The loan of organs between international organizations as a "normative bridge": insights from recent EU practice

LOANED ORGANS BETWEEN THE EUROPEAN UNION AND OTHER INTERNATIONAL ORGANIZATIONS AS A 'NORMATIVE BRIDGE': SOME REMARKS ON RECENT DEVELOPMENTS

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Abstract

The present article addresses the issue of the loan of organs between international organizations, focusing on the most recent practice regarding the European Union (EU) and, in particular, on the loan of the Commission and the European Central Bank to the European Stability Mechanism (ESM). The hypothesis is that the loan of the two EU institutions to the ESM bridges two autonomous international organizations and that, for this reason, the EU can indirectly influence the activities of the ESM. The bridge is built on normative grounds, as EU institutions are bound to respect EU law even when they are borrowed by other international organizations as the Court of Justice of the European Union held in Pringle. *In a more recent case, the* Ledra Advertising, *the same Court specified that the duty to respect EU law extends also to the Charter of Fundamental Rights. This last consideration might have a positive impact on the protection of human rights in the context of austerity measures adopted by the ESM. Moreover, it might give to the EU an important tool for the enhancement of human rights protection in the relations with other international organizations. In this regard, the most recent practice of the EU reveals at the same time promises and perils.*

Keywords: Ledra Advertising, Pringle, austerity measures, loan of organs, relations between international organizations

1. INTRODUCTION

The practice of loaned organs in international law is a well-established one as far as relations between States are concerned and justified the inclusion of an *ad hoc* rule of attribution in the *Articles on the Responsibility of States for Internationally Wrongful Act* (*ARSIWA*), namely Article 6[1]. Indeed, diplomatic agents, police and military troops and judicial organs – such as the Privy Council – formally belonging to one State have always been borrowed by other States[2].

A parallel rule exists in the *Draft Articles on the Responsibility of International Organizations* (*DARIO*) concerning the loan of organs between States and international organizations and between international organizations themselves. Article 7 *DARIO* presupposes that an international organization (or a State) puts one of its organs at the disposal of another international organization and that that organ maintains formal ties with the sending entity, at the same time becoming part of the institutional machinery of the receiving organization[3]. This Article is modeled on the practice of peacekeeping operations where States put their troops at the disposal of an international organization, but Article 7 *DARIO* wants to be considered a rule of general application[4]. In fact, it also potentially applies to organs placed at the disposal of an international organization by another, although there are fewer cases in this sense.

The commentary attached to the *DARIO* mentions cases of international organizations organs that also perform functions on behalf of other organizations[5]. The Directing Council of the Pan American Sanitary Organization and the Pan American Sanitary Bureau, which at the same time act as organs of the *Pan American*

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[1] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Act with commentaries (ARSIWA), 2001, Article 6: "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed." The expression 'loaned organs' is used by the same International Law Commission: see Commentary on Art. 6, para. 5.

[2] *ibid.*, Commentary on Art. 6, paras. 6-8.

[3] International Law Commission, Draft Articles on the Responsibility of International Organizations with commentaries (DARIO), 2011, Article 7: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

[4] *ibid.*, Commentary on Art. 7, para. 1.

[5] *ibid.*, para. 16.

Health Organization and, respectively, *Regional Committee* and the *Regional Office* of the *World Health Organization* for the Western Hemisphere, are clear examples[6].

A practice usually referred to – but not mentioned in the Commentary to Article 7 – is also that of 'hosted organizations', when Secretariats of international organizations are put at the disposal of other international organizations or conferences. One possible example is that of the Secretariat of the *International Fund for Agricultural Development* (*IFAD*), which was borrowed by the *Global Mechanism*, an entity established under Article 21 of the *1994 United Nations Convention to Combat Desertification*[7]. The relationship between *IFAD*, its Secretariat and the *Global Mechanism* was the subject of an Advisory Opinion adopted by the International Court of Justice, which, unfortunately, did not touch any attribution issue[8]. This notwithstanding, the usefulness of such a practice to understand Article 7 *DARIO* is not excluded[9].

Against the background of a scarce practice, the International Law Commission (ILC) did not provide any definition of 'loaned organs' in the relation between international organizations, limiting itself to mention that an organ is "placed at the disposal". On one side, this seems to be the consequence of the choice not to define the word 'organ' of an international organization. Article 2 *DARIO*, in fact, regards as organs of an international organization "any person or entity which has that status in accordance with the rules of the organization"[10]. On the other, the expression 'loaned organs' employed by the ILC in the context of the responsibility of States could not be replicated in the context of the responsibility of international organizations. The reason is that in the former an organ can be considered as 'loaned' if it exercises "elements of governmental authority" of the receiving State[11]; a kind of authority that international organizations do not exercise normally.

What precedes does not imply that in the context of the responsibility of international organizations there are no 'loaned organs'. The Special Rapporteur of the ILC on the Responsibility of International Organizations proposed to consider as relevant "the exercise of an organization's functions" instead of replicating the reference to the "governmental authority"[12].

In this regard, the few cases mentioned in the commentary to Article 7 *DARIO* demonstrates that it can be considered 'loaned' an organ of an international organization that is placed at the disposal of another to exercise functions on behalf of the latter.

The loan of organs between international organizations, in fact, is functional to fill technical gaps in the activities of international organizations. Such a phenomenon has been mainly studied from the perspective of the law of international responsibility and, in particular, of the rules on attribution. However, it can be viewed also as one of the features of the relations between international organizations[13].

The growing level of complexity and ambitions of international organizations reveals that they do not always have all the means to perform their functions, therefore they are compelled to interact between them and with their member States[14]. This assumption is confirmed by a sociological study carried out in 2013, where relations between international organizations are described as follows: "As organizations are neither self-contained nor in complete control over resources in their environment, they depend on their environment that consists of other organizations with access to certain resources or influence over activities"[15].

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[6] See Agreement Between the World Health Organization and the Pan American Health Organization, Approved by the Second World Health Assembly on 30 June 1949 with resolution WHA2.91, Article 2.

[7] Memorandum of understanding between the conference of the Parties of the United Nations Convention to Combat Desertification and the International Fund for Agricultural Development regarding the Modalities and Administrative Operations of the Global Mechanism, 30 August 1999, Annex I.

[8] MARTHA, "Attribution of conduct after the Advisory Opinion on the Global Mechanism", in RAGAZZI (ed.), *Responsibility of International Organizations*, Leiden-Boston, 2013, p. 275 ff.

[9] See PALCHETTI, "Applying Rules of Attribution in Complex Scenarios", *International Organizations Law Review*, 2016, p. 37 ff., p. 46.

[10] *DARIO*, *cit. supra* note 3, Article 2, (c).

[11] See *ARSIWA*, *cit. supra* note 1.

[12] GAJA, Second report on responsibility of international organizations, UN Doc. A/CN.4/541, YILC, 2004, vol. II, Part One, p 1 ff., p. 13, para. 47.

[13] See broadly on this issue: DUPUY, "Le droit des relations entre les organisations internationales", RCADI, 1960, p. 457 ff.; LAGRANGE, "Les relations entre les organisations internationales", in VELLANO (a cura di), *Il futuro delle organizzazioni internazionali. Prospettive giuridiche/L'avenir des organisations internationales. Perspectives juridiques*, Napoli, 2015, p. 131 ff. ; BOISSON DE CHAZOURNES, "Relations with other International Organizations", in COGAN, HURD, JOHNSTONE (eds.), *The Oxford Handbook of International Organizations*, Oxford, 2016, p. 691 ff.

[14] LAGRANGE, *cit. supra* note 13, p. 137.

[15] FRANKE, KOCH, "Inter-Organizational Relations as Structures of Corporate Practice", *Journal of International Organizations Studies. Special Issue: Sociological Perspectives on International Organizations and the Construction of Global Order*, 2013, p. 85 ff., p. 90.

As Dupuy put it in his course at The Hague Academy of International Law, international organizations have certain "techniques organiques"[16] at their disposal for interacting; among such techniques, the loan of organs is employed for functional reasons as it answers to the needs of the borrowing organization[17].

An interaction based on these premises inevitably leads international organizations to interact and, to some extent, to influence each other[18]. Such an influence can have a normative dimension; in other words, two international organizations might interact on normative grounds through the loan of their institutions.

The relation between the European Union (EU) and the European Stability Mechanism (ESM) represents a concrete example of how two international organizations interact according to this model. It is well known that the ESM Treaty is an instrument adopted outside the EU legal order by the Euro Area Member States[19]. According to Article 1 (1) of its founding treaty, the ESM is an "international financial institution" and, thus, can be regarded as an international organization governed by public international law[20]. The establishment of the ESM is the product of an initiative of some member States of the EU that have decided to create an autonomous legal organization with the aim of helping the EU member States which find themselves in financial need[21].

ESM has a legal statute distinct from that of the EU, thus it is not subject to the decision-making procedures and the judicial review of the latter[22]. This notwithstanding, some EU institutions play an important role in the ESM: the Commission and the European Central Bank (ECB) are borrowed by the ESM for providing technical assistance in the negotiations and then in the drafting of the Memoranda of Understanding (MoU) between the with the States asking for financial help.

More in details, Article 13 of the ESM Treaty tasks the Commission and the ECB with two fundamental functions: 1) to provide an assessment of some preliminary aspects of the assistance requests; 2) to conduct the negotiations with the requesting States when the request is approved by the Board of Governors of the ESM. In addition, the Commission – and the Commission only – bears the responsibility of signing the MoU that it negotiated along with the ECB and IMF on behalf of the ESM.

Against this background, the Commission and the ECB can be considered as 'loaned organs' as they perform functions on behalf of the ESM, while remaining part of the institutional framework of the EU. There are no formal agreements between the two organizations, although the Preamble to the ESM Treaty makes clear that "On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty".

The loan of the EU institutions to the ESM thus fits the model described before as it is justified by the need to provide the receiving organizations with the means to perform its functions[23]. It can be questioned if the Commission and the ECB are also capable of influencing the conduct of the ESM.

A recent judgment of the CJEU shed some lights on this issue. In the *Ledra Advertising* case, the Court discussed the conduct of the Commission in the ESM, providing interesting insights on the rules and principles governing the loan of EU institutions. The Court affirmed that EU institutions must respect the whole EU law – and therefore also the Charter of Fundamental Rights of the European Union (CFRUE) – even if they are borrowed by another international organizations. Regarding the case at stake, the Court held that EU organs, particularly, the Commission, are bound to uphold fundamental rights in the negotiations for the adoption of future memoranda within the context of the ESM. If they don't respect the CFRUE, individuals whose rights are violated by their conduct can present an action for damages before EU Courts.

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[16] DUPUY, *cit. supra* note 13, p. 478.

[17] Id., p. 479. The idea that relations between international organizations were initially conceived for functional reasons see BOISSON DE CHAZOURNES, *cit. supra* note 13, p. 693.

[18] See broadly on this BROSIG, "Governance between International Institutions: Analysing Interaction Modes between the EU, the Council of Europe and the OSCE", in GALBREATH, GEBHARDT (eds.), *Cooperation or Conflict? Problematizing Organizational Overlap in Europe*, Farnham, 2010, p. 29 ff.

[19] See Treaty Establishing the European Stability Mechanism (ESM), 2 February 2012, entered into force 27 September 2012.

[20] See BORGER, "The European Stability Mechanism: A crisis tool operating at two junctures", in WESSELS (ed.), *Research Handbook on Crisis Management in the Banking Sector*, Cheltenham, 2015, p. 150 ff., p. 152. See also Conclusions of the European Council of 24-25 March 2011, Doc. EUCO10/1/11Rev.1, Annex II, p. 22.

[21] See MIGLIO, "L'assegnazione di compiti alle istituzioni europee nell'ambito di accordi internazionali tra Stati membri", in PORCHIA, Governance *economica europea. Strumenti dell'Unione, rapporti con l'ordinamento internazionale e ricadute nell'ordinamento interno*, Napoli, 2015, p. 143 ff.

[22] DE WITTE, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", Sieps European Policy Analysis, June 2011, available at www.sieps.se.

[23] See on this DANIELE, "Misure anticrisi, riforme della *governance* e assetto istituzionale della UEM", in TIZZANO (a cura di), *Verso i 60 anni dai Trattati di Roma. Stato e prospettive dell'Unione europea*, Torino, 2016, p. 253 ff., p. 269.

From the conclusion reached by the CJEU in *Ledra Advertising* it seems possible to draw some general considerations on the relations between the EU and the ESM, in particular, and between the EU and other international organizations, in general.

The hypothesis is that that the EU, lending its organs, builds 'normative bridges' to other international organizations. For the purposes of this article, the expression 'normative bridge' refers to a normative connection established through the institutions of the EU that are put at the disposal of Member States' intergovernmental activities or of other international organizations[24]. In this regard, it seems that the relations between two international organizations entail a normative dimension, which the loan of organs contributes to realize[25].

It will be then fostered the idea that through such 'normative bridge', the EU might influence the conducts of the organizations that borrow its organs. Such an influence can have a positive impact on the protection of fundamental rights, thus reinforcing the idea that the EU has the means to enforce its values externally[26]. This is particularly crucial in the relations between the EU and the ESM; more in general, in the context of the implementation of austerity measures.

This hypothesis will be developed throughout the article using the judgment of the CJEU in the *Ledra Advertising* as a case study. Therefore, after having presented the main features of the jurisprudence of the Court in relation to the loan of EU institutions, the article will show how it will contributed to the development of the rules governing the issue, with a particular focus on the protection of fundamental rights. At the end, the article will focus on the potentials and the limits of the recent developments.

2. 'LOANED ORGANS' IN THE PRACTICE OF THE EU: BUILDING THE BRIDGES

Although its founding Treaties were and are silent on the loan of its institutions, the EU has developed an interesting practice on this issue. Given the absence of a normative provision, the practice is crucial for understanding the state of the art in relation to the loan of EU institutions and to understand the ties that bind the Commission and the ECB in the ESM. It is possible to anticipate that it is now widely accepted that the EU can potentially lend its organs to its Member States, under the condition that such loan does not alter the fundamental functions of the organ but the case law is quite telling about the process that led to such a result[27].

Indeed, before the entry into force of the ESM Treaty, EU Member States had borrowed an EU institution two times, when they conferred upon the Commission duties in intergovernmental scenarios. The practice is therefore centered on the use of EU institutions by Member States outside the EU legal order.

In 1993 and 1994 the two cases were brought before the then European Court of Justice (ECJ) by the European Parliament (EP). In the first one, the *Bangladesh* case, the EP challenged the validity of a decision collectively taken by all of the EU member States to confer upon the Commission the duty to manage a financial aid granted by them to Bangladesh[28]. One year later, in *Lomé*, in a similar vein the EP brought a case before the ECJ challenging a decision by the Council to establish a system for administering member states' assistance to African, Caribbean and Pacific countries; such a system was developed as a distinct from the usual budgetary procedure[29].

In both cases the ECJ rejected the EP's claims, affirming, as a matter of principle, that Member States are free to entrust the Commission with a coordinating role in a collective action undertaking by them[30] or to use the Commission from managing procedure set up outside the legal framework of the EU[31]. The judgments of the Court do not *per se* deserve a particular attention as they do not seem to have elaborated much on the rules and principles governing the borrowing of EU organs. To the contrary, the opinions of Advocate General Jacob, in particular that rendered in the *Lomé* case, are of utmost importance. Indeed, he stated that, although Member States

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[24] See accordingly RODRIGUEZ, "A Missing Piece of European Emergency Law", *European Constitutional Law Review*, 2016, p. 265 ff., p. 285.

[25] DUPUY, *cit. supra* note 13, p. 565 and 581.

[26] PECH, "Promoting the rule of law abroad: on the EU's limited contribution to the shaping of an international understanding of the rule of law", in KOCHENOV, AMTENBRINK (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge, 2013, p. 108 ff.

[27] PEERS, "Toward a new form of EU law? The use of EU institutions outside the legal framework", *European Constitutional Law Review*, 2013, p. 37 ff., p. 46-55 and 61-65; see also CRAIG, "Pringle and Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review*, 2013, p. 263 ff.

[28] Joined cases C-181/91 and C/248-791, *Parliament v. Council and Commission*, ECR, 1993, I-3685.

[29] Case C-316/91, *Parliament v. Council*, ECR, 1994, I-625.

[30] *Parliament v. Council and Commission* case, *cit. supra* note 28, para. 41.

[31] *Parliament v. Council* case, *cit. supra* note 29, para. 3.

enjoy a certain degree of freedom in conferring on EU institutions a role beside those derived from the EU treaties, "It is therefore possible for a Community institution to undertake on behalf of the Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations."[32]

The test of compatibility with the rules of the (then) Community Treaties is crucial to understand the ties that bind States when they confer on EU institutions duties outside the EU legal framework.

A test that the CJEU applied in the famous *Pringle* judgment[33]. It is worth recalling that in *Pringle* the Court was asked to rule, for the first time, on the compatibility with EU law of the role of the Commission and of the ECB in the ESM as defined in Article 13 of the ESM Treaty.

The answer of the CJEU was more elaborated than those rendered in *Bangladesh* and in *Lomé*, albeit those cases largely inspired the Court's legal reasoning in *Pringle*. In fact, after re-affirming that Member States are entitled to make use of EU institution outside the EU legal order, the CJEU added, as a condition, that a loan of the Commission and of the ECB to the ESM "do[es] not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties"[34]. The introduction of this condition is motivated by the circumstance that the EU did not have exclusive competence over economic policy. At a closer look, this premise is fundamental in the *Pringle* reasoning[35].

The CJEU then went on finding that "the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own" [36] and that "the activities pursued by those two institutions within the ESM Treaty solely commit the ESM"[37].

Moreover, and more importantly for our purposes, the Court elaborated on this point affirming that the role of both the Commission and the ECB in the ESM is compatible with the EU Treaty. After having affirmed, in para. 163 of the Judgment, that Article 17(1) of TEU entrust the Commission with the role of promoting the general interest of the EU and of overseeing the application of EU law, the CJEU stated that:

> "It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law"[38].

As it appears from above, the CJEU affirmed that the Commission's task in the ESM is not limited to technical support as indicated in the ESM Treaty. Rather, the Commission shall have a normative role, ensuring that the memoranda of understanding that grant financial aid to requesting States are adopted in respect of EU law. The CJEU in *Pringle*, did not clarify whether the application of EU law to the EU institutions borrowed by the ESM entails the application of the CFREU, thus leaving the many instances of compliance with human rights unanswered[39]. Conversely, Advocate General Kokott tackled the issue in her Opinion, affirming that: "The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights"[40]. The majority of scholars endorsed this view[41].

The case law of the CJEU, therefore, is quite telling on the current state of art regarding the loan of EU institutions. In *Bangladesh* and in *Lomé* the Court merely introduced a compatibility test, which oblige States not to entrust EU institutions with functions that are not compatible with EU Treaties. It can be said that the first two judgments of the CJEU on this issue posed on Member States a negative obligation not to alter the fundamental nature of EU institutions. In *Pringle*, the Court applied this principle in the relations between the EU and the ESM

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[32] Case C-316-91, *Opinion of Advocate General Jacobs*, ECR, 1993, I-628, para. 84.
[33] Case C-370/12, *Pringle v. Government of Ireland*, ECR, 2012, I-756, para. 164.
[34] *ibid.*, at para. 162.
[35] *ibid.,* paras. 158-59.
[36] *ibid.*, at para. 161.
[37] *ibid.*
[38] *ibid.*, para. 164.
[39] See TOMKIN, "Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy", *German Law Journal*, 2013, p. 169 ff., p. 186-187.
[40] Opinion of Advocate General Kokott, *Pringle*, *cit. supra* note 33, para. 176.
[41] POULOU, "Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?", *German Law Journal*, 2014, p. 1145 ff., p. 1158. See also PEERS, *cit. supra* note 25, p. 52 and CRAIG, *cit. supra* note 25, p. 282; SALOMON, "Of Austerity, Human Rights and International Institutions", *European Law Journal*, 2015, p. 521 ff., p. 436-537.

and, referring to the Commission, it noted that in the latter organization it has an active role, being engaged in ensuring the consistency of the MoU with EU law.

This last consideration suggests that the inner vision of the CJEU is to limit the potential negative effects of borrowing EU institutions, by imposing on the Member States a duty not to alter their fundamental nature and on the institutions themselves a duty to respect EU law. This is particularly evident for the Commission, which is bound by Article 17(1) TEU.

For these reasons, the loan of EU institutions has the potentials of building 'normative bridges' between the EU and the receiving institutions or entities. As anticipated in the previous paragraph such a connection has the potentials to link the ESM and the EU and to allow the latter to expand its reach[42].

3. THE *LEDRA ADVERTISING* CASE, OR HOW THE BRIDGE BETWEEN THE EU AND THE ESM WORKS

The judgment of the CJEU in the *Ledra Advertising* case helps to better clarify the duties of the institutions of the EU loaned to the ESM. The judgment stimulates insightful reflections[43] due to its peculiarity; hence, it is worth recalling the facts of the case before dwelling into further inquiries.

The Republic of Cyprus in 2012 asked for financial assistance from European institutions[44]. In the statement issued on 27th June 2012, the Eurogroup indicated that the financial assistance would have been provided by the ESM after the conclusion of a MoU, which was indeed negotiated by the Commission, together with the ECB and the International Monetary Fund.

The adoption of a draft MoU led the Cypriot Parliament to pass a law introducing a levy on all bank deposits. Consequently, many depositors in Cyprus suffered monetary losses. Among them, the Applicants in the *Ledra Advertising* case lodged several applications before the EU General Court. Their action is interesting as it contests the paragraph of the draft MoU which imposed the levy on the two banks in which they had an account. They asked the General Court: 1) to annul those paragraphs; 2) to consider the Commission and the ECB liable in the terms of Article 340 TFEU and, therefore, to provide compensation for the damage suffered.

The General Court declared the actions inadmissible on both grounds, affirming that "since neither the ESM nor the Republic of Cyprus is among the institutions, bodies, offices or agencies of the European Union, the General Court has no jurisdiction to examine the legality of acts which they have adopted together"[45].

The Applicants then brought before the CJEU an appeal against this order urging the Court to join the cases. On the 21st April 2016 Advocate General Wahl delivered its opinion, upholding the orders of the EU General Court, hence reinforcing its arguments[46].

Although this is not the object of the present article, the argument raised by Wahl deserves attention as he based its reasoning on the *DARIO*. Quite surprisingly, the Advocate General discussed the application of the *DARIO* to the *Ledra Advertising* case. The methodological approach that he adopted is well represented by the affirmation that the rules on the responsibility of international organizations "can be taken as a source of inspiration in the present case". The Advocate General applied this attribution rule to the role of the Commission in the ESM stating that: "there is no doubt that the Commission and the ECB are institutions of an international organization (the EU) that have been placed at the disposal of another organization (the ESM)". With regard to the case under discussion, he then concluded that: "when negotiating and/or signing the MoU, they acted on behalf, and under the actual control, of the Board of Governors of the ESM"[47]. The logical conclusion of his reasoning was that the "the ESM, and the ESM alone, is responsible for the acts which it adopts pursuant to the ESM Treaty"[48].

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[42] See again RODRIGUEZ, *cit. supra* note 24, p. 285.

[43] For an overview of the main issues discussed in the judgment see VEZZANI, "Sulla responsabilità extracontrattuale dell'Unione Europea per violazione della Carta dei diritti fondamentali: riflessioni in margine alla sentenza della Corte di giustizia nel caso Ledra Advertising", *Rivista di diritto internazionale*, 2017, p. 205 ff.

[44] See generally RUFFERT, "The European Debt Crisis and European Union Law", *Common Market Law Review*, 2011, p. 1777 ff.

[45] Case T-289/13, *Ledra Advertising Ltd v. Commission and European Central Bank*; Case T-291/13, *Eleftheriou and Papachristofi* v *Commission and ECB;* Case T-293/13, *Theophilou* v. *Commission and ECB*, 10 November 2014, para. 58.

[46] Opinion of Advocate General Wahl, Joined Cases C-8/15 P, C-9/15 P and C-10/15 P, *Ledra Advertising Ltd; Andreas Eleftheriou, Eleni Eleftheriou, Lilia Papachristofi; Christos Theophilou, Eleni Theophilou v. European Commission and European Central Bank*, 22 April 2016.

[47] *ibid.*, para. 100.

[48] *ibid.*, para. 102.

Therefore, the EU cannot incur non-contractual liability for the actions of the Commission and the ECB in the ESM[49].

Article 7 *DARIO* is a rule that implies that the borrowed organ at the same time maintains a formal tie with its original entity and with the receiving organization and that only the effective control test is suitable to attribute the conduct to the correct subject.

In his opinion, Wahl applied the effective control test to the relation between the EU, the ESM, the Commission and the ECB, concluding that the EU institutions were lent to the ESM and, therefore, must be considered 'agent' of the ESM and, as a consequence, no longer organs of the EU[50]. This is not convincing[51]. In fact, the Advocate General's conclusions seem not to be based on Article 7, but, rather on Article 6 DARIO, that deals with the responsibility of organs or agents of an international organization.

The Advocate General's opinion, along with the orders issued by the General Court, did not survive the judgment of the CJUE[52].

The *Grand Chambre* of the Court, in fact, clearly distinguished the appeal into two aspects. As for the first, it confirmed that, being an act adopted outside the EU legal order, the MoU concluded between Cyprus and the ESM could not have been reviewed under Article 263 TFEU. For what concerns the non-contractual liability prong, the Court did not confirm the Advocate General's Opinion and the General Court's orders and affirmed that it has jurisdiction under Article 340 TFEU over Commission and the ECB's actions in the ESM[53].

The second aspect of the Court's judgment is surely the most interesting one. As one of the first commentators pointed out, "the involvement of the Commission and the ECB in the adoption of an ESM Memorandum of Understanding may be unlawful and thus able to trigger the non-contractual (damages) liability of the EU"[54]. The Court reached this conclusion following the path that it had already suggested in the *Pringle* judgment. Although the ESM is an independent international organization that finds its legal basis outside the EU legal order, EU institutions and, in particular, the Commission involved in that organization have the duty to ensure the respect of EU law, especially in the adoption of the MoU with requesting States[55].

The crucial paragraphs of the judgment are the following:

> "Furthermore, the tasks allocated to the Commission by the ESM Treaty oblige it, as provided in Article 13(3) and (4) thereof, to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 164)[56]. […] Consequently, the Commission, as it itself acknowledged in reply to a question asked at the hearing, retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts"[57].

Interestingly, the Court fostered the idea that EU institutions remain bound by EU law even if they are lent to other international organizations and that their conduct might trigger the non-contractual liability of the EU under Article 340 TFUE[58].

The findings of the CJEU are important also because they implicitly rejected the arguments raised by Advocate General Wahl in its opinion. As anticipated, the Advocate General applied Article 7 *DARIO*, looking at the issue from the perspective of public international law. He observed that the case at hand regarded the loan of organs between international organizations, to which the default attribution rules of the *DARIO* apply. As a result, the

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[49] *ibid.*, para. 107.
[50] *ibid.*, para. 100.
[51] See accordingly VEZZANI, *cit. supra* note 42, p. 209.
[52] Joined Cases C-8/15 P, C-9/15 P and C-10/15 P, *Ledra Advertising Ltd; Andreas Eleftheriou, Eleni Eleftheriou, Lilia Papachristofi; Christos Theophilou, Eleni Theophilou v. European Commission and European Central Bank*, 22 September 2016.
[53] *ibid.*, para. 60.
[54] HINAREJOS, "Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising", EU Law Analysis, 25 September 2016, available at <http://eulawanalysis.blogspot.lu/2016/09/bailouts-borrowed-institutions-and.html>.
[55] *Pringle*, *cit. supra* note 33, para. 164.
[56] *Ledra Advertising*, *cit. supra* note 52 at para. 58.
[57] *ibid.*, at para. 59.
[58] See MIGLIO, "Borrowed institutions and fundamental rights in time of austerity", EuVisions, 24 October 2016, available at <http://www.euvisions.eu/institutions-fundamental-austerity/>.

Advocate General disconnected the Commission and the ECB from the EU legal order, projecting them into the realm of international law[59].

The approach of the CJEU in *Ledra Advertising* is preferable to that adopted by the Advocate General. In fact, whereas the Commission and the ECB can be considered agents of the ESM, they still remain organs of the EU[60] and they are bound to respect EU law as the Court indicated in *Pringle*.

It must be noted, however, that the CJEU, in its reasoning, scrutinized only the role of the Commission in the ESM, making explicit reference to Article 17 TEU; an article that mandates the Commission to act as the guardian of the EU Treaties. Beside this, the Court seemed to forget the ECB. In fact, Article 17 TEU does not mention any other institution: this means that this article cannot be considered a valid legal ground for binding the ECB to the respect of EU law. This is quite striking as it is known that also the ECB is requested to respect EU law[61]. The reference to Article 17 TEU, therefore, weakens the judgment of the CJEU in *Ledra Advertising*, making it difficult to draw general conclusions on the ties that bind *all* the EU institutions borrowed by the ESM.

In conclusion, the *Ledra Advertising* case represents an interesting new step in the evolution of the jurisprudence of the CJEU in relation to the law governing the loan of EU institutions. As seen in the previous paragraph, such a case law seems to be inspired by the will to create a bridge between the EU legal order and the borrowing international organizations – or the international agreements – to which EU Member States are parties[62]. The bridge, in *Ledra Advertising*, is even reinforced, as the CJEU affirmed that the conduct of EU loaned institutions might trigger the non-contractual liability of the EU.

This is particularly crucial as far as the ESM is concerned. As we will see in the following paragraph, the rationale of bridging the EU and the ESM is probably determined by the severe criticisms that the establishment of the ESM has attracted, being it fully demonstrated by the many scholarly opinions in which it is argued that the externalization of the financial stability mechanisms of the EU have a negative impact on the protection of fundamental rights.

4. PROTECTING FUNDAMENTAL RIGHTS THROUGH THE LOAN OF EU INSTITUTIONS

Quite understandably, the protection of fundamental rights was tackled by the first commentators of the *Ledra Advertising* judgment. They pointed to – and welcomed – the opening of the CJEU to consider the non-contractual liability of the UE for the conduct its institutions in the context of the ESM. As anticipated in the previous paragraph, this represents the second reason of interest of the CJEU's judgment as it offers to individuals whose rights are violated by austerity measures a hope for obtaining redress[63].

The potential liability of the EU for the act of its institutions lent to the ESM, in fact, implies that those institutions bear a duty to make EU law respected. As far as the Commission is concerned, such a duty signifies that it shall not sign a MoU on behalf of the ESM if it finds that this act has the potential to violate EU law, including the CFREU[64].

This last consideration is crucial. In fact, it must be reminded that the protection of fundamental rights is not even mentioned in the ESM Treaty. A gap that was probably intentional and that is at the origin of the sound criticism that austerity measures attracted since their inception[65]. Moreover, as anticipated in the second paragraph, the CJEU in *Pringle* left the issue open despite the conclusion of Advocate General Kokott.

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[59] See SMITS, "ESM conditionality in court: two Advocate Generals on 14 Cypriot appeal cases pending in Luxembourg", BlogActiv, 22 April 2016, available at <https://acelg.blogactiv.eu/2016/04/22/esm-conditionality-in-court-two-advocate-generals-on-14-cypriot-appeal-cases-pending-in-luxembourg/>.

[60] See DE WITTE, BEUKERS, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: the *Pringle* case", *Common Market Law Review*, 2013, p. 805 ff., p. 844.

[61] See, on the whole issue, VITERBO, "Legal and Accountability Issues Arising from the ECB's Conditionality", *European Papers*, 2016, p. 501 ff.

[62] See on this DE WITTE, "The European Union's Place among the International Cooperation Venues of its Member States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, p. 445 ff.

[63] See KILPATRICK, "Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?", *European Constitutional Law Review*, 2014, p. 394.

[64] See accordingly COSTAMAGNA, "The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights", REScEU Working Papers, 9 November 2016, available at <http://www.resceu.eu/publications/working-papers/wp-10-2016-the-court-of-justice-and-the-demise-of-the-rule-of-law-in-the-eu-economic-governance-the-case-of-social-rights.html>, p. 1 ff., p. 15 and 23-25.

[65] See generally COSTAMAGNA, "The Impact of Stronger Economic Policy Coordination on the European Social Dimension: Issues of Legitimacy", in ADAMS, FABBRINI, LAROUCHE (eds.), *The Constitutionalization of European Budget Constraints*, Oxford,

The CJEU in *Ledra Advertising* filled this gap, by including the CFREU in the normative framework governing the loan of the Commission: "in the context of the adoption of a memorandum of understanding such as that of 26 April 2013, the Commission is bound, under both Article 17(1) TEU, […] to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter"[66].

In the case at hand, it is clear that the CJEU bestowed on the Commission the power to shape the MoUs concluded in the context of the ESM in the light of the protection of fundamental rights. As one Author affirmed, "the Commission does not have a mere best-efforts obligation when it comes to ensuring compliance of a MoU with EU law (and more specifically, with the Charter): instead, it has a true performance obligation in that regard – a duty of result, rather than merely an obligation of means"[67].

It seems that the Court, with the *Ledra Advertising* judgment, closed the loop started with the *Pringle* case and went a little further, by saying that if EU institutions do not act in conformity with their mandate, they can trigger the non-contractual liability of the EU. It represents a *momentum* as it affirms the authority of the CJEU to hear actions for damages for the conduct of EU institutions deployed in the intergovernmental mechanisms established for dealing with the financial crisis.

This scenario echoes some of the features of the doctrine of counter-limits, which characterized the dialogue between domestic and international or European legal orders, in which the former elaborate a *noyeaux dur* of fundamental values that limited the effect of the latter. The Italian Constitutional Court, in cases such as *Frontini*[68] and the *Bundesverfassungsgericht*, in *Solange I*[69], elaborated the doctrine of counter-limits to force the then European Community (EC) to include the protection of fundamental rights in its policies. They did so 'threatening' the EC that they would have reviewed the compatibility of directly applicable EU acts with their basic constitutional rules[70].

The CJEU employed the same 'technique' in the various stages of the *Kadi* judicial saga to induce the United Nations to establish a mechanism for reviewing the inclusion of individuals in the 'black-lists' of the Security Council[71]. As one Author pointed out, "Kadi is the ECJ's Solange I, its response to the UN's exercise of governmental authority. It expressed principled disobedience, and at the same time sets forth what must be done for a normalisation to ensue"[72].

The doctrine of counter-limits has been convincingly depicted as a "gun to the head"[73]. In the cases presented before, national and European courts put the 'gun' on the table to force external actors to strengthen the protection of fundamental rights, which represents a sort of common denominator[74]. Counter-limits can thus be viewed as features in the relations between different actors; the relations between international organizations make no exceptions.

However, in *Ledra Advertising* the CJEU is not elaborating a doctrine of counter-limits in the relations between the EU and the ESM. Suffices it to say that in their established jurisprudence, national and European courts have invoked the doctrine of counter-limits to prevent the applicability of acts emanated in a different legal order. The MoUs concluded in the context of the ESM neither enter the EU legal order, nor are transposed as such in an EU

2014, p. 359 ff., p. 371-373; FISCHER-LESCANO, *Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding*, Bremen, 2014.

[66] *Ledra Adv. et al*, *cit. supra* note 52, para. 67.

[67] DE SCHUTTER, DERMINE, "The two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union", CRIDHO Working Paper 2016/2, December 2016, available at <http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2016-2-ODS-PD-22.12.2016-C.pdf>.

[68] *Corte Costituzionale*, Judgment No. 183 of 1973.

[69] *Bundesverfassungsgericht*, *Solange I*, Judgment of 29 May 1974.

[70] On the features of the *Solange* method see GRADONI, "Making Sense of 'Solanging' in International Law: the *Kadi* Case before the EC Court of First Istance", in van GENUGTEN, SCHARF, RADIN (eds.), *Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference*, The Hague, 2009, p. 139 ff., p. 142-144.

[71] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. EU Council and Commission*, ECR, 2008, I-6351.

[72] TZANAKOPOULOS, "Judicial Dialogue in Multi-level Governance: The Impact of the *Solange* Argument", in FAUCHALD, NOLLKAEMPER (eds.), *The Practice of International and National Courts and the (De-) Fragmentation of International Law*, Oxford, 2012, p. 185 ff., p. 208. See for a more detailed discussion GRADONI, "Il lato oscuro dell'art. 103 della Carta delle Nazioni Unite", in MECCARELLI, PALCHETTI, SOTIS (a cura di), *Le regole dell'eccezione. Un dialogo interdisciplinare a partire dalla questione del terrorismo*, Macerata, 2011, p. 263 ff., p. 278-279.

[73] PANUNZIO, "I diritti fondamentali e le Corti in Europa", in PANUNZIO (ed.), *I diritti fondamentali e le Corti in Europa*, Napoli, 2005, p. 3 ff., p. 17.

[74] On this practice see MARTINICO, "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts", *European Journal of International Law*, 2012, p. 401 ff., p. 419. As regards the practice of Italian courts see PALOMBINO, "Italy's compliance with ICJ decisions vs. constitutional guarantees: does the "counter-limits" doctrine matter?", *Italian Yearbook of International Law*, 2014, p. 187 ff.

act; accordingly, the CJEU affirmed that it has no jurisdiction to review them and no power to annul ESM decisions. It is true however, that some of the main contents of the MoU between the ESM and Cyprus were reproduced in a Council Decision[75]. Recently, Advocate General Wathelet argued that it would be possible for the CJEU to discuss the compatibility of such a decision with EU law, thus limiting the effects of the MoU[76].

Whereas it is true that the doctrine of counter-limits does not fit in the judgment of the CJEU in the *Ledra Advertising* case, two of its features are useful to understand how the relations between the EU and the ESM can work as far as the protection of fundamental rights is concerned. First, counter-limits are meant to force two institutions to dialogue[77]. Second, the counter-limits doctrine implies the creation of an internal space that is impermeable to the influence of international law[78].

As for the first feature, the EU and the ESM enter into a relation shaped by the jurisprudence of the CJEU. Indeed, the former can influence the conduct of the latter through the loaned institutions and in particular through the Commission, which is bound to respect EU law. As for the second feature, the Commission must take into account the CFREU when negotiating the MoU in the framework of the ESM, as affirmed for the first time in the *Ledra Advertising* case. This means that the Commission must not contribute to violate the internal rules of the EU in the field of human rights, otherwise an individual might be admitted to claim damages in front of EU Courts. It seems that the judicial scrutiny, that characterizes the doctrine of counter-limits[79], is not directed towards the act of another international organization or at the act transposing it into the EU legal order, but it is aimed at evaluating the conduct of the borrowed institution.

To sum up, it appears that the CJEU is now setting the conditions for the conduct of the Commission in the ESM, introducing a limit – the respect of the CFREU – that was neither mentioned in the ESM Treaty, nor introduced by the CJEU in *Pringle*.

In this regard, it seems that the judgment of the CJUE can be regarded as a prologue to a future dialogue between the two international organizations on the protection of fundamental rights. It is reasonable to say that the CJEU is opening the door to set the terms of this dialogue designing the content of the rights that the Commission should respect in the negotiations and in the signature of future MoUs[80].

5. FROM BUILDING THE BRIDGE TO CROSSING IT: A LONG WAY AHEAD

The preceding paragraphs have illustrated how the CJEU is building a bridge between the EU and the ESM and how such a bridge can facilitate a dialogue between the two institutions with a view to enhancing the protection of fundamental rights.

Nevertheless, there is a long way ahead of an efficient protection of fundamental rights in the context of the ESM because some aspects are still obscure.

First, in the dialogue between the EU and the ESM on the protection of fundamental rights the CJEU should clarify if, and to what extent, it is putting a 'gun to the head' of the ESM.

In *Ledra Advertising* the CJEU 'merely' threatens the admissibility of an action for damages, sending a message to the Commission and not to the ESM. While this is a concrete perspective for applicants, it has less chance of being a concrete leverage for inducing the ESM to develop a fundamental rights policy. An action for damages does not represent a straightforward path for obtaining redress[81]. In fact, the judicial organs of the EU has always interpreted Article 340 TFUE narrowly, making it hard for applicants to succeed in an action for damages. They must demonstrate that there is "a sufficiently flagrant violation of a superior rule of law for the protection of the individual" and a direct causation link between the contested conduct and the damage[82].

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[75] Decision No. 2013/463 of the Council of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU, OJ L 250, 20 September 2013, p. 40.

[76] Opinion of Advocate General Wathelet in Joined Cases C-105/15 P to C-109/15 P, *Mallis et al v. European Commission and European Central Bank (ECB)*, 21 April 2016, para. 91.

[77] See MARTINICO, *cit. supra*, note 70, p. 420.

[78] See PALOMBINO, *cit. supra*, note 70, p. 188-190.

[79] See again GRADONI, *cit. supra* note 66, p. 142-143.

[80] A role that was foreseen by BARNARD, "The Charter, the Court – and the Crisis", *University of Cambridge Legal Studies Research Paper Series*, Paper No. 18/2013, available at <https://www.law.cam.ac.uk/press/news/2013/08/legal-studies-research-paper-series-vol-4-no-6/2310>, p. 13-14.

[81] See again COSTAMAGNA, *cit. supra* note 64, p. 25. See also FISCHER-LESCANO, *cit. supra* note 65, p. 56.

[82] Case C-5/71 *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, ECR, 1971, I-975, para. 11.

More in general, an action for damages is the expression of an *ex post* control over the conduct of EU institutions, while it will be probably better to empower the institutions of the EU – and in particular the CJEU – with the means to tackle the issues in advance[83].

The hurdles that an action for damages hides lie also in the absence of a clear definition of the rights that the Commission must respect in the negotiations of future MoUs. The reference to the CFREU as a limit to the action of EU institutions can be regarded as an attempt to identify a list of fundamental rights that austerity measures must respect.

In this respect, however, the Court needs to elaborate further as the legal reasoning in the merit of the judgment is laconic. In *Ledra Advertising*, in fact, the CJEU deemed the property rights of the applicants not worthy of being weighed against the financial measures defined in the MoU concluded between Cyprus and the ESM. The CJEU did not devote any attention to the proportionality of the measures[84], affirming starkly that:

> "In view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed if the latter had failed, such measures do not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property"[85]

The stability of the banking system, in the above-mentioned passage, appears as an insuperable hurdle. One might argue that such a conclusion is reasonable, as property rights are no absolute. It is also true, however, that any violation of fundamental rights should be assessed in the light of the principle of proportionality; an assessment that the CJEU avoided, attracting several criticisms. The scenario may change if future MoUs will deprive a State from its ability to uphold the right to education (Article 14 of the CFREU) or the right to social security (Article 34), or to maintain high levels of provision of healthcare (Article 35) or access to services of general interest (Article 36)[86]. Should a case involving the violations of the above-mentioned rights be presented before EU Courts, it would be interesting to see if a more in depth elaboration will be provided.

More in general, what seems to be missing is a statement by the CJEU on the hierarchy of values that govern the relations between the EU and the ESM. In fact, although the 'normative bridges' are established, it is not clear if the normative dimension entails also a normative hierarchy[87].

Without a clear indication from the Court – or from the political bodies of the EU – it will be difficult to view optimistically the capacity of the EU to influence the activities of the ESM in order to enhance the protection of fundamental rights[88].

6. FUTURE DEVELOPMENTS

The paragraphs three and four of this article have shown that the Commission can shape the adoption of acts, such as the MoUs, formally attributed to other international organizations, such as the ESM, with a view to enact the protection of fundamental rights. It is therefore theoretically possible that the EU will influence the activities of the ESM in future, thus reproducing the governance model between international organizations presented in the introduction to this article. Paragraph five of the article has highlighted that the judgment in *Ledra Advertising* leaves many issues open and, in particular, does not clarify the hierarchy of values that governs the relations between the EU and the ESM.

One may argue if the conclusions reached by CJEU in *Ledra Advertising* can be regarded of a general nature and, therefore, be applicable to future loans of EU institutions. To put it plainly: will EU institutions be bound to respect and to ensure the respect of the CFRUE when borrowed by international organizations or agreements other than the ESM?

The peculiarities of the *Ledra Advertising* case require to approach this question with a pinch of salt. It should be reminded that the judgment of the CJEU is mainly a warning to EU member States that every use of EU institutions outside the EU legal order shall respect some rules and principles. It seems to be an application of the

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[83] An idea developed by MIGLIO, *cit. supra* note 21, p. 167-168.

[84] COSTAMAGNA, *cit. supra* note 64, p. 24.

[85] *Ledra Advertising et al.* case, *cit. supra* note 52, para. 74.

[86] DE SCHUTTER, DERMINE, *cit. supra* note 67, p. 21-22.

[87] Relations of this kind represent a model governed by the rules identified by René Jean Dupuy, in his second course at The Hague Academy of International Law (*cit. supra* note 13, p. 565 and 581): the "hiérarchie normative" and "l'indipendance fonctionnelle".

[88] For an optimistic view see VEZZANI, *cit. supra* note 42, p. 211-212, according to whom the actions for damages against the EU are promising.

primacy of EU law. Moreover, the duty of the institutions of the EU to respect EU law is present in the ESM Treaty; an inclusion that appears as a normative link between the EU and the ESM.

However, there are good arguments in favor of a positive answer. Indeed, the jurisprudence of the CJEU on the loan of EU institutions defined general principles, the application of which transcends the peculiarity of the single case. It is true, in fact, that future loans of EU institutions will be permitted only if compatible with the functions of the borrowed institutions. It is also true that the duty to respect EU law, including the CFREU, will bind EU institutions acting outside the EU legal order regardless of the international organizations to which they are lent. The inclusion of such a duty in the ESM Treaty seems to be a re-statement of a preexisting one. The EU Committee on Constitutional Affairs adopted, in 2013, a similar view, stating that the fundamental rights enshrined in the Charter "apply at all times"[89].

A positive answer to this question would enable the EU to influence the conduct of other international organizations through the loan of its institutions[90]. Consequently, and more broadly, the role of the EU in shaping the international legal order through the imposition of its internal legal standard in other institutional contexts would be reinforced[91].

This result would be interesting, as it could contribute to make fundamental rights applicable to the conduct of other international organizations through the involvement of the EU. The ESM, in fact, is not the only international organization the founding Treaty of which does not contain any reference to the protection of fundamental rights.

It remains to see if such a conclusion represents a merely theoretical speculation or has the potential of being a concrete tool in the hand of the EU.

The *Ledra Advertising* case is a fitting example. The CJEU benefited from the loan of the Commission to the ESM and assigned to this institution a 'bridging role' that originally was probably not conceived, that of guarantor of fundamental rights in the ESM.

However, leaving unanswered the many questions presented in paragraph five of this article, the judgment reveals that building bridges is not enough to 'bridge' two international organizations.

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[89] Opinion of the Committee on Constitutional Affairs for the Committee on Economic and Monetary Affairs on the enquiry report on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, (2013/2277(INI)), p. 4-5, para. 11.

[90] See DE WITTE, *cit. supra* note 62, p. 463-464. See also BOISSON DE CHAZOURNES, *cit. supra* note 13, p. 691-692.

[91] See PECH, *cit. supra* note 26, p. 112.