Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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CASE LAW

A. Court of Justice

Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*

Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others* v. *Commission and European Central Bank,* judgment of the Court (Grand Chamber) of 20 September 2016, EU:C:2016:701 and Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others* v. *Commission and European Central Bank*, judgment of the Court (Grand Chamber) of 20 September 2016, EU:C:2016:702

1. Introduction

In its famous *Les Verts* judgment, the European Court of Justice described the EU as "a Community based on the rule of law", in which "neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". The "system of legal remedies and procedures" established by the Treaties for this purpose is "complete" and "natural and legal persons are thus protected".[1] This understanding holds true when an interference with the legal sphere of an individual can be traced back to a Union legal act. It is, however, challenged when national measures implementing content that was set at supranational level were adopted because of non-legal reasons such as economic pressure on national legislators rather than due to an EU legal obligation. This challenge turns into a problem, from the perspective of judicial protection, if the economic pressure derives from the need of a national legislature to receive financial assistance from external sources in order to avoid a sovereign default. In such a situation, political commitments to payment conditions set by the external creditors produce effects similar to legal obligations. In avoiding sovereign default, national legislatures implement such political commitments as if they were prescribed by law. Whereas national courts can, when assessing measures implementing

1. Case 294/83, *Les Verts* v. *Parliament,* EU:C:1986:166, para 23.

EU legal obligations, request a review of the legality of these obligations from the ECJ, this possibility is precluded for measures implementing political commitments defined at supranational level in non-legal documents. These measures are purely national and to declare them void at national level would not violate EU legal obligations. Yet, national courts find themselves in the same position as the national legislature when initially adopting the measure under review: declaring the national measure void would result in a discontinuation of financial assistance, which might trigger a sovereign default. The lack of the possibility to review the supranational *raison d'être* of national measures implementing political commitments reveals the gap in judicial protection when it comes to austerity measures in the euro area.

In short, austerity measures can be characterized as measures whose substance is determined by a different actor than the one that is competent to adopt them. The substance is set in non-legal instruments negotiated and approved at supranational level. Compliance at national level is a precondition for the payment of financial assistance, so non-compliance embodies the risk of a sovereign default of the debtor country (the so-called "conditionality"[2]). Austerity measures affect individuals in the form of national legal acts. Judicial protection appears therefore to be available only for individuals at national level, excluding legal review of the supranational *raison d'être*. Indirect access to EU Courts, via the preliminary reference procedure, is precluded since national austerity laws in the euro area do not implement EU law. Direct access to EU Courts appears to be barred because of either a lack of a reviewable act or of direct concern of acts of EU origin for individuals.

In this context, a group of depositors who lost part of their savings after a "bail-in"[3] that was politically requested by the euro area Member States in Cyprus, brought direct actions at the General Court testing the limits of judicial protection against austerity measures in the euro area at EU level. On appeal against orders of the General Court dismissing the applications, the ECJ confirmed limits on direct access for individuals seeking the annulment of the European *raison d'être* of national austerity measures in the euro area (Art. 263 TFEU). But it opened the doors for them to claim damages from the Union for the violation of fundamental rights as guaranteed by the EU Charter of Fundamental Rights by the European *raison d'être,* even if it was adopted outside the EU legal framework and set down in a non-legal document (Arts. 268, 340(2) TFEU). Whilst the threshold for actually obtaining damages

2. Ioannidis, "EU financial assistance conditionality after 'Two Pack'", (2014) ZaöRV, 1; Poulou, "Financial assistance conditionality and human rights protection: What is the role of the EU Charter of fundamental rights?", in this *Review*, 991–1026.

3. "Bail-in" refers to a measure rescuing a failing financial institution, which requires creditors and depositors of the financial institution in distress to take a loss on their holdings.

remains high and was not overcome in the present case, the fact that under different factual circumstances the Union might be successfully held financially liable for individual rights' violations by austerity measures in the euro area represents an important and unexpected step in filling the gaps in judicial protection against these measures at EU level. The Commission must now anticipate the risk of possible actions for damages when negotiating financial assistance programmes with euro area Member States in financial distress.

2. Background to the disputes

On 29 March 2013, a "bail-in" of estimated 7 bn Euro[4] took place for Cyprus in order to recapitalize the two major Cypriot banks. This "bail-in" affected many depositors who lost part of their savings. The "bail-in" was based on two decrees adopted by the central bank of Cyprus. The first one (decree No. 103)[5] provided for a recapitalization of the Cypriot bank "Trapeza Kyprou Dimosia Etaira Ltd" ("Bank of Cyprus": BoC) through a conversion of deposits of more than 100,000 euro into shares of the bank[6] or into securities.[7] The other one (decree No. 104)[8] ordered a transfer of certain assets and liabilities of the "Cyprus Popular Bank Public Co. Ltd" (Laïki) to the BoC, including deposits of up to 100,000 euro. Deposits of more than 100,000 euro remained with Laïki, which was ultimately to be liquidated. The legal basis for both decrees was the "Law on the resolution of credit and other institutions" of 22 March 2013.[9]

The "bail-in" was part of a political agreement reached between the Republic of Cyprus, the Eurogroup, the Commission, the ECB and the IMF on the future macroeconomic adjustment programme in return for financial

4. Michaelides, "Cyprus: From boom to 'bail-in'", 29 *Economic Policy* (2014), 639, at 641.

5. Regulatory Administrative Act No. 103, EE, Annex III (I), No. 4645, 769–80, 29 Mar. 2013.

6. 37.5% of the deposits concerned were converted into shares of the Bank of Cyprus.

7. 22.5% of the deposits concerned were converted into securities which were convertible by the Bank of Cyprus into either shares or deposits; the remaining 40% of the deposits concerned were converted into securities which were convertible into deposits by the central bank of Cyprus.

8. Regulatory Administrative Act No. 104, EE, Annex III(I), No. 4645, 781–88, 29 Mar. 2013.

9. Resolution of Credit and Other Institutions Law (Basic Law) L17(I)/2013, 22 Mar. 2013. This law was adopted by the Cypriot Parliament only a couple of days after it rejected a legislative proposal introducing a one-off levy on all domestic bank deposits, which did not provide for an exemption for deposits with a value below EUR 100,000.

assistance,[10] described in detail in an annex to the Eurogroup Statement of 25 March 2013. Negotiations leading to this agreement were initiated by request of the Republic of Cyprus on 25 June 2012.[11] The political agreement was cast in legal form, the so-called "Memorandum of Understanding" (MoU), with the formal approval of the European Stability Mechanism (ESM), which is entrusted with the right to provide financial assistance to euro area Member States. The approval was adopted by the ESM Board of Governors, which is composed of the same persons as the Eurogroup, only on 24 April 2013 and thereby almost one month after the actual "bail-in" took place. The MoU was subsequently signed by the Commission, acting on behalf of the ESM, on 26 April 2013.

Adopting the law on the resolution of credit institutions before the formal entry into force of the MoU was necessary because of the ECB's announcement of 21 March 2013 to stall the "Emergency Liquidity Assistance" (ELA) provided by the Cypriot national central bank on 25 March 2013.[12] Freezing ELA would have led to an uncontrolled bankruptcy of the Cypriot banks as they would run out of liquid assets to meet clients' demands. ELA was at that time the only liquidity channel available for Cypriot banks since they weren't able to raise liquidity on private markets and the collateral held by Cypriot banks in form of Cypriot government debt was no longer accepted by the ECB in return for central bank liquidity.[13] In such a situation, national central banks may still issue liquidity against collateral of lower quality than that accepted by the ECB, provided it does not interfere with the objectives and tasks of the Eurosystem (Art. 14.4 ECB/ESCB Statute). The higher risk exposure under ELA as compared to ECB liquidity channels is

10. Eurogroup Statement on Cyprus of 16 Mar. 2013. It should be noted that the agreement reached on 16 Mar. did not exempt deposits below 100,000 euro either. This political agreement was in breach of Art. 7(1a) of Directive 94/19/EC on deposit-guarantee schemes, as amended by Directive 2009/14/EC, which elevated, by 31 Dec. 2010, the amount covered by national deposit guarantee schemes up to 100,000 euro. In a statement of 18 Mar. the President of the Eurogroup "reaffirms the importance of fully guaranteeing deposits below EUR 100,000" requesting "more progressivity in the one-off levy compared to what was agreed on 16 March". Only after the rejection of the proposed one-off levy by the Cypriot Parliament, the Eurogroup in its statement of 25 Mar. referred to a "safeguard [of] all deposits below EUR 100,000 in accordance with EU principles".

11. Cf. Statement of the Eurogroup on Cyprus of 27 June 2012, according to which the Eurogroup "invite the Commission, in liaison with the ECB, and the Cypriot authorities and the IMF to agree on a programme".

12. ECB, Press release of 21 Mar. 2013.

13. This was due to a downgrade of Cyprus into speculative grade territory by all accepted rating agencies, so that Cypriot government securities no longer fulfilled the creditworthiness requirement for collateral in Section 6.3.2 of Annex I to Guideline ECB/2011/14 on monetary policy instruments and procedures of the Eurosystem, O.J. 2011, L 331/1.

legally tolerable due to the fact that failure of ELA, being a purely national monetary policy measure, cannot entail liability of the Eurosystem.

This chain of events created a peculiar legal situation for those people that lost part of their deposits because of the "bail-in". Whereas the legal basis for the "bail-in" was exclusively to be found in national law, the latter was only enacted because of a political agreement with the Eurogroup, the Commission, the ECB and the IMF, which was legally approved only after the adoption of the abovementioned Cypriot legal acts.[14] The sole document of European origin referring to a "bail-in" that was published before their adoption was the statement of the Eurogroup of 25 March 2013.

Against this background, assuming that the Cypriot legal acts ordering the "bail-in" were only implementing measures of an agreement with Union institutions, judicial protection at EU level against the "bail-in", via direct actions, appeared imaginable against two different measures: the Eurogroup statement of 25 March, with the difficulty that these statements are not considered to be acts producing legal effects, and the MoU, with the difficulty that the latter was only adopted after the "bail-in" took place. Furthermore, the goal of the applicants could be achieved either by an annulment of the respective measure or by a successful claim for compensation against the European Union equivalent to the diminution in value of the lost deposits. Accordingly, two groups of depositors launched proceedings at the General Court against the Eurogroup statement and against the MoU.

3. Orders of the General Court

The first group of depositors brought an action for annulment at the GC against the Commission and the ECB in order to achieve the anulment of the Eurogroup statement of 25 March 2013.[15] Aware of the fact that the contested

14. In the form of the MoU of 24 Apr. 2013 and in the form of a Council Decision of 25 Apr. 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth, O.J. 2013, L 141/32, repealed by Council Implementing Decision 2013/463/EU of 13 Sept. 2013 on approving the macroeconomic adjustment programme for Cyprus, O.J. 2013, L 250/40.

15. Case T-327/13, *Mallis and Malli* v. *Commission and ECB*, EU:T:2014:909; Case T-328/13, *Tameio Pronoias Prosopikou Trapezis Kyprou* v. *Commission and ECB*, EU:T:2014:906; Case T-329/13, *Chatzithoma* v. *Commission and ECB*, EU:T:2014:908; Case T-330/13, *Chatziioannou* v. *Commission and ECB*, EU:T:2014:904 and Case T-331/13, *Nikolaou* v. *Commission and ECB*, EU:T:2014:905. In the following, a reference to the *Mallis* case implies a reference to the entire group of cases, since the orders of the General Court only differ with regard to amount of financial losses suffered by the respective applicant. See in detail on these judgments Karatzia, "Cypriot depositors before the Court of Justice of the European Union: Knocking on the wrong door?", 26 *King's Law Journal* (2015), 175–184.

statement was not adopted by the Commission and the ECB, the applicants argued that this act can nevertheless be imputed to both Union institutions. The General Court rejected this argument. The Eurogroup – the actual author of the statement – is an informal forum of discussion of the finance ministers of the euro area Member States and not a decision-making body, and has not received any delegations of power from the Commission or the ECB. The Eurogroup is hence not under the control of the Commission or the ECB, nor does it act as an agent of these institutions.[16] In consideration of the identical composition of the Eurogroup and the ESM Board of Governors, the GC further dismissed an alternative interpretation, according to which the statement could be imputed to the Commission and the ECB if it were to be attributed to the ESM. Also in the context of the ESM, there were no powers from the Commission or the ECB delegated to the ESM, nor had any of these institutions the powers to interfere with the internal decision making of the ESM.[17]

Furthermore, the GC did not consider the statement to be a reviewable act under the action for annulment. According to its interpretation, the statement was not intended to produce any legal effects but was of a purely informative nature. The GC based its understanding on the fact that the Eurogroup is not empowered to adopt any kind of legally binding measure. More specifically, in its statement, the Eurogroup only "welcomed the plans for restructuring the financial sector as specified in the annex",[18] and did not request the "bail-in" as a pre-condition for financial assistance. Also, the power formally to approve the financial assistance and the conditions attached to its payment does not fall within the sphere of the Eurogroup, but within the competence of the ESM Board of Governors.[19] Based on these considerations, the GC dismissed the application as inadmissible.

The second group of depositors based its action against the Commission and the ECB on the MoU. They requested an annulment of those paragraphs in the MoU referring to the restructuring and resolution of the BoC and Laïki[20] and filed a claim for a compensation of the losses incurred because of the "bail-in".[21] Like the applicants in *Mallis*, the applicants in *Ledra* faced the obstacle of the authorship of the contested measure. Accordingly, the GC

16. Case T-327/13, *Mallis*, paras. 41 to 44.
17. Ibid., paras. 46 to 50.
18. Eurogroup Statement on Cyprus of 25 Mar. 2013, para 3.
19. Case T-327/13, *Mallis*, paras. 53 to 60.
20. These were paras. 1.23 to 1.27 of the MoU, published in: European Commission, Occasional Papers 149, May 2013, 66–103, 74.
21. This concerns Case T-289/13, *Ledra Advertising* v. *Commission and ECB*, EU:T:2014:981; Case T-291/13, *Eleftheriou and Papachristofi* v. *Commission and ECB*, EU:T:2014:978 and Case T-293/13, *Theophilou* v. *Commission and ECB*, EU:T:2014:979. In

dismissed the action for annulment by simply referring to fact that the parties of the MoU, the Republic of Cyprus and the ESM, are not institutions mentioned in Article 263(1) TFEU.[22]

Regarding the claim for compensation, the GC discussed two possible forms of conduct leading to the damages suffered by the applicants. The first was the adoption of the MoU reiterating the restructuring and the resolution of BoC and Laïki. The second was the failure of the Commission to fulfil its role as guardian of the Treaties under Article 17(1) TEU when signing the MoU. With regard to the adoption of the MoU, the GC rejected the imputability of the MoU to the Commission or the ECB; the signature of the MoU by the Commission was, according to Article 13(4) of the ESM Treaty, only on behalf of the ESM. The MoU solely commits the ESM, but not the EU.[23] As regards the failure of the Commission to ensure that the MoU is in conformity with EU law, the GC refrained from discussing the allegation in substance but denied the existence of a causal link between this conduct and the damage suffered. The GC based its reasoning on the fact that the MoU was signed by the Commission on 26 April 2013, whereas the decrees by the Cypriot national central bank that ordered the "bail-in" entered into force on 29 March 2013, and thus before the signature of the MoU.[24] It hence concluded by dismissing the claims.

4. Opinions of the Advocates General

The claimants lodged appeals against the GC orders with the Court of Justice. The grounds of appeal revolve around the following legal problems: first, with regard to the actions for annulment, whether a Eurogroup statement and an MoU are reviewable acts under Article 263(1) TFEU, which can, second, be imputed to the Commission and the ECB as recognized defending parties in an action for annulment. Related to this, applying the principle of *falsa demonstratio non nocet,* whether, third, the Eurogroup instead of the Commission or the ECB could be considered a defending party in such proceedings. With regard to the action for damages, fourth, it remained debatable whether the Commission's signature of the MoU can be seen as unlawful conduct giving rise to damages and whether, fifth, there is a causal

the following, a reference to *Ledra* implies a reference to the entire group of cases since the orders of the General Court only differ with regard to amount of financial losses suffered by the respective applicant.

22. Case T-289/13, *Ledra*, para 58.
23. Ibid., paras. 44 to 47.
24. Ibid., paras. 48 to 54.

link between such unlawful conduct and the damages sustained due to the "bail-in".

The Advocate General's Opinion in *Mallis* dealt with the first three legal problems.[25] Remarkably, the Advocate General did not stay within the narrow borders of the subject-matter of the case, because of the "the importance of the questions which those appeals raise from the point of view of effective judicial protection",[26] but elaborated more fundamentally on crucial issues in relation to judicial protection against austerity measures in the euro area at EU level. Regarding the actual appeals, he came to the conclusion that they must be dismissed, as the Eurogroup statement of 25 March 2013 produced no binding legal effects with respect to third parties[27] and could, moreover, not be imputed to the Commission or the ECB.[28] Although he wondered whether the GC should have declared the application inadmissible because it was directed against the Commission and the ECB although it concerned a Eurogroup statement,[29] he based his reasoning on the same arguments as the GC.

Going beyond the subject of the appeals, the Advocate General took a closer look at alternative ways to obtain judicial protection against austerity measures than those used by the applicants in *Mallis*. This concerned the possibility to include the Eurogroup in the list of parties in Article 263(1) TFEU and the reviewability of paragraphs of an MoU, of Council decisions reiterating the content of an MoU, or of macroeconomic adjustment programmes reflecting the MoU under Regulation 472/2013.[30] Regarding the Eurogroup, the Opinion, first of all, dismissed an understanding of the Eurogroup as being a Council configuration: the Eurogroup is not mentioned in the list of Council configuration.[31] The existing links between the Eurogroup and the Council, in the form of the office of the President of the Eurogroup Working Group at the General Secretariat of the Council and the fact that the Eurogroup meets on the eve of meetings of the Economic and Financial Affairs Council (ECOFIN), are not sufficient to overcome the

25. Opinion of A.G. Wathelet in Joined Cases C-105-109/15 P, *Mallis,* EU:C:2016:294.
26. Ibid., para 53.
27. Ibid., para 132.
28. Ibid., para 117.
29. Ibid., para 109.
30. Regulation 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, O.J. 2013, L 140/1.
31. Decision of the Council (General Affairs) No. 2009/878/EU of 1 Dec. 2009 establishing the list of Council configurations in addition to those referred to in the second and third subparagraphs of Art. 16(6) TEU, O.J. 2009, L 315/46, amended by European Council Decision No. 2010/594/EU of 16 Sept. 2010 amending the list of Council configurations, O.J. 2010, L 263/12.

different functions assigned to the Eurogroup, on the one hand, and to the Council, on the other. Whilst the latter exercises, together with the European Parliament, legislative functions, the former is a mere forum, in which "questions related to the specific responsibilities [the euro area Member States] share with regard to the single currency" are discussed.[32] Not being a Council configuration does not exclude a classification of the Eurogroup as a body, office or agency in terms of Article 263(1) TFEU. Such a classification would, however, conflict with the fact that the Eurogroup has no legal personality. According to the Advocate General, if acts adopted by bodies without legal personality are to be subject to an action for annulment, the Treaty has named these bodies, such as the European Council or the Committee of Regions, explicitly.[33] The limitations set by the wording of Article 263(1) TFEU could, from the perspective of effective judicial protection, be overcome if the Eurogroup could adopt legally binding decisions. Since the Treaties do not provide for such a competence, the Eurogroup cannot implicitly be included in the list of parties under Article 263(1) TFEU.

Regarding the content of austerity measures in general, there are three possible acts that could form the subject-matter of a legal review: the MoU itself, which was the choice of the applicants in *Ledra*, the Council Decision reiterating the content of the MoU, and the macroeconomic adjustment programme under Article 7 of Regulation 472/2013. An MoU is not a legally binding instrument.[34] National measures adopted on the basis of an MoU do not constitute an implementation of EU law, although an MoU must, according to Article 13(3) of the ESM Treaty, be fully consistent with Union law.[35] An MoU is against this background not a reviewable act under Article 263(1) TFEU. Council decisions reiterating the content of an MoU form a reviewable act for an action for annulment. But they are not capable of being of direct concern to individuals initiating an action for annulment against such Council decisions.[36] The same reasoning applies to macroeconomic adjustment programmes adopted under Regulation 472/2013.[37] In order to close this gap in judicial protection against austerity measures in the euro area, the Advocate General considers a primary legal obligation for Member States "required by the second subparagraph of Article 19(1) TEU to provide

32. Art. 1 of Protocol No. 14.
33. Opinion in *Mallis*, para 64.
34. Ibid., para 87.
35. Ibid., para 84.
36. Ibid., paras. 89–90 referring to the GC Orders in Case T-541/10, *ADEDY and Others* v. *Council*, EU:T:2012:626, para 87 and Case T-215/11, *ADEDY and Others* v. *Council*, EU:T:2012:627, para 99.
37. Opinion in *Mallis*, para 98.

'remedies sufficient to ensure effective legal protection' enabling the courts of the Member State to refer to the Court of Justice questions for a preliminary ruling on the validity of those decisions and, consequently, the validity of the macroeconomic adjustment programme at issue."[38]

In *Ledra*, the concise Opinion focused on the issue under appeal.[39] Regarding the action for annulment of the MoU, the Advocate General rejected the jurisdiction of the ECJ. The MoU is an act decided by the ESM, which is extraneous to the EU legal order.[40] In relation to the action for damages, the Advocate General did not find any unlawful conduct on the part of the Commission which could give rise to damages. In doing so, he analysed two different acts that could form the basis for the unlawful conduct: one was the signature of the MoU by the Commission;[41] the other was the failure of the Commission to ensure that the MoU does not violate EU law.[42] With regard to the former, the Advocate General agreed with the GC's reasoning that, by signing on behalf of the ESM, the MoU cannot be imputed to the Commission. It may therefore remain open whether the contested paragraphs of the MoU violated individual rights under EU law; a violation could in any event not be attributed to Union institutions. With regard to the failure of the Commission to fulfil its role as "Guardian of the Treaties", the Advocate General denied the existence of a legal obligation under Article 17 TEU for the Commission "to act against any possible breach of EU law".[43] The Opinion distinguishes between a breach of EU law and the task of the Commission to ensure and to oversee the application of the Treaties under Article 17(1) TEU. The presence of the first does not imply an infringement of the latter in case of inaction. In order to arrive at this conclusion, the Advocate General relied on the legal regime of the infringement action under Articles 258 to 260 TFEU. Initiating proceedings against Member States that breach EU law lies within the discretionary powers of the Commission. Individuals have no legal claim to request the Commission to act against Member States. Failure to bring an infringement action against a Member State that violated EU law does not amount to unlawful conduct of the Commission and hence does not result in a successful claim for compensation against the Union.[44] This reasoning should be applied *a fortiori* to the Commission's general obligation to act as "Guardian of the Treaties". Against this background, the question of whether

38. Ibid., paras. 91 and 98.
39. Opinion of A.G. Wahl in Joined Cases C-8-10/15 P, *Ledra,* EU:C:2016:290.
40. Ibid., para 127.
41. Ibid., paras. 49 to 59.
42. Ibid., paras. 61 to 107.
43. Ibid., para 76.
44. Ibid., para 78 referring to Case 247/87, *Star Fruit* v. *Commission*, EU:C:1989:58, paras. 10 to 14 and Case C-87/89, *Sonito and Others* v. *Commission*, EU:C:1990:213, paras. 6 and 7.

a "bail-in" violates EU law could remain unanswered since, even if there had been a violation, the failure of the Commission to act under Article 17(1) TEU does not amount to an unlawful conduct under Article 340(2) TFEU triggering the non-contractual liability of the Union.[45]

Only in the alternative, the Advocate General turned to the substantive question whether the contested paragraphs of the MoU violate the Charter of the Fundamental Rights. His answer is in the negative, since he already denies the applicability of the Charter. Whereas the Commission is fully bound by the Charter, it only applies, according to Article 51(1), to Member States "when they are implementing Union law". The MoU, being an act of the ESM, does not implement Union law since the ESM was established by a subset of Member States exercising their national competences.[46] Requiring the Commission to apply the Charter when acting on behalf of the ESM and, thus, acting outside the competences conferred upon it by Union law, would extend "the applicability of the Charter into a field of law which is not meant to be regulated by that instrument".[47]

Anticipating possible criticism of his solution, the Advocate General clarifies that his understanding of Article 17 TEU does not imply that the ESM acts in a "legal vacuum".[48] By referring to Draft Articles on the responsibility of international organizations[49] he assigns the responsibility for violations of EU law by an MoU to the ESM and to the Member States that established the ESM.[50] Judicial protection should therefore be sought by citizens before the competent national courts.

5. Judgments of the Court

The Grand Chamber of the ECJ dismissed both appeals. It rejected the appeal with regard to the action for annulment of the Eurogroup statement in *Mallis* and of the MoU in *Ledra* in a very concise manner. As regards the action for damages, the Court approved, in the first instance, the argument of the appellants that the Commission's inaction to prevent a violation of the EU Charter of Fundamental Rights could constitute unlawful conduct leading to a non-contractual liability of the Union. The appeal was, however, not successful, because the alleged violation of Article 17 of the Charter was

45. Ibid., para 80.
46. Ibid., para 88 referring to Case C-370/12, *Pringle*, EU:C:2012:756, paras. 178 to 181.
47. Ibid., para 90.
48. Ibid., para 93.
49. *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.
50. Opinion in *Ledra*, paras. 98 to 103.

justified in order to ensure the stability of the banking system of the euro area as a whole, which thus rendered the Commission's conduct lawful, thereby ruling out the Union's non-contractual liability.

In *Mallis,*[51] the Court agreed with the GC and the Advocate General that the Eurogroup statement cannot be imputed to the Commission and the ECB, repeating their line of argument: the statement is of a purely informative nature[52] and the role of the Commission and of the ECB in the Eurogroup does not go beyond mere participation in its meetings.[53] Moreover, taking into account the identical composition of the Eurogroup and of the ESM Board of Governors, the role accorded to both Union institutions by the ESM Treaty is not broader than that in the Eurogroup. Their duties under the ESM Treaty do not entail the exercise of any power to take decisions on their own, and their activities only commit the ESM alone.[54] The same reasoning was applied by the Court in the *Ledra* case to the question whether, for the purpose of an action for annulment, an MoU concluded by the ESM could be imputed to the Commission and the ECB.[55]

In remarkable contrast to the GC and the Advocate General, the Court found in relation to the action for damages that a violation of Charter rights by an MoU can trigger the non-contractual liability of the Union under Article 340(2) TFEU. The conduct forming the basis for the non-contractual liability of the Union is the failure by the Commission to "oversee the application of Union law" as required by Article 17(1) TEU.[56] The obligation enshrined in the Commission's role as guardian of the Treaties in the context of the ESM is to "refrain from signing a memorandum of understanding whose consistency with EU law it doubts".[57] The fact that the power to sign an MoU is a task allocated to the Commission by the ESM Treaty, which is an international law instrument outside the EU legal order, does not alter the character of the legal obligations imposed by the EU Treaties on the EU institutions.[58] This conduct – the failure to "oversee the application of Union law" – amounts to unlawful conduct if there is a "sufficiently serious breach of a rule of law intended to confer rights on individuals".[59] Such rule of law can be found in individual rights enshrined in the Charter of Fundamental Rights (such as Art. 17 of the

51. Judgment in *Mallis*.
52. Ibid., para 59.
53. Ibid., para 57.
54. Ibid., para 53.
55. Judgment in *Ledra*, paras. 52 to 54.
56. Ibid., para 57.
57. Ibid., para 59.
58. Ibid., para 56.
59. Ibid., paras. 64 and 65.

Charter in *Ledra*).[60] Therefore, whenever there is a violation of an individual Charter right by a draft MoU, the failure by the Commission to prevent this violation from coming into existence constitutes unlawful conduct, which gives rise to damages under Article 340(2) TFEU provided that there is causal link between this conduct and the damage. The fact that Member States do not implement Union law in the context of the ESM and are therefore not bound by the Charter according to its Article 51(1) does not release Union institutions from their Charter obligations even when acting within the ESM framework.[61]

When assessing whether the "bail-in" of Cypriot depositors amounts to a violation of Article 17 of the Charter, the Court concluded that such a "bail-in" is a proportionate measure to ensure the "stability of the banking system of the euro area as a whole", which does not violate the Charter.[62] The appeals on admissibility in the *Ledra* case were therefore upheld, but the actions for damages were dismissed by the Court. Since the actions were dismissed on the ground of the lawfulness of the Commission's conduct, the Court no longer needed to rule on the issue of the causal link between the unlawful conduct and the damages, which was of importance for the initial order of the GC.

6. Comments

With its judgment in *Ledra*, the ECJ reduced the fragmentation of judicial protection against austerity measures in the euro area despite a legal framework that, to put it mildly, made it at least difficult for EU Courts to establish their jurisdiction. The protection gap is, however, not yet completely filled, as will be shown below. Before entering into a detailed discussion of the Court's judgments (section 6.4), it seems necessary to outline the legal framework of austerity measures in the euro area (6.1), the complexity of which makes the correct identification of the reviewable act and the legally accountable author for the purposes of achieving judicial protection against austerity measures in the euro area a difficult task (6.2). Afterwards a brief overview over the state of judicial protection against these measures at national level including the possibility to refer preliminary questions to the

60. Ibid., para 66. Art. 17 of the Charter states: "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

61. Ibid., para 67.

62. Ibid., paras. 71–74.

Court (6.3) reveals the judicial protection gap that can only be closed by direct actions before the ECJ (6.4).

6.1. *The legal framework of austerity measures in the euro area*

The legal framework of austerity measures in the euro area evolved over three generations in relation to the rescue packages that were set up for Greece I (May 2010), Ireland (November 2010), Portugal (May 2011), Greece II (July 2011), Spain (July 2012), Cyprus (May 2013) and Greece III (August 2015). The first generation (dealing with Greece I) was formed by a set of two intergovernmental agreements establishing the "Greek Loan Facility" (GLF), which pooled bilateral loans from euro area countries to Greece and which was managed by the Commission.[63] The second generation (dealing with Ireland, Portugal and Greece II) consisted of Council Regulation 407/2010 establishing a European financial stabilization mechanism (EFSM),[64] being a Union instrument managed by the Commission and financed by the EU budget, and of the intergovernmental EFSF Framework Agreement setting up the "European Financial Stability Facility" (EFSF),[65] being a "special purpose vehicle" under private law funded by the euro area Member States.[66] The third generation (dealing with Spain, Cyprus and Greece III) was created with the entry into force of the intergovernmental Treaty establishing the European Stability Mechanism (ESM).[67]

Although the legal framework consists of numerous legal acts stemming from within and outside the EU legal order, the basic construction of the legal framework remained the same. A Member State in financial distress receives financial assistance in return for the promise of policy reforms and the subsequent implementation of this promise in national legislation.[68] The

63. The Greek Loan Facility consisted of the Intercreditor Agreement between the euro area countries (other than Greece) of 8 May 2010 and the Loan Facility Agreement between the euro area countries (other than Greece and Germany) and the KfW (Kreditanstalt für Wiederaufbau, on behalf of Germany) as lenders, and Greece as borrower and the Bank of Greece as agent of the borrower of 8 May 2010 (attached as schedules 1 and 2 to the Irish Euro Area Loan Facility Act 2010 (2010 No. 7)).

64. Council Regulation 407/2010 establishing a European financial stabilization mechanism, O.J. 2010, L 118/1.

65. European Financial Stability Facility Framework Agreement of 7 June 2010.

66. The EFSF was established as a Société Anonyme under Luxembourg law.

67. Treaty establishing the European Stability Mechanism between the euro area Member States of 2 Feb. 2012 entering into force on 27 Sept. 2012.

68. Recital 6 of the Preamble and Arts. 4(1) and 4(2) of the GLF intercreditor agreement, Recitals 6 and 7 of the GLF loan facility agreement (first generation); Art. 3(1) of Regulation 407/2010 (EFSM) and Recital 2 and Art. 2(1)(a) of the EFSF Framework Agreement (second generation); Arts. 3 and 12(1) of the ESM Treaty (third generation).

content of the policy reforms is negotiated between the Member State's government and the so-called "troika" consisting of the Commission, the ECB and the IMF[69] and set out in a "memorandum of understanding" (MoU)[70] approved by representatives of the lenders.[71] The MoU embodies the unilateral declaration of intent of the Member State to adopt certain policy measures and the unilateral declaration of intent of the future creditor(s) to provide for financial assistance. The latter declaration approves the content of the former, and the disbursement of financial assistance is subject to the condition that policy reforms promised in the first declaration are implemented. Non-compliance is sanctioned by non-payment. The effectiveness of this compliance mechanism is hence based on the threat of sovereign default as a consequence of the non-payment of financial assistance. The recipient Member State follows up on its promises declared in the MoU by adopting national laws in accordance with national legislative procedures. Only then and only in the form of national laws do policy reforms agreed upon in an MoU affect individuals.

This basic construction is supplemented by Union acts: Council decisions, based on either Articles 126 and 136 TFEU (with a view to EFSF or ESM programmes)[72] or on Article 3(2) of Regulation 407/2010 (with a view to EFSM programmes),[73] reiterating parts of the content of an MoU and "macroeconomic adjustment programmes" (adopted by the Council),[74] based

69. Art. 2(1) of the GLF intercreditor agreement (first generation); Art. 3(1) of Regulation 407/2010 (EFSM) and Art. 2(1)(a) of the EFSF Framework Agreement (second generation); Art. 13(3) of the ESM Treaty (third generation).

70. Recital 6 of the Preamble and Art. 4(1) of the GLF intercreditor agreement, Recital 6 of the GLF loan facility agreement (first generation); Art. 3(1) of Regulation 407/2010 (EFSM) (here called: "economic and financial adjustment programme") and Recital 2 and Art. 2(1)(a) of the EFSF Framework Agreement (provided that there is no MoU approved by all euro area Member States (other than the recipient one) under Regulation 407/2010 covering also EFSF assistance) (second generation); Art. 13(3) of the ESM Treaty (third generation).

71. Art. 2(1) of the GLF intercreditor agreement (approval by the parties) (first generation); Arts. 3(2), (3)(c) and (4)(c) of Regulation 407/2010 (EFSM) (approval by the Council) and Art. 2(1)(a) of the EFSF Framework Agreement (approval by the Eurogroup Working Group) (second generation); Arts. 5(6)(f) and 13(4) of the ESM Treaty (approval by the ESM Board of Governors).

72. Greece I: Council Decision 2010/320/EU, O.J. 2010, L 145/6 (based on Arts. 126(9) and 136 TFEU); Greece II: Council Decision 2011/734/EU, O.J. 2011, L 296/38 (based on Arts. 126(9) and 136 TFEU); Spain: Council Decision 2012/443/EU, O.J. 2012, L 202/17 (based on Arts. 126(6) and 136 TFEU); Cyprus: Council Decision 2013/236/EU, O.J. 2013, L 141/32 (based on Arts. 126(6) and 136 TFEU).

73. Ireland: Council Implementing Decision 2011/77/EU, O.J. 2011, L 30/34; Portugal: Council Implementing Decision 2011/344/EU, O.J. 2011, L 159/88; Greece III: Council Implementing Decision 2015/1181/EU, O.J. 2015, L 192/15.

74. Ireland: Council Implementing Decision 2013/373/EU, O.J. 2013, L 191/10; Portugal: Council Implementing Decision 2013/375/EU, O.J. 2013, L 192/74; Cyprus: Council

on Article 7 of Regulation 472/2013,[75] which are supposed to set a benchmark for the content of MoU as the Commission has to ensure the consistency of MoU with these programmes.[76] These Union acts co-exist with the MoU and partly overlap in content. They are, however, legally not synchronized with each other. Modifications of the one have to be reproduced with regard to the other in accordance with the respective procedures.

Stepping back from the actual legal framework and looking only at its mechanics, one can draw a comparison with the mechanics of an EU directive under Article 288(3) TFEU. Just like directives, austerity measures affect individuals only in the form of national implementing measure. Like directives, the result to be achieved by austerity measures is set at supranational level. The only difference between the two is that compliance is ensured with regard to directives by legal internationalization based on the implementation obligation enshrined in Articles 288(3) TFEU and 4(3) TEU, and with regard to austerity measures by conditionality and the threat of sovereign default in case of non-compliance.[77]

6.2. *Complexity of the legal framework of austerity and judicial protection: Identifying the reviewable act and the legally accountable author*

Obtaining effective judicial protection requires the identification of the correct reviewable act and an action before the competent court against the legally accountable author of the identified act. Whilst this is, in principle, a matter of course in legal proceedings, in which the reviewable act is the one addressed to the affected individual and the legally accountable author is the authority adopting this act, the correct identification of both and, linked to that, of the competent court turns into a major challenge in relation to austerity measures against the background of the complex legal framework described above. Possible acts could be the national measure implementing the MoU, the MoU itself or Council decisions reiterating the content of an MoU. Possible authors can be the national legislature, the ESM/EFSF, the Commission, the

Implementing Decision 2013/463/EU, O.J. 2013, L 250/40; Greece III: Council Implementing Decision 2015/1411/EU, O.J. 2015, L 219/12.

75. Regulation 472/2013 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, O.J. 2013, L 140/1.

76. Art. 7(2)(2) of Regulation 472/2013, ibid.

77. For a detailed commentary on the various compliance mechanisms in EU economic governance, see Amtenbrink and Repasi, "Compliance and enforcement in economic policy coordination in EMU", in Jakab and Kochenov (Eds.), *The Enforcement of EU Law and Values* (OUP, 2017), p. 165 et seq.

ECB, the Council and the Eurogroup. Possible courts can be national and EU courts. An action before national courts may, in principle, be available against national measures adopted by the national legislature, but identifying the reviewable act and the legally accountable author for an action before EU courts is much more difficult. The obvious choice is Council decisions reiterating MoUs, being Union acts, with the Council, being a Union institution, as the author; but this suffers from ambiguity with regard to its legal impact on the MoU embodying the conditionality for financial assistance. If judgments concerning these Council decisions have no impact on MoUs, bringing an action against these decisions won't fill the detected gap in judicial protection. In the alternative, bringing an action against the MoU, as the core document containing the policy targets for the recipient Member State, meets the problem that this document does not intend to produce any legal effects, and this is required in order to be challengeable act under Article 263(1) TFEU. Besides, turning to the choice of the legally accountable author, the ESM/EFSF, representing the creditors approving the content of the MoUs, are authors of an MoU but located outside the EU legal framework. Though located inside the EU legal framework, the Commission and the ECB are not the explicit authors of an MoU. The Eurogroup, finally, representing the same people that decide on behalf of the ESM/EFSF, is not considered a legally accountable author because of its lack of decision-making powers and of any formal structure.

This brief tour of possible options for claimants reveals that, at the level of EU courts, effective judicial protection requires either a legally established spillover of legal consequences concerning Council decisions to MoUs, so that Council decisions may constitute an appropriate reviewable act for an action for annulment,[78] or the MoU has to be drawn into the EU legal framework by imputing it to the Commission, the ECB[79] or the Eurogroup. In the latter case, the Eurogroup would have to be included implicitly in the list of legally accountable authors in Articles 263(1), 267(1)(b) and 340(2) TFEU.[80] Finally, the Commission, being a Union institution legally accountable before EU Courts, could, when exercising powers conferred upon it outside the EU legal framework, still trigger the non-contractual liability of the Union under Article 340(2) TFEU, since the establishment of unlawful conduct on the part of the Union institution does not require the presence of a reviewable act, so an action for damages could be admissible.[81]

78. This issue is addressed in section 6.4.2. *infra*.
79. This issue is addressed in section 6.4.3. *infra*.
80. This issue is addressed in section 6.4.1. *infra*.
81. This issue is addressed in section 6.4.4. *infra*.

6.3. *Judicial protection against austerity measures through direct actions at national courts*

In principle, austerity measures affect individuals in the form of national law implementing MoUs. Individuals could therefore seek judicial protection at national courts reviewing austerity measures against national constitutions. This path was taken by several claimants in Portugal, Cyprus and Greece. Some of these actions were successful; for instance, the Portuguese Constitutional Court struck down a 10 per cent cut of former public workers' pensions,[82] and the Greek Council of State declared the privatization of the water supply of the cities of Athens and Thessaloniki void.[83] In other cases, however, the national courts were conscious, when assessing the constitutionality of a national measure, of the risk of sovereign default as a consequence of the "conditionality mechanism" described above. Most prominently, the Portuguese Constitutional Court considered in its ruling on the suspension of bonuses for public employees in 2012 that "the consequences of an unqualified declaration of unconstitutionality could endanger the maintenance of the agreed financing and thus the State's solvency".[84] Also the Greek Council of State, apparently under the impression of the imminent danger of sovereign default, justified benefit cuts promised by the Greek State in the first MoU by referring to the overriding requirement of consolidating public finances.[85]

Against this background it becomes apparent that effective judicial protection against austerity measures in the euro area must not only consider national measures that actually affect individuals, but also the supranational *raison d'être* of these measures. The comparison with the EU directive is revealing in this respect. If the content of the national measure was imposed by EU directives, national courts would reject legal review by simply referring to the EU legal obligation of the Member State to implement directives under Articles 288(3) TFEU and 4(3) TEU. They would furthermore consider referring a preliminary question on the validity of the EU directive to the ECJ, which ensures the rule of law at EU level. In the context of austerity measures,

82. Ruling No. 862/2013. More details on the Portuguese Constitutional Court cases in relation to austerity measures can be found in Canotilho, Violante and Lanceiro, "Austerity measures under judicial scrutiny: The Portuguese constitutional case-law", 11 EuConst (2015), 155.

83. Decision of the Council of State No. 1906/2014.

84. Ruling No. 352/2012, English summary, available at: <www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html> (last visited 22 June 2017).

85. Decision of the Council of State No. 668/2012.

there is an MoU instead of an EU directive.[86] Failure to qualify the latter an EU act precludes a validity check by the ECJ.

It should be noted that the fact that an MoU is not intended to produce legal effects does not render a preliminary reference under Article 267(1)(b) TFEU inadmissible. In contrast to the notion of the challengeable act under Article 263(1) TFEU, in order to be a matter of upon which a preliminary ruling can be requested, an act does not, by definition, have to have a binding effect.[87] Yet, the act must at least participate in the legal consequences of another EU act producing legal effects. A harmonized technical standard, for example, which is a non-binding measure set by a private standardization body, is subject to the Court's jurisdiction under the preliminary reference procedure because a provision of an EU legal act refers to this standard. Article 4(2) of Directive 89/106/EEC[88] confers on products, which satisfy the technical requirements defined in the harmonized technical standards, the benefit of a presumption of conformity with the basic requirements of that directive allowing the CE marking to be affixed to them.[89] A norm of EU law hence draws a measure having no legally binding effect into the EU legal framework and, by that, into the ECJ's jurisdiction under Article 267(1) TFEU. This explains why an MoU concluded by Romania in order to receive balance of payments assistance from the EU's Balance of Payments Facility (BoPF) could be subject of a preliminary reference.[90] The MoU implements Article 3a of Regulation 332/2002 establishing a facility providing medium-term financial assistance for non-euro area Member States,[91] as foreseen in Article 143 TFEU. The legal consequences defined by the Regulation make the MoU a part of the EU legal framework and, by that, subject to preliminary questions.

In contrast to this, MoUs concluded in order to receive financial assistance for euro area Member States have, as described above (section 6.1), no comparable link with the EU legal framework and can therefore not be considered EU acts. As such, MoUs concluded by euro area Member States cannot be part of preliminary reference proceedings, although the case law of the ECJ does not require an act to be intended to produce legal effects in order to be a valid subject-matter. This also seems to be the reason why the Court

86. The effectiveness of a legal review of the supplementary Union acts is assessed in section 6.4.2. *infra*.

87. Case C-613/14, *James Elliott Construction,* EU:C:2016:821, para 35; Case C-188/91, *Deutsche Shell*, EU:C:1993:24, para 18; Case C-322/88, *Grimaldi*, EU:C:1989:646, para 8.

88. Council Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, O.J. 1989, L 40/12.

89. Case C-613/14, *James Elliott Construction*, para 38.

90. Case C-258/14, *Florescu,* EU:C:2017:448, paras. 34 et seq.

91. O.J. 2002, L 53/1.

rejected its jurisdiction to answer preliminary questions involving national measures implementing MoUs.[92] Although these questions concerned the interpretation of provisions of the EU Charter of Fundamental Rights, the Court's reasoning, according to which the Portuguese Budget Law implementing the MoU does not seek to implement EU law, can be applied to the determination of the Court's jurisdiction to answer a question on the validity of an MoU. The MoU is not an act that connects the EU legal order with the national legal order. This finding is not put into question by the Court's case law on the broad interpretation of the scope of application of the Charter with regard to national measures.[93] Although Article 51(1) of the Charter is now to be understood to already bind Member States when acting "within the scope of application of EU law", there is still the necessity for an EU "triggering rule".[94] The MoU is not such a "triggering rule" of EU origin.[95]

In view of this, judicial protection against austerity measures in the euro area at national level appears to be fragmentary, as their supranational *raison d'être* cannot be legally reviewed. The pressure to comply with an MoU exerted by the conditionality mechanism that sanctions non-compliance with the discontinuation of financial assistance to States in distress does not only touch national legislatures when adopting national implementing measures, but also national courts when reviewing these measures. Without the possibility to achieve a judicial invalidation of the supranational *raison d'être,* national courts appear to be inclined to shrink away from declaring national austerity measures void.

6.4. *Judicial protection against austerity measures through direct actions at EU courts*

The fragmentary judicial protection against austerity measures through national courts prompts claimants to bring direct actions at EU Courts. The ECJ's judgments in *Mallis* and *Ledra* opened the Court's gates for direct actions against austerity measures and specified at the same time the

92. Case C-128/12, *Sindicato dos Bancários do Norte,* EU:C:2013:149, paras. 10–12; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins,* EU:C:2014:2036, paras. 18–20; Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2327, paras. 13–15.

93. Case C-617/10, *Åkerberg Fransson,* EU:C:2013:105. See generally, Poulou, op. cit. *supra* note 2.

94. Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013), 1267, at 1279.

95. Ibid., at 1286.

conditions for bringing such actions. Before going into details, it is important to clarify which issues the Court ruled on and which issues remain unsettled. The ECJ ruled on the nature of Eurogroup statements without classifying whether the Eurogroup could be considered a valid defending party in an action before it.[96] The Court did not discuss direct actions in relation to "supplementing Union acts" such as Council decisions reiterating austerity measures set by an MoU. In the context of the action for annulment, the Court ruled on criteria to determine whether a measure can be attributed to other Union institutions than the issuing body and declined to impute Eurogroup statements or MoUs to the Commission or the ECB. As for the action for damages, the Court set criteria under which a failure by the Commission to adopt a measure can lead to an unlawful conduct on its part, triggering the non-contractual liability of the Union. The Court concluded that a "bail-in", even if it is only mentioned in an MoU, can violate the Charter, but that it is justified in the case at hand. The question of the causal link between an MoU concluded after the enactment of a national austerity measure remained open, as the existence of unlawful conduct by the Commission was dismissed by the Court because the "bail-in" was justified. In the following, the emphasis will be placed on the Eurogroup as a defending party of direct actions (6.4.1), on the MoU as a reviewable act and the prospects of success of direct actions against supplementing Union acts (6.4.2), on the attribution of measures adopted by other bodies to Union institutions in the context of the action for annulment (6.4.3), and on the impact of measures adopted by other bodies on the establishment of unlawful conduct on the part of Union institutions in the context of the action for damages (6.4.4). Since the focus of these comments is on judicial protection against austerity measures in the euro area, the question whether a "bail-in" is a violation of Article 17(1) of the Charter and its justification by the Court will not be addressed in the following.[97]

6.4.1. *The Eurogroup as defending party of direct actions*

The claimants in *Mallis* brought their actions against a statement of the Eurogroup, as this was the only document published before the adoption of the contested "bail-in". Although the actions were directed against the

96. This derives from the fact that in *Mallis*, at para 61, the Court only addresses the annulment of a Eurogroup statement and refuses to equate the Eurogroup with a Council configuration or to classify it as body, office or agency. The Court does not, however, make a statement on the application of the *Les Verts* case law to the Eurogroup, as can be seen from the reference to paras. 55–65 of the Opinion of A.G. Wathelet, thus excluding para 66, in which the A.G. mentioned this possibility to teleologically extend Art. 263(1) TFEU to the Eurogroup.

97. See on this question e.g. Artemou, "Rights of European Union depositors under Article 17 of the Charter of Fundamental Rights after the Cyprus bail-out", 28 *Pace International Law Review* (2016), 205.

Commission and the ECB, prior to discussing whether a Eurogroup statement can be imputed to Union institutions, the questions should have been addressed whether the Eurogroup could be considered a defending party in direct actions. The GC referred in this regard to the issue of the "mistaken designation" of a defendant by the applicants.[98]

The Eurogroup is not mentioned amongst the parties in Article 263(1) TFEU. It can also not be considered a "body, office or agency of the Union". The common denominator of these is the presence of legal personality established by an EU act and its inclusion in the institutional and administrative structure of the EU, as reflected in the EU budget.[99] The Eurogroup has no legal personality. Article 137 TFEU and Protocol No. 14 create a forum of exchange of the finance ministers of the euro area Member States. If an actor has no legal personality, in order to be a defending party of direct actions, Article 263(1) TFEU explicitly mentions it, such as e.g. the European Council. Therefore, the Eurogroup can only be considered a party under Article 263(1) TFEU if it meets the criteria of the famous *Les Verts* judgment. According to this case law, an entity can be a valid defending party although it is not mentioned in Article 263(1) TFEU if it is "capable of taking decisions affecting individuals".[100] The rationale underlying this judgment is the fundamental principle of the rule of law "inasmuch as neither [EU] Member States nor [EU] institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[101]

Again, a look at the wording of Article 137 TFEU and Protocol No. 14 appears to suggest that the Eurogroup cannot adopt decisions intended to produce legal effects. Neither confer any explicit competences on the Eurogroup. The absence of legal effects is in particular true with a view to the contested Eurogroup statement, which used language giving rise to the impression that it only took note of political developments that happened in Cyprus, without having exerted any kind of influence on them itself. The Eurogroup statement has the appearance of being "purely informative". Based on this assessment, the conclusion that the Eurogroup is not a defending party under Article 263(1) TFEU since the Eurogroup statement is not a legal act affecting third parties is certainly valid if not compelling.

98. Case T-327/13, *Mallis*, para 36.

99. Opinion of A.G. Jääskinen in Case C-562/12, *Liivimaa Lihaveis*, EU:C:2014:155, para 35.

100. Case 294/83, *Les Verts,* paras. 23 and 24; Opinion of A.G. Jääskinen in Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo,* EU:C:2014:2416, para 51. In Case T-117/08, *Italy* v. *EESC*, EU:T:2011:131, paras. 32 et seq. The GC recognizes the EESC as a valid defending party by reference to this reasoning.

101. Case 294/83, *Les Verts,* para 23.

Yet, a different understanding appears to be arguable, according to which the Eurogroup is more than an informal meeting, when taking the other fora into account that bring together the same people composing the Eurogroup: the ESM Board of Governors (Art. 5(1) and (2) ESM Treaty) and the ECOFIN Council when taking decisions mentioned in Article 139(4) TFEU or on the basis of Article 136 TFEU or of secondary law, which was adopted in conjunction with Article 136 TFEU (such as the "two pack" regulations). In the latter case, the finance ministers of all EU Member States are allowed to be present during the deliberations, but only those from the euro area Member States have the right to vote.[102] A statement of the Eurogroup "of a purely informative nature" foreshadows, against this background, subsequent decisions adopted by the ESM (and hence outside the EU legal framework) or the Council (but maybe only "approving" national measures after their enactment), in particular when the terminology used by the statement corresponds to that of the subsequent decisions. This "foreshadowing effect" could form the basis for an argument according to which legally binding decisions adopted by another forum of the members of the Eurogroup can be attributed to the Eurogroup. In line with the *Les Verts* judgment the Eurogroup can then be considered a defending party in an action for annulment. The reference to the *Les Verts* case law implies that a number of conditions have to be fulfilled in order to reach this conclusion: there has to be a lacuna in the system of judicial protection against measures of European origin that cannot be bridged other than by an extensive interpretation of Article 263 TFEU. The *Les Verts* case law is built on the assumption that the system of legal remedies and procedures in the Treaty is complete, albeit special conditions of admissibility limiting the direct access to the Court for natural and legal persons. If therefore a lacuna in judicial protection can be closed by obtaining a preliminary ruling on the validity of the contested measure of European origin, via national judicial proceedings, direct access to EU courts remains restricted. The above-mentioned orders of the Court rendering preliminary references from Portuguese courts in the context of austerity measures inadmissible prove, however, in principle, the presence of a lacuna in the EU system of legal remedies and procedures which must be filled by opening the doors to direct actions.[103]

102. It should be noted that the Eurogroup meets usually "on the eve of the Economic and Financial Affairs Council meeting", see <www.consilium.europa.eu/en/council-eu/euro group> (last visited 22 June 2017); this carries the risk of advanced deliberations in the Eurogroup and subsequent voting in the ECOFIN Council without in-depth discussions.

103. Kilpatrick, "On the Rule of Law and economic emergency: The degradation of basic legal values in Europe's bailouts", 35 *Oxford Journal of Legal Studies* (2015), 1, at 24–26, shedding light on this rule of law challenge.

Although this argument could lead to an admissible direct action against the Eurogroup, it would not change the outcome of the Court's decision in *Mallis*. Not only was this action not directed against the Eurogroup (but the Commission and the ECB), it was also limited to the Eurogroup statement without further reference to any decision with a legally binding effect. To reinterpret the action from one directed against the Commission and the ECB aiming at annulling a Eurogroup statement as one directed against the Eurogroup aiming at annulling corresponding paragraphs in the Eurogroup statement, the MoU concluded between Cyprus and the ESM, Council Decision 2013/236 and Council Implementing Decision 2013/436, would certainly transgress the limits of the "mistaken designation", as it would amount to an entire new action.[104]

6.4.2. *The MoU as reviewable act and the prospects of success of direct actions against supplementing Union acts*

In contrast to the *Mallis* case, focusing on the Eurogroup statement, *Ledra* revolves around the MoU. In passing, the GC[105] and the Advocate General[106] deal with the quality of an MoU as a reviewable act. Whilst legal scholarship discusses the legal status of MoU as legally binding[107] or not,[108] the GC and the Advocate General simply refer to the parties of the MoU being located outside the EU legal framework, whereby EU courts have no jurisdiction to review MoUs. The arguments classifying an MoU an act which is not intended to produce legal effects and which is concluded between parties outside the EU legal framework are ultimately more convincing. The choice of an MoU, being an instrument that traditionally does not produce legal effects, in order to lay down the conditions for financial assistance instead of an international legal agreement is a deliberate one made by the parties. As described in section 6.1, the MoU embodies the unilateral declaration of intent of a Member State to adopt certain policy measures, and the unilateral declaration of intent of the

104. A.G. Wathelet in his Opinion in *Mallis*, paras. 108 to 115, viewed this reinterpretation by the GC as crossing these limits.

105. Case T-289/13, *Ledra*, paras. 56 to 58.

106. Opinion in *Ledra*, paras. 123 to 129.

107. Fischer-Lescano, *Human Rights in Times of Austerity Policy* (Nomos, 2014), pp. 32 to 37, referring to Klabber, *The Concept of Treaty in International Law* (Kluwer Law International, 1996), p. 42; Cisotta and Gallo, "The Portuguese Constitutional Court case law on austerity measures: A reappraisal", in Kilpatrick and De Witte (Eds.), *Social Rights in Times of Crisis in the Euro Area: The Role of Fundamental Rights' Challenges,* EUI Working Papers 2014/05, 85, 88; Kilpatrick, "Are bailouts immune to EU social challenge because they are not EU law?", 10 EuConst (2014), 393, 412.

108. Aust, *Modern Treaty Law and Practice,* 3rd ed. (Cambridge University Press, 2013), pp. 48–50; Greek Council of State, Ruling No. 668/2012, para 27 and Ruling No. 2307/2014, para 19.

future creditor(s) to provide for financial assistance. Non-compliance with the promise made by the Member State in financial distress is sanctioned by non-payment. Creditors have, however, no legal claim to compliance. At the same time, debtors have no legal claim to request payment in the event of a successful implementation of the promised policy reforms. The legal basis for disbursement is not to be found in the MoU, but in the legal act establishing the creditors' institution, which provides for a stand-alone decision of the governing bodies on the disbursement of each tranche of financial assistance.[109]

This understanding of the MoU brings the Council decisions reiterating the content of MoUs into focus.[110] These decisions are reviewable acts under Article 263(1) TFEU and the Council as their author is legally accountable for these decisions. Direct actions against such Council decisions brought by individuals require, however, that the contested decisions, being addressed to Member States, are of individual and direct concern to the claimants in order to render the action admissible. Because of the "wide discretion" left to the national authorities as to how they implement policy reforms referred to in these decisions, the GC already ruled that these decisions are not of direct concern to individuals.[111] This requirement of "direct concern" does not need to be met for the admissibility of preliminary references, which also explains why Advocate General Wathelet suggests precisely this path for obtaining effective judicial protection against austerity measures in the euro area.[112]

Yet, the prospect of success of this path depends on whether there is a legal spillover of Court judgments concerning Council decisions to MoUs. Only if the substance of an MoU has to be modified as a consequence of a Court decision in a preliminary reference procedure on Council decisions reiterating this substance, can effective judicial protection against austerity measures in the euro area be achieved by way of preliminary rulings on these Council decisions. Assuming such legal spillovers appears, however, rather doubtful. The legal framework as described in section 6.1 clearly shows that conditionality is attached to the MoU and not to the Council decisions reiterating the MoU.

109. With regard to the ESM: Arts. 13(5), 15(5), 16(5) and 17(5) of the ESM Treaty.

110. Opinion in *Mallis*, para 134; Kilpatrick, "On the Rule of Law and economic emergency: The degradation of basic legal values in Europe's bailouts", 35 *Oxford Journal of Legal Studies* (2015), 1, 18; Kilpatrick, op.cit. *supra* note 107, 409–413; Tuori and Tuori, *The Euro Area Crisis* (Cambridge University Press, 2014), pp. 237–238; Costamagna, "Saving Europe 'under strict conditionality': A threat for EU social dimension?", Centro Einaudi, Working Paper LPF No. 7 (2012), 14; Poulou, "Austerity and European Social Rights", 15 *German Law Journal* (2014), 1145, 1160.

111. Case T-541/10, *ADEDY*, paras. 84, 87; Case T-215/11, *ADEDY*, paras. 97, 99.

112. Opinion in *Mallis*, paras. 91, 98.

The disbursement of financial assistance from the ESM is therefore only conditional upon compliance with the MoU and not with the Council decision reiterating the MoU. Article 7 of Regulation 472/2013 does not link the "macroeconomic adjustment programmes", which are adopted by these Council decisions, to the disbursement of financial assistance. Declaring parts of these Council decisions void would hence not affect conditionality. This could only be seen differently if the MoU has to be adapted to the operative part of a judgment of the ECJ on Council decisions reiterating the MoU. The provisions of the ESM Treaty governing the MoUs do not, however, provide for such an adaptation obligation. Article 13(3)(2) of the ESM Treaty states that the "MoU shall be fully consistent with the measures of economic policy coordination" under EU law. There must hence be an alignment between the MoU and the "macroeconomic adjustment programmes", being measures of economic policy coordination, before the formal adoption of an MoU. Furthermore, one can conclude from the power of the Commission to sign the MoU on behalf of the ESM in Article 13(4) of the ESM Treaty that there is the duty on the part of the Commission to check the draft MoU's compliance with EU law, including "macroeconomic adjustment programmes", before signature.[113] Yet, there is no provision in the ESM Treaty, which would empower Union institutions to modify an already existing MoU in accordance with any changes made to "macroeconomic adjustment programmes" or any other Council decision reiterating the content of the MoU, including a possible partial annulment by the ECJ.[114] Against this background, judicial protection against Council decisions reiterating the content of MoUs appears not to be sufficient in order to bridge the detected gap in judicial protection against austerity measures in the euro area. Council decisions and MoUs co-exist next to each other without a legal obligation to adapt the latter to the former after the MoU entered into force.

6.4.3. *The attribution of measures adopted by other bodies to Union institutions in the context of the action for annulment*

The core issue addressed by the two judgments is the attribution of measures adopted by other bodies (such as the Eurogroup in *Mallis* or the ESM in *Ledra*) to Union institutions. The ECJ stated in this regard that a measure formally adopted by another body is to be imputed to Union institutions if it is the "expression of a decision-making power" of those institutions.[115] Applying this reasoning to the Eurogroup statement, the Court examined first

113. Ibid., para 82.

114. Kilpatrick, op.cit. *supra* note 107, 403 comes to a different conclusion referring to the EEOP 147, p. 15; that is, however, not a legal text.

115. Judgment in *Mallis*, para 57.

whether the Commission and the ECB possess own decision-making rights within the Eurogroup or within other fora composed of the same people as the Eurogroup, such as the ESM, and secondly whether the Eurogroup or other fora composed of the same people have received delegated powers from the Commission or the ECB or act under the supervision of these institutions. Within none of them do the Commission or the ECB exercise own powers to make decisions, and none of them has received any powers from these institutions. The Eurogroup has, according to Article 137 TFEU and Protocol No. 14 no competences to take decisions and the decision-making powers of the ESM were conferred on it by the Contracting Parties. The exercise of the ESM powers is not supervised by Union institutions, so acts adopted by exercising these powers cannot be imputed to the Commission or the ECB. This assessment is in line with GC's case law on imputing measures adopted by Union agencies to the Commission.[116] Consequently, the action for annulment of measures adopted by other bodies than the Union institutions against which the action was directed has to be considered inadmissible.

6.4.4. *Impact of measures adopted by other bodies on triggering the non-contractual liability of the Union*

The doors to the action for annulment in the context of austerity measures appear to be closed for affected individuals either because measures adopted outside the EU legal framework cannot be imputed to Union institutions, or because a reviewable act is not of direct concern to the individual bringing such action. These obstacles are, however, less relevant when individuals bring an action for damages under Articles 268, 340(2) TFEU. The interest pursued by the individual is then not aimed at nullifying an act but at a compensation for damages, whilst the act remains valid. Instead of proving that a reviewable act is of individual and direct concern, the individual must then only assert having sustained damages due to unlawful conduct on the part of Union institutions.[117] In order to establish the non-contractual liability of the Union, a four-step test must be carried out.[118] First, a breach of a rule of EU law intended to confer rights on individuals has to be identified. Second, Union institutions must have contributed, through action or inaction, to this breach in a sufficiently serious manner. Third, there must be actual and certain damage. Fourth, a direct causal link between the damage and the sufficiently

116. Case T-133/03, *Schering-Plough* v. *Commission and EMEA,* EU:T:2007:365, paras. 22–23; Case T-439/08, *Kalliope Agapiou Joséphidès* v. *Commission and EACEA,* EU:T:2010:442, para 34.

117. Gutman, "The evolution of the action for damages against the European Union and its place in the system of judicial protection", 48 CML Rev. (2011), 695, 710 et seq.

118. Case C-352/98 P, *Bergaderm and Groupil* v. *Commission*, EU:C:2000:361, para 42.

serious breach must be established in a sense that the damage is not to be found to be too remote from the unlawful conduct on the part of the Union institutions and that the violation can be imputed to the Union institutions' action or inaction. It should be noted that non-contractual liability of the Union for *lawful* acts or conduct is excluded by the case law of the ECJ,[119] with the notable exception of claims for compensation because of unjustified enrichment on the part of the Union,[120] which cannot be considered a "liability for damages" in the strict sense.[121]

A sensible evaluation of the Court's judgment in *Ledra* requires to identify at the very outset the issues the Court was addressing and those that were not mentioned by it in its findings. Conclusions with regard to future cases can only be drawn from issues that the Court dealt with in its judgment. Since the action was dismissed, although the appeals were upheld, the Court did not have to discuss all conditions necessary for a successful claim for compensation but only those leading to the dismissal. Amongst the requirements for establishing the non-contractual liability of the Union, the Court dealt with the rule of EU law which is intended to confer rights on individuals, the breach of this rule, the margin of manoeuvre in indicating the presence of a sufficiently serious breach in the context of the adoption of an MoU and the imputability element of the causal link between the unlawful conduct on the part of the Commission and the alleged damage.

The individual right that was allegedly breached by the Commission in *Ledra* was the right to property, as enshrined in Article 17(1) of the Charter, which binds the Commission as a Union institution without any reservations according to Article 51(1) of the Charter. Although the "bail-in", as requested from Cyprus in the MoU, falls within the scope of Article 17(1) of the Charter, the Court rejected a breach of the right to property because a "bail-in" can be justified as a proportionate measure in order to ensure the stability of the banking system of the euro area as a whole. These two points represent the first step in assessing the Union's non-contractual liability under Article 340(2) TFEU. No further discussion would have been necessary in the proceedings in the *Ledra* case. Yet, since the GC dismissed the action not because there was no breach of EU law but because the contested paragraphs

119. Joined Cases C-120 & 121/06 P, *FIAMM et al.* v. *Council and Commission*, EU:C:2008:476, paras. 167–179.

120. In this case the applicant has merely to show that there is an enrichment on the part of Union institutions, for which there is no valid legal basis, and an impoverishment on the part of the applicant which is linked to that enrichment, cf. Case C-47/07 P, *Masdar* v. *Commission*, EU:C:2008:726, paras. 47–50.

121. The Court accepted the admissibility of an action under Arts. 340(2) and 268 TFEU because of the non-contractual nature of the claim in order to avoid a gap in effective judicial protection at EU level (ibid., para 50).

on the "bail-in" in the MoU could not be imputed to the Commission, the Court was forced, on appeal, to turn to the question of imputability although this is an element of the causality test, which constitutes the last step in establishing the non-contractual liability of the Union.

Crucial for establishing whether a breach of an individual right can be imputed to a Union institution is the precise identification of the conduct that is found to have contributed to the breach. The GC considered the adoption of the MoU to constitute this conduct. The Court, however, referred to the Commission's inaction in overseeing the application of Union law (Art. 17(1) TEU) and in ensuring that MoU are consistent with EU law (Art. 13(3) and (4) ESM Treaty). For the Court, it is the Commission's inaction in the context of the adoption of the MoU that constitutes the conduct to examine when deciding on the imputability of the breach. The Court's view appears to be the more convincing solution. When identifying the conduct that contributed to an alleged violation of EU law, one has to take all those steps in a chain of events into consideration that, if the acting institution had decided differently, would beyond any reasonable doubt have prevented the alleged breach from materializing. This includes the formal adoption of the MoU, which cannot be imputed to the Commission, but it also includes the signature of the MoU, which can only be done by the Commission according to Article 13(4) of the ESM Treaty, and the negotiations of the content of an MoU, which are led by the Commission "in liaison with the ECB and, wherever possible, together with the IMF" (Art. 13(3) ESM Treaty). Signing an MoU and negotiating it even though the Commission doubts the consistency of parts of the MoU with EU law form a stand-alone contribution of the Commission to an alleged breach of EU law by these parts of the MoU once the latter is formally adopted. It is therefore convincing to attribute an alleged breach of EU law by an MoU to the Commission for the purpose of establishing the non-contractual liability of the Union. The fact that the MoU is an act located outside the EU legal framework does not change this finding since, with reference to *Pringle*, "the tasks conferred on the Commission and the ECB [by the ESM Treaty] do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[122]

Two elements amongst the requirements in order to establish the non-contractual liability of the Union for breaches of fundamental rights by austerity measures still have to be addressed: the sufficiently serious manner in which the Commission contributed to the alleged breach and the direct causal link between the damage and the unlawful conduct, inasmuch as the damage could be found to be too remote from the conduct. Crucial for

122. Case C-370/12, *Pringle*, para 162.

establishing a sufficiently serious breach of an individual right is the determination of the margin of manoeuvre a Union institution has at its disposal when acting within the scope of the allegedly violated individual right. If this margin is considerably reduced, or even correlates to a duty to act, the mere infringement of EU law may suffice to establish the existence of a sufficiently serious breach of that right.[123] If a Union institution has discretion when acting, there is only an unlawful conduct on the part of this institution if it "manifestly and gravely disregarded the limits on its discretion".[124] When defining the limits of the margin of manoeuvre a Union institution has at its disposal, the field, the circumstances and the context in which that duty was imposed on the EU institution or body concerned, as well as the complexity of the situations to be regulated, must be taken into account.[125]

In its judgment in *Ledra,* the ECJ only implicitly addresses the issue of a sufficiently serious breach and the Commission's margin of manoeuvre in the field of negotiating and adopting an MoU, as it was not necessary for the dismissal of the actions (because there was no breach). Yet, the Court stresses the obligation of the Commission to ensure that MoU are consistent with EU law[126] "in the context of the adoption of the Memorandum of Understanding".[127] This reasoning in the judgment should be seen against the Opinion of the Advocate General; the latter rejected a sufficiently serious breach because of the Commission's broad discretion. In *Ledra,* the determination of the margin of manoeuvre of the Commission depended on the interpretation of Article 17(1) TEU and the Commission's role as "guardian of the Treaties" when acting within the scope of Charter rights in the context of the adoption of MoUs. In interpreting Article 17(1) TEU, the ECJ differs from the Opinion of its Advocate General with far-reaching consequences.

The Court identified in Article 17(1) TEU a duty for the Commission "to refrain from signing a memorandum of understanding whose consistency with EU law it doubts",[128] whereas the Advocate General considered that the Commission has "no obligation as to the result to avert any possible conflict or tension between provisions of an act adopted by other entities and any EU

123. Case C-337/15 P, *European Ombudsman* v. *Staelen,* EU:C:2017:256, para 39; Case C-440/07 P, *Commission* v. *Schneider Electric*, EU:C:2010:324, para 160; Case C-282/05 P, *Holcim* v. *Commission*, EU:C:2007:226, para 47.

124. Case C-352/98 P, *Bergaderm*, para 43.

125. Case C-337/15 P, *Staelen,* para 40; Case C-440/07 P, *Schneider Electric*, para 161; Case C-282/05 P, *Holcim*, para 50; Joined Cases C-363 & 364/88, *Finsider and Others* v. *Commission*, EU:C:1992:44, para 24.

126. Judgment in *Ledra*, paras. 63, 66 and 67.

127. Ibid., paras. 63, 66, 67 and 68.

128. Judgment in *Ledra*, para 59.

rule".[129] Whilst for the Court "the Commission's inaction in breach of the obligation to ensure, in the context of the adoption of the Memorandum of Understanding, that the latter was in conformity with EU law"[130] constitutes unlawful conduct, the Advocate General considers it sufficient on the part of the Commission "to deploy its best endeavours to prevent" a breach of EU law by an MoU.[131] The Advocate General understands the powers linked to the Commission's role as "Guardian of the Treaties" in Article 17(1) TEU as discretionary powers. His reasoning builds on a comparison of these discretionary powers to the power to act against Member States infringing EU law under Articles 258, 260 TFEU. With a view to the latter there is indeed a well-established case law, according to which the Commission has no obligation to initiate infringement proceedings against Member States although they are breaching EU law, so a failure to do so cannot trigger the Union's non-contractual liability.[132]

Yet, this comparison is less persuasive than appears at first sight. In the context of the infringement procedure, the Commission is entrusted to defend EU law that was already breached by Member States. This should be distinguished from a situation in which the exercise of powers conferred upon the Commission such as the negotiation and the signature of an MoU contribute to a potential breach of EU law. Refusing to negotiate certain conditions in the MoU or to sign the MoU on behalf of the ESM would prevent such a breach coming into existence. In the first situation, the violation of EU law was committed by a Member State without any involvement of the Commission, whereas in the second situation the Commission would contribute to the violation. It can therefore well be argued that, under Article 17(1) TEU, there is discretion regarding the pursuit of infringements committed by other actors but there is a duty on the part of the Commission not to contribute to any violation of EU law. This is precisely the position of the Court.[133] In sum, in the context of the adoption of MoU, a violation of a fundamental right, as it is guaranteed by the Charter, by an MoU amounts to a sufficiently serious breach of EU law by the Commission provided that the violation cannot be justified.

Lastly, the issue of the damage that could be found to be too remote from the unlawful conduct is to be addressed. This issue is of particular interest in the

129. Opinion in *Ledra*, para 80.

130. Judgment in *Ledra*, para 63.

131. Opinion in *Ledra*, para 70.

132. Case 247/87, *Star Fruit*, paras. 10–14; Case C-72/90, *Asia Motor France* v. *Commission*, EU:C:1990:230, para 13; GC, Case T-202/02, *Makedoniko Metro and Michaniki* v. *Commission*, EU:T:2004:5, paras. 42–47.

133. Interestingly, this is also the position of the A.G. in the *Mallis* case, in contrast to his colleague in the *Ledra* case, cf. Opinion in *Mallis*, para 82.

Ledra case, as the "bail-in" took place before the formal adoption of the MoU. The GC focused on the causal link, which it denied. Reading the Court's judgment setting aside the orders of the GC carefully reveals that the causal link cannot be rejected that easily. It is true that the signature by the Commission took place after the "bail-in". The Court, however, did not establish the unlawful conduct of the Commission on the basis of the signature of the MoU, but on the basis of the Commission's inaction in breach of the obligation to ensure the conformity of the MoU with EU law. This obligation applies to the Commission not only when signing the MoU but also when negotiating it. Negotiations with the Republic of Cyprus by the Commission, together with the ECB and the IMF, were initiated on 27 June 2012.

Whilst basing the unlawful conduct on a failure by the Commission allows legally to establish a causal link with damages suffered before the formal adoption of an MoU, it remains questionable whether this will help claimants in practice. In the context of the action for damages, the burden of proof that all conditions are fulfilled is on the claimants.[134]

7. Conclusions

Since the famous *Marbury* v. *Madison* case of the US Supreme Court[135] landmark rulings of highest courts that establish long-lasting principles limiting the powers of the defending public authorities were not favourable for the claimants. The *Ledra* judgment appears to be a comparable landmark decision with regard to the judicial protection against austerity measures in the euro area. It closed the doors for individuals to the action for annulment against MoUs and Eurogroup statements, but opened them to the action for damages against the Commission. The Court thus bridged, unexpectedly, one of the gaps in judicial protection against austerity measures at EU level. Although it will pose a significant challenge for future claimants to convince the Court that a violation of individual rights fails to meet the justification test,[136] the fact that the main negotiator of austerity measures is not shielded

134. Case C-100/07 P, *É.R. and Others* v. *Council and Commission,* EU:C:2007:585, para 27.

135. 5 U.S. (1 Cranch) 137 (1803).

136. In its first judgment after the *Ledra* case, the GC rejected claims for compensation in Case T-531/14, *Sotiropoudou and others* v. *Council,* EU:T:2017:297 because of the broad margin of appreciation the Council is supposed to have when adopting policy recommendations under Article 126(7) TFEU and because of a justification of a potential violation of Charter rights by the objective of achieving the budgetary health of the Member State in financial distress (para 89).

against any kind of judicial accountability will already lead to more carefully negotiated policy reforms in future MoUs.

Yet, there are still gaps in the system of judicial protection. This refers most notably to the fact that a successful action for damages does not affect the validity of the supranational *raison d'être* of national austerity laws. Against this background, the possibility to check macroeconomic adjustment programmes that are adopted as Council decisions under Article 7 of Regulation 472/2013 via the preliminary reference procedure becomes crucial. The Union legislature introduced the instrument of macroeconomic adjustment programmes in order to draw political commitments entered into by Member States in financial distress in order to receive financial assistance from the ESM into the EU legal framework. Whilst Article 7(2)(2) of Regulation 472/2013 establishes an obligation on the part of the Commission to ensure that MoUs signed on behalf of the ESM or of the EFSF are fully consistent with macroeconomic adjustment programmes, the legal situation is unclear as to the relationship between modifications of macroeconomic adjustment programmes and MoUs that already entered into force. Since MoUs define the conditions for financial assistance of the ESM and not the macroeconomic adjustment programmes, a validity check of the latter by the Court in a preliminary reference procedure is rendered practically meaningless if a preliminary ruling does not also lead to a modification of political commitments embodied in an MoU.

Future case law will show whether the ECJ is willing to continue along the path set out in *Ledra* in filling the gaps in judicial protection against austerity measures in the euro area.

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