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EU MEMBER STATES' ANTI-BANKRUPTCY SOLUTIONS IN CONSIDERATION OF SOVEREIGN DEBT RECOVERY UPON INTERNATIONAL LAW

I.

The problem of states insolvency has been discussed in international law since the end of the last century. The refusal of financial liabilities is generally illegal, but in a special situation it may be qualified as legal[1]. The idea of funding international insolvency law, which comes originally from Jeffrey Sachs (1995), was developed by the Vice-President of the International Monetary Fund, Anne Krueger[2], who proposed to apply national bankruptcy regimes regarding companies as well as decision-making procedures adopted among holders of debentures, that is Collective Action Clauses. The concept referred to creating legal opportunities for the majority of creditors to approve the restructuring agreements binding for minorities in order to simplify the relationship between the debtor and the creditors. This concept also took into account the protection of debtor's assets and its financial capacity in negotiations with creditors by guaranteeing the possibility of entry into a dispute with the creditor after the suspension of payments and a mechanism to protect the interests of the creditor in the course of this dispute, as well as by ensuring priority for new funding. The aim was to allow debtors to decide freely whether to agree to the terms of restructuring. This proposal, however, met with a number of reservations of countries and financial institutions and was not developed[3]. The main complaints were: finding a form to secure such a decision upon national law, the legitimacy of rights of the majority, the scope of the debt coming under collective negotiations. As a consequence, no mechanism of international insolvency law was developed[4]. Also the UN Charter does not provide effective mechanisms on the universal level. The UN Security Council may, on the basis of Art. 39 and Art. 40 (Chapter VII) of the UN Charter apply for state's financial problems a recommendation or an interim measure[5], however, the insolvency must be linked to a threat of international peace or security. The doctrine indicates that it is possible to interpret the term "peace" broadly. It must not be limited to an interstate conflict, but extends to occasions when due to financial problems the internal situation threatens people and means no guarantee of human rights[6]. Under this assumption, the UN Security Council may appeal on the country's creditors for financial aid, which could also eliminate at least a part of obligations. However, the clarity as to the limits of such action is lacking[7].

The relativization of state sovereignty and the membership in the European Union created the possibility of introducing new solutions to the problem of states' insolvency. The aim of this article is to attempt to answer the questions, what is the legal situation of EU Member States that are threatened with insolvency, what is the difference between the EU law and the classical international law in this area and whether the legal situation of Member States with a derogation and the Member States whose currency is the euro are identical. For the purposes of this article, it was hypothesized that the EU law developed regulations regarding the risk of the Member States' insolvency that differ significantly from those of classical international law and that they differ depending on whether the country belongs to the euro zone or whether it is a state with derogation. The hypothesis will be verificated by the mean of traditional research methods applied in legal sciences: the dogmatic method, involving the analysis of legislation and judgments and the historical-comparative method, which allows to carry out the synthesis and formulation of conclusions. The article is divided into five parts: the first part introduces the hypothesis and the methods, the second examines the ways of vindicating sovereign debts upon classical international law, the third explores the possibilities of a states' refusal to debt repayment upon classical international law, the forth deals with the procedures of EU Member States' insolvency and the fifth provides for a brief summary.

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II.

One of the oldest forms of debt recovery upon classical international law are reprisals and diplomatic protection. In the history, a state, by virtue of its sovereignty, was formally free from a unilateral intervention also in the case of insolvency. However, in practice, there were military interventions undertaken both because of a refusal to pay under interstate obligations or because of performing diplomatic protection in the interests of citizens. As for the first case, when in 1861 in Mexico Juarez suspended debt repayment, the UK, Spain and France have agreed on a joint treaty and attacked Mexico[8]. Similarly, in 1902 a German-English-Italian expedition stroke Venezuela because of the lack of payment[9]. In the latter case, the decisions were rather taken in dependence on political circumstances. Lord Palmerston, the British Prime Minister and multiple foreign minister, formulated in the mid-nineteenth century a doctrine relating to foreign loans. He decided that buying foreign bonds is the risk of British investors. If they prefer to purchase them instead of safer debentures of the British Government (with lower interest rates), they should not expect assistance from this government[10]. However, in the case of the nationalization of the Suez Canal an action of British bombers was taken, who attacked Israeli, French and British troops. The case was closed thanks to the mediation of the World Bank and the US pressure on the United Nations, through the agreement between Egypt and the company, signed in Rome on 13 July 1958[11]. An example of diplomatic protection is the judgment of the Permanent Court of International Justice (PCIJ) of June 1939 *Societe Commerciale De Belgique* (Socobelge)[12]. The company Socobelge resorted to arbitration under the contract. The 1936 Arbitral Commission gave two awards, entitling Socobelge to 6.7 million $ (about 400 million € today) in compensation. Subsequently, Greece – instead of challenging the awards – declared bankruptcy to avoid the necessity to pay. In the negotiations followed, Greece promised only gradual repayment, in lockstep with its other external debt. Greece justified its insolvency with the possibility of avoiding the obligation to pay debts, if the payment would violate the public order, the social peace or the performance of general state duties. The negotiations with the Belgian Government within the framework of diplomatic protection lasted over a year and were repeatedly interrupted. 1938 Belgium brought the case to the PCIJ[13]. That was one of the first cases of state insolvency brought to an international tribunal, whereas previous judgements did not give clear answers to questions about the effects of the insolvency of states[14]. The Belgian Government argued that Greece refusing to comply with the arbitration award, breached its international obligations. PCIJ held Greece responsible for violating the state's international obligations and ordered to repay debts to the company[15]. The Court held that the Greek Government is obliged to comply with arbitral awards and that their refusal to pay is an abuse. The attempt to influence the company and the Belgian Government to determine their own conditions and payment methods have been considered to be unlawful. The PCIJ stated, however, that the submission was expressly presented as a consequence of the preceding submission and therefore of the existence of *res judicata*, because its submission followed logically from the definitive and obligatory character of the arbitral awards. PCIJ also considered that on the basis of arbitration awards it is not able to assess Greece's economic situation, therefore, for the purposes of discussion about the state insolvency the judgment can also be interpreted in a opposite way, that is as conferring, in principle, that bankruptcy is a prerequisite for the release of the obligations[16]. Greece was not satisfied with this settlement and the case was continued after the war at the Brussels civil court[17]. The refusal to pay state debts appeared again in the international arena after the Argentinean crisis, after the Government due to the state of necessity took action calming financial markets, albeit at the expense of investors. This resulted in a number of processes before arbitration tribunals[18]. Cases concerning payment of debts by the state may also be settled by arbitration as a result of entering into a contract upon international law or by reference to the international tribunal in a dispute resolution clause. Seeking redress at national courts is rather rare, but the need for such an action may result from coercion under the contract itself, which sometimes refers to national law of a particular state. The obligation may be general or contained in the judicial clause, regardless of whether the contract is concluded between states or between a state and private creditors. The governing law clause also generally includes explicitly or implicitly the question of the court having jurisdiction, which in the absence of internationalization is usually a national court. The admissibility of claim against the debtor is then determined by the law of the country in which the claim is being made. Basically, there might be three legal systems: the court of the debtor, the court of the creditor or the court of a third state allowed by local law, by provisions of the agreement between the parties or by provisions of treaties concluded by the respective state. The least preferred option is, of course, the court of the debtor. However, this solution may be justified by a very weak position of the creditor (investor) while entering into a contract from an economic (lack of financial attractiveness) or political perspective (lack of support of the country of origin). The court of a creditor or this of a third country provides for the most rational position.

The cases of financial obligations of states are being nowadays rarely resolved by international courts. National courts generally try to move them into the realm of restructuring negotiations, which is facilitated by national law, where the priority negotiations before the final decision taken by the court is often normatively secured[19]. The complaint may be filed only when a party considers that the dispute cannot be resolved by negotiation or consultation. Conversely, this means, however, that in other cases it is possible[20].

In addition, courts may refuse to decide in a case on the basis of the "act of state" doctrine or state immunity, because commercial activity of a state refers to *acta iure gestionis*[21]. The US courts rest sometimes their decisions on the principle of comity, which consists in the adoption of a foreign judgment without going into its substantive or procedural merits. This does not result from any legal obligation, but it is because of mutual respect, as the basis of comity is the expectation of reciprocity[22]. Although the comity is not regarded as a principle of law[23], but only a

principle of courtesy and good will, but it is used by courts to clarify rules and principles dividing public and private international law.

The most common form of redress are currently negotiations. The doctrine indicates two positions on the scope of the obligation to negotiate. The first is the obligation to negotiate considered as a general principle of law within the meaning of Art. 38.1c) of the Statute of the ICJ. It is a duty to negotiate collectively, where the interests of a state and private creditors are treated equally[24]. It is, however, criticized by indicating that in general it is not allowed to transfer solutions directly from national systems into international law, without regard to their specific situation[25]. The second is an obligation to negotiate. It s regarded only as a practice of states due to lack of *opinio iuris sive necessitatis*[26]. In case of a bankruptcy risk or if bankruptcy is noticed by the debtor, the creditors also usually take negotiations.

State creditors use to negotiate the so-called Paris Club, which was established in 1956 as an institution serving states to communicate on matters of mutual debt. Private creditors are members of the so-called London Club. Organizing a community aims to strengthen the position of creditors to negotiate with a bankrupt state. As recognized by the PCIJ in 1939, creditors are not obligated to negotiate, because the weakness of the debtor does not oblige the creditor to negotiate[27]. The contemporary doctrine seeks support in national legislation by checking whether contracts not containing standards ordering negotiations are in case of bankruptcy interpreted in the spirit of the obligation to negotiate. However, even with the recognition of such an obligation, the creditor is obliged only to negotiate in good faith (*pactum de negociando*), but the obligation includes neither the release of the debtor or the modification of the contract[28]. The position of state creditors is additionally supported by their sovereignty, because forcing them to a specific effect in the negotiations would be the breach thereof.

An important platform of creditor protection are standards of investment protection[29]. Back in the 70s. it was difficult to qualify for a loan from the legal and substantive point of view. Then it was an equity instrument of unclear interstate nature whereas it is now classified as a property. This is due to the practice of arbitration tribunals, which tends to a broad understanding of the notion of investment including not only the transactions leading to the production activities in another country, but also investments in securities[30]. Apart from that, arbitration tribunals understand indirect deprivation of property as a hidden or incidental activity on property matters, in order to deprive the owner in whole or in part of the possibility to reap benefits from it or to use it, even if the state itself does not reap the benefits from it (case Metalclad v. Mexico[31]). The judicial practice confirms that investment courts perceive the institution of acknowledgment of debt, as well as material loans as investment in terms of investment protection law[32], which is important for understanding the legal concept of loans, thereby strengthening the position of creditors.

III.

From the perspective of international law, refusal of sovereign debt repayment means that a state attempts to avoid its liability. Although it is generally not allowed, however, some exceptions are possible, that is: consent of the creditor, retaliatory measures, self-defence, force majeure and state of necessity. Those conditions are generally applicable in the relations between states, however, their application to refuse debt repayment in the relation between a state and a private creditor is problematic. The consent of a state acting as a creditor may be the reason to evade the debt payment only to him. It cannot, however, constitute grounds for liberation from debt private entities, e.g. citizens of the consenting state.

This is not only due to the general principles of international law, but also due to the nature of financial liabilities, which are in fact autonomous in relation to public international law, being derived from international investment law. Retaliatory measures may instead be directed not only against states, but also against private parties[33]. The reason for them is not the desire to avoid debt repayment, but the revenge, especially when these entities are accused of violating law. Their effectiveness, however, is reduced by investment treaties that may prohibit any action of this kind. Similarly, the self-defence may be used against another state only under conditions laid down by international law, and it can be applied to the private entity only in specific situations when the private entity is engaged in activities classified as armed aggression. Both retaliatory measures and self-defence are in practice difficult to connect with bankruptcy. According to this, the catalogue could also include other institutions, which are possible to be linked with avoiding the implementation of commitments in specific cases, e.g. a humanitarian intervention. None of the above structure, therefore, does deserve to be classified as directly relating to the refusal of debt repayment by a state in the event of bankruptcy.

A prerequisite for the release from liability, however, is the cancelation of a contract. Its implementation depends on the legal nature of the agreement. It should be examined, whether it was concluded with another country, and it is an international agreement or whether it was signed by a private entity or by another country, but it is a civil contract. In the first case, the contract is valid irrespective of the political situation and its invalidity can be determined only upon the provisions of the Vienna Convention on the Law of Treaties[34]. In addition, if a state would not like to pay obligations, it must be the nullity *ab initio*. Therefore, one of two conditions have to be applied: a contradiction with the norms of *ius cogens* or a coercion. The use of funds in contravention of international law or contractual provisions does not exempt from the payment. Similarly, the use of *rebus sic stantibus* clause would be contrary to the purpose and the meaning of the contract[35]. Civil contracts with private creditors, as well as private agreements between states, by contrast, include the governing law clause which aims to regulate the legal issues arising from them. In those cases, the governing law clause indicates usually foreign law, which makes any cancellation impossible.

Another prerequisite to refuse the debt payment upon international law is the state of necessity. It means a situation that threatens the existence of the state, leading to the need of infringement of protected rights that are recognized as a lower value in relation to the protection of statehood. Its source of public international law is international custom. In general positive international law it is mentioned only once, in the International Covenant on Civil and Political Rights, persuant to which "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties may take measures derogating from their obligations"[36]. In the European regional regulations its equivalent is Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[37]. Art. 15.2 of the Convention prohibits evasion of its obligations under Art. 2 (right to life), except in respect of deaths resulting from lawful acts of war, as well as its obligations contained in Art. 3 (prohibition of torture), Art. 4.1 (slavery) and Art. 7 (no punishment without law). However, they are not absolute.

The concept of state of necessity arises, however within the works on Articles on Responsibility of States for Internationally Wrongful Acts[38]. The International Law Commission stated in Art. 33, the decisive factor here is the existence of a situation where the essential interests of the state are threatened significantly and directly. It should be a threat to the political and economic existence of the state, to the maintaining of essential conditions for the performance of general state duties, to the protection of peace, of a part of society or of the environment on a part or on all of the territory of a state. Such threats include also the debt repayment[39]. However, the structure of the draft convention only applies to the discrepancies between the states, not between the state and individuals. The doctrine based on the case law[40], recognizes sometimes the opportunity to build the refusal to pay debts to private creditors on a state of necessity[41]. The authors believe, however, that this option weakens the duty to negotiate. In addition, they consider that this condition is time-limited, while the debt until the repayment is permanent. The state of necessity allows therefore only to postpone the repayment or to renegotiate its terms[42]. In addition, it cannot be an effect of activity the state itself. In practice, the international state of necessity was raised as a ground for refusal of debt payment by Argentina, which in the early twenty-first century fell into financial trouble[43]. The effect of Argentinean activity was a number of limitations, striking mainly foreign creditors, who, based on investment treaties raised their claims to arbitration tribunals. The judgments confirmed that the state of necessity can be a basis liberating from obligations[44].

Also the force majeure was repeatedly examined by international courts as a prerequisite for the refusal to pay sovereign debts. Frequently cited is the *Russian Indemnity* judgment[45] resolved by the Permanent Court of Arbitration in 1912 in the context of force majeure. The essence of the problem was a dispute, whether or not the Imperial Ottoman Government must pay to Russian claimants interest-damages by reason of the dates on which the said Government made payment of the indemnities and what would be the amount of these interest-damages. The exception of force majeure, cited as the most important, may be pleaded in opposition in public as well as in private international law, because international law must adapt itself to political necessities. The Imperial Russian Government expressly admitted that the obligation of a State to fulfill treaties may give way "if the very existence of the State should be in danger, if the observance of the international duty is (…) „self-destructive". The Court rejected this assessment[46] and found that it is a disputable institution upon public international law and private international law and that international law must be adapted to political requirements. Ruled that It would clearly be exaggeration to allow that the payment of the comparatively small sum due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation. The exception of *force majeure* was, therefore, not accepted. The force majeure as the cause of financial difficulty of the state, which was to serve as a basis for refusal to pay liabilities was also applied by Ecuador in a dispute with *Duke Energy Electroquil Partners and Energoquil SA*[47]. The arbitral tribunal did not approved the refusal, although in its judgement of 2008 it confirmed the existence of negative circumstances alleged by Ecuador, which were an armed conflict with Peru, a decline in oil prices, effects of Hurricane El Ninio, changes in the monetary system and lack of access to external credits.

The last ground for refusal of debt repayment are the so-called *odious debts*. Basically, debts remain in the process of succession by the state which run into debt. However, according to the practice of states and the international law doctrine, the repayment of odious debts may be legally refused not only in the event of bankruptcy. The basics of a modern doctrine of odious debts were created by Alexander Nahum Sack[48]. This theory is currently associated with practical problems associated with the processes of national transformation. Sack defined odious debts as incurred by regimes not for the purposes of the state, but to strengthen its own power. He thought that after coming to power by the people, the debt are not a subject to succession, because. they were drawn against the nation. If the creditor knew about it, he should not grant the loan, because he acted against the nation. This loan belongs to the authority which has concluded a contract. However, since this doctrine could be misused, Sack suggested that the new government must prove that the debt was contrary to the interests of the state, and the creditors were aware of this. After this proof, however, creditors wanting to recover the debt, would be forced to prove before an international tribunal, that the money has been used for the benefit of the state. Otherwise, there was no obligation. The concept of odious debts is conducive to solve problems regarding the obligations of "third world" countries. It is recognized that such debts incurred e.g. for the suppression of the national liberation movement or other actions contrary to the interests of former colonies, the newly created state must not pay[49].

IV.

The relativization of state sovereignty and the membership in the European Union, created the possibility of introducing new separate procedures concerning the insolvency of the state. The objective of the monetary union was,

among others, to avoid crises by entrusting the care of a monetary policy to a supranational regime. The EU preserved substantial fiscal autonomy for its members but has been progressively absorbing other economic and regulatory policy prerogatives[50]. However, there were some problems as a consequence of inconsistency of actions at the supranational level. First of all, there was a discrepancy between the area of the so-called economic union, involving coordination of economic policies, and supranational monetary union. In addition, the first stage of the creation of the euro area involved, for political reasons, eleven countries, despite the fact that only nine of them actually met the convergence criteria[51]. Another problem was the evaluation criterion of the budget deficit, as the evaluation proceeded on the basis of economic, but not legal facts[52]. Also fiscal policies of the Member States were inappropriate and at the EU level real tools to influence the avoidance of excessive deficit were lacking. For this reason, the crisis that started in 2009, brought a number of problems for the EU economy, including threats of states bankruptcy (Greece, Italy, Portugal, Spain, Belgium). Sovereign debt crises that occurred in the EU pointed to the need for a reform of the financial architecture of the EU, because they lead to endangering the stability of the financial system. It was therefore essential to prevent debt crises occurring under altered constellations in the world economy[53].

The boundaries of the involvement of the EU and the Member States in financial trouble of one of the other Member States are clearly defined in the TFEU[54]. Pursuant to Article 123.1. TFEU, overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments. Article 124 TFEU states that any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited. According to Article 125.1. TFEU, the EU shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public under takings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. In other words, no state or EU entity can assume responsibility for a Member State's public debt[55]. The character of these standards makes it unlikely that the EU and the Member States get financially involved in the problems of other states in the context of insolvency, but does not prohibit this in absolute terms. These standards must therefore be interpreted in the context of other regulations.

The Treaties include standards relating to reorganization proceedings, whereas the provisions differ as for ember states of the euro zone and the Member States with a derogation. These standards, however, do not provide a treaty formula establishing the obligation to adopt regulations developed by the entire euro zone, but introduce a limited treaty mechanism affecting the economic policies of the Member States. In this context, Art. 121 TFEU is applicable for receiving a part of the broad economic policy for the euro area, pursuant to which the Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council. Additionally, the Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned, when it is established that the economic policies of a Member State are not consistent with the respective guidelines or that they may provide jeopardising the proper functioning of the economic and monetary union.

Upon Article 126 TFEU, if the Member States fail to fulfil the requirements to avoid excessive government deficits, the Commission is enable to undertake respective measures. Article 122 TFUE allows the Council, on a proposal from the Commission to grant, under certain conditions, Union financial assistance to the Member State, where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control concerned. This solution was applicated to the supportive action among the euro zone Member States taken during the financial crisis in 2009/2010, after the threat of Greek insolvency (2010)[56]. The surveillance of budgetary discipline was then started and a term for the deficit correction was set. Since Greece did not meet the term, the Council of Finance Ministers (ECOFIN) assessed the effect of Greece negatively. Therefore, in February 2010, it was decided to establish a precise timetable for action under Art. 126.9 TFEU. Formally, this was the next stage of the excessive deficit procedure, in order to reduce the public debt. Also a series of recommendations in accordance with art. 121.4 TFEU was adopted, that is the administration reform, changes in the labour market, improving standards for businesses and changes in education. A similar procedure was repeated as for Portugal[57]. The practice also relied on the political cooperation of the euro area, while stimulating the construction of appropriate mechanisms. According to its content, the mechanism will be in force for as long as is necessary to safeguard financial stability. In addition, on 7 June 2010, the Member States of the euro area – in line with the conclusions of the ECOFIN Council of 9-10 May 2010 – set up a European Financial Stability Facility (EFSF) as a special purpose limited liability company (*société anonyme*) under the laws of Luxembourg. The funding was secured by proportional guarantees of the Member States of the euro zone to a total of 440 billion euro.

For the Member States of the euro zone, the most important is the Art.136.1 TFEU, according to which in order to ensure the proper functioning of economic and monetary union the Council shall adopt measures specific to those Member States whose currency is the euro to strengthen the coordination and surveillance of their budgetary discipline as well as to set out economic policy guidelines for them, while ensuring that they are compatible with those

adopted for the whole of the EU and are kept under surveillance. It therefore regulates the possibility for the Council to adopt measures for coordination and surveillance of budgetary discipline and of the general directions for national economic policies and the adoption of measures for the oversight of them. The Council acts here in case of problems in the proper functioning of the economic and monetary union, in order to restore regularity. This regulation was accused of not providing anything else than the other primary law[58]. In 2011, a new paragraph 3[59] was added to Art. 136, under which 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. This provision also provides that the granting of any required financial assistance under the mechanism will be made subject to strict conditions. The Member States of the euro area subsequently concluded, on 2 February 2012, the treaty establishing the European Stability Mechanism with a legal personality. A respective decision was made at the informal European Council meeting on 11 February 2010. The topic of the meeting was the possibility and extent of involvement of the International Monetary Fund, due to the loss of image of the euro area, the loss of value of the currency, and the respective formal possibility to act by the EU and the IMF. It was then recognized that the problems of the Member States are the result of the global financial crisis, extending beyond the control of individual countries, which requires special action at the EU level[60]. The authorities decided to introduce an EU stabilization mechanism, which aims to maintain balance on transnational forum. Consequently, the Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism was adopted[61]. It aims to launch, under strict conditions, funds and provide its members, that encounter or are likely to face serious financial difficulties, support for stability. The aid may be granted, if it is necessary to ensure the financial stability of the euro area as a whole and of its Member States. The mechanism may raise funds through the issuance of financial instruments and agreements and financing agreements, or other members of the European Stability Mechanism, financial institutions and other third parties. The initial lending capacity was set at 500 billion EUR. Strict conditions governing support may include in particular the implementation of macroeconomic adjustment program or the obligation to comply with pre-established conditions of the funds granted[62].

A separate group constitute the Member State with a derogation, remaining outside the euro zone. To these Member States, Art. 143 TFEU and Art. 144 TFEU concerning the balance of payment difficulties and possible payment crises shall be applied. These standards do not apply to the Member States of the euro zone. Art. 143 TFEU enables the Commission to investigate immediately the position of the State in question and the action which that State has taken or may take in accordance with the provisions of the Treaties, making use of all the means at its disposal. The provision shall apply to the situations when a Member State with a derogation is in difficulties or is seriously threatened with difficulties regarding its balance of payments. It is also possible to launch the activity of the Commission, if the situation is a result of an overall disequilibrium, or a result of the type of currency at its disposal. The additional prerequisite is that the difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy. If this is not sufficient, the Council shall grant mutual assistance to the Commission. Its supportive activity may take the following forms: a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse (np. ICF[63]), measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries, or the granting of limited credits by other Member States, subject to their agreement. Pursuant to Article 144 TFEU, where a sudden crisis in the balance of payments occurs and a decision within the meaning of Art 143.2 is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must not be wider in scope than necessary and may only cause the least possible disturbance in the functioning of the internal market. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. Also in this case the Commission may recommend to the Council the granting of mutual assistance under Art. 143. The Council may decide that the respective state has to change, suspend or abolish the protective measures referred to above[64].

There is also a mechanism for financial assistance for the Member States with a derogation based on Art. 119 TFEU[65]. It is based on the EU's own financial capacity and the mandate for the Commission to borrow in financial markets. It can be implemented on the initiative of the Commission or a Member State. The decision is to be made by the Council and it is taken by a qualified majority. The implementation is governed by the Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility for providing medium-term financial assistance for Member States' balances of payments[66], as amended by Council Regulation (EC) No 1360/2008 of 2 December 2008[67].

V.

The insolvency does not relieve the state of debt. Any withdrawal from the *pacta sunt servanda* principle should be considered only under exceptional circumstances. The position of the creditor is also supported by the international morality manifested by the existence of the principle of equity. All attempts to shift the consequences of the situation of the debtor to the creditor are to be regarded as contrary to this principle. International law, however, contains structures that states are trying to take advantage of in order to avoid debt repayment. Both the position of the creditor and the debtor's position are on the basis of classical international law not entirely clear.

However, within each organization of an economic nature, the ability to assist in the event of the insolvency of a Member State is dependent on the existence of the respective treaty formula, or at least on the absence of the prohibition to undertake such an action. The EU has developed a far-reaching formula allowing for the interference of EU authorities in decision-making processes of the Member States. There is thus an imbalance between the prin-

ciple of solidarity that binds the EU Member States together on the one hand and the principle that each Member, as a sovereign state, is responsible for its own finances on the other.

In the case of states with a derogation the respective measures include financial assistance mechanism and means needed to avoid deflection of trade. The ultimate goal seems to be to maintain the least possible disturbance in the functioning of the internal market. Crucial for the Member States of the euro zone are respective stability mechanisms and financial stability instruments to strengthen and to coordinate their budgetary discipline as well as to set out economic policy guidelines for them. The EU mechanisms are aimed primarily at preventing the insolvency of the Member States and not dealing with their bankruptcy, as it is the case of the classical mechanisms upon international law. This is the fundamental difference between them.

The sovereign debt crisis in the euro area in 2010 has revealed that the monetary and fiscal policy framework of the European Monetary Union is still incomplete and insufficient to prevent a debt crisis despite its emphasis on keeping public sector deficits low and strengthening budgetary planning. The EU responded to the crisis only by agreeing on stabilisation for Greece and then by creating the EFSF that succeeded in calming the markets[68]. However, these tool were developed in an ad-hoc manner and on a temporary basis only and were not able to establish adequate grounds for dealing with any possible future debt crises in the euro area[69]. These mechanisms interfere deeper into areas that usually remain in the range of the sovereign power than it is the case of those originating in classical international law. If they are more effective, only time will tell.

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[1] *R. Dolzer,* Staatliche Zahlungsfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht. (in:) Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Karl Josef Partsch. Berlin 1989, p. 552.

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Summary

Mariusz Muszyński, Joanna Osiejewicz. **EU member states' anti-bankruptcy solutions in consideration of sovereign debt recovery upon international law.**

The problem of states insolvency has been discussed in international law since the end of the last century, however, no mechanism of international state insolvency law have been developed. The relativization of state sovereignty and the membership in the European Union created the possibility of introducing new solutions to the problem of states' insolvency. The aim of the article is to attempt to answer the questions, what is the legal situation of EU Member States that are threatened with insolvency, what is the difference between the EU law and the classical international law in this area and whether the legal situation of Member States with a derogation and the Member States whose currency is the euro are identical. For the purposes of this article, it was hypothesized that the EU regulations regarding the risk of the Member States' insolvency differ significantly from those of classical international law and that the difference depends on whether the country belongs to the euro zone or whether it is a state with derogation.

Key words: state bankruptcy, state insolvency, sovereign debt recovery, European Union, international economic law.