

## 34 AN OVERVIEW OF LITIGATION IN THE CONTEXT OF FINANCIAL ASSISTANCE TO EUROZONE MEMBER STATES

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Crisis-driven austerity measures adopted by some Eurozone Member States to satisfy the conditions for receiving financial assistance have raised concerns over the level of protection of fundamental rights afforded to individuals, and have thrown into sharp relief the problems surrounding the efficiency and the lack of transparency of crisis management mechanisms at the national and EU level. This contribution provides an overview of some of the most prominent litigation arising in the context of financial assistance given to Portugal, Greece, and Cyprus. Growing literature has examined the macroeconomic adjustment programmes of these countries from a constitutional (*viz.* the legal competence of the EU bailouts/bail-ins) and a social policy perspective (*viz.* the impact of the programmes on labour and employment social rights). Taking stock of these accounts, this article seeks to provide an updated picture of the most relevant case law, focusing on the position of the individual as a litigant.

The article does not purport to provide an all-encompassing or comparative analysis of the litigation concerning the Eurozone bailouts. Such a challenging task would require extensive analysis not only of cases brought before numerous national courts, but also of the specifics of the national judicial systems of the three Eurozone Member States.<sup>1</sup> Instead, this contribution aims to bring together the main attempts that have taken place so far to challenge measures adopted by the three Eurozone Member States in order to fulfill the conditions for receiving financial assistance. To this effect, the article first explains the concept of conditionality in the context of financial assistance (i). It then outlines some of the most pertinent cases at the national level (ii) and discusses the litigation before the Court of Justice of the EU (CJEU), focusing on recent developments in the case law con-

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1 For an example of discussion about country-specific case law see M. Canotilho, T. Violante, R. Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case law', Vol. 11(1) *E.C.L.Rev.*, 2015, p. 155.

cerning financial assistance by the European Stability Mechanism (ESM) (iii). It concludes with an outlook on future developments in this saga of litigation. As a concise account of relevant case law, the article could be of interest to anyone who wishes to follow the development of the judicial responses to the Eurozone bailouts.

### 34.1 INTRODUCTION

A host of key crisis management mechanisms have been adopted at the supranational level during the Eurozone financial and economic crisis with the aim of improving the economic governance framework of the Economic and Monetary Union (EMU). Besides the reforms in the EMU budgetary constraints, mechanisms of financial stabilization that could provide financial assistance to troubled Member States were also established.<sup>2</sup> These include the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF), both of which have been replaced by the European Stability Mechanism (ESM). Whilst the EFSM was adopted on the basis of EU law (Art. 122(2) TFEU) in accordance with a Council Regulation, the EFSF was established by an agreement of the Heads of State and Government of the Eurozone as a private company incorporated under Luxembourg law, and the ESM on the basis of an international Treaty adopted by the Eurozone Member States.<sup>3</sup>

As a result of the EMU's legal overhaul, numerous judicial challenges concerning the Eurozone crisis response mechanisms have been brought before both EU and national courts. These cases can be categorised into two groups.<sup>4</sup>

Firstly, there are cases disputing the constitutionality of the revised construction of the EMU. *Inter alia*, these include the seminal *Pringle*<sup>5</sup> and *Gauweiler (OMT)*<sup>6</sup> judgments of the European Court of Justice (ECJ). It is well known by now that the cases started off as domestic claims and reached the ECJ via preliminary reference requests from the Irish and the German courts respectively. In this category of cases we can also include, among

2 For an overview see R. Smits, 'The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments', *Fordham Int'l L.J.* 38(4), 2015, 1135.

3 See respectively: Consolidated Version of the European Financial Stability Facility Framework Agreement (adopted 7 June 2010, entered into force 18 October 2011); Council Regulation 407/2010 OJ 2010 L118/1; Consolidated Version of the Treaty establishing the European Stability Mechanism (adopted 2 February 2012, entered into force 27 September 2012) (hereinafter ESMT) and Council Decision No. 2011/199/EU OJ 2011 L 91/1.

4 For a slightly different categorisation see A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, OUP, Oxford 2015, p. 122.

5 Judgment of 27 November 2012, Case C-370/12, *Pringle v. Government of Ireland, Ireland and the Attorney General*, [2012] ECR I-756.

6 Judgment of 16 June 2015, Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag*, [2015] ECR I-400.

others, the Estonian challenge to the constitutionality of the ESM Treaty (ESMT), and the French challenge to the ratification of the Fiscal Compact.<sup>7</sup>

Secondly, there are cases adjudicated at the national and EU level concerning the adoption and implementation of macroeconomic adjustment programmes (i.e. of the programmes establishing the conditions for financial assistance), in which applicants contested some of the measures that were adopted by Member States for implementing these programmes. This category includes cases brought by individuals, and associations of individuals, regarding the Greek, Portuguese, and Cyprus bailouts (or ‘bail-in’ in the case of Cyprus).<sup>8</sup> The three Member States received financial assistance in different forms; either as a bilateral loan complemented by arrangements with the International Monetary Fund (IMF), or through the EFSM, EFSF, or ESM.

This article focuses on the second set of cases, which concern the implementation of the macroeconomic adjustment programmes by the Member States in need of financial assistance. It begins by explaining the procedure for the provision of financial assistance to the Member State requesting assistance, and the reasons why individuals may wish to contest the legality of the macroeconomic adjustment programmes. It will then briefly discuss the most prominent case law from national courts in Portugal, Greece, and Cyprus, highlighting some of the similarities or differences in their approach. Subsequently, it will turn to the (currently) limited yet significant litigation at the EU level to explain the most pertinent questions currently facing the CJEU in the context of financial assistance under the ESM. Since the ESM is the EU’s permanent crisis resolution mechanism for Eurozone Member States, questions concerning its function, scope, and reach are not only apposite to the pending cases, but also with regard to future financial assistance packages.

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7 Estonian Supreme Court, Constitutional Case No. 3-4-1-6-12, judgment of 12 July 2012; France Constitutional Court Decision no 2012-653 DC, judgment of 9 August 2012; For an analysis see S. Bardutzky and E. Fahey, ‘Who got to adjudicate the EU’s financial crisis and why? Judicial review of the instruments of a postnational legal order: adjudicating the practices of the Eurozone’ in M. Adams, F. Fabbrini, P. Larouche (Eds.), *The Constitutionalization of European Budgetary Constraints*, Hart, Oxford 2014; F. Fabbrini, ‘The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective’, *Berkeley J. Int’l Law*, Vol. 32, 2014.

8 Ireland was also a recipient of a financial assistance package, see [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/ireland/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm); Spain received only partial financial assistance by the ESM for the purpose of recapitalising its banking system and thus the details of its agreement with the ESM are different in nature than those of the other four Member States. With regard to the distinction between ‘bailout’ and ‘bail-in’, this has been explained as follows: “The term bail-out describes a rescue operation in which the onus is placed on external investors or the taxpayer. The term ‘bail-in’ refers to a rescue operation in which the bank’s creditors are obliged to agree to have a portion of their debt written off.” See Advocate General Wathelet in Joined Cases C-105/15 P to C-109/15 P, *Mallis and Malli v. Commission and Central Bank*, delivered on 21 April 2016, para. 34 (hereinafter AG Wathelet).

### 34.1.1 *Conditionality and Liability*

The starting point of the subsequent discussion is that financial assistance to Eurozone Member States in need can be provided only on the basis of strict conditionality. Such conditionality was attached to assistance given under the 2010 Greek bilateral loan, the EFSF and the EFSM, and applies also to assistance given under the ESM. The EFSF Framework Agreement, the Regulation establishing the EFSM, and the ESM Treaty (ESMT) all require that financial assistance is conditional upon the implementation of certain economic policy conditions by the Member State. These economic policies are contained in the so-called ‘macroeconomic adjustment programmes.’<sup>9</sup>

In a nutshell, the process of negotiating and agreeing on conditionality was similar under the EFSF and the EFSM:<sup>10</sup> the national authorities of the recipient Member State negotiated the adjustment programme with officials from the Commission, the ECB, and the IMF (i.e. the ‘Troika’) and submitted their Memorandums of Understanding (MoUs) which then needed to be formally approved by the competent body for each programme. For EFSM assistance this was the Council, and for EFSF assistance it was the Eurogroup Working Group. The terms of the conditionality were included in a Memorandum of Understanding (MoU), and the most important terms were repeated in a Council Implementing Decision adopted under Articles 126(6), 126(9), and 136 TFEU and addressed to the borrowing Member State.

Under the provisions for financial assistance by the ESM, the negotiation and signing of the programmes is a task of the Commission acting on behalf of the ESM Board of Governors (Art. 13 ESMT).<sup>11</sup> Article 13 of the ESMT describes the process for granting stability support to ESM Members. After receiving a request from a Member State, the Board of Governors entrusts the Commission and the ECB to undertake the necessary assessments of the country’s public debt and financing needs, and of the risk posed by the country’s financial situation to euro area as a whole. On the basis of that assessment, the ESM Board of Governors decides whether to grant stability support to the said State in the form of a ‘financial assistance facility.’ If the ESM Board of Governors decides to grant stability support to a requesting Member State, it entrusts the Commission and the ECB “with the task of negotiating with the ESM Member concerned, [an MoU] detailing the

9 See generally European Parliament, DG for Internal Policies, Committee Study on the State of Play in Implementing Macroeconomic Adjustment Programmes in the Euro Area: [www.europarl.europa.eu/document/activities/cont/201402/20140219ATT79589/20140219ATT79589EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201402/20140219ATT79589/20140219ATT79589EN.pdf).

10 For this explanation and a detailed analysis of conditionality see M. Ioannidis, ‘EU Financial Assistance Conditionality after “Two Pack”’ 2014 p. 12 <http://ssrn.com/abstract=2398914>; M. Ioannidis, ‘How Strict is “Strict Conditionality”? The New Eurozone Agreement on Greece’ 2015 <http://europeanlawblog.eu/?p=2716>.

11 The ESM Board of Governors is a body currently comprised of the finance ministers of the Eurozone countries i.e. currently the same actors as those formulating the Eurogroup.

conditionality attached to the financial assistance facility” (Art. 13(3) ESMT). In other words, the conditions of such ‘financial assistance facility’ are negotiated and agreed between, on the one hand, the Commission and the ECB and, on the other hand, the borrowing Member State – and in some cases the IMF (Art. 3 ESMT).<sup>12</sup> The two EU Institutions, however, are not acting under the EU legal order, but rather as agents of the ESM.<sup>13</sup> In addition, Regulation 472/2013, which is discussed later in this article, sets out the procedure for the approval of the macroeconomic adjustment programmes by the Council, and gives to the Commission the role of ensuring that “the [MoU] signed by the Commission on behalf of the ESM is fully consistent with the macroeconomic adjustment programme approved by the Council.”<sup>14</sup>

Although Portugal, Greece, and Cyprus received assistance under different mechanisms, they all committed to fulfilling the economic policy conditions set out in the macroeconomic adjustment programme prepared for each country. To refresh the memory of the reader, while the loan conditions for Portugal and Ireland were based both on the EFSM and the EFSF, Greece received funding from the wholly bilateral Greek Loan Facility (the first bailout), then exclusively from the intergovernmental EFSF (the second bailout), and the third time from the ESM (the third bailout), whilst Cyprus received financial assistance from the ESM. Even though the specific objectives of each State’s programme differed, the overall aim of the programmes was “to return Member States to sound macroeconomic or financial health and restore their capacity to meet their public-sector obligations.”<sup>15</sup> Since a primary target of the adjustment programmes concerns fiscal consolidation *vis-à-vis* government deficits, the programmes include measures that aim to reduce public spending and reform social benefits and pensions, thus potentially affecting matters “ranging from that country’s financial system and labour market, to the judiciary.”<sup>16</sup>

The measures adopted by the Member States in receipt of financial assistance are said to have come at the expense of fundamental and social rights’ protection not only because of their content but also because of the procedures in which they were adopted.<sup>17</sup> Procedurally, for example, the negotiation and conclusion of financial assistance programmes for

12 Case C-370/12, *Pringle* para. 72.

13 For a detailed analysis of the constitutional issues regarding the role of the EU Institutions in the functioning of the ESM arising from the case of *Pringle* see P. Craig, ‘Pringle and the Nature of Legal Reasoning’, *Maastricht Journal of European and Comparative Law*, 2014, p. 205; and S. Peers, ‘Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework’, Vol. 9 *E.C.L.Rev.*, 2013 p. 38.

14 Art. 7(2) of 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, 2013, OJ L 140/1.

15 Court of Auditors Special Report on Financial assistance provided to countries in difficulties, 2015, [www.eca.europa.eu/Lists/ECADocuments/SR15\\_18/SR\\_CRISIS\\_SUPPORT\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR15_18/SR_CRISIS_SUPPORT_EN.pdf) p. 11.

16 M. Ioannides, 2014, p. 17.

17 A. Baraggia, ‘Conditionality measures within the euro area crisis’, Vol. 4(2), *C.J.I.C.L.* 2015, pp. 268-288; M. Ioannidis, 2014, p. 14.

Greece and Portugal took place without, or after very limited, social dialogue and consultation between the government and social partners.<sup>18</sup> The European Parliament and national parliaments often had a limited say in the negotiations and the agreement on the specific measures.<sup>19</sup> The MoUs' negotiations are also notorious for their lack of transparency, whilst a recent report from the European Court of Auditors highlighted inconsistencies in the treatment of countries that were in a comparable situation.<sup>20</sup> Substantially, the measures have brought to the fore concerns over the human rights impact of the crisis and have sparked academic discussion on the role of the EU Charter of Fundamental Rights in the negotiations and agreements over the financial assistance packages.<sup>21</sup> International organisations and committees have highlighted the increase of unemployment and social exclusion in the recipient Member States.<sup>22</sup>

As mentioned already, some of these austerity measures can arguably be traced back to the conditionality that characterises the provision of financial assistance. Yet the extent of responsibility for the conditions of the bailouts remains undetermined.<sup>23</sup> For individuals, uncertainty regarding the 'ownership'<sup>24</sup> of these programmes affects their attempts to attribute liability or claim compensation for harm resulting from measures and policies adopted on the basis of the MoUs. With this in mind, the next section outlines some of the attempts that have taken place to challenge the conditionality of the financial assistance programmes before Greek, Portuguese, and Cyprus courts.

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18 A. Koukiadaki, 'Can the austerity measures be challenged in supranational courts?', Analysis for ETUC, 2014, [www.etuc.org/sites/www.etuc.org/files/publication/files/austerity\\_greeceportugal\\_en\\_3.pdf](http://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf) p. 19.

19 A. Poulou, 'Austerity and European Social Rights: How can Courts Protect Europe's Lost Generation?' Vol. 15(6), *German Law Journal* 2014, p. 1152; Baraggia, 2015, p. 285.

20 Court of Auditors, 2015. The Report of the Court of Auditors states: 'When comparing countries with similar structural weaknesses, it was found that the required reforms were not always in proportion to the problems faced or that they pursued widely different paths.' Having said that, the Report also stated that 'the programmes were successful in prompting reforms' pp. 8-9; Also see A. Poulou, 2015, pp. 1151-1154.

21 See M. Salomon, 'Of Austerity, Human Rights and International Institutions' LSE Working Papers 2/2015, 2015, p. 2; C. Barnard, 'The Charter, the Court – and the Crisis', University of Cambridge Faculty of Law Research Paper No. 18/2013, 2013; C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' Vol. 10, *EuConst*, 2014 p. 393; C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', Vol. 35(2), *Oxford J Legal Studies*, 2015, p. 325; A. Nolan, 'Not fit for purpose? Human rights in times of financial and economic crisis', Vol. 4, *H.R.L.R.*, 2015, p. 360.

22 For example, certain austerity measures adopted by Greece to satisfy the requirements of financial assistance programmes have been considered incompatible with international instruments ratified by Greece. See A. Bernard (ed.), 'Downgrading Rights: the cost of austerity in Greece' FIDL/HLHR Report, 2014, [www.fidh.org/en/region/europe-central-asia/greece/greece-report-unveils-human-rights-violations-stemming-from-austerity](http://www.fidh.org/en/region/europe-central-asia/greece/greece-report-unveils-human-rights-violations-stemming-from-austerity). See Study for the LIBE Committee of the European Parliament, 'The impact of the crisis on fundamental rights across Member States of the EU: Comparative Analysis' PE 510.021, 2015.

23 M. Salomon, 2015, p. 17; C. Kilpatrick, 2014, pp. 393-407.

24 M. Ioannidis, 2015.

### 34.1.2 Litigation at the National Level

Attempts to claim redress have taken place at the national level, where the most prominent case law has come from Greek and Portuguese courts, and concerned reductions in salaries and pensions. Against a rather different background, cases were also brought before the Supreme Court of Cyprus to challenge the national measures adopted for the restructuring of the financial sector which took place in 2013 in the run-up to the agreement on a financial assistance programme for the country.

The Portuguese Constitutional Court is said to have been vocal in terms of asserting review of domestic budgetary measures that were adopted by the Portuguese government as part of the bailout agreement to receive a rescue package from the EFSM, the EFSF, and the IMF.<sup>25</sup> Examples of such measures include pay cuts in the wages of public sector workers, and legislation concerning pay cuts in the pensions of retired citizens.<sup>26</sup> Challenges were also brought by associations of individuals before Portuguese Labour Courts, some of which resulted to preliminary reference questions for the ECJ.<sup>27</sup>

The most well-known line of cases concerns the constitutional challenges to provisions of the Portuguese 2011, 2012, 2013 and 2014 Budget Acts.<sup>28</sup> Whilst initially the Portuguese Constitutional Court found that the salary reductions prescribed by the 2011 Budget Act for the income of civil servants were not unconstitutional in the light of the economic situation of the country,<sup>29</sup> its approach changed over time. Regarding the 2012 Budget Act, the Court found that provisions which suspended the 14th monthly salary and allowed for temporary pension and wage cuts in the public sector were excessive and unconstitutional, yet it suspended the effects of its ruling as an acknowledgment of the exceptional public interest of the Portuguese state to keep receiving external financial aid.<sup>30</sup> Subse-

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25 F. Fabbrini, 2014, pp. 100-103; R. Cisotta, D. Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal' in C. Kilpatrick, B. de Witte (Eds.), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' EUI Working Papers, 2014, p. 85.

26 Since we are currently discussing the cases from the individual's perspective, it is worth noting that the constitutional review mechanism in Portugal was in fact triggered not by individuals but by Parliamentarians, the Ombudsman or the President of the Portuguese Republic. See M. Canotilho et al., 2015, pp. 158-159; As commented, in Portugal there was a 'general discontent of people but there has not been a culture of judicial challenges.' M.N. de Brito, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis' in C. Kilpatrick and B. de Witte (Eds.), 2014 p. 77.

27 See *infra*, Section iii.

28 C. Fasone, 'Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective', European University Institute Working Paper MWP 2014/25, 2014.

29 Portuguese Constitutional Court Decision no 396/2011, judgment of 21 September 2011.

30 Portuguese Constitutional Court Decision no 353/2012, judgment of 5 July 2012; F. Fabbrini and EUI Working Paper; Ribeiro explains the impact of this judgment: "The Government would thereby have to pay both subsidies in 2012, an expenditure not foreseen in that year's budget. Since there was no time to design policy alternatives that could compensate the imbalance, the decision would imply a serious aggravation of the budget deficit." G.A. Ribeiro, 'Judicial Activism Against Austerity in Portugal', *Int'l J. Const. L. Blog*, 2013, [www.icconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/](http://www.icconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/).

quently, provisions in the 2013 Budget Act which *inter alia* required pay cuts for public sector workers were found to violate the constitutional principle of proportional equality; the objective of reducing the public deficit was not accepted as a justification.<sup>31</sup> This time the Portuguese court did not suspend its judgment, thus obliging the Portuguese Government to reconsider the measures in question. Notably, the Portuguese Court struck down the austerity measures on grounds such as that the measures breached constitutional principles (i.e. equality, legal certainty, and protection of legitimate expectations) rather than on the basis of the individuals' right to work or other social rights.<sup>32</sup> Alternatively – if the degree of judicial protection had been based on individual constitutional rights – it would have been easier to modify the scope of those rights through a constitutional reform than it would be to modifying the constitutional framework on which the Portuguese Court relied.<sup>33</sup>

The above development of the Portuguese case law was said to signal a progressively more active approach by the Portuguese Court in reviewing measures of financial stabilization and economic adjustment.<sup>34</sup> This conclusion, however, could be nuanced in light of more recent commentary stressing that the Portuguese Constitutional Court also found a number of austerity measures allegedly encroaching on fundamental rights to be constitutional.<sup>35</sup> Furthermore, the approach of the Portuguese Court has not been without criticism, especially from commentators arguing that the Court did not take sufficiently into consideration the wider European context of the crisis. In this wider context, the political choices of the Portuguese Government under review by the Court were inevitably influenced by – and had to respect – the positions of other Member States and those of the country's international creditors, meaning that the Court also had to respect the delicate political negotiations that preceded the adoption of the budgetary measures in question.<sup>36</sup>

In comparison with the Portuguese Constitutional Court litigation, in Greece the most relevant legal challenges arose indirectly through requests for annulment of general administrative acts executing legal provisions.<sup>37</sup> Contrary to the Portuguese Constitutional Court, the Greek Council of State is an administrative court and therefore cannot rule directly on the constitutionality of legislation or repeal legislation.<sup>38</sup> Instead, as the country's supreme administrative court, the Greek Council of State can adjudicate disputes for

31 Portuguese Constitutional Court Decision n. 187/2013, judgment of 5 April 2013.

32 M. Canotilho et al., 2015, pp. 182-183.

33 Ibid.

34 Fabbrini, 2014, pp. 100-103; C. Fasone, 2014.

35 M. Canotilho et al., pp. 182-183.

36 Ribeiro, 2013; Also see R. Gissota, D. Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal' LUISS Academy Working Paper 4/2014.

37 See A.I. Marketou, M. Dekastros, 'Constitutional Change through Eurocrisis law: Greece', available at: <http://eurocrisislaw.eui.eu/Greece>.

38 A. Dimopoulos, 'Constitutional Review of Austerity Measures in the Eurozone Crisis', 3 September 2013, available at <http://ssrn.com/abstract=2320234>.



compensation concerning the liability of government, local government, and public entities. Claimants cannot seek to annul legislation directly but they can ask the Council of State to declare that the legal basis of certain administrative decisions does not produce any legal effect in the case at hand.<sup>39</sup>

Two cases illustrate the approach of the Greek Council of State to the first and second package of financial assistance, even though they cannot provide any conclusive evidence of the entirety of the Greek crisis litigation.<sup>40</sup> With regard to the country's first economic programme, a challenge was brought before the Greek Council of State contesting the wages' and benefit cuts that were imposed through Law 3845/2010 in order to ratify the respective MoU.<sup>41</sup> The statute was contested on the grounds that it violated the right to property (Art. 1 of Protocol 1 of the ECHR, Article 17 of the Greek Constitution, and the principle of proportionality (Art. 25(1) of the Greek Constitution). The Greek Council of State relied on the 'state of emergency' doctrine and concluded that, although the measures interfered with property rights enshrined in Article 1 of Protocol 1 of the ECHR, they served the overlaying public interest of consolidating public finances and were not disproportionate to the objective pursued. In this way, the Court included for the first time the fiscal interest of the country into the concept of public interest which could justify fundamental rights' restrictions.<sup>42</sup>

More recently, the Greek Council of State applied a similar rationale of emergency to a challenge by nine trade unions concerning measures ratifying the second MoU and allowing the legislator to remove a number of issues from the scope of collective bargaining and collective agreements.<sup>43</sup> The court found that the state intervention was exceptional and the measures were proportionate. Notably, this time the court did not refer to the 'overarching financial public interest' that it had developed in the first case.<sup>44</sup> Instead, it examined the constitutionality of the measures *vis-à-vis* reasons of 'higher social interest' that could only be invoked under strict preconditions (e.g. that the core of the constitutional right in question must not be neutralized). However, as commented, it is currently difficult

39 As explained by A.I. Marketou, M. Dekastros, 'Constitutional Change through Eurocrisis law: Greece', available at: <http://eurocrisislaw.eu.eu/Greece>.

40 For a more extensive analysis of the case law see: D.M. Tsakiri, 'The Protection of the Fundamental Social Rights in the Greek Legal System' ANESC Papers, 2015.

41 Greek Council of State Decision 668/2012 (20 February 2012).

42 M. Yiannakourou, 'Challenging austerity measures affecting work rights at domestic and international level. The case of Greece' in C. Kilpatrick, B. de Witte, 2014, pp. 22-23; A.I. Marketou, 'Economic Emergency and the loss of faith in Greek Constitution', Vol. 4(2) *C.J.I.C.L.* 2015 pp. 307-309; P. Pikrammenos, 'Public law in extraordinary circumstances from the point of view of the administrative procedure for annulment', 2012, *Epitheorissis Ergatikou Dikaiou*, p. 385.

43 Greek Council of State Decision 2307/2014; M. Yiannakourou, 'Labour measures of Memorandum II before the Greek Council of State: Decision 2307/2014 (Plenum)' Decision 2307/2014, 2014, [http://eurocrisis-law.eu.eu/wp-content/uploads/2015/04/Greek-Council-of-State-2307\\_2014.pdf](http://eurocrisis-law.eu.eu/wp-content/uploads/2015/04/Greek-Council-of-State-2307_2014.pdf).

44 *Ibid.*

to evaluate whether this change in approach might have long-term implications on future litigation, or whether it should be perceived as yet another attempt by the Greek Council of State to “maintain a balance between self-restraint and guaranteeing [fundamental] rights.”<sup>45</sup>

Finally, individuals have gone to national courts in Cyprus in an attempt to impose liability on Cyprus national authorities for the so-called ‘haircut of deposits’ that took place in 2013 before signing an MoU for financial assistance from the ESM. Given the troubled banking sector of the country, the purpose of the haircut was to recapitalise Bank of Cyprus, one of the two biggest banks, using portions of the holdings of shareholders, bond holders, and uninsured depositors.<sup>46</sup> The second troubled bank, namely Laiki Bank, was resolved and split into a ‘good bank’ and a ‘bad bank’. Whilst the ‘good bank’ was used for the recapitalisation of the Bank of Cyprus, the ‘bad bank’ ceased to exist. The measures resulted in an extensive write-off of Cypriot and foreign bank deposits (the so-called ‘haircut’).

Numerous appeals were filed in the Supreme Court of Cyprus by depositors of Laiki Bank and Bank of Cyprus. In June 2013, the Court issued a judgment over 55 such appeals.<sup>47</sup> The claimants sought to annul two Decrees (hereinafter Decree 103 and 104) issued by the Central Bank of Cyprus on 29 March 2013 on the basis of the 2013 Resolution Law.<sup>48</sup> Decree 103 provided for the recapitalisation of Bank of Cyprus. Decree 104 provided for the resolution of Laiki Bank by transferring all deposits below 100,000 Euros to the Bank of Cyprus and by writing-off all deposits above 100,000 Euros. The applicants had argued that the contested Decrees impinged on their constitutionally guaranteed rights to property (Art. 23) and were violating the constitutional principle of equality and non-discrimination (Art. 28).

Contrary to the Greek and Portuguese courts, the Supreme Court of Cyprus did not engage in a constitutional review of the relevant acts. It found that the applicants did not have standing; they lacked legitimate interest because the contested acts concerned matters of private (i.e. between the bank and its depositors), rather than public law, and therefore fell outside the Supreme Court’s exclusive jurisdiction.<sup>49</sup> According to the Court, the alleged

45 Ibid.; X. Contiades, *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Routledge, Oxon 2013, p. 208.

46 For a detailed discussion, see P. Charalambous, ‘Cyprus: A bad “haircut” is not easily forgotten’, *Financial Regulation International*, 2013.

47 *Christodoulou v. Central Bank of Cyprus*, Case No. 551/2013 (hereinafter *Christodoulou*).

48 The 2013 Resolution of Credit and Other Institutions Law (Basic Law) L17(I)/2013, 22 March 2013. The 2013 Decree on the bailing in of Bank of Cyprus, Regulatory Administrative Act No. 103, EE, Annex III (I), No. 4645, 769-80, 29 March 2013 (hereafter Decree 103); The 2013 Decree on the sale of certain operations of Laiki, Regulatory Administrative Act No. 104, EE, Annex III(I), No. 4645, 781-88, 29 March 2013 (hereafter Decree 104).

49 According to Art. 146 of the Cyprus Constitution, the Supreme Court of Cyprus has jurisdiction to review the legality of acts, decisions and omissions issued or noticed in the exercise of executive or administrative power of organs and authorities of the State (Art. 146(1)). Recourse to the Supreme Court of Cyprus may

effect of the Decrees on the depositors' rights concerned the contractual obligations of the banks towards their depositors or investors and thus fell under the scope of private law. As such, the claimants should first and foremost go against the banks if they wished to bring legal proceedings. These legal proceedings should take place before District Courts, which were also the appropriate fora to potentially award monetary damages to the applicants. Any claim as to the responsibility of the Republic of Cyprus could arise incidentally in these civil actions before the District Courts.<sup>50</sup>

In the aftermath of the Supreme Court judgment, cases are pending before Cyprus District Courts, whilst the possibility of preliminary references to the ECJ from these lower courts under Article 267 TFEU is not excluded. Such references may seek to clarify the EU law dimension of the cases, including the involvement of the EU Institutions in the bail-in.<sup>51</sup> In light of this possibility, the next section provides an overview of the main cases that have arisen before the CJEU in the context of financial assistance to Eurozone Member States.

### 34.1.3 *Litigation at the EU Level*

Some of the applicants in the above mentioned cases found their way before the CJEU to challenge the measures arising from the conditionality measures or claim damages for financial losses allegedly resulting from such measures. Cases concerning the Portuguese and Greek bail-out and the Cypriot bail-in were brought before the CJEU either on the basis of Article 267 TFEU (preliminary references from national courts), or 263 TFEU (direct action against EU institutions) and 340 TFEU (action for damages against EU institutions).

The first few cases, concerning the Portuguese and Greek bailouts, have already attracted academics' attention.<sup>52</sup> Specifically the preliminary reference requests sent by Portuguese Labour Courts illustrated the difficulties with identifying a link between the MoUs and

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be made by 'a person whose any existing legitimate interest, which he has either as a person, or by virtue of being a member of a community is adversely and directly affected by such a decision or act or omission' (Art. 146(2)).

50 For earlier commentaries on the case see J Giotaki, 'The Cypriot "Bail-in" Litigation', *Butterworths Journal of International Banking and Financial Law*, 2015, p. 485; According to Cyprus Supreme Court, the relevant test to be applied by the District Courts for the purposes of deciding on compensation for the depositors should be based on the 'no-creditor-worse-off principle', i.e. whether as a result of the measures in question have caused the depositors greater loss than what would have been incurred if the measures had not been adopted (either because the two banks had been resolved under normal insolvency proceedings or because an alternative bailout had taken place), *Christodoulou* p. 37.

51 *Christodoulou* p. 37; It can be said here that, to an extent, the possibility for a preliminary reference request also depends on the outcome of the cases by Cypriot depositors currently pending before the CJEU, see *infra* Section iii.

52 See for example C. Kilpatrick, 2014; A. Hinarejos 2014.

EU law that would allow the ECJ to answer the Portuguese Court's questions on the compatibility of public sector cuts with the Charter.<sup>53</sup> According to the ECJ, the applicants did not demonstrate a link between the national measure in question and EU law. Since the Portuguese State Budget Act under consideration was not implementing EU law – a link which is a *sine qua non* for the application of Article 51(1) of the Charter to the Member States – the ECJ held that it lacked jurisdiction to hear the case. In response to the judgments, academic commentators have called for a more active approach by the ECJ in finding a link between national measures implementing MoU conditions and EU law – by virtue of the Council Decisions adopting the macroeconomic adjustment programmes – even if this would mean that the Court would then exercise restraint in reviewing the cases on their merits.<sup>54</sup> Others have advocated a more active review by the CJEU of financial assistance conditions, both on procedural and substantive grounds.<sup>55</sup>

The link between EU law and MoUs or, more generally, between EU law and the conditionality for financial assistance to Eurozone Member States, has come to the spotlight more recently after recent judgments of the General Court (GC) in two sets of cases initiated by Cypriot depositors who suffered monetary losses as a result of the bail-in described previously.<sup>56</sup> The cases deal particularly with the haircut of deposits perceived as a condition for financial assistance for the country from the ESM. Most of the cases from each set of cases are currently under appeal.

In the first set of cases before the GC<sup>57</sup> (hereinafter *Mallis*) the applicants had requested the annulment under Article 263 TFEU of the Eurogroup statement that announced the restructuring of the banking sector in Cyprus. The applicants' claim was based on the rationale that the two (national) Decrees that provided for the said restructuring (i.e. Decrees 103 and 104) were the implementation of decisions taken at the EU level by the Eurogroup, which were then communicated through the contested Eurogroup statement.

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53 Ibid.; Order of 7 March 2013, Case 128/12, *Sindicato dos Bancários do Norte and Others v. BPN* [2013] ECR I-149; Order of 16 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* [2014] ECR I-2036; Order of 21 October 2014, Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins* [2014] ECR I-2327; All the references asked whether legal reforms that took place in Portugal in order to receive financial assistance were contrary the Charter.

54 A. Hinarejos, 2014, p. 122.

55 A. Poulou, 2014, p. 1175.

56 See *supra* fn. 8.

57 Orders of 16 October 2014 in Cases T-237/13 to T-331/13. The nature of the claims and the orders are almost identical, except for the amount of amount of financial losses the claimants are said to have suffered. Reference to *Mallis* in this article refers to Case T-327/13, *Mallis and Malli v. Commission and ECB* [2014] ECR I-909 and implies reference to the other four cases as well. For commentary see A. Karatzia, 'Cypriot Depositors Before the Court of Justice of the European Union: Knocking on the Wrong Door?' Vol. 26(2) *KLJ*, 2015, p. 175. Five cases from this group are currently on appeal: *Cases C-105/15P, Mallis and Malli v. Commission and ECB; C-106/15P Tameio Pronoias Prosopikou Trapezas Kyprou v. Commission and ECB; C-107/15P Chatzithoma v. Commission and ECB; C-108/15P Chatziioannou v. Commission and ECB, C-109/15P Nikolaou v. Commission and ECB.*

Acknowledging, perhaps, that the decisions of the Eurogroup would not be subjected to judicial review under Article 263 TFEU, the applicants argued that the Commission and the ECB were the *de facto* authors of the contested statement.

Indeed, the GC held that the Eurogroup was an informal political forum for discussion which is not able to adopt legally binding decisions, and thus its acts cannot be subject to judicial review by the CJEU. Moreover, the Eurogroup “could not be regarded as being under the control of the Commission or the ECB, or as an agent of those institutions” (Para. 44). The GC then considered whether the contested statement should be attributed to the ESM and, if so, whether the ESM could be seen as being controlled by the Commission and the ECB. According to the applicants, this line of connection between the ESM and the contested Eurogroup statement would mean that the statement originated from the two EU institutions and should be subjected to judicial review. Relying on *Pringle*, the GC dismissed this argument as well. Neither of the two EU institutions has the power to control the ESM since their acts under the ESMT are binding only on the ESM.

In the second group of cases<sup>58</sup> (hereinafter *Ledra*) the GC considered a claim for compensation under Article 340 TFEU and Article 268 TFEU (i.e. non-contractual liability of EU institutions). The applicants sought to argue that the Commission and the ECB should compensate them with an amount “equivalent to the diminution in value of the deposits” that the applicants had lost as a result of the enforcement of Decrees 103 and 104 (Para. 24). They argued that the damage for which they sought compensation resulted from the conditions attached to the financial assistance provided to the Republic of Cyprus. Their argument was that the conditions, which were stipulated in the MoU adopted jointly by the ESM and the Republic of Cyprus on 26 April 2013, were in fact imposed on the Republic of Cyprus by the Commission and the ECB.

According to the GC, the adoption of the MoU did not originate from the Commission and the ECB, since the two institutions do not have any powers to make decisions of their own under the ESMT.<sup>59</sup> The GC also made it clear that the claim was inadmissible in so far as it contested the legality of certain provisions of the MoU adopted by the ESM and the Republic of Cyprus; the MoU was not an act of the ‘institutions, bodies, offices or agencies of the European Union’ that could be challenged on the basis of Article 263 TFEU (Para. 44).

The GC also interpreted the argument of the applicant from an alternative angle, i.e. as arguing that the Commission should be liable for damages for infringing its “obligation

58 Orders of 10 November 2014, in Cases T-289/13 to T-294/13. References to *Ledras* in this article refers to Case T-289/13, *Ledra Advertising Ltd v. Commission and ECB*, [2014] ECR I-981 and implies reference to the other five cases as well. Three cases from this group are currently on appeal, see Cases C-8/15P, *Ledra Advertising v. Commission and ECB*; C-9/15P, *E. Eleftheriou and L. Papachristofi v. Commission and ECB*; and C-10/15P, *Theofilou v. Commission and ECB*.

59 Case C-370/12, *Pringle para.* 161.

to guarantee that the MoU is in conformity with EU law” which allegedly arose out of the Commission’s role as the guardian of the Treaties under Article 17 TEU (Para. 49). In this regard, the GC examined whether the alleged conduct of the Commission could amount to non-contractual liability for the EU under Article 340 TFEU. It found that an action for damages under Article 340 manifestly lacked any foundation in law because there was no established causal nexus between the damage in question and the alleged inaction of the Commission, since the MoU was signed after the reduction of the applicants’ deposits (Para. 54).

The cases constitute the first tangible manifestation of issued ruled upon by the ECJ in the case of *Pringle*. In this sense, they go to the core of questions on the justiciability of financial assistance conditionality. Two recently published Advocate General (AG) Opinions on the cases provide rich insight into whether ESM conditionality measures can be challengeable, the potential basis of a legal challenge, and the role of the Commission and the ECB in the negotiations and signing of the MoUs under the ESMT. AG Wathelet gave his Opinion on the five appeals from the first group of cases (*Mallis*),<sup>60</sup> and AG Wahl opined on the three appeals from the second group of cases (*Ledra*).<sup>61</sup> They both agreed that the appeals should be dismissed.<sup>62</sup> Space precludes a detailed discussion of the several issues raised in the cases and the Opinions. Instead, we will subsequently touch upon two key issues which are directly linked with individuals’ attempts to find an avenue through which to contest, or impose liability for the ESM financial assistance conditionality.

The first issue is whether financial assistance conditionality can be contested via a direct action for annulment under Article 263 TFEU. In this regard the GC in *Ledra* was clear: conditionality under the ESM as set out in the MoUs cannot be challenged on the basis of EU law before the CJEU. The MoUs are acts adopted by the ESM and the Member State in need of financial assistance. According to Article 5(6)(g) of the ESMT, the economic policy conditionality that accompanies the financial assistance given to Member States in difficulty is defined by the Board of Governors of the ESMT, which means that the CJEU has no jurisdiction to dispose of an action for annulment against such conditionality. Since the ESM is an intergovernmental agreement to which the EU is not a party, the acts of the ESM are ‘extraneous to the EU legal order’ even if some EU Institutions (i.e. the Commission and the ECB) are given a role under the ESMT.<sup>63</sup>

Given that the MoUs fall outside the EU legal order, national measures adopted on the basis of these MoUs do not constitute implementation of EU law by the Member States.<sup>64</sup>

60 AG Wathelet *supra* fn. 8.

61 AG Wahl Opinion in Joined Cases C-8/15P, C-9/15P, C-10/15P (hereinafter AG Wahl).

62 For a commentary see R. Smits ‘ESM conditionality in court: two Advocate Generals on 14 Cypriot appeal cases pending in Luxembourg’, AGEL blog, 2016, <http://acelg.blogactiv.eu/2016/04/22/esmconditionality-incourttwoadvocategenerals14cypriotappealcasespendinginluxembourg/>.

63 AG Wahl, paras. 52-53; Case C-370/12, *Pringle*, para. 161.

64 AG Wathelet, para. 84.

Hence the CJEU cannot scrutinise the compliance with EU law of national measures adopted by the Member States to observe their obligations under the MoUs (e.g. through potential preliminary reference requests). In his Opinion, however, AG Wathelet notes that some of the conditions that are stipulated in the MoUs are reproduced in a Council Decision. He then indicates that the measures that are reproduced in a Decision adopted by the Council after the signature of the MoU constitute implementation of EU law even though an MoU is not an act of EU law (Para. 89). Notably, the AG refers to Regulation 472/2013, reinstating that the Regulation aims to “[enshrine in Union law] full consistency between the TFEU multilateral surveillance framework and the possible policy conditions attached to financial assistance”<sup>65</sup> and in this way reinforce the link between ESM conditionality and EU law (Para. 92). As mentioned earlier, Article 7 of Regulation 472/2013 sets out the procedure for the preparation and agreement of a macroeconomic adjustment programme. According to Article 7(2) of the Regulation, the Council needs to approve the macroeconomic adjustment programme and “the Commission shall ensure that the [MoU] signed by the Commission on behalf of the ESM or the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council.”

Reading the AG Wathelet’s commentary alone, one would be inclined to think that there is, indeed, a way for some of the measures implementing the MoUs to be directly challenged before EU Courts by virtue of the link identified between the MoUs and EU law.<sup>66</sup> However, the line of argument does not stop there. AG Wathelet continues by explaining that, even if these Council Decisions bring the measures within the scope of EU law, the non-privileged applicants who wish to contest the Council Decisions before the CJEU will still find in their way the infamous *Plaumann*<sup>67</sup> standing test under Article 263 TFEU. In particular, when it comes to the Council Decisions in question, individuals will find it difficult – if not impossible – to show that the Decisions are of direct concern to them and thus to satisfy the first limb of the *Plaumann* test.

The obstacle facing potential applicants is illustrated by the case of *ADEDY*, where Greek civil servants attempted to contest MoU-implementing measures by going after the Council Decision on excessive deficit addressed to Greece.<sup>68</sup> The applicants were found to lack direct concern because of the wide discretion left to the Hellenic Republic to choose the means to reduce the country’s excessive deficit, which was the objective set out in the Council Decision. Recognising the difficulty with showing direct concern, AG Wathelet concludes that it is now up to the national courts of recipient Member States to assess the compliance of a Member State with EU law where the contested measures are implementing

65 Recital 3 of Regulation 472/2013, 2013, OJ L 140/1.

66 This link has also been demonstrated in the literature. See C. Kilpatrick, 2014; M. Ioannidis, 2014; A. Poulou, 2014.

67 Judgment of 15 July 1963, Case 25-62, *Plaumann & Co. v. Commission of the European Economic Community*.

68 Case T-541/10, *ADEDY and Others v. Council*, [2012] ECR I-626.

conditions of the MoU that are repeated in Council Decisions (paras 91 and 96). In this regard, Member States are bound to provide ‘remedies sufficient to ensure effective legal protection’ (Art. 19(1) TEU), including the possibility for national courts “to refer to the [ECJ] for a preliminary ruling questions on the validity of implementing decisions and the compatibility of macroeconomic adjustment programmes with the [TFEU], the general principles of EU law and the Charter” (Para. 98).

At the very least, the AG’s analysis is noteworthy because it is the first time that Regulation No. 472/2013 features in an ECJ case. Although the role of the Regulation as a ‘bridge’ between EU law and ESM financial assistance conditionality had been analysed in the literature,<sup>69</sup> the AG explains his own understanding of how the Regulation can come into play in future instances where individuals wish to challenge MoU measures. In addition, the AG’s Opinion can be of help to future claimants regarding the Cyprus haircut because it supports the view that the Council Decision 2013/236 addressed to Cyprus<sup>70</sup> turned the haircut of deposits into a legally binding obligation for the Republic of Cyprus (Para. 134). This line of argument could potentially be used to show that the Republic of Cyprus was implementing EU law when enforcing the haircut.<sup>71</sup> It remains to be seen whether, and to what extent, the ECJ will engage with the same issues in its final judgment, especially given that the AG made these remarks as preliminary observations before considering the actual grounds of appeal in the case at hand.

The second issue arising from the two cases concerns the role of EU institutions – especially the Commission – in the financial assistance mechanisms.<sup>72</sup> In agreement with the GC, AG Wathelet clarifies in his Opinion that the Eurogroup cannot be considered an EU institution, office, body or agency and thus acts of the Eurogroup concerning financial assistance conditionality cannot be annulled on the basis of Article 263 TFEU (Para. 67). AG Wahl focuses on the obligations of the Commission under the ESMT, and the interpretation of the Commission’s duty to “ensure that the [MoUs] concluded by the ESM are consistent with European Union law.”<sup>73</sup> His starting point is that “even when acting outside the EU framework, EU institutions must scrupulously observe EU law” (Para. 69). Nonetheless, he draws a distinction between a positive and a negative dimension

69 See *supra* fn. 66.

70 Council Decision of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth, [2013] OJ L 141/32. The Decision was replaced by Council Implementing Decision 2013/463/EU of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus [2013] OJ L 250/40.

71 However, the AG does not delve further into this point and hence does not explain how the haircut was turned into a legal obligation by a Decision taken after the haircut had already taken place. A look at the timeline of the financial assistance given to Cyprus indicates that the resolution measures (set out in Decrees 103 and 104) were executed on 29 March 2013 and the Council Decision 2013/236 was adopted on 25 April 2013.

72 AG Wahl, para. 1.

73 Case C-370/12, *Pringle*, para. 164.



of the Commission's duties.<sup>74</sup> With regard to the negative dimension, the AG states what the Commission cannot do: "[it] may not deliberately breach EU rules" and "may not contribute, through its conduct, to an infringement of the EU rules committed by other entities or bodies" (Para. 69). However, in the AG's view this should be distinguished from a positive dimension of the Commission's duties that would require the Commission "to avert any possible conflict or tension" between an ESM act and any applicable EU rule (Para. 70). In the view of the AG, there is no such positive obligation of the Commission when acting under the ESMT.

Assuming, however, that there is both a positive and a negative dimension to the Commission's duty under the ESMT, the AG also examines whether the signature of the MoU "resulted in a possible breach of EU law which the Commission should have averted" (Para. 82). Although he concurs with the argument that the Commission should respect the Charter when acting outside the EU legal framework, the AG argues that this position falls short of imposing an obligation on the Commission "to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU legal framework" (Para. 85). The ECJ may take the AG's Opinion as an opportunity to clarify the applicability of the Charter to the EU institutions when acting under the ESMT, an issue which was left open in *Pringle*.

#### 34.2 CONCLUDING REMARKS

The two AG Opinions in *Mallis* and *Ledra* raise interesting points regarding the extent to which individuals can challenge the conditionality attached to financial assistance under the ESM. There is little value in speculating about the outcome of the appeals. The preceding discussion attempted to touch upon some of the issues that could concern the ECJ in the near future. The two future ECJ's judgments are crucial not only because they are an opportunity to clarify some of the matters left open in *Pringle*, but also in respect of other pending cases where individuals are challenging conditionality measures attached to financial assistance under the ESM.<sup>75</sup>

This article has sought to provide an overview of some of the attempts to challenge austerity measures adopted by Eurozone Member States in receipt of financial assistance. As we have seen from the *tour d'horizon* of the national litigation in Portugal, Greece, and Cyprus, judicial control by national higher courts has taken place to a varying extent. The differences between the macroeconomic adjustment programmes designed for each

<sup>74</sup> For a discussion of the two dimensions see A. Poulou, 2014, p. 1159.

<sup>75</sup> See, for example, Case T-405/14, *Yavorskaya v. Council and Others*, action brought on 31 May 2014; Case C-161/15, *Brinkmann (Steel Trading) a.o. v. Commission and ECB*, action brought on 1 April 2015; Case T-786/14 *Bourdouvali e.a./Council e.a.*, action brought on 1 December 2014.

Member State; the type of review exercised by each Member State's highest court; the traditions of each court regarding the exercise of judicial restraint; the incomplete picture of the case law at national level; as well as the on-going litigation at the CJEU, warrant a careful approach towards drawing overarching conclusions from the judgments discussed in this contribution – at least for the time being. In spite of this 'cautionary note', future country-by-country case studies mapping in depth the development of the national-, and EU-level case law could assist in drawing conclusions regarding the extent of judicial protection afforded to individuals by national and EU courts when it comes to challenging financial assistance conditionality.

To conclude, anyone interested in the judicial developments concerning the Eurozone bailouts should keep a close eye on the upcoming 'episodes' in the saga of litigation briefly described in this article. In addition to the forthcoming ECJ judgments in the appeals discussed above, pending cases include those against EU institutions *vis-à-vis* the Cyprus bail-in. Some of these cases in fact add to the list of questions to be clarified by the CJEU. For instance, one of the pending cases consists of a claim for damages on the basis of Article 340 TFEU against not only the Commission and the ECB, but also the Council of the European Union, the 'EU represented by the Commission', and 'the Eurogroup represented by the Council of the EU'.<sup>76</sup> The applicants argue that the bail-in measures adopted by the Republic of Cyprus 'were introduced solely in order to implement measures adopted by the defendants, and were also approved by the defendant institutions.' As for the grounds of review, the applicants not only invoke their right to property under the Charter (Art. 17(1), Article 1 of Protocol 1), but also argue that the EU institutions breached the principles of proportionality, protection of legitimate expectations and non-discrimination. Future CJEU judgments could therefore further illustrate the role of the EU *vis-à-vis* conditionality for financial assistance, and especially the links, and the dividing lines, between the EU legal order and the ESMT.

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76 Case T-680/13, *K. Chrysostomides & Co. e.a. v. Council e.a.*, action brought on 20 December 2013.