



Edited by
MASSIMO MECCARELLI

READING

THE CRISIS

Legal,
Philosophical
and Literary
Perspectives

READING THE CRISIS

The Figuerola Institute
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SOCIAL RIGHTS IN CRISIS: ANY ROLE FOR THE COURT OF JUSTICE OF THE EU?

Francesco Costamagna¹

1. Introduction: the reform of the European economic governance in response to the crisis

The European response to the crisis revolved around two main axis²: financial assistance for Member States in difficulty and the creation of new mechanisms that may yield stronger economic coordination and tighter control on Member States economic choices.³

Since 2008, eight European States have obtained financial assistance that has been provided through a variety of instruments. Early cases, involving non-euro States, such as Hungary, Latvia and Romania, received assistance on the basis of Article 143 TFEU, which envisages the possibility to grant “mutual assistance” to non-Eurozone States facing difficulties as regard its balance of payments. Vice versa, in the first Greek bailout package approved in May 2010 there was no EU mechanism available and, thus, resources had to be provided through bilateral loans by Eurozone States and by the International Monetary Fund (IMF) under a stand-by arrangement.

After this experience, the EU rushed to fill the gap, creating two new bailout mechanisms: the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF). The former was established

¹ I wish to express my gratitude to Paolo Pachetti and Massimo Meccarelli, conveners of the seminar “Perceptions of (in)security and forms of legal protection in times of crisis”, held in Macerata on the 11th December 2015, and to the participants. Furthermore, a special thanks goes to Annamaria Viterbo, Andrea Spagnolo and Alberto Miglio for the time spent discussing about these issues and, in particular, the *Ledra* case. All errors remain mine. This chapter has been written in the context of the REScEU project (Reconciling Economic and Social Europe, www.resceu.eu), funded by the European Research Council (grant no. 340534).

² A third axis consists of measures aiming at creating a safer financial sector in the EU. These measures involved stronger prudential requirements for banks, improved depositor protection and rules for managing failing banks. They set the foundations for the creation of a European Banking Union. See Kern (2015).

³ See generally, Viterbo and Cisotta (2012); Ruffert (2011).

by Regulation No. 407/2010⁴ and it had the capacity to borrow up to a total of 60 million euros. The latter, endowed with more financial resources⁵, has been created by an international agreement and operates as a private company established in Luxembourg. Most of the resources used to provide financial assistance to Ireland and Portugal came from these sources. Conversely, the second adjustment program for Greece was entirely financed by the ESFS.

The need to reduce the risk of contagion through the establishment of a credible firewall pushed Member States to create a permanent mechanism to provide financial assistance to Euro-Area Members experiencing or threatened by financing difficulties. The European Stability Mechanism⁶ was established on 27 September 2012 with a maximum lending capacity of 500 million euros. The ESM intervened to provide assistance to Cyprus, together with a loan by Russia, and to Spain for the bailout of the financial sector. Furthermore, the ESM is also involved in the third financial assistance package for Greece, approved in August 2015.

Each bailout was premised upon the respect by the beneficiary State of a set of policy conditions to be agreed with EU institutions, acting on behalf of the donors. Conditionality is a typical tool used by international financial institutions that serves different purposes. First, it aims to reduce moral hazard and to ensure that resources are used to solve the beneficiary State's problems.⁷ Moreover, conditionality is meant to protect the whole Eurozone against possible negative spill overs (the so-called 'contagion effect'), safeguarding its long-term financial stability by making sure, *inter alia*, that the beneficiary State will be in the position to payback its loan. Tying financial support to the adoption of austerity measures also purports to send a reassuring message to financial markets, by showing concerned States' resolve in trying to address the root causes of the problem. Lastly, conditionality serves deterrent purposes, since, as pointedly observed by Schepel, "States will have to be deterred from pursuing unsound budgetary policies by the prospect of having to live through the same amount of pain and misery inflicted on States assisted by the ESM".⁸

4 Council Regulation (EU) No. 407/2010 of 11 May 2010, establishing a European financial stabilization mechanism, [2010] OJ L 118/1.

5 It had the capacity to borrow up to a total of 440 million euros.

6 The *Treaty Establishing the European Stability Mechanism* ('ESM Treaty') was signed in March 2012.

7 Ioannidis (2016).

8 Schepel (2017), p. 88.

The Commission and the European Central Bank (ECB) are key actors in this context, being them part, together with the IMF, of the so-called Troika since the first economic adjustment programme for Greece. After these informal beginnings, their role has been recognized and codified in legal acts. For instance, Article 13(3) ESM Treaty establishes that, once it has decided to grant financial assistance, the Board of Governors “shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (a “MoU”) detailing the conditionality attached to the financial assistance facility”.⁹

The second axis of the European response to the crisis consists of the reinforcement of budgetary discipline by Member States and the creation of a new mechanism for stronger economic policy coordination.

This has been achieved through a combination of EU legislative measures and international law treaties. As for the former, in November 2011 the European Parliament and the Council adopted the so-called ‘Six-Pack’, a bundle of five Regulations and one Directive that strengthened both the preventive and corrective arms of the Stability and Growth Pact and introduced the Macro-Economic Imbalance Procedure.¹⁰ One of the Regulation of this package¹¹ codified the European Semester, a policy coordination framework that brings under a single procedural umbrella both soft and hard coordination and sur-

9 The provision has been copied and pasted in Article 7 Regulation (EU) No. 472/2013 of 21 May 2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*, [2013] OJ L140/1.

10 Regulation (EU) No. 1175/2011 of 16 November 2011 amending Council Regulation (EC) No. 1466/97 of 7 July 1997 *on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies*, [2011] OJ L306/12; Regulation (EU) No. 1177/2011 of 8 November 2011 amending Council Regulation (EC) No. 1467/97 of 7 July 1997 *on speeding up and clarifying the implementation of the excessive deficit procedure* [2011] OJ L306/33; Regulation (EU) No. 1173/2011 of 16 November 2011 *on the effective enforcement of budgetary surveillance in the Euro area* [2011] OJ L306/1; Council Directive No. 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, [2011] OJ L304/41; Regulation (EU) No. 1176/2011 of 16 November 2011 *on the prevention and correction of macroeconomic imbalances* [2011] OJ L306/25 and Regulation (EU) No. 1174/2011 of the Council of 16 November 2011 *on enforcement measures to correct excessive macroeconomic imbalances in the Euro area*, [2011] OJ L306/8.

11 Regulation (EU) No. 1175/2011, above n. 8.

veillance mechanism.¹² In May 2013 the EU legislator adopted two further measures – the ‘two-pack’- aimed at strengthening economic and budgetary surveillance over Euro-States in difficulty and at monitoring budgetary plans of all Euro-States.¹³

In March 2012, 25 out of 27 EU Member States signed the *Treaty on Stability Co-ordination and Governance in the Economic and Monetary Union*,¹⁴ known as the ‘Fiscal Compact’, in order to send out unequivocal signs of their commitment toward budgetary probity. Indeed, the TSCG sets out, *inter alia*, stringent targets in terms of structural deficits, so to make sure that Contracting Parties’ budgetary position is balanced or in surplus.¹⁵ Moreover, Article 3(2) TSCG requires Contracting Parties to bring these rules into effect in their national legal orders “through provisions of binding force and permanent character”.

These measures had a profound impact on the fabric of the European integration process, engendering systemic¹⁶ conflicts with some of its foundational elements.¹⁷ This paper looks at the capacity of the system to deal with these conflicts in order to avoid that they may shake its foundations and further weaken the legitimacy of the integration process. In particular, the paper focuses on the role that the Court of Justice of the European Union (‘the Court’) has been able and/or willing, to play when anti-crisis measures encroach upon fundamental social rights and, more in general, the balance between the social and the economic dimensions within the EU legal order. The first part looks at the departure from the rule of law in the context of bail-out programmes devised to assist Member States that have been hard hit by the crisis. The second part looks at the impact of anti-crisis measures on so-

¹² See generally Hallerberg, Marzinotto, Wolff (2012).

¹³ Regulation No. 472/2013 of 21 May 2013 *on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability*, [2013] OJ L140/1 and Regulation (EU) No. 473/2013 of 21 May 2013 *on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the Euro area* [2013] OJ L140/11.

¹⁴ *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* was signed in March 2012 by representatives of all EU Member States, but the UK and Czech Republic. It entered into force on 1 January 2013. For an analysis of its legal form and content, as well as its contradictory relationship with EU law, see Craig (2012).

¹⁵ Article 3 TSCG.

¹⁶ On this notion see Von Bogdandy, Ioannidis (2014).

¹⁷ Menéndez (2013), pp. 511-519.

cial rights, examining some of the defining features of the conditions attached to financial assistance packages. The third and fourth parts turn to the Court, critically analysing its role in the new European economic governance and its capacity to preserve some of the foundational elements of the EU legal order.

2. The crisis, the EU and the demise of the Rule of Law

Focusing on the financial assistance axis, Kilpatrick convincingly argued that “EU sovereign debt conditionality in ‘debtor states’ significantly troubles the Rule of Law”.¹⁸ To this end, she pointed to a number of key features of bailout instruments that threatens one of the cornerstone of the European integration process.

Bailout programs are often governed by a mixture of acts of uncertain legal nature, especially due to Member States’ recourse to intergovernmental mechanisms, such as the European Stability Mechanism, that operate outside the scope of EU law. The departure from the Rule of Law is even more evident in those cases where EU institutions and, in particular, the ECB resorted to informal tools, such as secret letters, to put pressure on some Member States in order to force them into socially painful structural adjustment programs.¹⁹ This is what happened, for instance, with Italy that, in August 2011, received a letter²⁰ from the then-President of the ECB and the then-Governor of the Italian Central Bank detailing a list of measures that it had to take and even the legal instruments it had to use. The adoption of these reforms were considered as a condition to benefit from the purchase of sovereign debt paper on the secondary market in the context of the Securities Market Programme, although the letter did not make this link explicit. The same line of action has also been followed with Spain and, although using other forms of pressure, with Ireland,²¹

¹⁸ Kilpatrick (2015b), p. 325. See also Munari (2015).

¹⁹ See generally Viterbo (2016).

²⁰ See *Economia e Finanza - Corriere della Sera*, http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?refresh_ce-cp, luglio 2017.

²¹ In this case, the ECB played a key role to force the State to enter in a structural adjustment programme to be negotiated with the Troika. In a letter of 15 October 2010, Trichet reminded to then Irish Minister of Finance the ECB Governing Council’s powers and discretionality in applying collateral rules and in setting limits to ELA, In a subsequent letter of 19 November 2010, Trichet was even clearer on this point, by stating that

Cyprus²² and Greece.²³

According to Joerges and Weimer, the reform of the EU economic architecture had an even deeper impact, perverting Europe's economic constitution and its legal structure.²⁴ In particular, it marks the definitive shift away from the 'integration through law' model toward a form of executive managerialism, which they see as the heir of the new governance model. The main casualties of this move are "the virtues of 'old' traditional law based upon ideas of representative democracy, command and control, rights protection and justiciability, and the stabilization of expectations via formal legal norms".²⁵

Although diverging on several aspects, these perspectives concur on the fact that the departure from the rule of law has been a choice and not an accident. As it often happens in situations that are perceived as having an exceptional character,²⁶ the respect for rules has been perceived as a constraint that could hamper and, thus, make less effective the response to the crisis. Therefore, the characterization of the crisis as an emergency situation allowed decision-makers to adopt exceptional measures to cope with it and getting rid of the constraints imposed by an allegedly ineffective legal framework. In this

"[i]t is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions: 1) The Irish government shall send a request for financial support to the Eurogroup; 2) The request shall include the commitment to undertake decisive actions in the areas of fiscal consolidation structural reforms and financial sector restructuring, in agreement with the European Commission, the IMF and the ECB [...]". Unsurprisingly the Irish Government bowed in, formally asking for financial assistance on the 20 November 2010.

22 In a Decision of 21 March, the ECB Governing Council made clear that it would have rejected a request of Emergency Liquidity Assistance by Cyprus' National Central Bank unless "an EU/IMF programme is in place that would ensure the solvency of the concerned banks". Also in this case, the pressure put by the ECB was enough to convince the State.

23 On 28 June and 6 July 2015, the ECB Governing Council twice decided to reject the request by the Greek National Central Bank to raise the Emergency Liquidity Assistance, forcing Greek authorities to impose a bank holiday and capital control. These decisions did not refer at all to the breakdown of the negotiations between Greece and EU institutions on the Third Assistance Package. However, it is telling that the very day in which the Tsipras Government secured a Parliamentary vote on the measures that it pledged to obtain assistance from the EU, the ECB raised the ELA by 900 millions euros.

24 Joerges, Weimer (2012), p. 20.

25 Joerges, Weimer (2012) p. 15. See also Menéndez (2017).

26 The war on terror represents a good example in this regard.

context, effectiveness has become the main, if not the only, feature that anti-crisis measures must possess, even at the expenses of legality.

The new framework gives to EU institutions an unprecedented capacity to take part and influence decisions adopted by national authorities in domains reserved to Member States, as it reaches across the entire spectrum of the their economic and social policies. This is particularly evident with regard to States under financial assistance: structural adjustment programs give to EU institutions the capacity to exercise policy formulation, supervision and guidance on key social issues, such as the provision of social services or the regulation of the labour market.²⁷

Referring to the case of implicit conditionality, Sacchi described the situation as an “extreme case of vertical [...] integration in the policy arena, which goes well beyond what is generally meant by Europeanization, and cannot be captured through multilevel governance heuristic”. In his view, this transformation is better described as “a fusion ‘of responsibilities for the use of state instruments’”²⁸. In the same vein, the strengthening of economic policy coordination and surveillance mechanisms has potentially heightened the level of involvement of EU institutions into domestic policymaking. Chalmers, in particular, described the regimes aiming at securing balanced budgets, avoiding excessive deficits and avoiding or correcting macroeconomic imbalances as a process of co-government that “goes to the structure and rationale of a State fiscal and welfare systems”.²⁹

This development puts severe constraints on political bargaining processes that should take place at national level.³⁰ Indeed, in many cases national institutions – especially those of States under financial assistance – cannot but follow the line decided at supranational level, with little, if any, discretion.

3. The Impact of Anti-Crisis Measures on Social Rights

Reduction of social expenditure, modernization of social protection systems and reform of the labour market are ever-present ingredients in the recipes proposed in the menu of the EU anti-crisis strategy. These objectives are

²⁷ Costamagna (2012).

²⁸ Sacchi (2015), p. 89.

²⁹ See also Chalmers (2012).

³⁰ Floris de Witte (2013).

strongly reminiscent of those traditionally pursued by IMF-sponsored structural adjustment programmes back in the ‘80s and ‘90s, even though the IMF itself is now reconsidering the wisdom of this approach.³¹ Some commentators have aptly dubbed such a paradoxical situation as the “European rescue of the Washington Consensus”.³²

Especially from 2010 onward, the priority of austerity-driven rescue packages was reducing sovereign debts, by invariably imposing draconian cuts to social expenditure. The attention toward this issue may be explained by referring to its relative weight in European States’ budgets, as social expenditure account for roughly 30% of the total. At the same time, this strategy seems to be fully in line with one of the dominant narratives of the crisis, according to which the latter had been mainly generated by the profligacy of Southern States and the excessive generosity of their welfare systems.³³ This is very much evident in the case of States forced to enter into a structural adjustment programme in order to get financial assistance from the EU or from EU-related mechanisms. For instance, Greece and Hungary were forced to reduce their social expenditure by respectively 17% and 11% in the period 2007-2013³⁴. Moreover, it is worth observing that the First Economic Adjustment Programme for Greece envisaged cuts in health care expenditure amounting to more than 2 billion euro by 2015 and cuts in social benefits amounting to more than 5 billion euro by the same year to be achieved through, *inter alia*, a reduction of the monetary transfers to certain categories of vulnerable persons. In the third package approved in August 2015, Greek authorities committed to target savings of around 0.25% of GDP in 2015 and around 1% of GDP by 2016 to improve the long-term sustainability of the pension system.

A second component of the austerity-driven strategy is the promotion of internal devaluation, so to enable the ‘beneficiary’ State to regain external competitiveness. In a context where currency devaluation is no longer an option³⁵, the objective has been mostly pursued by reducing wages and other labour costs, making individual and collective dismissals easier, forcing Member States to revise (or even dismantle) the wage-setting system, by giving

31 Lütz (2015).

32 Lütz, Kranke (2010).

33 Tsoukala (2013).

34 OECD (2014).

35 Internal devaluation policies have been considered as “functional equivalents” to exchange rate flexibility. See generally Armigeon, Baccaro (2012).

precedence to individual over collective bargaining. This stems from the (belated) recognition that fiscal consolidation is not enough to promote growth and that there is the need to pursue it by mainly looking at the supply side.

Over the years, there have been some attempts to pay greater attention to the social implications of financial assistance programmes. Article 7 of Regulation (EU) 473/2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, represents a good example in this regard. The provision establishes that, when a Member State requests financial assistance, the draft macroeconomic adjustment programme has to take “into account the practice and institutions for wage formation and the national reform programme of the Member State concerned”, as well as to “fully observe Article 152 TFEU and Article 28 of the Charter”. Likewise, the August 2015 Memorandum for Greece seems, at least on paper, more ‘socially-conscious’ than its predecessors. In particular, it explicitly recognizes the need for greater social justice, urging the Greek Government to “roll out a basic social safety net in the form of a Guaranteed Minimum Income”³⁶ and praising the adoption of some measures aimed at supporting the most vulnerable part of the population.³⁷

Although certainly welcome, these attempts to work out a more balanced approach seem far too limited, especially if compared with the magnitude of the problem. Indeed, austerity measures contributed much to make the economic crisis evolve into a full-scale social crisis, having a severe negative impact on the enjoyment of a wide range of social rights, in particular with regard to certain groups, such as children, women, young and pensioners.

The impact of austerity measures on social rights has been the objective of several studies. Notably, in January 2015 the European Parliament published a detailed comparative analysis regarding the impact on fundamental rights of austerity measures imposed in response to the crisis by seven EU Member States: Belgium, Cyprus, Greece, Ireland, Italy, Spain and Portugal³⁸. The analysis focused on a number of rights protected by the EU Charter of Fundamental

³⁶ *Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece*, 19 August 2015, p. 4.

³⁷ However, this praise sounds at bit paradoxical, as the adoption of these measures had been severely criticized by the donors at the time when they had been adopted.

³⁸ European Parliament (2015).

Rights and by the European Social Charter, such as education, healthcare, work, pension, access to justice, freedom of expression and assembly, housing, property and some rights at work. The findings of the study paint a bleak picture.

For instance, with regard to the right to education, it found that reduction in the number of schools, in the number of teachers and of administrative and other school-related costs “include a danger to the overall quality of education and children’s success at school; an increase in unemployed workers in education; reduced availability of services [and] deterioration of general conditions in classrooms”. All these consequences being more intense for “[c]hildren with disabilities, Roma, Travellers’ children, as well as children of migrants”.³⁹ Furthermore, the study found that the massive reforms of the healthcare systems adopted in certain countries, such as Greece and Cyprus, primarily aimed at reducing costs through restricting access to healthcare, introducing or increasing participation fees, reducing salaries and freezing the employment of staff took an equally heavy toll on the enjoyment of the right to health. In particular these measures reduced access to healthcare, increased waiting times for treatments and unmet medical needs, as well as decreased preventive and protecting care. Also in this case, these effects were more acutely felt by the most vulnerable, such as poor and homeless people, older people, people with disabilities and their families, women, and undocumented migrants.⁴⁰ The analysis comes to similarly troublesome conclusions also with regard to other rights, such as work-related ones and, in particular, the right to collective bargaining; the right to social security, as social benefits have been cut and access has been severely restricted in many States; and the right to housing, as foreclosures and evictions escalated in countries such as Spain.⁴¹

4. The Court of Justice and the Safeguard of Social Rights in Crisis

4.1. The crisis, the reform of the European economic governance and the Court

At least on paper, the reform of the European economic governance strengthened the position of the Court.

³⁹ European Parliament (2015), p. 12.

⁴⁰ European Parliament (2015), p. 13.

⁴¹ European Parliament (2015), pp. 13-16.

On the one hand, new legal instruments, even if adopted outside the EU legal order, conferred further competences to the Court. This is the case of Article 37(3) ESM Treaty that gives to the Court the power to hear any dispute concerning the interpretation or the application of the Treaty. Furthermore, Article 8 TSCG empowers each Contracting Party to bring a claim before the Court when it considers that another Party failed to fully transpose, into its national legal order, the balanced budget rule, as provided for by Article 3(2) TSCG.⁴²

On the other hand, some commentators pointed out that the Court, together with some national supreme judicial bodies, has been very much involved in the fiscal domain, to a degree that is far higher than in the past and elsewhere. They considered that this has led to a level of judicial interference that is excessive, as decisions in this domain are better left with the political branches. They maintained that the main reason behind such an unprecedented judicial intervention in the fiscal domain is the recourse to international law instruments, which are more amenable to judicial review than EU ones.⁴³

However, the image of a stronger and pro-active Court can be hardly reconciled with the peripheral role that it has played with regard to the protection of social rights and, more generally, the safeguard of non-economic interests and values *vis-à-vis* the strengthening of the EMU.⁴⁴ This contrasts starkly with the key role that the Court played in the construction of the EU legal architecture underpinning the European integration process, through the introduction of new principles - such as that concerning the protection of fundamental rights - that have contributed much to shape the European integration process as a whole. Indeed, as aptly observed by Poiares Maduro, the CJEU “promoted the use of law as [...] a ‘mask for politics’ in European integration”, supplementing the work of the legislative process and compensating for the lack of consensus among Member States on key issues.⁴⁵ To this end, the CJEU did make full use of the interpretative discretion left by EU rules, stretching them to the limit and, in many instances, even beyond.

Conversely, in the cases concerning austerity measures the CJEU has keenly accepted the limits posed by EU law to its capacity to review the legal-

42 See generally Porchia (2013).

43 Fabbrini (2014).

44 The Court is not alone in holding this position: see Hinarejos (2016).

45 Poiares Maduro (1998), pp. 17-19.

ity of such measures. Most of these solutions are defensible,⁴⁶ resting upon a flawless, even though quite formalistic, reading of the relevant provisions. Nonetheless, the overall approach contrasts with the far more proactive attitude that it had adopted in the past, showing that the CJEU was not just unable to play a part, but, at least to a large extent, also unwilling to do so.

4.2. *The systematic rejection of annulment actions brought by private applicants*

The first line of relevant cases concerns the claims brought to the CJEU by private applicants seeking the annulment of acts addressed to a Member State in the context of a financial assistance programme.

A fitting example in this regard is the *Ledra* case,⁴⁷ concerning the ESM intervention to assist Cyprus in the management of the difficulties faced by two of its biggest banks and, consequently, to avoid contagion. ESM financial assistance, which lasted from 2013 to 2016, was granted on the back of a macro-economic adjustment programme set by a MoU to be negotiated between the Troika and the Cypriot authorities. Negotiations started in 2012 and ended in April 2013, when the MoU was signed by the Commission, on behalf of the ESM, the Central Bank of Cyprus and the Minister of Finance of Cyprus. In the meanwhile, the Cypriot authorities put the two largest Cypriot banks into resolution and provided for the recapitalisation of one of them, at the expenses of uninsured depositors, shareholders and bondholders. Some of them, after having seen a substantial decrease in the value of their deposits, turned to the EU General Court seeking the annulment of the parts of the MoU providing for the restructuring of the banks. In this case, the General Court⁴⁸ swiftly rejected the claim, pointing to the fact that the MoU had been adopted by the Republic of Cyprus and the ESM and, thus, not being an act of an EU institution, body, office or agency, its legality cannot be reviewed under Article 263 TFEU.

The CJEU came to the same conclusion also in cases where the challenge

46 Munari (2015), p. 49.

47 Judgment of 20 September 2016, *Ledra Advertising at al.*, Joined cases C-8/15 to C-10/15 P, EU:C:2016:701.

48 Order of 10 November 2014, *Ledra Advertising Ltd*, T-289/13, EU:T:2014:981, paras. 56-63.

was directed toward EU acts. In the *ADEDY* case,⁴⁹ for instance, a public sector trade union sought the annulment of two Council decisions addressed to Greece aiming at reinforcing and deepening fiscal surveillance, as well as pushing through measures for the reduction of an excessive deficit. Applicants argued that, inter alia, the two acts violated the principle of conferral, enshrined in Article 5(2) TEU. The General Court dismissed the action, as it considered that the applicants had no standing to bring it. Indeed, Article 263(4) TFUE provides that natural or legal persons can institute an annulment proceeding only in those cases where the act, if not addressed to them, is “of direct and individual concern to them”. The General Court focused exclusively on the requirement of direct concern and, having found that it had not been fulfilled and having considered that the two conditions are cumulative, it declared the action inadmissible without having to take into consideration the other one. In particular, it observed that the acts not only were addressed to Greece, but were also very general in content, leaving much discretionary space to Greek authorities as to the selection of the concrete measures to be adopted in order to reduce the deficit. Therefore, applicants were not in the position to claim that the EU decisions were of direct concern to them.

This conclusion is in line with a well-settled case law and it did not come as a surprise. The same goes also with a final remark made by the Court, dismissing the incompatibility between the inadmissibility decision and the right to effective judicial protection. Following, also in this case, a usual path,⁵⁰ the Court pointed out that the remedy provided for under Article 263(4) TFUE is not to be considered in isolation, as it represents just one of the possibilities available to private parties to challenge the validity of EU acts having a general character. Indeed, private parties can bring their claim in front of national courts and, then, ask them to make a reference to the CJEU for a preliminary

49 Order of 27 November 2011, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY)*, *Spyridon Papaspyros and Ilias Iliopoulos v Council of the European Union*, T-15/11, EU:T:2012:627.

50 However this line of reasoning has been much contested also within the CJEU, as the strict interpretation of the conditions for admissibility of action brought by private applicants were considered to be incompatible with the right to an effective judicial remedy: see Judgment of 3 May 2002, *Jego-Quéré*, T-177/01, EU:T:2002:112. The judgment was subsequently set aside by the Court, which considered that the then Court of First Instance erred in law, as it failed to duly consider that “the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions” (Judgment of 1 April 2004, *Jego-Quéré*, C-263/02, EU:C:2004:210).

ruling on the validity of the contested acts. As confirmed in *ADEDY*, the annulment procedure and the preliminary reference one establish “a complete system of legal remedies and procedures designed to enable the European Union Courts to review the legality of acts of the institutions”

4.3. A truly “complete system of legal remedies”? Austerity measures outside the reach of the Charter

The application of the ‘complete system’ doctrine does not seem to offer many reasons for hope with regard to the capacity of the Court to play a more active role for the protection of rights threatened by austerity measures. Indeed, the CJEU has rejected most of the requests for preliminary rulings submitted by national courts, showing, in particular, much reluctance to apply the EU Charter on Fundamental Rights (‘the Charter’) in cases concerning anti-crisis measures.

In this regard, the case that set the tone was *Pringle*,⁵¹ one of the few decided by the Court sitting in plenary session. The case originated from a referral by the Irish High Court, which had been asked to ascertain whether, by ratifying the ESM Treaty, Ireland would have undertaken obligations in contravention with several provisions of EU law and, in particular, with the norms on the protection of fundamental rights, as contained in the Charter. The Court answered in the negative, observing that in the case at hand the Charter does not find application. According to Article 51 of the Charter, its provisions are addressed to Member States only when they are implementing EU law and, according to the Court, this condition was not fulfilled in the case at stake. Indeed, “Member States are not implementing Union law [...] when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism”.⁵² Regrettably, the Court did not conclusively address the other issue on the table, i.e. whether the Charter applies when EU institutions, such as the Commission and the European Central Bank, act outside the EU legal framework, as it happens, for instance, when they participate to the definitions of the conditions attached to ESM-sponsored assistance packages. In this regard, it is worth considering that, in her conclusions on the case, Advocate General Kokott made clear that the Commission “as such

⁵¹ Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

⁵² *Pringle* above note 50, para. 180.

is bound by the full extent of European Union law, including the Charter of Fundamental Rights”.⁵³

The CJEU adopted an equally restrictive stance with regard to the applicability of the Charter in cases directly concerning the legality of austerity measures. A good example in this regard is the Order adopted by the Court in *Sindicato dos Bancarios do Norte and Others*.⁵⁴ The case concerned the Portuguese bailout and, in particular, a number of measures aimed, as clarified in the Implementing Decision 2011/344/EU,⁵⁵ at “strengthening labour market functioning by limiting severance payments and making working time arrangements more flexible” by the end of 2011, as provided for by the Memorandum of Understanding. The Portuguese Government honoured its commitments with the Budget Law for 2011, which imposed, *inter alia*, cuts to public sector wages and suspended the payment of bonuses. Public sectors trade unions challenged these measures in front of the employment tribunal of Porto that, in turn, referred a number of preliminary questions to the Court. In particular, it asked whether the right to fair and just working conditions, as enshrined in Article 31 of the Charter, prevented the reduction of workers’ salary, when there is no modification of the collective agreement. Moreover, the Portuguese tribunal also asked whether the same provision is to be interpreted as imposing a remuneration that allows the worker to maintain a satisfactory standard of living. Lastly, it asked whether salary cuts, insofar as they are not the only available measure to ensure the sustainability of public finances, contravene Article 31 of the Charter, as they put at risk the standard of living of the affected workers. The Court refused to hear any of these questions, claiming that it had no jurisdiction to take cognisance of the requests. Indeed, it confirmed that the Charter does not find application in this case, since, when Portugal adopted the contested measures, it was not implementing EU law.

The strict interpretation of the conditions regulating the applicability of the Charter seems compatible with the black letter of Article 51 of the Charter, which establishes that the Charter applies to member States “only when they

⁵³ View of 26 October 2012, *Pringle*, C-370/12, EU:C:2012:675, para. 176. See Kilpatrick (2015a), pp. 405-406.

⁵⁴ Order of 7 March 2013, *Sindicato dos Bancarios do Norte and Others*, C-128/12, EU:C:2013:149.

⁵⁵ Council Implementing Decision no. 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal [2011] OJ L159/88.

are implementing Union law”. However, there has been instances where the Court opted for a much liberal reading of the provision, allowing for the application of the Charter in cases where the State concerned was not implementing EU law. A case that stands out in this regard is *Åkerberg Fransson*, a judgment concerning an alleged violation of the *ne bis in idem* principle enshrined in Article 50 of the Charter.⁵⁶ Mr. Fransson, having been charged for serious tax offences, had first been ordered to pay a hefty tax surcharge by the Swedish Tax Board and, then, criminally prosecuted for these very offences. From our perspective, the most interesting issue is that neither the Tax Board, nor the Prosecutor were implementing EU law when they imposed the penalties on Mr. Fransson or when they decided to prosecute him. This notwithstanding, the Court established that the Charter could find application in the case at hand, as it considered that the existence of a link, even though quite tenuous, between the offences committed by Mr Fransson and EU law would suffice to this end. In particular, the Court pointed to the fact that some of these breaches concerned the obligation to declare VAT, which, in turn, is one of the sources of EU’s own resources and it regulated by EU primary and secondary norms. This element, according to the Court, was enough to draw the situation under the scope of EU law and, thus, to make the Charter applicable. This broad reading of the conditions governing the application of EU fundamental rights norms refers back to case law predating the entry into force of the Charter and it used by the CJEU to broaden its scope of application vis-à-vis Member States.

Had the Court followed the same interpretive approach when faced with challenges directed against austerity measures, it would have come to different conclusions as to the applicability of the Charter. Indeed, the measures at stake had been adopted in the context of structural adjustment programs negotiated with EU institutions, in accordance to procedures governed by EU law and to pursue objectives, such as the reduction of the excessive deficits, sanctioned by EU norms. In a word, they clearly have a much stronger link with the EU legal order than those in *Åkerberg Fransson*.

4.4. *The ‘complete system’ doctrine avenged? Yes, but only partially*

As seen above, the Court went through a long period in which it seemed to fully adhere to the idea that bailout measures were immune from judicial scrutiny at supranational level. However, there are now some tentative signs

⁵⁶ See Lazzerini (2013); Montaldo (2013), pp. 574-581.

pointing in the opposite direction, showing a renewed commitment toward opening up new judicial avenues for the protection of fundamental rights in times of austerity.

The most recent example in this regard is the *Florescu* judgment of June 2017. The case concerned a Romanian law of 2009 that prohibited the combining of a pension with an income for activities carried out in a public institution. Anyone in such position had to either ask for the suspension of the pension or renounce to the paid job. The law had been adopted in order to fulfil the obligations arising under the MoU negotiated by the Romanian Government with the Commission as a condition to obtain financial assistance from the EU. Three retired judges, teaching at the law faculty of Sibiu, challenged the measure, which, in their view, violated several of their rights, as enshrined in the Charter. The Court of Appeal decided to stay proceedings and raise a number of preliminary questions. Quite remarkably, the Court has already had the chance to rule on similar measures adopted by Romanian authorities on the basis of the very same law. However, in 2011 and 2012 it dismissed two requests coming from Romanian judges, finding “an easy escape route”⁵⁷ in poorly drafted orders for reference that failed to highlight the connection between national measures and EU law. In *Florescu*, the Court took a different path, declaring its competence to rule on the compatibility between Romanian austerity measures and EU law provisions protecting fundamental rights. To this end, it found that the MoU is reviewable under Article 267 TFEU, since it is mandatory and “constitutes an act of an EU institution”.⁵⁸ This is quite remarkable, being it the first time, nine years after the first financial assistance programme was launched, in which the Court take a clear position on this issue. Yet, the implications of this finding need to be assessed against the specificities of the Romania’s assistance programme. Indeed, the latter was based on Article 143 TFEU, which empowers the EU to financially assist non-euro States facing difficulties as regards their balance of payments. This means that the MoU at issue finds its roots in EU law, having being adopted on the basis of Article 143 TFEU and Regulation (EC) No. 332/2002.⁵⁹ In the light of the above, the Court had an easy run in finding that the Charter

57 Barnard (2013).

58 Judgment of 13 June 2017, *Florescu*, C-258/14, EU:C:2017:448, para. 35.

59 Council Regulation (EC) No. 332/2002 of 18 February 2012 *establishing a facility providing medium-term financial assistance for Member States’ balances of payments*, OJ L 53 of 23.202.2012, pp. 1-3.

was applicable to the case at hand, by pointing to the fact that Romanian authorities were implementing EU law when adopting measures that aimed at realizing the objectives set forth in the MoU. In the process, the Court excluded, by correctly referring to its previous case-law, that the existence of a margin of discretion for national authorities in deciding what measures were to be adopted could in any way call into question this analysis.⁶⁰

What remains to be seen is whether *Florescu* is a sign of a broader change of attitude by the Court or if the latter will stick to its strict interpretative approach when it comes to deciding on the applicability of the Charter in cases where bailout conditions are set by documents whose main legal basis lies outside the EU legal framework. The Court will be called upon to provide an answer to this question in a pending case concerning the reduction of the salaries of Portuguese Court of Auditors' judges. The reduction resulted from a law adopted in 2014 that scaled down the remuneration of many categories of public servants, so to fulfil one of the conditions contained in the structural adjustment programme negotiated with the Troika. In the national proceeding, claimants sought the annulment of the measure, arguing that it contrasted with the principle of judicial independence, as enshrined in the TEU and in Article 47 of the Charter. The referring judge – the *Supremo Tribunal Administrativo* – decided to turn to the Court, asking whether these EU provisions have to be interpreted in the sense of precluding the adoption of measures such as the contested one. In his Opinion, AG Saugmandsgaard Øe⁶¹ concluded that the Portuguese measure “constitutes an implementation of provisions of EU law, within the meaning of Article 51 of the Charter”.⁶² The conclusion seems to rest on the existence of a sufficiently strong linkage between the contested measures and the EU legal order. In particular, the AG posited, without spelling it out clearly, that the reduction of salaries constituted a measure adopted to comply with conditions referred to also in EU legal acts, such as Council implementing decisions. Doubts can be legitimately raised as to whether the Opinion will be able to persuade the Court to revisit its position on the applicability of the Charter to this type of bailout measures. Indeed, the AG was too swift in addressing this controversial aspect, jumping directly to the conclusion and failing to clearly articulate all the steps of his argumentative path.

⁶⁰ *Florescu* above note 57, Para. 48.

⁶¹ Opinion of AG Saugmandsgaard Øe of 18 May 2017, *Associação Sindical dos Juizes Portugueses*, C-64/16.

⁶² *ASJP* above note 60, Para. 53.

It is worth highlighting that the Court had already opened up another judicial avenue for the protection of fundamental rights in non-EU based structural adjustment programmes. In the above-mentioned *Ledra* judgment, the Court of Justice declared the admissibility of an action for damages brought by a number of Cypriot investors against the Commission and the ECB for their role in the negotiation and conclusion of the MoU. As seen above, the latter document detailed a series of measures to be adopted by Cypriot authorities as a condition to obtain financial assistance by the ESM. In particular, applicants claimed that the Commission and the ECB played a key role in devising the bail-in implemented by Cypriot authorities in a way that made their bank deposits' value drop dramatically and, thus, violating their right to property as enshrined in Article 17 of the Charter. On this point, the Court overturned the decision of the General Court and distanced itself from the path suggested by Advocate General Wahl.

The General Court, in an Order issued on November 2014, rejected the claims for compensation on several different grounds. First, it found that there was no act, nor course of action, that could be imputed to the Commission or the ECB, since the ESM Treaty does not confer to them any power to take autonomous decisions. Consequently, the acts adopted in that context "solely commit the ESM"⁶³ and the Court has no jurisdiction to consider a claim that is based on the illegality of an act that does not originate from a EU institution acting within the EU. Secondly, it excluded that the Commission could incur responsibility for having failed to fully exercise its role as guardian of the Treaties, as provided for in Article 17 TEU. In particular, it opined that the alleged omission did not meet one of the conditions for the admissibility of the action for damages, that of the existence of a causal link between the behaviour of the institution and the damage. Indeed, the decree that determined the severe reduction of the value of claimants' deposits was adopted before the conclusion of the MoU and, consequently, the Commission could have done nothing to avert the losses.⁶⁴

The Advocate General's Opinion⁶⁵ was, up to a certain point, broadly in line with the arguments put forward by the General Court. After excluding that the MoU could be directly imputed to either the Commission or the ECB,

⁶³ *Ledra* above note 47, para. 45.

⁶⁴ *Ledra* above note 47, paras. 54-55.

⁶⁵ Opinion of 21 April 2016, *Ledra Advertsing Ltd*, Joined cases C-8/15 P to C-10/15 P, EU:C:2016:701.

he offered a distinctively restrictive reading of *Pringle* and, in particular, of the paragraph where the Court hinted at the existence of an obligation for the Commission to ensure the consistency of the MoU with EU law.⁶⁶ Further he drew an unpersuasive parallel between the discretionality that the Commission enjoy in the context of the infringement procedure and the situation at stake, going as far as maintaining that “it cannot be argued that every time the Commission breaches a specific Treaty provision, or does not prevent such a provision being breached by another entity, that breach amounts to an infringement of the general provision of Article 17 TEU”. All these elements led him to conclude that there was no duty for the Commission to act in case of incompatibility between bailout instruments and EU law and, thus, no responsibility could arise. For good measure, the Advocate General also excluded the applicability of the Charter when the Commission acts outside the EU legal framework. In his final remarks, AG Wahl admitted that aggrieved individuals should not look for remedies within the EU legal order, but at national or international level. As for the latter, he took the UN Draft Articles on the Responsibility of International Organizations as a “source of inspiration”⁶⁷ to conclude that only the ESM, and possibly Member States, can be held responsible for the acts adopted in the context of ESM-sponsored financial assistance programmes.

Conversely, the Court of Justice declared the action for damages admissible, at least with regard to the Commission. The fact that the MoU falls outside the scope of application of EU law – the Court observed – does not bar applicants from bringing an action for compensation. Indeed, this element is relevant for the admissibility of an action for annulment, but not in the case at stake. The two actions are autonomous⁶⁸ and their admissibility depends on the fulfilment of different conditions. Subsequently, the Court turned to address the crux of the matter, i.e. whether the Commission is bound to ensure the respect of EU law even when acting outside the EU legal order. *Pringle* had been quite reticent on this point, carefully avoiding to draw any conclusion. *Ledra* represents a step forward in that regard: moving from the

⁶⁶ *Pringle* above n. 50, Para. 164.

⁶⁷ *Pringle* above note 50, Para. 100. Quite remarkably, in drawing inspiration from this document, the Advocate General did not even feel the need to distinguish between international responsibility, which is the subject matter of DARIO, and non-contractual liability under Art. 340 TFEU.

⁶⁸ See Gutman (2011), pp. 703-708.

premise that the participation to the ESM activities cannot alter the powers conferred to the institution by the Treaties, the Court inferred that “the Commission retains, [...] within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from article 17(1) TEU”. For this reason, it is bound to “refrain from signing a memorandum of understanding” even in the case “it doubts” its consistency with EU law.

Such a conclusion rests on the assumption that the primacy of EU law operates not only with regard to domestic law, but also with regard to agreements concluded between Member States.⁶⁹ What the Court is saying, without making it explicit, is that Article 17 TEU, mandating the Commission to act as guardian of the Treaties, prevails over Article 13(4) ESM Treaty, which establishes that the “Commission shall sign the MoU on behalf of the ESM” when the document is approved by the Board of Governors. In this regard, the Court is seemingly sending a strong message to EU institutions or, at least, to the Commission, making it clear that their freedom of action in the context of intergovernmental mechanism created by Member States is not unlimited.

These judgments and opinions represent a step forward, signalling the Court’s renewed commitment toward the protection of fundamental rights in the context of structural adjustment programmes. However, the sense of relief may well evaporate if one considers how the cases have been decided on the merit. Both in *Florescu* and *Ledra* the Court found against the private claimants, excluding that any violation of the rights had occurred. These conclusions are by and large convincing in the light of the factual scenarios: indeed, in both cases the impugned measures touched upon privileges, more than rights. Far more problematic is the argumentative path followed to get there, especially if the Court is going to follow it also in the future, when dealing with other types of measures. In both these cases, the Court adopted an extremely deferential standard of review in applying the proportionality test, granting to national authorities an extremely wide margin of appreciation.

In *Ledra*, the Court began with making clear that, even when acting in the context of the ESM Treaty, the Commission had to ensure that the MoU was consistent with the rights guaranteed therein and, in particular, with the right to property, contained in Article 17. Subsequently, it observed that, under the Charter, this right is not absolute, as it can be subject to restrictions. How-

69 This proposition is fully in line with the case law of the Court; see Judgment of 10 November 1992, *Exportur SA*, C-3/91, EU:C:1992:420. Furthermore, it finds strong support in the literature, see Bruno de Witte (2001), pp. 244-245.

ever, Article 52(1) Charter establishes that limitations to the exercise of any right are possible only in so far as they pursue an objective of general interest, comply with the principle of proportionality and does not impair the essence of the right. The Court enumerated all the conditions, but it then contented itself with just one of them, i.e. the fact the impugned measures pursued an objective of general interest. Little, if any, attention is devoted to their proportionality and to their capacity to preserve the essence of the right. The importance of the objective pursued by the measures – ensuring the stability of the banking system and of the euro area as a whole – it is enough, in the eyes of the Court, to conclude that they “do not constitute a disproportionate and intolerable interference impairing the very essence of the appellants’ right to property”. Without any need to consider the suitability of the measures to reach the stated objectives, their necessity or whether a fair balance had been struck with other competing objectives.⁷⁰

Likewise, in *Florescu* the Court found that the contested measure did not violate claimants’ right to property, since it “is capable of attaining the general interest objective pursued and is necessary to attain that objective”. To this end, it acknowledged that national authorities enjoy a wide margin of appreciation “when adopting economic decisions”, being them “in the best position to determine the measures likely to achieve the objective pursued”.⁷¹ Such a highly deferential approach is at the vanishing point of judicial scrutiny, putting the Court in the spectators’ seat while national authorities are free to run the show at their will. What justifies the granting of a wide margin is “the particular economic context” that needs to be confronted by “reducing public sector wage costs and [...] reforming the pension system”.⁷² The Court seemed, thus, to share the sense of inevitability that traditionally pervades the adoption of austerity measures and that represents a defining trait of the technocratic approach prevailing in this context. In other words, this approach can be read as offering a stark – and troublesome – confirmation of the deep impact of the crisis on the EU constitutional fabric and, in particular, on the relationship between different objectives therein. Ensuring the finan-

⁷⁰ The Court seems to have taken very seriously, even too much, the suggestion of some commentators who argue that, instead than putting these measures outside the reach of EU law, the Court should address the merit of the cases, granting a wide margin of discretion to decision-makers in order to preserve their autonomy of action. See Barnard (2013), pp. 13-14.

⁷¹ *Florescu* above note 57, para. 57.

⁷² *Florescu* above note 57, paras 56-57.

cial stability of the euro area has seemingly become a sort of a trump card that just needs to be invoked in order to prevail over any other competing objective.⁷³

5. Concluding remarks

The analysis shows that the Court has consistently adopted a non-interventionist stance with regard to judicial actions challenging the compatibility of austerity measures with key principles of EU law, such as the protection of fundamental rights. This finding still holds true after the *Ledra* and *Florescu* judgments, where the Court finally declared the amenability of bailout measures to some form of judicial control at supranational level, but it then adopted an extremely deferential approach toward the choice made by national authorities.

This choice can be viewed as an attempt by the Court not to interfere with decisions taken by political bodies – being them national or supranational ones – to cope with an emergency situation. This is nothing new, as there are many examples where courts have decided to refrain from constraining the capacity of the legislative or, more often, executive power to (re-)act in the face of an emergency.⁷⁴

However, the adoption of this approach by the Court is problematic under many accounts. In particular, the choice not to engage with these issues reveals its passive acceptance of the demise of the role that the law can play in the response to the crisis and the construction of a new architecture.⁷⁵ This is all the more disturbing in the context of the European Union that, as the Court itself has proudly repeated several time and it has been codified in the Preamble of the Charter, is “based on the rule of law”. The situation is further compounded by the effects that the managerialist turn, and its blind adherence to fiscal austerity, is having on what can be broadly defined as the ‘European social model’. In this context, the Court’s unwillingness – and not just inability – to fully exercise its role do not certainly do any good in restoring the legitimacy of the European integration process.

⁷³ See generally Costamagna (2014), pp. 371-373.

⁷⁴ This tendency has been extensively analysed with regard to the so-called fight against terrorism, see recently Fabbrini (2010); Cole (2003).

⁷⁵ Giubboni (2015).

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