of assistance granted by the Union under that provision, in particular because it would cover not only debts owed by the Member States to the Union, but also debts owed by the Member States to other natural or legal persons, both public and private, and that situation is clearly not addressed by Article 122 TFEU".[59]

At the same time, the Court affirmed that

"there is nothing to support the conclusion, and nor has the applicant in any way demonstrated that the adoption of the principle of the state of necessity, which would authorize a Member State unilaterally to decide to write off its public debt, would serve the objective of coordinating budgetary discipline or fall within the scope of the economic policy guidelines which the Council is entitled to draw up in order to ensure the proper functioning of economic and monetary union".[60]

[57] *Anagnostakis v. Commission*, cit., paras 42-43.
[58] *Ibid.*, para. 48.
[59] *Ibid.*, para. 49.
[60] *Ibid.*, para. 57.

Alongside the Court's reasoning, it is also worth noting that if the Greek initiative had been accepted, its outcome would have been incompatible with Regulation 211/2011 because it would have gone beyond merely applying the Treaties as is required by Art. 2, para. 1, and Art. 4, para. 2, of the Regulation.

If the General Court had decided the case differently, it would have also raised the question of the effects of a judgment of the Court on agreements between states and private actors. Would the Court have the power to interfere in an agreement by declaring it or part of it void? The answer to this hypothetical question is still lacking, but it will not be possible to avoid it for much longer, due to the proposal for the establishment of a European Monetary Fund.[61]

Nevertheless, some commentators have pointed out that Art. 48 TEU (amendment procedure) grants the Commission the option of submitting a proposal for amendment of the Treaties to the Council: one possible line of reasoning would, therefore, be to recognise a citizens' initiative as a possible ground for the Commission to trigger the amendment procedure in order to ensure the successful conclusion of a citizens' initiative procedure.[62] However, the Commission has already expressly and correctly rejected such reasoning: "in accordance with the Treaty, citizens' initiatives can only concern matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[63]

Going back to the judgment, it is interesting to note that the General Court did not recognise the principle of economic necessity at the EU level nor did it acknowledge its (gradual) affirmation at the international law level.[64] More detailed argument from the General Court for such reasoning would have been valuable considering the increasing importance of the role played by regional courts in testing the effectiveness of international customary law.[65]

The General Court's interest in this point was merely to circumscribe the Commission's prerogatives with respect citizens' initiative and therefore its judgment concludes as follows:

> "Even if there is a rule of international law which enshrines the principle of the state of necessity, in accordance with which a Member State would be authorized to not repay its

[61] See *infra*, section V.

[62] See M. MEZZANOTTE, *La democrazia diretta nei trattati dell'Unione Europea*, Padova: Cedam, 2015, p. 109 *et seq*.

[63] Commission, European Citizens' Initiative, Official Register, ec.europa.eu.

[64] For a possible definition of "economic necessity", see A.O. SYKES, *Economic "Necessity" in International Law*, in *American Journal of International Law*, 2015, p. 296 *et seq.*

[65] See J. WOUTERS, D. VAN EECKHOUTTE, *Giving Effect to Customary International Law Through European Community Law*, in *K.U. Leuven Institute for International Law, Working Paper*, no. 25, 2002; see also E. CANNIZZARO, *Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza "Intertanko"*, in *Il Diritto dell'Unione Europea*, 2008, p. 645 *et seq*.

sovereign debt in exceptional circumstances, the mere existence of such a principle of international law would not suffice, in any event, as a basis for a legislative initiative on the Commission's part, since there is there is no conferral of powers to that effect in the Treaties, as is clear from an examination of the various Treaty provisions to which the applicant refers in the present case".[66]

On this point, it must not be forgotten that for matters falling outside its competence, the Commission can rely on Art. 352, para. 1, TFEU, which provides that:

"If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

The article does not preclude the Commission's proposal to be founded upon a citizens' initiative. However, Declaration no. 51 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon clarifies the scope of application of Art. 352 TFEU providing that "the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union",[67] thereby excluding the policies related to the economic and monetary union (Art. 3, para 4, TEU) and therefore Mr Anagnostakis's initiative. At the same time, however, it is also true that declarations are not binding instruments but rather a tool for interpreting the Treaties.[68] In other words, and from a systematic perspective, there is *therefore* no legal impediment to the Commission's invocation of Art. 352.[69]

Mr Anagnostakis appealed the General Court's judgment rejecting his complaint before the Court of Justice.[70] In his appeal, he added two fresh considerations to those already expressed before of the General Court.

He argued that there was an analogous relationship between his initiative and the "odious debt" doctrine, arguing that "the measure sought, non-payment of the abhorrent

[66] *Anagnostakis v. Commission*, cit., para. 65.

[67] Declaration on Article 352 of the Treaty on the Functioning of the European Union, eur-lex.europa.eu.

[68] See J.-C. Piris, *The Lisbon Treaty*, cit., p. 65.

[69] In this sense, see e.g., M. Mezzanotte, *La democrazia diretta nei trattati dell'Unione Europea*, cit., p. 115.

[70] Appeal brought on 13 November 2015 by Alexios Anagnostakis against the judgment delivered on 30 September 2015 by the General Court (First Chamber) in Case T-450/12 *Anagnostakis v. Commission*.

debt, is designed exclusively to strengthen the budgetary discipline of the Member States and to ensure the proper functioning of economic and monetary union (Art. 136, para 1, TFEU)".[71] Mr Anagnostakis argued against the General Court's view that Art. 136, para. 1, TFEU has no binding effect. He contended that the principle of economic necessity can be applied in case of a debt which is not only conspicuous but also illegitimate according to the odious debt doctrine. The argument is however a daring one in that the doctrine of odious debt is not considered a proper *legal device* in general international law.[72]

A similar analogy to the odious debt doctrine was not drawn in relation to Art. 122 TFEU. The appeal here was limited to reaffirming that Art. 122 alone should be the basis for inferring from the Treaty the existence of the principle of economic necessity in the Treaties as an expression of the *solidarity* principle between Member States.[73]

The most effective reasoning in the appeal was perhaps the following: "International law and the principles of international law constitute sources of law for the European Union. As such they are directly incorporated into and applied in EU law, without more. The Commission has a right of proposal with regard to the application of the foregoing principles of higher-ranking law, even without specific provision in the Treaties should it be considered that the latter is lacking".[74] The assumption behind this reasoning is that the EU has a duty to comply with the rules of international law and therefore the Commission can apply the principle of economic necessity even without a specific competence being provided by the Treaties in this sense because it would simply be applying at the regional level a rule in force at the international level.[75] In this respect, when commenting on recent Court of Justice case law some scholars have pointed out that "there is a broad willingness to take customary international law into account for considering the limits of State or EC jurisdiction and powers, for providing rules of interpretation and for the purpose of filling certain gaps in the internal legal order".[76]

On 7 March 2017, AG Mengozzi presented his Opinion, nevertheless confirming the ruling of the General Court.[77]

He argued that:

[71] Appeal brought on 13 November 2015 by Alexios Anagnostakis, cit., para. 2, let. b).

[72] See R. Howse, *The Concept of Odious Debt in Public International Law*, in *United Nations Conference on Trade and Development Discussion Papers*, no. 185, 2007; see also C.G. Paulus, *The Evolution of the Concept of Odious Debts*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2008, p. 391 *et seq*.

[73] Appeal brought on 13 November 2015 by Alexios Anagnostakis, cit., para. 2, let. c).

[74] *Ibid*., para. 2, let. e).

[75] See F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milano: Giuffrè, 2008, p. 168 *et seq*.

[76] J. Wouters, D. Van Eeckhoutte, *Giving Effect to Customary International Law Through European Community Law*, cit., p. 44.

[77] Opinion of AG Mengozzi delivered on 7 March 2017, case C-589/15 P, *Anagnostakis v. Commission*.

> "The introduction of a mechanism by which a Member State decided unilaterally not to repay its debt cannot therefore be classified under the appropriate measures implemented pursuant to Article 122(1) TFEU, a fortiori where those measures are supposed to be driven by a spirit of solidarity. In addition, such measures are necessarily *ad hoc*, whereas the proposed ECI, as is rightly noted by the General Court, envisages the establishment of a general and permanent mechanism which would continue to be available to Member States if they were to encounter severe difficulties".[78]

Moreover, since the concerns are related to *financial* obligations which often have negative repercussions on the relations between a state and its creditors, Art. 122 TFEU – as interpreted by the General Court – should not be applied:

> "Furthermore, even assuming that the establishment of a principle of the state of necessity constitutes a form of financial assistance covered by the notion of 'appropriate measures' for the purposes of Article 122(1) TFEU, the judgment in *Pringle*, delivered by the Full Court, would seem to have clearly precluded recourse to that article in the case of a Member State experiencing financing problems. The Court thus ruled, more generally, that the subject matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. [...] If the proposed ECI is to be interpreted as seeking to introduce a mechanism by which a Member State decides unilaterally not to repay its debt with regard to the Union, this cannot be regarded as 'financial assistance' granted by the Union to the Member State concerned within the meaning of Article 122(2) TFEU".[79]

As for Art. 136 TFEU, the Advocate General disputed that economic necessity could be beneficial as a systemic measure. On the contrary, the Advocate General maintained that "it is uncertain that the economic health of other Member States, and thus of economic and monetary union, is not affected if those Member States held that non-repaid debt".[80]

In his conclusions, AG Mengozzi contests any possibility for the Commission to intervene in areas in which it does not have competences *specifically* granted to it by the Treaties: "It is indeed the founding treaties on which the Union is built – and they alone – which are capable of forming the basis for the Commission's power to propose an act. It follows from the application of the principle of conferral of powers as defined above that that institution cannot derive any power from the existence in international law of a possible principle of the state of necessity".[81]

[78] *Ibid.*, para. 42.
[79] *Ibid.*, paras 42-43.
[80] *Ibid.*, para. 55.
[81] *Ibid*, para. 62.

This approach might be considered too inflexible, but it still reflects the jurisprudence of the Court of Justice, at least with respect to the citizens' initiative. It is not surprising therefore that the Court completely confirmed the decision of the General Court.[82]

V. Final Remarks

The Court of Justice's decision confirmed a strict dualist approach, without bringing any innovative considerations into its judgment, and therefore almost cast it the role of guarantor of the fundamental principles of the European legal order – a typical function of constitutional courts. The conclusion is therefore twofold.

First, the General Court will protect the core principles of the EU as though they were constitutional, even in an exceptional case such as *Anagnostakis*. It does so by adopting a sort of "counter-limits approach" to defending the conditionality principle and the no bail-out clause.

Second, this reticent approach towards international (economic) law – which includes sovereign insolvency law as well[83] – only seems appropriate with respect to the matters which do *not directly* impinge on EU law. However, it must be noted that – quoting David Foster Wallace – *the water is changing*: within the contemporary context, sovereign bankruptcy is an unavoidable issue even for the EU legal order.[84]

The Eurozone crisis has caused a shift within both the institutional and the legal paradigm in this area. Only three months after the Court of Justice's judgment, the Commission drafted its proposal for the establishment of a European Monetary Fund (substituting the ESM).[85] This proposal allows the Court to judge – even indirectly – sovereign default situations. Unless the intention is to solve this kind of cases only through the provisions of the Treaties, these occurrences will need to be dealt with by employing those few principles of international (economic) law which – according to some scholars – already exist on sovereign solvency.[86]

[82] Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Anagnostakis v. Commission* [GC]. See, in particular, M. Inglese, *European Citizens' Initiatives, Greek Debt and Court of Justice: The Final Chapter*, in *European Papers*, Vol. 3, 2018, No 1, www.europeanpapers.eu, p. 375 *et seq*.

[83] See e.g., M. Herdegen, *Principles of International Economic Law*, Oxford: Oxford University Press, 2016, p. 540 *et seq*.

[84] See E. Mostacci, *La sindrome di Francoforte: crisi del debito, "costituzione finanziaria europea" e torsioni del costituzionalismo democratico*, in *Politica del diritto*, 2013, p. 481 *et seq.*; G. Majone, *From Regulatory State to a Democratic Default*, in *Journal of Common Market Studies*, 2014, p. 1216 *et seq.*; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 15 *et seq.*; F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, Oxford: Oxford University Press, 2016, p. 151 *et seq*.

[85] Commission Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final.

[86] See e.g., A. Reinisch, C. Binder, *Debts and State of Necessity*, in J.P. Bohoslavsky, J.L. Černič (eds), *Making Sovereign Financing and Human Rights Work*, Oxford: Hart, 2014, p. 115 *et seq*.

In other words, and especially regarding this issue, the Court of Justice's dualist approach is no longer sustainable:

> "On the one hand, the ECJ borrowed monistic arguments in order to establish the 'autonomy' of the EU legal order, unifying the legal order of its Member States with the legal system of the EU. On the other hand, the ECJ [...], facing foreign law, which is possibly dangerous for the EU legal order, prefers a dualistic argument separating its own from external legal systems. This provokes the question as to whether this 'Janus Face' can be justified".[87]

After all, something similar has already happened in the past: the principle of *good faith* – both a general principle of law and a general principle of international (economic) law – can be considered a quite significant example of this.

In 1997 the then Court of First Instance – in a judgment which is often quoted in the literature as one of the most important steps towards the general consolidation of this principle – affirmed that: "the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice and is therefore binding on the Community".[88] Thanks also to this brief – and *monist-oriented* – statement/ruling (a sort of game of mirrors between an international judge and a European one),[89] good faith has become an increasingly important pillar of international (economic) law,[90] even for the legal management of the sovereign debt crisis (e.g. the duty to protect creditors' *legitimate expectations* circumscribes the limits of possible contractual changes or renegotiations).[91]

To conclude, reasoning from the case analysed above, a new kind of role can be suggested for the EU judges, even strictly connected to the right of initiative. Despite the "legal irregularity" of some proposals submitted through the citizens' initiative, and while rejecting those which are totally absurd and unreasonable, EU tribunals could still

[87] L. KIRCHMAIR, *The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law*, in *Göttingen Journal of International Law*, 2012, p. 685 *et seq.*; see also J. WOUTERS, J. ODERMATT, T. RAMOPOULOS, *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford: Hart, 2014, p. 249 *et seq*.

[88] Court of First Instance, judgment of 22 January 1997, case T-115/94, *Opel Austria v. Council*, para. 90.

[89] See e.g., R. UERPMANN-WITTZACK, *The Constitutional Role of International Law*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford: Hart, Munich: Beck, 2009, pp. 135, 137 *et seq.*

[90] See e.g., A.R. ZIEGLER, J. BAUMGARTNER, *Good Faith as a General Principle of (International) Law*, in A.D. MITCHELL, M. SORNARAJAH, T. VOON (eds), *Good Faith and International Economic Law*, Oxford: Oxford University Press, 2015, pp. 9, 17 *et seq*.

[91] See in particular, M. GOLDMANN, *Putting Your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, in *Yale Journal of International Law*, 2016, p. 117 *et seq*.

rule on the general "principles" expressed in these initiatives: either by directly affirming what the general principles are or through *obiter dicta*.[92]

Again, considering the Anagnostakis proposal, one of the main interests expressed by the initiative is to achieve the general affirmation of the principle of necessity even with respect to financial agreements (both private and public). From this perspective, EU judges, working on the relationship between regional and international law, can contribute to the development of the international customary law[93] – including the principle supported by the Anagnostakis initiative – and can in any event provide an answer to the "social" needs expressed by certain initiatives, even considering the possibility of a future reform to introduce a form of EU sovereign insolvency mechanism (starting from the EMF).

Once again, it must be noted that if this legislative project is realized, the Court will have to manage several disputes related to – among the many – the Member States' financial assistance from the new so-called EMF. However, it is neither reasonable nor feasible to think that the Court will be able to judge these new disputes only through the actual content of the Treaties (as well as the secondary law), which says almost nothing on the point. This means that the Court of Justice will initially need to apply the only existing rules on the matter, which are nothing else than the economic international law. On the point, it may be appropriate to reconsidering the "dualistic" approach so far adopted by the Court: the *Anagnostakis* case (as well as the *Pringle* case) has been a missed opportunity in this direction.

In other words, by considering both debt and default as physiological phenomena,[94] the present work finally suggests that (even) an EU sovereign insolvency mechanism must imply a balanced evaluation of all the public and private interests at stake, with the specific purpose of designing an equitable *juridical* governance system,[95] which should involve all the EU institutions, and, for the arguments already developed, the Court of Justice above all.

[92] See R. BADINTER, S. BREYER (eds), *Judges in Contemporary Democracy: An International Conversation*, New York: New York University Press, 2004, p. 175 *et seq*.

[93] See A. GIANNELLI, *Customary International Law in the European Union*, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds), *International Law as Law of the European Union*, Leiden, Boston: Martinus Nijhoff, 2011, p. 93 *et seq*.

[94] See the considerations set out above in section I.

[95] See A. SOMMA, *Il diritto privato europeo e il suo quadro costituzionale di riferimento nel prisma dell'economia del debito*, in *Contratto e impresa*, 2016, p. 123 *et seq*. In this sense it is possible to broadly speak of "decommodification" of the European integration: see D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. KOCHENOV (ed), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 3 *et seq*.