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The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights

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Abstract

The paper analyses the demise of the Rule of Law in the EU economic governance, after the reforms enacted to respond to the economic crisis that hit the region after 2008. The analysis engages critically with the marginal role played by the Court of Justice in this context and, in particular, when it comes to the protection of social rights in time of austerity. The paper demonstrates that this situation is only partially attributable to “external” constraints, such as the choice to resort to mechanisms that are outside the EU legal order or the strict requirements concerning the locus standi of private applicants that wish to challenge the validity of EU acts. So far, the Court has been unwilling to fully perform its role, even in those cases where it could have done so.

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

The European response to the crisis revolved around two main axis¹: financial assistance for Member States in difficulty and the creation of new mechanisms that

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¹ A third axis consists of measures aiming at creating a safer financial sector in the EU. These measures involved stronger prudential requirements for banks, improved depositor protection and rules for managing failing banks. They set the foundations for the creation of a European Banking Union. See A. Kern, ‘European Banking Union: a Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism’, *European Law Review*, 40, 2015, 154-187.

may yield stronger economic coordination and tighter control on Member States economic choices.²

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

After this experience, the EU rushed to fill the gap, creating two new bailout mechanisms: the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF). The former was established by Regulation No. 407/2010³ and it had the capacity to borrow up to a total of 60 million euros. The latter, endowed with more financial resources⁴, has been created by an international agreement and operates as a private company established in Luxembourg. Most of the resources used to provide financial assistance to Ireland and Portugal came from these sources. Conversely, the second adjustment program for Greece was entirely financed by the EFSF.

The need to reduce the risk of contagion through the establishment of a credible firewall pushed Member States to create a permanent mechanism to provide financial assistance to Euro-Area Members experiencing or threatened by financing difficulties. The European Stability Mechanism⁵ was established on 27 September 2012 with a maximum lending capacity of 500 million euros. The ESM intervened to provide assistance to Cyprus, together with a loan by Russia, and to Spain for the

² See generally, A. Viterbo, R. Cisotta, ‘La crisi del debito sovrano e gli interventi dell’UE: dai primi strumenti finanziari al Fiscal Compact’, *Il Diritto dell’Unione europea*, 2012, 323-366; M. Ruffert, ‘The European Debt Crisis and European Union Law’, *Common Market Law Review*, 48, 2011, 1777-1806.

³ Council Regulation (EU) No. 407/2010 of 11 May 2010, *establishing a European financial stabilization mechanism*, [2010] OJ L 118/1.

⁴ It had the capacity to borrow up to a total of 440 million euros.

⁵ The *Treaty Establishing the European Stability Mechanism* (‘ESM Treaty’) was signed in March 2012.

bailout of the financial sector. Furthermore, the ESM is also involved in the third financial assistance package for Greece, approved in August 2015.

Each bailout entailed the respect by the beneficiary State of a set of policy conditions to be agreed with EU institutions, acting on behalf of the donors. Conditionality is a typical tool used by international financial institutions that serves different purposes. First, it aims to reduce moral hazard⁶ and to ensure that resources are used to solve the beneficiary State's problems. Moreover, conditionality is also meant to protect the whole Eurozone against possible negative spill overs (the so-called 'contagion effect'), safeguarding its long-term financial stability by making sure, *inter alia*, that the beneficiary State will be in the position to payback its loan. Lastly, tying financial support to the adoption of austerity measures purports to send a reassuring message to financial markets, by showing concerned States' resolve in trying to address the root causes of the problem.

The Commission and the European Central Bank (ECB) are key actors in the context of the Eurocrisis, being them part, together with the IMF, of the so-called Troika since the first economic adjustment programme for Greece. After these informal beginnings, their role has been recognized and codified in legal acts. For instance, Article 13(3) ESM Treaty establishes that, once it has decided to grant financial assistance, the Board of Governors "shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (a "MoU") detailing the conditionality attached to the financial assistance facility".⁷

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

This has been achieved through a combination of EU legislative measures and international law treaties. As for the former, in November 2011 the European

⁶ See specifically M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', *Common Market Law Review*, 53, 2016, 1245-1246.

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

Parliament and the Council adopted the so-called 'Six-Pack', a bundle of five Regulations and one Directive that strengthened both the preventive and corrective arms of the Stability and Growth Pact and introduced the Macro-Economic Imbalance Procedure.⁸ One of the Regulation of this package⁹ codified the European Semester, a policy coordination framework that brings under a single procedural umbrella both soft and hard coordination and surveillance mechanism.¹⁰ In May 2013 the EU legislator adopted two further measures – the 'two-pack'- aimed at strengthening economic and budgetary surveillance over Euro-States in difficulty and at monitoring budgetary plans of all Euro-States.¹¹

In March 2012, 25 out of 27 EU Member States signed the *Treaty on Stability Coordination and Governance in the Economic and Monetary Union*,¹² known as the 'Fiscal Compact', in order to send out unequivocal signs of their commitment toward budgetary probity. Indeed, the Fiscal Compact sets out, *inter alia*, stringent targets in terms of structural deficits, so to make sure that Contracting Parties' budgetary

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

⁹ Regulation (EU) No. 1175/2011, above n. 7.

¹⁰ See generally M. Hallerberg, B. Marzintotto, G.B. Wolff, *An Assessment of the European Semester, Study for the European Parliament's Committee on Economic and Monetary Affairs*, 2012 IP/A/ECON/ST/2010-24.

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

¹² *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* was signed in March 2012 by representatives of all EU Member States, but the UK and Czech Republic. It entered into force on 1 January 2013. For an analysis of its legal form and content, as well as its contradictory relationship with EU law, see P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', *European Law Review*, 37, 2012, 231-248.

position is balanced or in surplus.¹³ Moreover, Article 3(2) TSCG requires Contracting Parties to bring these rules into effect in their national legal orders “through provisions of binding force and permanent character”.

These measures have had a profound impact on the fabric of the European integration process, engendering systemic¹⁴ conflicts with some of its foundational elements.¹⁵ This paper looks at the capacity of the system to deal with these conflicts in order to avoid that they may shake its foundations and further weaken the legitimacy of the integration process. In particular, the paper focuses on the role that the Court of Justice of the European Union (‘the Court’) has been able, and/or willing, to play when anti-crisis measures encroach upon fundamental social rights and, more in general, the balance between the social and the economic dimensions within the EU legal order. The first part looks at the departure from the rule of law in the context of bailout programmes devised to assist Member States that have been hard hit by the crisis. The second part focuses on the impact of anti-crisis measures on social rights, examining some of the defining features of the conditions attached to financial assistance packages. The third and fourth parts turn to the Court, critically analysing its role in the new European economic governance and its capacity to preserve some of the foundational elements of the EU legal order.

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

Focusing on the financial assistance axis, Kilpatrick convincingly argued that “EU sovereign debt conditionality in ‘debtor states’ significantly troubles the Rule of Law”.¹⁶ To this end, she pointed to a number of key features of bailout instruments that threatens one of the cornerstone of the European integration process.

¹³ Article 3 TSCG.

¹⁴ On this notion see A. Von Bogdandy, M. Ioannidis, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’, *Common Market Law Review*, 2014, 59-96

¹⁵ J.A. Menéndez, ‘The Existential Crisis of the European Union’, *German Law Journal*, 14(5), 2013, 511-519.

¹⁶ C. Kilpatrick, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’, *Oxford Journal of Legal Studies*, 2015, 325. See also F. Munari, ‘Crisi dell’Euro e crisi delle regole: Rule of Law o ragion politica? Il diritto dell’Unione europea dinanzi a nuove sfide’, in O. Porchia (ed.), *Governance economica europea. Strumenti dell’Unione, rapporti con l’ordinamento internazionale e ricadute sull’ordinamento interno*, Giappichelli: Torino (2015), 33-56.

Bailout programs are often governed by a mixture of acts of uncertain legal nature, especially due to Member States' recourse to intergovernmental mechanisms, such as the European Stability Mechanism, that operate outside the scope of EU law. The departure from the Rule of Law is even more evident in those cases where EU institutions and, in particular, the ECB resorted to informal tools, such as secret letters, to put pressure on some Member States in order to force them into socially painful structural adjustment programs.¹⁷ This is what happened, for instance, with Italy that, in August 2011, received a letter¹⁸ from the then-President of the ECB and the then-Governor of the Italian Central Bank detailing a list of measures that it had to take and even the legal instruments it had to use. The adoption of these reforms were considered as a condition to benefit from the purchase of sovereign debt paper on the secondary market in the context of the Securities Market Programme, although the letter did not make this link explicit. The same line of action has also been followed with Spain and, although using other forms of pressure, with Ireland,¹⁹ Cyprus²⁰ and Greece.²¹

¹⁷ See generally A. Viterbo, 'Legal and Accountability Issues Arising from the ECB's Conditionality', *European Papers*, 2016, 1, 501-531

¹⁸

See

http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?refresh_ce-cp

¹⁹ In this case, the ECB played a key role to force the State to enter in a structural adjustment programme to be negotiated with the Troika. In a letter of 15 October 2010, Trichet reminded to then Irish Minister of Finance the ECB Governing Council's powers and discretionality in applying collateral rules and in setting limits to ELA, In a subsequent letter of 19 November 2010, Trichet was even clearer on this point, by stating that "[i]t is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions: 1) The Irish government shall send a request for financial support to the Eurogroup; 2) The request shall include the commitment to undertake decisive actions in the areas of fiscal consolidation structural reforms and financial sector restructuring, in agreement with the European Commission, the IMF and the ECB [...]". Unsurprisingly the Irish Government bowed in, formally asking for financial assistance on the 20 November 2010.

²⁰ In a Decision of 21 March, the ECB Governing Council made clear that it would have rejected a request of Emergency Liquidity Assistance by Cyprus' National Central Bank unless "an EU/IMF programme is in place that would ensure the solvency of the concerned banks". Also in this case, the pressure put by the ECB was enough to convince the State.

²¹ On 28 June and 6 July 2015, the ECB Governing Council twice decided to reject the request by the Greek National Central Bank to raise the Emergency Liquidity Assistance, forcing Greek authorities to impose a bank holiday and capital control. These decisions did not refer at all to the breakdown of the negotiations between Greece and EU institutions on the Third Assistance Package. However, it is telling that the very day in which the Tsipras Government

According to Joerges and Weimer, the reform of the EU economic architecture had an even deeper impact, perverting Europe's economic constitution and its legal structure.²² In particular, it marks the definitive shift away from the 'integration through law' model toward a form of executive managerialism, which they see as the heir of the new governance model. The main casualties of this move are "the virtues of 'old' traditional law based upon ideas of representative democracy, command and control, rights protection and justiciability, and the stabilization of expectations via formal legal norms".²³

Although diverging on several aspects, these perspectives concur on the fact that the departure from the rule of law has been a choice and not an accident. As it often happens in situations that are perceived as having an exceptional character,²⁴ the respect for rules has been perceived as a constraint that could hamper and, thus, make less effective the response to the crisis. Therefore, the characterization of the crisis as an emergency situation allowed decision-makers to adopt exceptional measures to cope with it and getting rid of the constraints imposed by an allegedly ineffective legal framework. In this context, effectiveness has become the main, if not the only, feature that anti-crisis measures must possess, even at the expenses of legality.

One of the most clear example and, at the same time, one of the most troublesome feature of this development is the disregard of the principle of conferral and, thus, of the division of competences between States and the EU in key policy areas and, in particular, in the social sector. The new framework gives to EU institutions an unprecedented capacity to take part and influence decisions adopted by national authorities in domains reserved to Member States, as it reaches across the entire spectrum of the their economic and social policies. This is particularly evident with regard to States under financial assistance: structural adjustment programs give to EU institutions the capacity to exercise policy formulation, supervision and guidance

secured a Parliamentary vote on the measures that it pledged to obtain assistance from the EU, the ECB raised the ELA by 900 millions euros.

²² C. Joerges, M. Weimer, *A Crisis of Executive Managerialism in the EU: No Alternatives?*, Maastricht Working Papers 2012-7, 20

²³ C. Joerges, M. Weimer, above n. 21, 15.

²⁴ The war on terror represents a good example in this regard.

on issues, such as the provision of social services or the regulation of the labour market.²⁵

Referring to the case of implicit conditionality, Sacchi described the situation as an “extreme case of vertical [...] integration in the policy arena, which goes well beyond what is generally meant by Europeanization, and cannot be captured through multilevel governance heuristic”. In his view, this transformation is better described as “a fusion ‘of responsibilities for the use of state instruments’”²⁶. In the same vein, the strengthening of economic policy coordination and surveillance mechanisms has potentially heightened the level of involvement of EU institutions into domestic policymaking. Chalmers, in particular, described the regimes aiming at securing balanced budgets, avoiding excessive deficits and avoiding or correcting macroeconomic imbalances as a process of co-government that “goes to the structure and rationale of a State fiscal and welfare systems”.²⁷

This development is particularly troublesome also from a broader perspective, as it severely constrains political bargaining processes that should take place at national level.²⁸ Indeed, in many cases national institutions – especially those of States under financial assistance – cannot but follow the line decided at supranational level, with little, if any, discretion.

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

Reduction of social expenditure, modernization of social protection systems and reform of the labour market are ever-present ingredients in the recipes proposed in the menu of the EU anti-crisis strategy. These objectives are strongly reminiscent of those traditionally pursued by IMF-sponsored structural adjustment programmes back in the ‘80s and ‘90s, even though the IMF itself is now reconsidering the

²⁵ F. Costamagna, *Saving Europe Under Strict Conditionality: A Threat for EU Social Dimension?*, LPF Working Paper no. 7, 2012.

²⁶ S. Sacchi, ‘Conditionality by Other Means: EU Involvement in Italy’s Structural Reforms in the Sovereign Debt Crisis’, *Comparative European Politics*, 13(1), 2015, 89.

²⁷ D. Chalmers, ‘The European Redistributive State and a European Law of Struggle’, *European Law Journal*, 18, 2012, 679-681. See also

²⁸ F. de Witte, ‘EU, Policy and the Social Question’, *German Law Journal*, 14(5), 2013, 581-611.

wisdom of this approach.²⁹ Some commentators have aptly dubbed such a paradoxical situation as the “European rescue of the Washington Consensus”.³⁰

Especially from 2010 onward, the priority of austerity-driven rescue packages was reducing sovereign debts, by invariably imposing draconian cuts to social expenditure. The attention toward this issue may be explained by referring to its relative weight in European States’ budgets, as social expenditure account for roughly 30% of the total. At the same time, this strategy seems to be fully in line with one of the dominant narratives of the crisis, according to which the latter had been mainly generated by the profligacy of Southern States and the excessive generosity of their welfare systems. This is very much evident in the case of States forced to enter into a structural adjustment programme in order to get financial assistance from the EU or from EU-related mechanisms. For instance, Greece and Hungary were forced to reduce their social expenditure by respectively 17% and 11% in the period 2007-2013³¹. Moreover, it is worth observing that the First Economic Adjustment Programme for Greece envisaged cuts in health care expenditure amounting to more than 2 billion euro by 2015 and cuts in social benefits amounting to more than 5 billion euro by the same year to be achieved through, inter alia, a reduction of the monetary transfers to certain categories of vulnerable persons. In the third package approved in August 2015, Greek authorities committed to target savings of around ¼% of GDP in 2015 and around 1% of GDP by 2016 to improve the long-term sustainability of the pension system.

A second component of the austerity-driven strategy is the promotion of internal devaluation, so to enable the ‘beneficiary’ State to regain external competitiveness. In a context where currency devaluation is no longer an option³², the objective has been mostly pursued by reducing wages and other labour costs, making individual

²⁹ S. Lütz, ‘From Washington Consensus to Flexible Keynesianism? The International Monetary Fund After the Financial Crisis’, *Journal of International Organizations Studies*, 6, 2015, 85-98.

³⁰ S. Lütz, M. Kranke, *The European Rescue of the Washington Consensus? EU and IMF Lending to Central and Eastern European Countries*, LEQS Paper No. 22/2010

³¹ OECD, *Society at a Glance 2014. OECD Social Indicators*, 2014 available at dx.doi.org/10.1787/soc_glance-2014-en

³² Internal devaluation policies have been considered as “functional equivalents” to exchange rate flexibility. See generally K. Armigeon, L. Baccaro, *Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation*, in *Industrial Law Journal*, 41(3), 2012, 254-275.

and collective dismissals easier, forcing Member States to revise (or even dismantle) the wage-setting system, by giving precedence to individual over collective bargaining. This stems from the (belated) recognition that fiscal consolidation is not enough to promote growth and that there is the need to pursue it by mainly looking at the supply side.

Over the years, there have been some attempts to pay greater attention to the social implications of financial assistance programmes. Article 7 of Regulation (EU) 473/2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, represents a good example in this regard. The provision establishes that, when a Member State requests financial assistance, the draft macroeconomic adjustment programme has to take “into account the practice and institutions for wage formation and the national reform programme of the Member State concerned”, as well as to “fully observe Article 152 TFEU and Article 28 of the Charter”. Likewise, the August 2015 Memorandum for Greece seems, at least on paper, more ‘socially-conscious’ than its predecessors. In particular, it explicitly recognizes the need for greater social justice, urging the Greek Government to “roll out a basic social safety net in the form of a Guaranteed Minimum Income”³³ and praising the adoption of some measures aimed at supporting the most vulnerable part of the population.³⁴

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

The impact of austerity measures on social rights has been the objective of several studies. Notably, in January 2015 the European Parliament published a detailed comparative analysis regarding the impact on fundamental rights of austerity measures imposed in response to the crisis by seven EU Member States:

³³ At 4.

³⁴ However, this praise sounds a bit paradoxical, as the adoption of these measures had been severely criticized by the donors at the time when they had been adopted.

Belgium, Cyprus, Greece, Ireland, Italy, Spain and Portugal³⁵. The analysis focused on a number of rights protected by the EU Charter of Fundamental Rights and by the European Social Charter, such as education, healthcare, work, pension, access to justice, freedom of expression and assembly, housing, property and some rights at work. The findings of the study paint a bleak picture.

For instance, with regard to the right to education, it found that reduction in the number of schools, in the number of teachers and of administrative and other school-related costs “include a danger to the overall quality of education and children’s success at school; an increase in unemployed workers in education; reduced availability of services [and] deterioration of general conditions in classrooms”. All these consequences being more intense for “[c]hildren with disabilities, Roma, Travellers’ children, as well as children of migrants”.³⁶ Furthermore, the study found that the massive reforms of the healthcare systems adopted in certain countries, such as Greece and Cyprus, primarily aimed at reducing costs through restricting access to healthcare, introducing or increasing participation fees, reducing salaries and freezing the employment of staff took an equally heavy toll on the enjoyment of the right to health. In particular these measures reduced access to healthcare, increased waiting times for treatments and unmet medical needs, as well as decreased preventive and protecting care. Also in this case, these effects were more acutely felt by the most vulnerable, such as poor and homeless people, older people, people with disabilities and their families, women, and undocumented migrants.³⁷ The analysis comes to similarly troublesome conclusions also with regard to other rights, such as work-related ones and, in particular, the right to collective bargaining; the right to social security, as social benefits have been cut and access has been severely restricted in many States; and the right to housing, as foreclosures and evictions escalated in countries such as Spain.³⁸

³⁵ European Parliament, *The Impact of Crisis on Fundamental Rights Across Member States of the EU. Comparative Analysis*, Brussels, 2015.

³⁶ Ivi, 12.

³⁷ Ivi, 13.

³⁸ Ivi, 13-16.

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

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

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

On the one hand, new legal instruments, even if adopted outside the EU legal order, conferred further competences to the Court. This is the case of Article 37 (3) ESM Treaty that gives to the Court the power to hear any dispute concerning the interpretation or the application of the Treaty. Furthermore, Article 8 Fiscal Compact empowers each Contracting Party to bring a claim before the Court when it considers that another Party failed to fully transpose, into its national legal order, the balanced budget rule, as provided for by Article 3(2) Fiscal Compact.³⁹

On the other hand, some commentators pointed out that the Court, together with some national supreme judicial bodies, has been very much involved in the fiscal domain, to a degree that is far higher than in the past and elsewhere. They considered that this has led to a level of judicial interference that is excessive, as decisions in this domain are better left with the political branches. They maintain that the main reason behind such an unprecedented judicial intervention in the fiscal domain is the recourse to international law instruments, which are more amenable to judicial review than EU ones.⁴⁰

However, the image of a stronger and pro-active Court can be hardly reconciled with the peripheral part that it has played with regard to the protection of social rights and, more generally, the safeguard of non-economic interests and values that have been badly affected by the austerity-driven reaction to the crisis.⁴¹ This contrasts starkly with the key role that it played in the construction of the EU legal architecture underpinning the European integration process, through the introduction of new principles - such as that concerning the protection of fundamental rights - that have contributed much to shape the European integration process as a whole. Indeed, as aptly observed by Poiares Maduro, the CJEU

³⁹ See generally O. Porchia, 'Il ruolo della Corte di Giustizia dell'Unione europea nella governance economica europea', *Il diritto dell'Unione europea*, 593-612.

⁴⁰ F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective', *Berkeley Journal of International Law*, 32, 2014, 64-123.

⁴¹ The Court is not alone in holding this position: see A. Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis', *European Law Journal*, 22, 2016, 61-73.

“promoted the use of law as [...] a ‘mask for politics’ in European integration”, supplementing the work of the legislative process and compensating for the lack of consensus among Member States on key issues.⁴² To this end, the CJEU did make full use of the interpretative discretion left by EU rules, stretching them to the limit and, in many instances, even beyond.

Conversely, in all the cases concerning austerity measures the CJEU has keenly accepted the limits posed by EU law to its capacity to review the legality of such measures. Most of these solutions are defensible,⁴³ resting upon a flawless, even though quite formalistic, reading of the relevant provisions. Nonetheless, some of the conclusions reached by the CJEU contrast with the much more liberal approach that it had adopted in several instances, showing that the CJEU was not just unable to play its part, but, to a large extent, unwilling to do so.

4.2 The systematic rejection of annulment actions brought by private applicants

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

A recent and fitting example in this regard is the *Ledra* case,⁴⁴ concerning the ESM intervention to assist Cyprus in the management of the difficulties faced by two of its biggest banks and, consequently, to avoid contagion. ESM financial assistance, which lasted from 2013 to 2016, was granted on the back of a macro-economic adjustment programme set by a MoU to be negotiated between the Troika and the Cypriot authorities. Negotiations started in 2012 and ended in April 2013, when the MoU was signed by the Commission, on behalf of the ESM, the Central Bank of Cyprus and the Minister of Finance of Cyprus. In the meanwhile, the Cypriot authorities put the two largest Cypriot banks into resolution and provided for the recapitalisation of one of them, at the expenses of uninsured depositors, shareholders and bondholders. Some of them, after having seen a substantial decrease in the value of their deposits, turned to the EU General Court seeking the

⁴² M. Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, Hart Publishing: Oxford (1998), 17-19.

⁴³ F. Munari, above n. 16, 49.

⁴⁴ Judgment of 20 September 2016, *Ledra Advertising at al.*, Joined cases C-8/15 to C-10/15 P, ECLI:EU:C:2016:701.

annulment of the parts of the MoU providing for the restructuring of the banks. In this case, the General Court⁴⁵ swiftly rejected the claim, pointing to the fact that the MoU had been adopted by the Republic of Cyprus and the ESM and, thus, not being an act of an EU institution, body, office or agency, its legality cannot be reviewed under Article 263 TFEU.

The CJEU came to the same conclusion also in cases where the challenge was directed toward EU acts. In the *ADEDY* case,⁴⁶ for instance, a public sector trade union sought the annulment of two Council decisions addressed to Greece aiming at reinforcing and deepening fiscal surveillance, as well as pushing through measures for the reduction of an excessive deficit. Applicants argued that, inter alia, the two acts violated the principle of conferral, enshrined in Article 5(2) TEU. The General Court dismissed the action, as it considered that the applicants had no standing to bring it. Indeed, Article 263(4) TFEU provides that natural or legal persons can institute an annulment proceeding only in those cases where the act, if not addressed to them, is “of direct and individual concern to them”. The General Court focused exclusively on the requirement of direct concern and, having found that it had not been fulfilled and having considered that the two conditions are cumulative, it declared the action inadmissible without having to take into consideration the other one. In particular, it observed that the acts not only were addressed to Greece, but were also very general in content, leaving much discretionary space to Greek authorities as to the selection of the concrete measures to be adopted in order to reduce the deficit. Therefore, applicants were not in the position to claim that the EU decisions were of direct concern to them.

This conclusion is in line with a well-settled case law and it did not come as a surprise. The same goes also with a final remark made by the Court, dismissing the incompatibility between the inadmissibility decision and the right to effective judicial protection. Following, also in this case, a usual path,⁴⁷ the Court pointed out

⁴⁵ Order of 10 November 2014, *Ledra Advertising Ltd*, T-289/13, EU:T:2014:981, paras. 56-63.

⁴⁶ Order of 27 November 2011, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos v Council of the European Union*, T-15 /11, EU:T:2012:627

⁴⁷ However this line of reasoning has been much contested also within the CJEU, as the strict interpretation of the conditions for admissibility of action brought by private applicants were considered to be incompatible with the right to an effective judicial remedy: see Judgment of 3 May 2002, *Jego-Quéré*, T-177/01, EU:T:2002:112. The judgment was

that the remedy provided for under Article 263(4) TFUE is not to be considered in isolation, as it represents just one of the possibilities available to private parties to challenge the validity of EU acts having a general character. Indeed, private parties can bring their claim in front of national courts and, then, ask them to make a reference to the CJEU for a preliminary ruling on the validity of the contested acts. As confirmed in *ADEDY*, the annulment procedure and the preliminary reference one establish “a complete system of legal remedies and procedures designed to enable the European Union Courts to review the legality of acts of the institutions”

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

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

In this regard, the case that set the tone was *Pringle*,⁴⁸ one of the few decided by the Court sitting in plenary session. The case originated from a referral by the Irish High Court, which had been asked to ascertain whether, by ratifying the ESM Treaty, Ireland would have undertaken obligations in contravention with several provisions of EU law and, in particular, with the norms on the protection of fundamental rights, as contained in the Charter. The Court answered in the negative, observing that in the case at hand the Charter does not find application. According to Article 51 of the Charter, its provisions are addressed to Member States only when they are implementing EU law and, according to the Court, this condition was not fulfilled in the case at stake. Indeed, “Member States are not implementing Union law [...] when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a

subsequently set aside by the Court, which considered that the then Court of First Instance erred in law, as it failed to duly consider that “the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions” (Judgment of 1 April 2004, *Jego-Quéré*, C-263/02, EU:C:2004:210).

⁴⁸ Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

mechanism”.⁴⁹ Regrettably, the Court did not conclusively address the other issue on the table, i.e. whether the Charter applies when EU institutions, such as the Commission and the European Central Bank, act within the context of the ESM Treaty, as it happens, for instance, when they participate to the definitions of the conditions attached to the assistance package. In this regard, it is worth considering that, in her conclusions on the case, Advocate General Kokott made clear that the Commission “as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights”.⁵⁰

The CJEU adopted an equally restrictive stance with regard to the applicability of the Charter in cases directly concerning the legality of austerity measures. A good example in this regard is the Order adopted by the Court in *Sindicato dos Bancarios do Norte and Others*.⁵¹ The case concerned the Portuguese bailout and, in particular, a number of measures aimed, as clarified in the Implementing Decision 2011/344/EU,⁵² at “strengthening labour market functioning by limiting severance payments and making working time arrangements more flexible” by the end of 2011, as provided for by the Memorandum of Understanding. The Portuguese Government honoured its commitments with the Budget Law for 2011, which imposed, inter alia, cuts to public sector wages and suspended the payment of bonuses. Public sectors trade unions challenged these measures in front of the employment tribunal of Porto that, in turn, referred a number of preliminary questions to the Court. In particular, it asked whether the right to fair and just working conditions, as enshrined in Article 31 of the Charter, prevented the reduction of workers’ salary, when there is no modification of the collective agreement. Moreover, the Portuguese tribunal also asked whether the same provision is to be interpreted as imposing a remuneration that allow the worker to maintain a satisfactory standard of living. Lastly, it asked whether salary cuts, insofar as they are not the only available measure to ensure the sustainability of

⁴⁹ Para. 180.

⁵⁰ View of 26 October 2012, *Pringle*, C-370/12, EU:C:2012:675, para. 176. See see C. Kilpatrick, ‘Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’, *European Constitutional Law Review*, 10, 2015, 405-406.

⁵¹ Order of 7 March 2013, *Sindicato dos Bancarios do Norte and Others*, C-128/12, EU:C:2013:149

⁵² Council Implementing Decision no. 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal [2011] OJ L159/88.

public finances, contravene Article 31 of the Charter, as they put at risk the standard of living of the affected workers. The Court refused to hear any of these questions, claiming that it had no jurisdiction to take cognisance of the requests. Indeed, it confirmed that the Charter does not find application in this case, since, when Portugal adopted the contested measures, it was not implementing EU law.

The strict interpretation of the conditions regulating the applicability of the Charter seems compatible with the black letter of Article 51 of the Charter, which establishes that the Charter applies to member States “only when they are implementing Union law”. However, there has been instances where the Court opted for a much liberal reading of the provision, allowing for the application of the Charter in cases where the State concerned was not implementing EU law. A case that stands out in this regard is *Åkerberg Fransson*, a judgment concerning an alleged violation of the *ne bis in idem* principle enshrined in Article 50 of the Charter.⁵³ Mr. Fransson, having been charged for serious tax offences, had first been ordered to pay a hefty tax surcharge by the Swedish Tax Board and, then, criminally prosecuted for these very offences. From our perspective, the most interesting issue is that neither the Tax Board, nor the Prosecutor were implementing EU law when they imposed the penalties on Mr. Fransson or when they decided to prosecute him. This notwithstanding, the Court established that the Charter could find application in the case at hand, as it considered that the existence of a link, even though quite tenuous, between the offences committed by Mr Fransson and EU law would suffice to this end. In particular, the Court pointed to the fact that some of these breaches concerned the obligation to declare VAT, which, in turn, is one of the sources of EU’s own resources and it is regulated by EU primary and secondary norms. This element, according to the Court, was enough to draw the situation under the scope of EU law and, thus, to make the Charter applicable. This broad reading of the conditions governing the application of EU fundamental rights norms refers back to case law predating the entry into force of the Charter and it used by the CJEU to broaden its scope of application vis-à-vis Member States.

⁵³ See N. Lazzarini, ‘Il contributo della sentenza “Åkerberg Fransson” alla determinazione dell’ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell’Unione Europea’, *Rivista di diritto internazionale*, 96, 2013, 88-912; S. Montaldo, ‘L’ambito di applicazione della carta dei diritti fondamentali ed il principio del ne bis in idem’, *Diritti umani e diritto internazionale*, 2013, 574-581

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

4.4 The 'complete system' doctrine avenged? The action for damages as a (so far) illusory new dawn

A recent decision by the Court of Justice seems to open up new avenues for individuals lamenting a violation of their rights by measures adopted in the context of a structural adjustment program. In the above-mentioned *Ledra* judgment, the Court of Justice declared the admissibility of an action for damages brought by a number of Cypriot investors against the Commission and the ECB for their role in the negotiation and conclusion of the MoU. As seen above, the latter document detailed a series of measures to be adopted by Cypriot authorities as a condition to obtain financial assistance by the ESM. In particular, applicants claimed that the Commission and the ECB played a key role in devising the bail-in implemented by Cypriot authorities in a way that made their bank deposits' value drop dramatically and, thus, violating their right to property, enshrined in Article 17 of the Charter. On this point, the Court overturned the decision of the General Court and distanced itself from the path suggested by Advocate General Wahl.

The General Court, in a Order issued on November 2014, rejected the claims for compensation on several different grounds. First, it found that there was no act, nor course of action, that could be imputed to the Commission or the ECB, since the ESM Treaty does not confer to them any power to take autonomous decisions. Consequently, the acts adopted in that context "solely commit the ESM"⁵⁴ and the Court has no jurisdiction to consider a claim that is based on the illegality of an act that does not originate from an EU institution acting within the EU. Secondly, it

⁵⁴ Para. 45.

excluded that the Commission could incur responsibility for having failed to fully exercise its role as guardian of the Treaties, as provided for in Article 17 TEU. In particular, it opined that the alleged omission did not meet one of the conditions for the admissibility of the action for damages, that of the existence of a causal link between the behaviour of the institution and the damage. Indeed, the decree that determined the severe reduction of the value of claimants' deposits was adopted before the conclusion of the MoU and, consequently, the Commission could have done nothing to avert the losses.⁵⁵

The Advocate General's Opinion⁵⁶ was, up to a certain point, broadly in line with the arguments put forward by the General Court. After excluding that the MoU could be directly imputed to either the Commission or the ECB, he offered a distinctively restrictive reading of *Pringle* and, in particular, of the paragraph where the Court hinted at the existence of an obligation for the Commission to ensure the consistency of the MoU with EU law.⁵⁷ Further he drew an unpersuasive parallel between the discretionality that the Commission enjoy in the context of the infringement procedure and the situation at stake, going as far as maintaining that "it cannot be argued that every time the Commission breaches a specific Treaty provision, or does not prevent such a provision being breached by another entity, that breach amounts to an infringement of the general provision of Article 17 TEU". All these elements led him to conclude that there was no duty for the Commission to act in case of incompatibility between bail-out instruments and EU law and, thus, no responsibility could arise. For good measure, the Advocate General also excluded the applicability of the Charter when the Commission acts outside the EU legal framework. In his final remarks, AG Wahl admitted that aggrieved individuals should not look for remedies within the EU legal order, but at national or international level. As for the latter, he took the UN Draft Articles on the Responsibility of international Organizations as a "source of inspiration"⁵⁸ to

⁵⁵ Paras. 54-55.

⁵⁶ Opinion of 21 April 2016, *Ledra Adverting Ltd*, Joined cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701

⁵⁷ *Pringle*, above n. 47, para. 164.

⁵⁸ Para. 100. Quite remarkably, in drawing inspiration from this document, the Advocate General did not even feel the need to distinguish between international responsibility, which is the subject matter of DARIO, and non-contractual liability under Art. 340 TFEU.

conclude that only the ESM, and possibly Member States, can be held responsible for the acts adopted in the context of ESM-sponsored financial assistance programmes.

Conversely, the Court of Justice declared the action for damages admissible, at least with regard to the Commission. The fact that the MoU falls outside the scope of application of EU law – the Court observed – does not bar applicants from bringing an action for compensation. Indeed, this element is relevant for the admissibility of an action for annulment, but not in the case at stake. The two actions are autonomous⁵⁹ and their admissibility depends on the fulfilment of different conditions. The Court of Justice, then, turned to address the crux of the matter, i.e. whether the Commission is bound to ensure the respect of EU law even when acting outside the EU legal order. *Pringle* had been quite reticent on this point, as it mentioned Article 17 TEU without drawing any conclusion. *Ledra* represents a step forward in that regard: moving from the premise that the participation to the ESM activities cannot alter the powers conferred to the institution by the Treaties, the Court inferred that “the Commission retains, [...] within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from article 17(1) TEU”. For this reason, it is bound to “refrain from signing a memorandum of understanding” even in the case “it doubts” its consistency with EU law.

Such a conclusion rests on the assumption that the primacy of EU law operates not only with regard to domestic law, but also with regard to agreements concluded between Member States.⁶⁰ What the Court is saying, without making it explicit, is that Article 17 TEU, mandating the Commission to act as guardian of the Treaties, prevails over Article 13(4) ESM Treaty, which establishes that the “Commission shall sign the MoU on behalf of the ESM” when the document is approved by the Board of Governors. In this regard, the Court is seemingly sending a strong message to EU institutions or, at least, to the Commission, making clear that their freedom of

⁵⁹ See K. Gutman, “The Evolution of the Action for Damages Against the European Union and its Place in the System of Judicial Protection”, *Common Market Law Review*, 48, 2011, 703-708.

⁶⁰ This proposition is fully in line with the case law of the Court; see Judgment of 10 November 1992, *Exportur SA*, C-3/91, EU:C:1992:420. Furthermore, it finds strong support in the literature, see B. de Witte, ‘Chameleontic Member States: Differentiation by Means of Partial and Parallel International Agreements’, in B. De Witte, D. Hanf, H. Voos (eds), *The Many Faces of Differentiation in EU Law*, Intersentia: Antwerpen – Oxford – New Yprk (2001), 244-245.

action in the context of intergovernmental mechanism created by Member States is not unlimited.

The judgment represents a remarkable step forward, as it is the first case where the Court has finally admitted the possibility that bailout measures are, to some extent, amenable to judicial review also in the EU legal order. However, the sense of relief quickly evaporates if one considers the part of the judgment on the merit of the case. The Court concluded that no damages could be awarded, since claimants failed to establish a sufficiently serious breach of a rule of law and, more in detail, a violation of claimants' right to property. The main problem does not lie with the conclusion – which is by and large convincing in the light of the circumstances of the case -, but with the argumentative path followed by the Court to get there.

The Court began with making clear that when acting in the context of the ESM Treaty, the Commission is bound to respect and to ensure respect for the Charter. Therefore, it had the duty to make sure that the MoU was consistent with the rights guaranteed therein and, in particular, with the right to property, contained in Article 17. Subsequently, it observed that, under the Charter, this right is not absolute, as it can be subject to restrictions. However, Article 52(1) Charter establishes that limitations to the exercise of any right are possible only in so far as they pursue an objective of general interest, comply with the principle of proportionality and does not impair the essence of the right.

The Court enumerated all the conditions, but it then contented itself with just one of them, i.e. the fact the impugned measures pursued an objective of general interest. Little, if any, attention is devoted to their proportionality and to their capacity to preserve the essence of the right. The importance of the objective pursued by the measures – ensuring the stability of the banking system and of the euro area as a whole – it is enough, in the eyes of the Court, to conclude that they “do not constitute a disproportionate and intolerable interference impairing the very essence of the appellants' right to property”. Without any need to consider the suitability of the measures to reach the stated objectives, their necessity or whether a fair balance had been struck with other competing objectives.⁶¹

⁶¹ The Court seems to have taken very seriously the suggestion of some commentators who argue that, instead than putting these measures outside the reach of EU law, the Court should address the merit of the cases, granting a wide margin of discretion to decision-makers in order to preserve their autonomy of action. See C. Barnard, ‘The Charter, the

This approach can be read as offering a stark – and troublesome – confirmation of the deep impact of the crisis on the EU constitutional fabric and, in particular, on the relationship between different objectives therein. Ensuring the financial stability in the euro area has become a sort of a trump card that just needs to be invoked in order to prevail over any other competing objective.⁶² Furthermore, the refusal of the Court to engage in any sort of proportionality review of the measures send a worrisome message to future applicants. Should the Court confirm this approach, the chance of success of actions brought against austerity measures are almost non-existent, since all these measures aim at restoring or preserving the stability of the euro area.

5. Concluding remarks

The analysis shows that the Court has consistently adopted a non-interventionist stance with regard to judicial actions challenging the compatibility of austerity measures with key principles of EU law, such as the protection of fundamental rights. This finding still holds true after the *Ledra* judgment, where the Court declared the admissibility of damages actions brought by Cypriot investors against the Commission and the ECB, but it then rejected them by avoiding to exercise any meaningful control on the impugned measures.

This choice can be viewed as an attempt by the Court not to interfere with decisions taken by political bodies – being them national or supranational ones – to cope with an emergency situation. This is nothing new, as there are many examples where courts have decided to refrain from constraining the capacity of the legislative or, more often, executive power to (re-)act in the face of an emergency.⁶³

Court – and the Crisis’, *University of Cambridge Legal Studies Research Paper Series*, Paper No. 18/2013, 13-14.

⁶² See generally, F. Costamagna, ‘The Impact of Stronger Economic Policy Coordination on the European Social Dimension: Issues of Legitimacy’, in M. Adams, F. Fabbrini, P. Larouche (eds), *The Constitutionalization of European Budget Constraints*, Hart Publishing: Oxford, 2014, 371-373.

⁶³ This tendency has been extensively analysed with regard to the so-called fight against terrorism, see recently F. Fabbrini, ‘The Role of the Judiciary in Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice’, *Yearbook of European Law*, 28, 2010, 664-697; D. Cole, ‘Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis’, *The Michigan Law Review*, 101, 2003, 2565-2595.

However, the Court seems to have gone too far and such an approach is problematic under many accounts. In particular, the choice of the Court not to engage with these issues reveals its passive acceptance of the demise of the role that the law can play in the response to the crisis and the construction of a new architecture.⁶⁴ This is all the more disturbing in the context of the European Union that, as the Court itself has proudly repeated several times and it has been codified in the Preamble of the Charter, is “based on the rule of law”. The situation is further compounded by the effects that the managerialist turn, and its blind adherence to fiscal austerity, is having on what can be broadly defined as the ‘European social model’. In this context, the Court’s unwillingness – and not just inability - to fully exercise its role do not certainly do any good in restoring the legitimacy of the European integration process.

⁶⁴ S. Giubboni, ‘Europe Crisis-Law and the Welfare State – A Critique’, *European Labour Law Journal*, 2015, 8-9.