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Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*

Case C-258/14, *Eugenia Florescu and Others* v. *Casa Județeană de Pensii Sibiu and Others*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448

1. Introduction

The *Florescu* ruling forms part of the growing body of case law on the Economic and Monetary Union (EMU) and is the most recent Grand Chamber ruling concerning the bailouts conducted during the financial crisis. The case, which originated in the context of the Romanian bailout, presented the Court with an opportunity to consider two important issues at the core of the legal debates on the euro crisis and on the EU's activities with respect to States in receipt of financial assistance. On the one hand, *Florescu* prompted the Court to clarify the legal status and effects of the so-called Memoranda of Understanding (MoUs) that the recipient States conclude with their creditors, at least insofar as balance-of-payments assistance is concerned (Art. 143 TFEU). On the other hand, and related to the first point, the ECJ shed more light on the link between the EU legal order and the national measures adopted by the beneficiary States to fulfil the commitments made in the MoUs. The issue at stake in the case was whether Romania could be regarded as implementing Union law, within the meaning of Article 51(1) of the EU Charter of Fundamental Rights, when it legislated the impugned prohibition on combining a public-sector retirement pension with income from activities carried out in public institutions, in order to fulfil its MoU commitments.

The comments below start by analysing the ECJ case law prior to *Florescu* (section 5.1), aiming to place the new judgment in its proper context and to highlight the various ways in which it adds to the existing case law. We then turn to consider the legal nature of the MoU, its interplay with other acts in this area, and the remedies that could be admissibly brought against it before the EU courts (section 5.2). It will be argued that the *Florescu* ruling serves to enhance the legal accountability of the EU institutions for their actions with respect to bailouts. The following section looks at the scope of application of the EU Charter of Fundamental Rights with respect to national measures adopted in the context of a bailout programme and defends the Court's choice to reconnect with its well-established case law (section 5.3). The final section

assesses the proportionality analysis carried out by the Court (section 5.4). The annotation aims to highlight the novelties in the Court's ruling in the case, and to plug the gaps wherever the Court stayed silent or did not elaborate on a given issue. It will be shown that the legal significance of the judgment for EMU law far exceeds the circumstances of the case.

2. Factual and legal background to the dispute

The facts of the case are fairly simple and need not be considered in great detail. Romania was in receipt of multilateral financial assistance by the EU, the International Monetary Fund and the World Bank and is currently under post-programme surveillance.[1] Union assistance was granted through the facility providing medium-term financial assistance for non-euro area Member States experiencing difficulties with respect to their balance of payments. This facility was established by Regulation 332/2002, which was adopted on the basis of Article 143 TFEU.[2] Under this procedure, the Council may, acting on a proposal from the Commission made after consulting the Economic and Financial Committee, decide to grant financial assistance to a non-Eurozone Member State "experiencing, or seriously threatened with, difficulties as regards its balance of current payments or capital movements".[3] To this end, the Commission shall conduct borrowings on the financial markets.[4] The Commission further monitors the conditionality attached to the financial assistance granted to the recipient State.[5]

Romania received three different assistance programmes (2009–11; 2011–13; and 2013–15). The latter two packages were granted on a precautionary basis. Union financial assistance was made available upon the adoption of Council decisions pursuant to Regulation 332/2002.[6] *Florescu*

1. European Commission, "Financial assistance to Romania", available at <ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-romania_en>, (last visited 4 Sept. 2017).

2. Council Regulation (EC) 332/2002 of 18 Feb. 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, O.J. 2002, L 53/1.

3. Ibid., Arts. 1(1), 3 and 8.

4. Ibid., Art. 1(2).

5. Ibid., Art. 5.

6. See generally Council Decision 2009/459/EC of 6 May 2009 providing Community medium-term financial assistance for Romania, O.J. 2009, L 150/8; Council Decision 2011/288/EU of 12 May 2011 providing precautionary EU medium-term financial assistance for Romania, O.J. 2011, L 132/15; Council Decision 2013/531/EU of 22 Oct. 2013 providing precautionary Union medium-term financial assistance to Romania, O.J. 2013, L 286/1; Council Decision 2013/532/EU of 22 Oct. 2013 granting mutual assistance for Romania, O.J. 2013, L 286/4.

concerns the first of these programmes, which had granted Union assistance to Romania following Council Decision 2009/458/EC.[7] Council Decision 2009/459/EC set out the core terms of the bailout,[8] which were subsequently laid down in greater detail in the MoU concluded between the European Community (represented by the Commission) and Romania.[9]

The applicants in the main proceedings were judges who also held teaching positions at the university, as the law permitted at that time. The same law provided that retired judges and prosecutors could combine their pension with income from a professional activity, regardless of the level of that income. However, when the crisis broke out, Law No. 329/2009 "on the reorganization of certain public authorities and institutions, on streamlining public spending, on supporting businesses and on complying with the framework agreements with the European Commission and the International Monetary Fund" was adopted. The contested measure at issue in the main proceedings prohibited the combining of the net pension with income from activities carried out in public institutions if the amount of the pension exceeded a certain threshold. This threshold was fixed at the amount of the national gross average salary, which was also the basis for drawing up the State social security budget. The persons affected by the contested law were required to opt in writing either for payment of their pension to be suspended for the duration of that activity, or for termination of the employment relationship, if the net pension paid to them was higher than the national gross average income. A failure to opt for one of those alternatives within the prescribed period constituted grounds for automatic termination of the employment relationship. The applicants, who were retired judges, opted for suspension of payment of their pensions. They sought to argue that Article 17 of the Charter (right to property) should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibited the combining of a net public-sector retirement pension with income from activities carried out in public institutions if the amount of the pension exceeded a certain threshold.

The Court was asked to rule whether the MoU concluded between the EU and Romania could be regarded as an act of an EU institution that could be subject to interpretation pursuant to Article 267 TFEU. It was further requested to rule whether the MoU required the adoption of the impugned national measure. Last, the Court was asked whether Article 17 of the Charter

7. Council Decision 2009/458/EC of 6 May 2009 granting mutual assistance to Romania, O.J. 2009, L 150/6.

8. Council Decision 2009/459/EC of 6 May 2009 providing Community medium-term financial assistance for Romania, O.J. 2009, L 150/8.

9. Memorandum of Understanding between the European Community and Romania, available at <ec.europa.eu/economy_finance/publications/pages/publication15409_en.pdf>, (last visited 4 Sept. 2017).

must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits the combining of a net public-sector retirement pension with income from activities carried out in public institutions if the amount of the pension exceeds a certain threshold.

3. Opinion of the Advocate General

With regard to the nature of the MoU, Advocate General Bot opined that "… there [was] no doubt, to [his] mind, that the Memorandum of Understanding [was] an act of the institutions."[10] More specifically, it "was adopted on the basis of Article 143 TFEU, which confers on the EU the power to secure commitments to a Member State."[11] As it was adopted in accordance with the procedure laid down in Regulation 332/2002,[12] "[t]he Memorandum of Understanding therefore gives concrete form to an undertaking between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that undertaking, to benefit from financial assistance from the EU."[13]

Notably, the Advocate General opined that "… the Memorandum of Understanding does not produce binding legal effects."[14] However, it is not necessary that an act of an institution, body, office or agency of the Union have binding force for a preliminary reference to be admissible.[15] The Advocate General concluded that "… the Memorandum of Understanding must be regarded as an act of the EU institutions for the purposes of Article 267 TFEU and … the Court has jurisdiction to interpret it."[16]

With regard to the second question, the Advocate General noted the absence of any reference to a prohibition of the combining of the public service pension with income from activities carried out in public institutions, hence "… the Memorandum of Understanding must be interpreted as meaning that it does not require the adoption of national legislation, such as that at issue in the main proceedings …".[17] However, with regard to the third question, he noted that the impugned national legislation was adopted to implement the commitments made in the MoU, which was part of EU law. As

10. Opinion of A.G. Bot in Case C-258/14, *Eugenia Florescu,* EU:C:2016:995, para 49.
11. Ibid., para 49.
12. Ibid., paras. 49–51.
13. Ibid., para 52.
14. Ibid., para 53.
15. Ibid., paras. 53–54.
16. Ibid., para 55.
17. Ibid., paras. 56–60.

such, EU law governed the situation of the applicants in the main proceedings.[18] It was irrelevant, in his view, that the MoU left discretion to the recipient State with respect to the measures required to ensure compliance with the MoU, as "… the objectives referred to in Article 3(5) of Decision 2009/459, and also in the Memorandum of Understanding, are sufficiently detailed and precise to constitute a specific rule of EU law in that respect, unlike mere recommendations adopted by the Council, on the basis of Article 126 TFEU, and addressed to Member States whose public deficit is considered excessive."[19] Consequently, the impugned national law triggered the application of the EU Charter.[20] The Advocate General opined, however, that there was no violation of Article 17 of the EU Charter.[21]

4. Judgment of the Court

The judgment is substantially similar to the Opinion of the Advocate General, with the exception of two key points that will be discussed below. With regard to the first question referred, the Court ruled that the MoU "gives concrete form to an agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU".[22] Its legal basis lies in Article 143 TFEU and Regulation 332/3002, and it was concluded, in particular, by the European Union, represented by the Commission. The Memorandum of Understanding therefore "constitutes an act of an EU institution within the meaning of Article 267(b) TFEU",[23] and may thus "be subject to interpretation by the Court".[24]

The Court went on to assess whether the MoU should be interpreted as requiring the adoption of the impugned national measure. It held that "… the Memorandum of Understanding, although mandatory, contain[ed] no specific provision requiring the adoption of the national legislation at issue in the main proceedings".[25] Nevertheless, the Court observed that "… the purpose of the measure at issue in the main proceedings … [was] to implement the undertakings given by Romania in the Memorandum of Understanding, which

18. Ibid., paras. 65–69.
19. Ibid., para 70.
20. Ibid., para 71.
21. Ibid., paras. 72–87.
22. Judgment, para 34. See further para 38.
23. Judgment, para 35.
24. Ibid., para 36.
25. Ibid., para 41.

is part of EU law".[26] The Court added that "the objectives set out in Article 3(5) of Decision 2009/459, as well as those set out in the Memorandum of Understanding, [were] sufficiently detailed and precise to permit the inference that the purpose of the prohibition on combining a public-sector retirement pension with income from activities carried out in public institutions, stemming from Law No 329/2009, [was] to implement both the memorandum and that decision, and thus EU law, within the meaning of Article 51(1) of the Charter".[27] Consequently, the Charter was applicable to the dispute in the main proceedings.[28]

As regards the compatibility of the impugned measure with the EU Charter, the Court held that "such a measure restrict[ed] the use and enjoyment of the pension entitlement of the persons concerned, in that it entail[ed] a suspension of the payment of their pension when they [had] opted, instead, to pursue such an activity".[29] The Court observed that it was apparent from the wording of Article 2 of Law No. 329/2009, that that law was of an exceptional nature and was intended to be temporary.[30] Moreover, it did not call into question the very principle of the right to a pension, but restricted its exercise in well-defined and limited circumstances, namely, when the pension was combined with a professional activity carried out in public institutions and when the amount of the pension exceeded a certain threshold.[31] Law No. 329/2009 was thus found to be consistent with the essential content of the applicants' right to property.[32]

Further, the impugned national legislation aimed to achieve two objectives – that of reducing public sector wage costs and that of reforming the pension system – "which were laid down by Decision 2009/459 and by the Memorandum of Understanding with a view to reducing the balance of payments difficulties that led Romania to seek and to obtain financial assistance from the European Union".[33] Such objectives were, said the Court, objectives of general interest.[34]

As regards the suitability and necessity of the impugned measure, the Court noted that "given the particular economic context, Member States have broad discretion when adopting economic decisions and are in the best position to determine the measures likely to achieve the objective pursued".[35] Moreover,

26. Ibid., para 47.
27. Ibid., para 48.
28. Ibid., para 48.
29. Ibid., para 52.
30. Ibid., para 55.
31. Ibid., para 55.
32. Ibid., para 55.
33. Ibid., para 56.
34. Ibid., para 56.
35. Ibid., para 57.

Law 329/2009 did not impose a disproportionate and excessive burden on the persons concerned by the prohibition on combining a retirement pension with income from an activity in a public institution, given that "on the one hand, they [had] to choose between the payment of their pension or of that income only where the amount of their pension exceed[ed] the national average gross wage which was the basis for drawing up the State's social security budget, and that, on the other, they [might] at any time decide to terminate their employment relationship and receive their pension again…."[36]

The Court concluded that there was no violation of Article 17(1) of the Charter.

5. Analysis

5.1. *Placing the ruling in context*

Three types of legal challenges could be mounted against the conditionality attached to a bailout programme: (1) an action for annulment under Article 263 TFEU; (2) a reference to the Court for a preliminary ruling under Article 267 TFEU concerning the interpretation and/or validity of the impugned act; and (3) an action for damages caused by the EU institutions involved in a bailout programme (Art. 340 TFEU). The requirements for standing are of course different for each of these. Moreover, a different range of acts (or omissions) is caught by these remedies. As regards the grounds for review, natural or legal persons may rely on primary and/or secondary EU law with a view to arguing that the conditionality attached to a bailout programme was illegal under EU law. The EU Charter rights are especially important in this respect, and litigants often seek to argue that the conditionality attached to a bailout programme violates their Charter rights.

Austerity programmes or reforms agreed at EU level need implementation at the national and/or subnational level. This perforce means that national implementing measures adopted in order to comply with the MoU may also be challenged before the national courts under hierarchically superior national law or international law (e.g., under the ECHR). However, this is different from challenging those measures under EU law. Litigants need to strike at the core: they need to strike at the source of these measures, which is the MoU. Challenging national law whilst leaving the MoU intact is akin to cutting the branches of a tree while leaving its roots intact. The tree will be allowed to stand and its branches will sooner or later grow again. When you believe that a measure is illegal, you need to be able to uproot its normative source. And

36. Ibid., para 58.

when this is not possible under EU law, because the MoU sits outside the EU legal order, for instance, litigants could instead challenge an EU law act which replicates the key provisions of the MoU in the EU legal order. Litigants need, in other words, to challenge the "supranational *raison d'être*" of national austerity measures.[37]

This is exactly what happened when litigants from Greece brought an annulment action against Council Decisions adopted in accordance with the Excessive Deficit Procedure (the so-called *ADEDY* cases).[38] The General Court ruled, however, that the applicants in the main proceedings were not directly concerned by the contested measures. There is good reason to think that if the ECJ were to follow its well-established case law on direct and individual concern, virtually no Article 263 TFEU challenge against such Council Decisions could ever be admissible, except for a narrow category of retrospective cases.[39] Subsequently, the Court's Grand Chamber held in *Mallis* that an action for annulment against a Eurogroup statement is not admissible, as the Eurogroup is an informal grouping of the euro area finance ministers and its acts could not be attributed to the Commission or the ECB.[40]

The first preliminary references that arose in the context of the financial and public debt crisis were sent to the ECJ by national courts in Portugal and Romania. The Portuguese cases concerned the MoU concluded to receive financing from the European Financial Stabilization Mechanism (EFSM) and the European Financial Stability Facility (EFSF), whereas the Romanian cases arose in the context of balance-of-payments assistance. The ECJ declared all those challenges inadmissible, holding that the Member States concerned were not "implementing Union law" in adopting the impugned measures.[41] It was not clear, as we shall see below (section 5.3), whether the litigants in those

37. Repasi, "Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*", 54 CML Rev. (2017), 1123–1156, 1140.

38. Case T-541/10, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos* v. *Council of the EU*, EU:T:2012:626; Case T-215/11, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos* v. *Council of the EU*, EU:T:2012:627.

39. See Craig and de Búrca, *EU Law: Texts, Cases, and Materials*, 6th ed. (OUP, 2015), p. 520.

40. Joined Cases C-105-109/15 P, *Konstantinos Mallis and Others* v. *European Commission and European Central Bank*, EU:C:2016:702.

41. See Case C-434/11, *Corpul National al Politistilor* v. *MAI*, EU:C:2011:830; Case C-134/12, *MAI et al*. v. *Corpul National al Politistilor*, EU:C:2012:288; Case C-369/12, *Corpul National al Politistilor* v. *MAI*, EU:C:2012:725; Case C-462/11, *Cozman* v. *Teatrul Municipal Targoviste*, EU:C:2011:831; Case C-128/12, *Sindicato dos Bancarios do Norte et al.* v. *BPN*, EU:C:2013:149; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* v. *Fidelitate Mundial*, EU:C:2014:2036; Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins* v. *Via Directa*, EU:C:2014:2327.

cases failed to establish the link with EU law or whether the ECJ thought that the MoUs concerned were not part of EU law at all.

The only type of action that has thus far been ruled admissible is the action for damages. The leading case is *Ledra Advertising*, where the Grand Chamber held that the European Commission retained its role as guardian of the Treaties when acting in the framework of the European Stability Mechanism (ESM) and should therefore refrain from signing a MoU with the ESM whose consistency with EU law it doubts. Otherwise, it could be rendered liable for damages by aggrieved individuals pursuant to an Article 340 TFEU challenge.[42]

It is in this context that the *Florescu* ruling was delivered: a context of uncertainty as to whether the conditionality attached to the MoU could be amenable to a legal challenge under EU law, even in those cases where the financial assistance was administered through a mechanism established within the EU legal order. Prior to the ruling in *Florescu*, the prevailing view was that litigants had to "work around" the MoU to find a Union act that could form the basis of a direct (Art. 263 TFEU) or – more plausibly – an indirect challenge (Art. 267 TFEU) to the bailout terms before the EU courts.[43] This meant that one should challenge secondary EU law acts: either Council Decisions adopted pursuant to the Excessive Deficit Procedure which are addressed to the recipient Member State (Arts. 126 and 136 TFEU) or Council Decisions adopted under Article 7 of "two-pack" Regulation 472/2013 – the EU's new framework for financial assistance within the euro area.[44] Another option for litigants would have been to seek damages for breach of EU law by the EU institutions due to their activities related to bailout measures (Art. 340 TFEU), whenever the relevant conditions are met.[45]

42. Joined Cases C-8-10/15 P, *Ledra Advertising Ltd and Others* v. *European Commission and European Central Bank*, EU:C:2016:701. See also, among other cases, Case T-531/14, *Leïmonia Sotiropoulou and Others* v. *Council of the EU*, EU:T:2017:297 (concerning the non-contractual liability of the Council with respect to Decisions adopted within the framework of the Excessive Deficit Procedure).

43. See generally Kilpatrick, "Are the bailouts immune to EU social challenge because they are not EU law?", 10 EuConst (2014), 393–421, 398–407. This is not to say that Kilpatrick excludes the possibility that "both the EU law source and the MoU can be defined as legally binding acts": see 411–412.

44. Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, O.J. 2013, L 140/1.

45. One should, however, keep in mind that substantive hurdles will most probably make it very difficult for litigants to succeed on the merits of their compensation claims. The threshold is indeed high for plaintiffs, and recent case law suggests that they will struggle to establish a "sufficiently serious breach of a rule of law intended to confer rights on individuals". See

Florescu adds to the earlier case law by establishing that the MoU for balance-of-payments assistance is an act of an EU institution which may be interpreted by the Court following a reference for a preliminary ruling. The *Florescu* ruling brings the MoU linked to balance-of-payments assistance within the EU legal order and renders it amenable to an Article 267 TFEU request for interpretation (see section 5.2). The Court further clarifies the scope of application of the EU Charter of Fundamental Rights with respect to bailout measures (see section 5.3), this being especially important as most litigants in this area rely primarily on the EU Charter with a view to striking down measures linked to bailout packages. The remainder of the annotation is concerned with these issues, as well as with the proportionality test as applied in *Florescu* (section 5.4).

5.2. *The MoU as an act of an EU institution which may be subject to interpretation by the Court*

Perhaps the most groundbreaking finding by the Court in *Florescu* was that it held for the very first time that the MoU could be qualified as a Union act within the meaning of Article 267(1)(b) TFEU. As such, it might be subject to interpretation by the Court, following a preliminary reference by a national court. It will be argued that the Court thereby enhanced the legal accountability of the EU institutions acting in this area (section 5.2.1). However, there are a number of questions that arise from the Court's ruling. Accordingly, we will explore the interplay between the MoUs and Council Decisions (section 5.2.2), as well as whether the MoUs concluded under other financial assistance mechanisms could also be challenged before the CJEU (section 5.2.3). Notably, the Court did not come clean on the precise legal nature of the MoU, therefore we cannot know the exact type of remedies that may be admissibly brought against the MoUs before the CJEU (section 5.2.4).

5.2.1. *Enhancing the legal accountability of the EU institutions for the conditionality attached to bailout packages*

The *Florescu* ruling enhances the legal accountability of the EU institutions for the rescue terms linked to an EU bailout. We have seen in section 5.1 that, prior to the *Florescu* ruling, the prevailing view was that one had to "work around" the MoU to find a Union act that could form the basis of a direct (Art. 263 TFEU) or – more plausibly – an indirect challenge (Art. 267 TFEU) to the bailout terms before the EU courts. A Council Decision adopted pursuant to the Excessive Deficit Procedure (Arts. 126 and 136 TFEU) or the "two-pack"

further Dermine, "The end of impunity? Legal duties of 'borrowed' EU institutions under the ESM framework", 13 EuConst (2017), 369–382, 379.

legislation (Art. 7 of Regulation 472/2013) would do for these purposes. The MoU was, seemingly, legally untouchable. Another option for litigants would have been to seek damages for breach of EU law by the EU institutions (Art. 340 TFEU). The Court in *Florescu* expands the list of possible challenges against bailout measures by qualifying the MoU linked to balance-of-payments assistance as an "act of an EU institution" and hence rendering it amenable to an Article 267 TFEU request for interpretation.

It should be stressed that this legal development is not just about facilitating access to the EU courts for austerity-hit litigants wishing to contest the legality of the bailout terms. Since the MoU was held to be an act of an EU institution which may be interpreted by the Court, it is argued here that it should be interpreted in the light of *all* primary and secondary EU law, including the EU Charter of Fundamental Rights.[46] This is important, because it could serve to mitigate, it is hoped, the MoU's adverse impact on the socioeconomic conditions in the recipient Member State. The contested bailout term(s) could be brought to bear a different meaning, read in the light of primary and/or secondary EU law, insofar as this would not result in a *contra legem* interpretation.

5.2.2. *Filling the gaps: The interplay between the MoU and Council Decisions*

There are, however, a number of questions that the *Florescu* ruling gives rise to. For one, the Court did not look at the interplay between the MoU and the relevant Council Decision.[47] We have seen that the legal territory of bailout programmes is occupied by both MoUs and Council Decisions. The latter typically include only the core bailout terms and are not as detailed as the MoUs. Consequently, some bailout terms are found in both instruments, whereas other rescue terms are only included in the MoU.

In light of this, there are two possible readings of the *Florescu* ruling. On one reading, the effect of the Court's ruling is that at least for those MoUs concluded within the EU legal order, litigants need not worry whether the relevant Council Decision includes the contested bailout term or not. On this reading of the judgment, if the bailout term that litigants wish to challenge is not reproduced in the Council Decision, they may instead challenge the MoU, which is an "act of the EU institutions". This would greatly enhance the legal

46. For an argument that all EU law is also binding on the EU institutions outside the EU legal order, see Lenaerts and Gutiérrez-Fons, "The European Court of Justice as the guardian of the rule of EU social law", in Barnard, De Baere and Vandenbroucke (Eds.), *A European Social Union after the Crisis* (OUP, 2017), p. 439; Karatzia and Markakis, "What role for the Commission and the ECB in the ESM?", 6 *Cambridge International Law Journal* (2017), 232–252.

47. In *Florescu*, this was Council Decision 2009/459/EC.

accountability of the EU institutions precisely in those cases where the contested bailout term is only in the MoU and is not equally found in a Council Decision.

There is, however, another possible reading of the judgment, according to which it was crucial for the admissibility of the challenge that the contested bailout term was included in both the Council Decision *and* the MoU. It should be noted that the Court refers to *both* the Council Decision and the MoU in various parts of the judgment.[48] Consequently, it is not crystal clear whether it would have made any difference to the outcome of the case had the relevant term of the MoU not been included in the Council Decision at all. We cannot know which reading of the two the Court would give preference to in future rulings, but we argue that the construction of the MoU for balance-of-payments assistance as an "act of an EU institution" that may be subject to interpretation by the Court opens a gateway into the EU courts, even in cases where there is no equivalent term in the relevant Council Decision.

5.2.3. *Filling the gaps: The MoUs with other financial assistance mechanisms*

Following the ruling in *Florescu*, we argue that those MoUs concluded within the EU legal order will henceforth be regarded as Union acts that may be subject to interpretation by the Court. This would cover the MoUs linked to balance-of-payments assistance or the MoUs with the EFSM.[49] However, the ESM[50] and the EFSF[51] were established, and remain, outside the EU legal order. Consequently, their MoUs and other acts cannot be regarded as Union acts.[52] Recalling the two criteria employed by the Court in *Florescu*, the MoU with the ESM is not an act whose legal basis lies in EU law provisions and it is not concluded with the EU. The MoU with the ESM has its legal basis in the ESM Treaty and is concluded between the recipient Member State and the ESM (and is signed by the European Commission).

In the case of the ESM, one could therefore challenge the relevant Council Decisions adopted pursuant to the Excessive Deficit Procedure and/or the

48. See, e.g., judgment, paras. 38, 48 and 56.

49. The EFSM was established under Art. 122 TFEU by Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, O.J. 2010, L 118/1. On the MoU with the EFSM, see the Opinion of A.G. Saugmandsgaard Øe in Case C-64/16, *Associação Sindical dos Juízes Portugueses* v. *Tribunal de Contas*, EU:C:2017:395, para 45, which is discussed later in this annotation.

50. See Treaty establishing the European Stability Mechanism, signed between the Eurozone countries on 2 Feb. 2012.

51. Established by a Framework Agreement concluded between the Eurozone countries on 9 May 2010.

52. Joined Cases C-8-10/15 P, *Ledra Advertising*, paras. 52–55.

"two-pack" legislation. This Council Decision may itself include the contested bailout term, and mandate that the beneficiary Member State comply with it. If the impugned bailout term "is partly contained in an EU law source and partly in a MoU", it may still be possible that "it could be read into the EU source".[53] Consequently, an Article 263 TFEU challenge or an Article 267 TFEU challenge is in principle possible against such Council Decisions, providing that the relevant admissibility requirements are met. It should be stressed that this is perforce conjecture, as there has not yet been a ruling by the ECJ on the interpretation and/or validity of a Council Decision adopted under "two-pack" legislation.

A separate issue is whether the MoU with the ESM should be amended accordingly after an ECJ ruling on the interpretation and/or validity of the relevant Council Decision. This would clearly be easier for MoUs concluded within the EU legal order, because the conditionality forms part of EU law and hence the relevant Council Decision could be amended accordingly. Space precludes a detailed analysis of this point. Suffice it to say for present purposes that we believe that there is a legal obligation to adjust the MoU with the ESM following a ruling by the ECJ on the validity of the relevant Council Decision. The relevant provisions in the ESM Treaty and "two-pack" legislation are cast in terms which are broad enough to encompass the meaning proposed here.[54] It would further contradict the Commission's role as guardian of the Treaties (Art. 17(1) TEU) – a role stressed by the Grand Chamber in *Ledra Advertising* – to argue that these provisions merely set out a "static" obligation to ensure that the MoU is consistent with EU law only when it is drafted. A "dynamic" obligation, whereby the Commission would run a check on the MoU's compatibility with EU law *throughout the duration of the programme*, is coherent with the Commission's role as guardian of the Treaties and more suited for an instrument (MoU) which is amended after successive programme reviews.[55] The legal framework of the ESM cannot be compatible with EU law unless it foresees this possibility. Consequently, the MoU with the ESM should, according to this argument, be adjusted by the ESM organs[56] to the amended Council Decision, following a ruling by the

53. Kilpatrick, op. cit. *supra* note 43, at 410–411.

54. These provisions are Arts. 13(3)-(4) ESM Treaty and 7(2) of Regulation 472/2013.

55. It should be stressed that the Court has not yet ruled on the matter, and that it only ruled in Joined Cases C-8-10/15 P, *Ledra Advertising*, para 59 that the Commission "should refrain from signing a memorandum of understanding whose consistency with EU law it doubts".

56. This could be achieved through the "Supplemental Memorandum of Understanding", which a document updating the reform commitments undertaken by the Government concerned in the original MoU and is approved by the ESM's Board of Governors. In the case of Greece, see <ec.europa.eu/info/sites/info/files/ecfin_smou_en.pdf>, (last visited 27 Sept. 2017).

ECJ on the validity of terms included in that Decision.[57] Alternatively, at the very least, the Commission should take the relevant ruling of the ECJ into account when overseeing the implementation of the MoU by the recipient State.

5.2.4. *Filling the gaps: Other remedies*

The *Florescu* ruling only concerns Article 267(1)(b) TFEU requests for the interpretation of the bailout terms included in an MoU for balance-of-payments assistance. This begs the question: could other remedies discussed previously (see section 5.1) also be brought against an MoU concluded within the EU legal order? More specifically, would it be possible for the ECJ to rule on the *validity* of the MoU? In principle, a Union act may be found invalid by the ECJ pursuant to Article 267(1)(b) TFEU or Article 263 TFEU, if the relevant procedural requirements are met. It will be recalled that the definition of an act forming the subject matter of an action for annulment under Article 263 TFEU is different (narrower) than that under Article 267 TFEU (the latter including, in particular, acts that are not "intended to produce legal effects").[58] Therefore, if the MoU is not "intended to produce legal effects" within the meaning of Article 263 TFEU, an action for annulment would not be admissible. According to the test developed in the *ERTA* case, "[a]n action for annulment must … be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".[59] However, the terminology shifted in the Court's later case law, with the ECJ requiring that an act have *binding* legal effects.[60] A new Advocate General's Opinion argues that the ECJ should also be able to review under Article 263 TFEU non-binding acts producing legal effects that can reasonably be perceived as inducing compliance, but that is not

57. For an argument building on Art. 13 ESM Treaty, see Shaelou and Karatzia, "Some preliminary thoughts on the Cyprus bail-in litigation: A commentary on *Mallis* and *Ledra*", 42 EL Rev. (2018), (forthcoming). For a different view, see Repasi, op. cit. *supra* note 37, 1147–1148, who argues that "Council decisions and MoUs co-exist next to each other without a legal obligation to adapt the latter to the former after the MoU entered into force".

58. See e.g. Case C-613/14, *James Elliott Construction Limited* v. *Irish Asphalt Limited*, EU:C:2016:821, para 35: "Moreover, the Court has also held that the fact that a measure of EU law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Art. 267 TFEU [citing Case C-188/91, *Deutsche Shell*, EU:C:1993:24, para 18]." We are grateful to René Repasi for this observation.

59. Case 22/70, *Commission* v. *Council*, EU:C:1971:32, para 42.

60. See generally Case 151/88, *Italy* v. *Commission*, EU:C:1989:201, para 21; Case C-308/95, *Netherlands* v. *Commission*, EU:C:1999:477, para 30; Joined Cases C-463 & 475/10 P, *Deutsche Post AG and Germany* v. *Commission*, EU:C:2011:656, para 36; Case C-31/13 P, *Hungary* v. *Commission*, EU:C:2014:70, para 54. See, however, Case C-301/03, *Italy* v. *Commission,* EU:C:2005:727, paras. 22–24, which refers to mere "legal effects".

the current legal position.[61] On the other hand, Article 267(1)(b) TFEU challenges to the validity of an act seem to be available, according to the ECJ's case law, also when an act is not binding.[62]

In the judgment annotated, the Court described the MoU as "mandatory".[63] The French language version is slightly more revealing: the MoU was said to have a "binding character" (*un caractère contraignant*). Other language versions also point in the same direction as the French.[64] It should be noted, however, that Advocate General Bot diverged on this point, opining that "the Memorandum of Understanding does not produce binding legal effects" (*effets juridiques obligatoires*).[65] This point is not addressed explicitly in the Court's judgment. It could perhaps be said that the Court intentionally chose not to include this passage from his Opinion in the judgment, which otherwise reproduces almost verbatim the Opinion of the Advocate General.[66]

This brings us to the core issue left open in *Florescu*: the Court may have elaborated but certainly did not come clean on the legal nature of the MoU for balance-of-payments assistance. There is extensive literature on "atypical acts" and EU soft law,[67] as well as specifically on the MoUs concluded in the context of financial assistance.[68] The legal nature of the MoUs, specifically with the ESM or the EFSF which were established *outside* the EU legal order, has further been the subject of fruitful debate recently in this journal, with Poulou alluding, as we see it, to their legally binding character, whereas

61. Opinion of A.G. Bobek in Case C-16/16 P, *Belgium* v. *Commission*, EU:C:2017:959.

62. Case C-322/88, *Salvatore Grimaldi* v. *Fonds des maladies professionnelles*, EU:C:1989:646, para 8; Opinion of A.G. Bobek in Case C-16/16 P, *Belgium* v. *Commission*, para 106.

63. Judgment, para 41.

64. See, e.g., the Dutch (*bindende kracht*), Spanish (*vinculante*) and Greek (*δεσμευτικό*) versions. See, however, the German version (*verpflichtend*, rather than *verbindlich* which is used for "binding" in the EU Treaties).

65. Opinion, para 53.

66. The only other point of divergence between the Opinion and the judgment concerned Art. 126 recommendations (see para 70 of the Opinion).

67. See generally Bertrand, "Rapport introductif: Les enjeux de la soft law dans l'Union européenne", (2014) Rev de l'UE, 73–84; Klabbers, "Informal instruments before the European Court of Justice", 31 CML Rev. (1994), 997–1023; Knauff, "Europäisches Soft Law als Gegenstand des Vorabentscheidungsverfahrens", (2011) EuR, 735–744; Schwartze, "Soft Law im Recht der Europäischen Union", (2011) EuR, 3–18; Scott, "In legal limbo: Post-legislative guidance as a challenge for European administrative law", 48 CML Rev. (2011), 329–355; Senden, *Soft Law in European Community Law* (Hart Publishing, 2004); Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer, 2012); Wellens and Borchardt, "Soft law in European Community law", 14 EL Rev. (1989), 267–321.

68. See e.g. Fischer-Lescano, *Human Rights in Times of Austerity Policy* (Nomos, 2014), pp. 56–62; Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, 2015), pp. 131–136, Kilpatrick, op. cit. *supra* note 43, 411–412.

Repasi makes the opposite argument.[69] MoUs concluded *within* the EU legal order, such as the MoU for balance-of-payments assistance, have a different legal pedigree.[70] The MoU for balance-of-payments assistance may be, according to the Court in *Florescu*, an "act of an EU institution within the meaning of Article 267(b) TFEU"[71] that is "mandatory",[72] but we simply do not know if it is regarded by the Court as a Union act that is binding or produces legal effects. The significance of this point is illustrated by means of the following examples. They should be regarded as hypotheses, rather than settling the debate on the legal nature of the MoU.

First of all, if the MoU is regarded as legally binding, it may be declared wholly or partly invalid by the ECJ pursuant to an Article 263 TFEU challenge, provided that the relevant procedural requirements are met. As such, if a natural or legal person is directly and individually concerned by the contested term in the MoU, he or she may bring an action for annulment against the MoU before the General Court. Again, it should be stressed that this is uncharted territory, as there are no other judgments on the matter yet. But the formal extension of the reviewing powers of the ECJ would be significant, as it would match the power that the EU *de facto* (some would say *ex lege*) enjoys in this area with an appropriate degree of legal accountability.

Secondly, there is what may be termed the "reverse scenario" compared to the one in *Florescu*. In *Florescu*, as well as in the cases discussed in section 5.1, the legal challenge focused on the bailout terms and their alleged incompatibility with primary and secondary EU law. Austerity-hit litigants commonly seek to persuade national courts to send a reference to the ECJ for a preliminary ruling on the interpretation of EU law, hoping that a favourable ruling would then lead national courts to set aside national austerity measures. But there might be a further possibility. If the MoU is regarded as binding on (or "mandatory" for) national authorities, then one could domestically challenge *national laws in conflict with the MoU* and seek to persuade domestic courts to bring the matter before the ECJ. In this hypothetical

69. See Poulou, "Financial assistance conditionality and human rights protection: What is the role of the EU Charter of Fundamental Rights?", 54 CML Rev. (2017), 991–1026, 1019–1022. She argues that "national austerity measures … amount to an implementation of legal obligations undertaken by Member States in the framework of financial assistance" and that "the implementation of lending conditions entailed in [the] MoU should also be understood as an implementation of EU law in the meaning of Article 51(1) EUCFR". For a different argument, see Repasi, op. cit. *supra* note 37, 1146–47, saying that "[t]he arguments classifying an MoU an act which is not intended to produce legal effects and which is concluded between parties outside the EU legal framework are ultimately more convincing". Both authors focus on the MoU with the ESM (or the EFSF).

70. Repasi, op. cit. *supra* note 37, 1141–1142.

71. Judgment, para 35.

72. Ibid., para 41.

scenario, litigants would not be challenging the bailout terms but rather be seeking to enforce them in the recipient State. This would be akin to cases in internal market law, whereby private individuals and companies rely on regulations or directives to set aside conflicting national law. This is to assume the existence of a directly effective provision in the MoU, which might be to assume a great deal. It will be recalled that the relevant TFEU provisions on EMU are traditionally understood as lacking direct effect.

Leaving the relevant technicalities aside,[73] the salient point for present purposes is that citizens (or companies) could invoke provisions from the MoU against the State, seeking to persuade domestic courts to set aside national laws that conflict with the commitments undertaken by the State concerned in the MoU. It is normatively significant and indeed very different to suggest that a Member State is not implementing Union law when it is not complying with the bailout terms, rather than "simply" to argue that a beneficiary Member State is not honouring its commitments towards its lenders. Considering that the MoUs touch upon many policy areas falling within the competence of the Member States, EU law would be making yet more inroads into national regulatory autonomy – this time equipped with binding, supreme force, and possibly also direct effect. This is very different from, say, Council recommendations or other soft law instruments, which do not set out legally binding standards for economic convergence. Furthermore, private (or even public) enforcement of EMU law would truly revolutionize this area of law. The crux of the matter is that the availability of all these "intriguing" possibilities rests on the precise legal effects of the MoU (binding force, direct effect, and so on), an issue which remains far from settled after *Florescu*.

The debate on the legal nature and effects of the MoU cannot be disentangled from the issue of competence. As the EU has no primary competence to regulate public sector pay in the Member States, the EU institutions would have not been able to adopt, say, a Regulation governing public sector pay in the Member States. However, the EU is not seeking to adopt general rules on public sector pay, nor were there any such EU rules of general application in force when the *Florescu* case was decided. The EU institutions instead condition the provision of financial assistance on the fulfilment of a number of conditions that require (or induce) the recipient Member State to reduce public sector pay. Does the EU have the competence

73. The relevant MoU term would need to be sufficiently clear, precise, and unconditional for direct effect. The ECJ could perhaps further demand that the State must have failed to implement the relevant term in the MoU in national law by the end of the period prescribed or that it must have failed to implement it correctly. This would be akin to the conditions for direct effect of unimplemented (or wrongly implemented) directives.

to approve the conditions attached to the financial assistance and if so, what type of conditions could the Council attach to the granting of financial assistance?

It is clear from the EU Treaties and secondary law that the EU institutions indeed have the secondary competence to set out the terms attached to the financial assistance granted to crisis-hit Member States. For example, Article 122(2) TFEU, which served as the legal basis for the EFSM, provides that the Council "may grant, under certain conditions, Union financial assistance to the Member State concerned". As regards balance-of-payments assistance, the Treaty foundation is Article 143 TFEU, which provides that "[t]he Council … shall adopt directives or decisions laying down the conditions and details of such assistance", and the relevant secondary law is Regulation 332/2002. The conditionality attached to the financial assistance granted to Member States resembles the *ex ante* conditionalities which are applicable in the context of the European Structural and Investment Funds.[74] As evidenced by, say, the general *ex ante* conditionalities, these too sometimes concern areas that the EU might lack the primary competence to regulate.[75] The failure to complete actions to fulfil these conditionalities constitutes a ground for suspending interim payments by the Commission to certain priorities of the programme concerned.

Going back to the EU's secondary competence to set the terms on which assistance is given, it could be argued that the Court was ambivalent in its earlier case law as to whether the relevant Council Decisions and MoUs gave rise to an EU law obligation incumbent on the beneficiary Member States to implement the bailout terms in national law. The obverse argument could be said to presuppose a mismatch between what is formally written down in Articles 121, 126 and 136 TFEU, which merely authorizes economic policy coordination, and the relevant Council Decisions which set the bailout terms. The impugned acts might have perhaps only stipulated the way in which the national authorities were to exercise their own competences if they wished to be granted financial assistance by their peers (thus implying that, at any time, they could have renounced such assistance). If this had been true, these acts would have not sufficed, so the argument goes, to bring the matter within the

74. Art. 19 of Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 Dec. 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006, O.J. 2013, L 347/320.

75. Ibid., Part II of Annex XI. See also ibid., Art. 23 (measures linking effectiveness of ESI Funds to sound economic governance).

scope of EU law. However, it is important to emphasize that we cannot be sure whether this line of reasoning best explains the Court's earlier case law, as the wording of its judgments could also be taken at face value, meaning that litigants might have simply not established the link between the contested measures and EU law with sufficient clarity (see *supra* section 5.1).

The ECJ did not address the issue of competence in *Florescu*, and it did not fully clarify the legal effects of the MoU. It was argued here that the Union indeed possesses the secondary competence to request that Member States in receipt of balance-of-payments assistance implement a number of reforms. Moreover, our understanding of *Florescu* is that the Court regards the MoU for balance-of-payments assistance as having binding legal force. This is what the use of the adjective "mandatory" seems to suggest. This view is further supported by other language versions of the Court's judgment, as well as by the juxtaposition of the Court's ruling with the Opinion of the Advocate General. It will take, however, more rulings before we can establish with a sufficient degree of certainty whether "mandatory" means legally binding in *Florescu*, or whether that was meant in a more "contractual" sense, as the MoU gives, in the words of the Court, concrete form to an agreement between the Member State concerned and the EU institutions on an economic programme (see section 4 above).

5.3. *The scope of application of the EU Charter of Fundamental Rights*

The discussion thus far has focused on the legal nature of the MoU as an "act of an EU institution" which may be subject to interpretation by the Court. We now turn to consider the scope of application of the EU Charter of Fundamental Rights.

By holding that Romania, when carrying out MoU-inspired reforms, is implementing EU law in accordance with Article 51(1) of the Charter, the *Florescu* ruling is truly unprecedented. The contrast with the Court's previous case law on the topic (also concerning Romania) could not have been sharper. So far, the Court had always found similar requests for a preliminary ruling to be inadmissible, repeatedly reasoning that Member States adopting national reforms meant to comply with the conditionality they agreed on in a MoU were not "implementing Union law" and were therefore not bound by the Charter in those circumstances.[76] The Court thus refused to test the compatibility of such reforms against the Charter. In considering all those cases inadmissible, the Court was certainly "assisted" by the poor quality of the references, which did not establish the link between the national measures

76. Interestingly, all relevant rulings relate to the Romanian and Portuguese bailouts. See *supra* note 41.

at stake and the EU legal order, and thus offered the Court an easy way out. The Court could however have displayed more proactivity, and sought to reformulate the questions or rearticulate the referrals, as it had done in many other cases.[77] It chose not to do so. This strict stance, which has been criticized elsewhere,[78] was highly problematic from a constitutional perspective. It served to obscure the supranational inspiration of the austerity plans and consolidation programmes implemented in various EU countries during the financial and public debt crisis, artificially inflated the actual autonomy and discretion retained by the domestic authorities in those countries, and hence allowed the EU institutions to evade judicial scrutiny for their actions in the bailout context.

As it contributes to bringing back segments of the "conditionality" business within the ambit of EU law, and matches the extended powers that the EU *de facto* enjoys in that field with the possibility of judicial scrutiny, *Florescu* is certainly a ruling to be welcomed. It challenges the early crisis hypothesis, according to which the national systems were the main locus for designing – and combating – austerity and conditionality. In doing so, it adjusts the legal picture to the bailout reality unfolding on the ground, and makes the whole system less opaque and dissonant.[79] Because the sovereign debt crisis was an EU-wide problem, mostly dealt with at the European level, judicial scrutiny of the responses to the crisis could simply no longer be left to national and international fora only. *Florescu* moreover clarifies and confirms the Member States' duties under the Charter in the financial assistance context, and in a way, it mirrors and extends the logic of the *Ledra* judgment (delivered by the Grand Chamber as well), which also expanded judicial scrutiny with regard to the EU institutions involved in the actual operation of the ESM.[80]

77. See further Hinarejos, op. cit. *supra* note 68, pp. 131–136; Kilpatrick, "On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts", 35 *Oxford Journal of Legal Studies* (2015), 1–29, 23–26. For a somewhat different view, see Kornezov, "Social rights, the Charter, and the ECHR: Caveats, austerity, and other disasters", in Barnard, De Baere and Vandenbroucke, op. cit. *supra* note 46, pp. 410–411.

78. See Peers, "Towards a new form of EU law? The use of EU institutions outside the EU legal framework", 9 EuConst (2013), 37–72, 53; Barnard, "The Charter in time of crisis: A case study of dismissal", in Countouris and Freedland (Eds.), *Resocializing Europe in a Time of Crisis* (CUP, 2013), pp. 267–277; Kilpatrick, op. cit. *supra* note 43, 399–406; Repasi, op. cit. *supra* note 37, 1140–1142; Poulou, op. cit. *supra* note 69, 1019–1026.

79. For an interesting analysis of the sovereign debt programmes through the lens of "liminal legality", see Kilpatrick, "The EU and its sovereign debt programmes: The challenges of liminal legality", EUI Working Papers, LAW 2017/14.

80. Joined Cases C-8-10/15 P, *Ledra Advertising*, paras. 55–60. This ruling made clear, for the first time since the onset of the euro crisis, that the EU institutions (in this case, the Commission and the ECB) remain fully bound by their Charter-related duties when acting as agents of an international organization such as the ESM. For extended analysis, see Dermine,

More generally, the Court is reconnecting with its traditional approach regarding the applicability of the Charter to the Member States. In *Florescu*, the Court and the Advocate General heavily drew on the wording of Law No. 329/2009 and the intent of the Romanian legislator in order to conclude that the measure at issue was implementing EU law.[81] The outer limits of the scope of the Charter with regard to the Member States remain a hotly debated issue,[82] but the Court's findings in *Florescu*, however daring they may be, are beyond controversy from a technical perspective. It is well-admitted, especially since the seminal *Åkerberg Fransson* ruling (to which the Court explicitly refers),[83] that "implementing Union law" should be understood widely, and that only purely internal situations or instances that are only remotely connected with the EU legal order fall outside the scope of the Charter.[84] The Court has moreover established a set of factors that may be relied upon to establish a link with EU law: "whether that legislation is intended to implement a provision of EU law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and also whether there are specific rules of EU law on the matter or capable of affecting it".[85] Against that background, once it had established that the MoU with Romania was an "act of an EU institution", the Court could only have inferred that Law No. 329/2009, which explicitly stated that it was adopted to ensure Romania's compliance with its commitments under the MoU, constituted an implementation of EU law within the meaning of Article 51(1) of the

op. cit. *supra* note 45; Karatzia and Markakis, op. cit. *supra* note 46; Shaelou and Karatzia, op. cit. *supra* note 57; Repasi, op. cit. *supra* note 37.

81. It is interesting to observe that the Court's ruling sticks to this language (that of Art. 51(1)), whereas A.G. Bot in his Opinion speaks of, almost interchangeably, "implementation" of EU law (para 64), a situation "governed by EU law" (para 69) or an application of EU law (para 62).

82. Among many others, see Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 EuConst (2012), 376–397, 376–387; Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP, 2015), pp. 488–499; Dougan, "Judicial review of Member State action under general principles and the Charter: Defining the 'scope of Union law'", 52 CML Rev. (2015), 1201–1245; Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013), 1267–1304.

83. Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105.

84. See e.g. Case C-206/13, *Cruciano Siragusa* v. *Regione Sicilia*, EU:C:2014:126; Case C-309/96, *Daniele Annibaldi* v. *Sindaco del Comune di Guidonia and Presidente Regione Lazio*, EU:C:1997:631; Case C-299/95, *Friedrich Kremzow* v. *Republik Österreich*, EU:C:1997:254.

85. Case C-40/11, *Yoshikazu Iida* v. *Stadt Ulm*, EU:C:2012:691, para 79; Case C-87/12, *Kreshnik Ymeraga and Others* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:291, para 41.

Charter.[86] More specifically, this is a case of positive, *Wachauf*-like implementation,[87] where a State acts in purposeful furtherance of Union law.[88] Furthermore, the Court was right to rule that the discretion enjoyed by Romania in defining the actual content of the measures adopted to comply with its commitments under the MoU, did not question its overall assessment.[89] It is indeed settled case law that the exercise by a Member State of a certain discretion granted by EU law, must be regarded as implementation of EU law.[90]

Technically speaking, as noted above, the Court's findings in *Florescu* are only relevant for countries which are or could be subject to a balance-of-payments assistance programme under Regulation 332/2002, i.e. non-Eurozone countries. This gives rise to two further questions.

First, could *Florescu*'s *ratio decidendi* on the applicability of the Charter be applied by analogy to other financial assistance contexts? One has directly in mind the two ad hoc firewalls established during the euro crisis – the EFSM and the EFSF – and the now permanent ESM. The Court will soon be given the opportunity to clarify this point with regard to the EFSM in the context of a reference made by a Portuguese Court[91] and, if it decides to follow the lead of Advocate General Saugmandsgaard Øe, it may rule that MoU-inspired reforms adopted following a bailout under the EFSM framework are to be considered as an implementation of EU law, and should therefore comply with the Charter.[92] Such an outcome in favour of the applicability of the Charter would be the logical extension of the *Florescu* doctrine to the EFSM context. The parallel between the two frameworks for financial assistance is indeed

86. The Romania-Commission MoU, and its paras. 5(a) (reduction of the public sector wage bill) and 5(b) (reform of the structural parameters of the national pension system), are thus explicitly identified as "triggering rule" (on that concept, see Sarmiento, op. cit. *supra* note 82, 1279–1280). These policy commitments were deemed "sufficiently detailed and precise" to permit the abovementioned inference.

87. Case C-5/88, *Hubert Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*, EU:C:1989:321.

88. Dougan, op. cit. *supra* note 82, 1212.

89. Judgment, para 48.

90. See Joined Cases C-411 & 493/10, *N. S.* v. *Secretary of State for the Home Department and M. E. and Others* v. *Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras. 65–68. See also, Case C-275/06, *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU*, EU:C:2008:54, para 68; Case C-135/13, *Szatmári Malom Kft.* v. *Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve*, EU:C:2014:327, para 55; Case C-406/15, *Petya Milkova* v. *Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, EU:C:2017:198, paras. 52–54.

91. See Case C-64/16, *Associacao Sindical dos Juizes Portugueses* (still pending). This case concerns the Charter-compatibility of salary cuts in the judicial sector decided by Portuguese authorities following the 2011 bailout.

92. See Opinion of A.G. Saugmandsgaard Øe in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, paras. 43–53.

obvious. In a similar fashion as under the balance-of-payments framework, financial assistance under the EFSM is granted pursuant to a Council Regulation, itself grounded on a Treaty provision (Art. 122(2) TFEU), and is further materialized in a Council Decision[93] and an MoU concluded between the Commission and the beneficiary Member State.[94]

The issue is more complex for the EFSF and the ESM, for the main reason that they were formally established outside the EU legal framework. However, as abundantly shown in the literature,[95] the organic, institutional and substantive intertwining of these institutions with the EU legal structure is very strong. Against this background, we claim that there is a strong case to be made *de lege ferenda* in favour of extending *Florescu*'s *ratio decidendi* to the EFSF/ESM framework, and the subjection of all related national "conditionality" measures to the EU legal apparatus and to the Charter, undeniably so since the European legislature, relying on Articles 136 and 121(6) TFEU, chose to repatriate EFSF/ESM conditionality within the ambit of EU law, most notably by requiring the translation of the MoU's main conditions into a macroeconomic adjustment plan endorsed by the Council by means of an Implementing Decision.[96] However, insofar as the ESM remains outside the EU legal order, the MoU with the ESM remains a non-EU legal measure.[97]

Second, one may wonder whether the Court's view on the applicability of the Charter could be expanded beyond the realm of financial assistance to other areas of economic governance, such as the Stability and Growth Pact, the Macroeconomic Imbalance Procedure or even the European Semester. The Court has not thus far ruled on the issue (and this includes the ruling in

93. Council Regulation (EU) 407/2010, Art. 3(2).

94. Ibid., Art. 3(5).

95. See among many others, Poulou, op. cit. *supra* note 69, 995–1003; Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (OUP, 2014), pp. 89–101.

96. See Regulation 472/2013, Art. 7(2). For a similar view, see Opinion of A.G. Wathelet in Case C-105-109/15 P, *Mallis*, EC:C:2016:294, para 89. See further Lenaerts, "EMU and the EU's constitutional framework", 39 EL Rev. (2014), 753–769, 759, who argues that "the adoption of Regulation 472/2013 is a positive development, as it guarantees, albeit indirectly, that the MoU, which is not an EU measure, is compatible with the Charter, notably with the fundamental right of collective bargaining and action" and that "the question that needs to be asked is actually whether, by adopting those measures, the Member State receiving financial assistance is fulfilling an obligation imposed by EU law, notably by the Council Decision approving that programme and/or by Regulation 472/2013". See also Markakis, *Political and Legal Accountability in Economic and Monetary Union*, Doctoral thesis completed at Oxford University (2017), Ch. 6.

97. On the pending incorporation of the ESM into the EU legal order, see COM(2017)827 final, "Proposal for a Council Regulation on the establishment of the European Monetary Fund"; Karatzia and Markakis, op. cit. *supra* note 46.

Florescu),[98] but Advocate General Bot considered in his Opinion in *Florescu* that it should not be the case, for the main reason that the commitments to be implemented by the Member States under these mechanisms – Advocate General Bot uses the example of the Council recommendations addressed to a Member State subject to an Excessive Deficit Procedure (Art. 126 TFEU) – are not sufficiently detailed and precise to constitute a specific rule of EU law.[99]

Though we would be inclined to agree with the conclusion reached by Advocate General Bot,[100] we are of the opinion that the legal criterion relied upon to reach such conclusion may be inappropriate. More than the level of detail or precision of the norm of EU law envisaged to connect a national measure with the Charter, it seems that the crucial criterion in that regard is rather the binding nature of that EU "triggering rule". That criterion, moreover, seems much more workable than the one suggested by the Advocate General. Admittedly, we are entering uncharted waters here. On the one hand, the Court has so far never explicitly held that the binding nature of the EU norm governing the situation at stake is a *conditio sine qua non* for the applicability of the Charter to a Member State action to be established. This is, as we have seen, one possible reading of *Florescu* (see 5.2.2 above). On the other hand, the Charter has never been ruled applicable to a situation merely governed by soft, non-binding EU norms. Such a criterion would moreover make much sense in view of the primary purpose of Article 51(1), which is the prevention of an undue expansion of the Charter's scope of application *vis-à-vis* State action, and the preservation of the constitutional balance between the EU and its Member States.

98. See, however, Lenaerts, op. cit. *supra* note 96, 766–767, who argues: "From a substantive perspective, it is worth recalling that the EU institutions are bound by the principle of conferral. This means, in the realm of EMU, that while the European Union is empowered to lay down budgetary discipline and balance rules with which Member States must comply, it lacks the power to impose choices as to taxation and spending on them. It is for the European Union to set budgetary and fiscal objectives, and it is for the Member States to choose the means for attaining them. For example, when the Council establishes the existence of an excessive macroeconomic imbalance, it addresses a recommendation to the Member State concerned on the basis of which the latter must submit a corrective action plan. Notwithstanding the fact that the corrective action plan must be approved by the Council, it is for the Member State concerned to adopt the 'specific policy actions' that are required. Thus, the role of the Council is limited to determining whether the actions envisaged are sufficient to correct excessive macroeconomic imbalances."

99. Opinion, para 70; judgment, para 48.

100. It should be noted that the commitments for Member States under the more standard mechanisms of economic policy coordination can sometimes be very detailed and precise, as illustrated, for example, by the level of specificity of the country-specific recommendations issued under the European Semester.

In spite of the Delphic language favoured by the Court in the above context, its ruling in *Florescu* could perhaps be reconstructed along the following lines: the binding (or at least "mandatory") nature of the MoU *vis-à-vis* the Romanian authorities, established *en passant* by the Court,[101] was, combined with the other elements evoked above, crucial in regarding Law No. 329/2009 as an implementation of EU law. The Council Decision did not seem to be equally crucial, and the questions referred for a preliminary ruling focused instead on the MoU. Against this background, we consider that *Florescu*'s findings on the applicability of the Charter could not be applied by analogy to the more "standard" prongs of EU economic governance, where the quasi-totality of the EU's normative output remains of a soft, non-binding nature, and this is notwithstanding the substantial intensification of the EU's presence in the field of economic policy, witnessed since the onset of the euro crisis.

5.4. *The proportionality analysis undertaken by the Court*

The discussion on the EU Charter has thus far focused on its scope of application. We now turn to examine the proportionality analysis carried out by the Court under Article 52(1) of the Charter with respect to the impugned national measure in *Florescu*.

Overall, the discussion on the proportionality of the impugned national measure was more comprehensive and detailed than the discussion in *Ledra Advertising*.[102] It is commendable that the Court drew on the case law of the ECtHR[103] in its proportionality assessment, though it mostly did so with

101. In that regard, see judgement, para 41, where the Court characterizes the MoU as "mandatory".

102. Joined Cases C-8-10/15 P, *Ledra Advertising*, paras. 69–74. On the proportionality analysis in *Ledra*, see e.g. Hinarejos, "Bailouts, borrowed institutions, and judicial review: *Ledra Advertising*", EU Law Analysis blog, 25 Sept. 2016, available at <eulawanalysis.blogspot.nl/2016/09/bailouts-borrowed-institutions-and.html>, (last visited 12 Sept. 2017), who argues that "the Court did not discuss the proportionality of the interference with the applicant's rights at much – or any – length". See also the detailed, critical analysis by Shaelou and Karatzia, op. cit. *supra* note 57.

103. On the relevant case law of the ECtHR, see generally *Koufaki and ADEDY* v. *Greece*, Appl. Nos. 57665/12 and 57657/12, judgment of 7 May 2013 (on wage and pension cuts in the context of the first Greek MoU); *Da Conceiçao Mateus and Santos Januario* v. *Portugal*, Appl. Nos. 62235/12 & 57525/12, judgment of 8 Oct. 2013 (on a reduction in holiday and Christmas subsidies in the context of the Portuguese MoU); *Da Silva Carvalho Rico* v. *Portugal*, Appl. No. 13341/14, judgment of 1 Sept. 2015 (on an extraordinary solidarity contribution imposed on pensioners); *Frimu and Others* v. *Romania*, Appl. Nos. 45312/11, 45581/11, 45583/11, 45587/11 & 45588/11, judgment of 13 Nov. 2012 (on divergent court rulings on pension reduction; no violation of Arts. 6 and 14); *Mihăieş and Senteş* v. *Romania*, Appl. Nos. 44232/11 & 44605/11, judgment of 6 Dec. 2011 (on a temporary salary reduction; no violation

respect to establishing the scope of the right to property. In that regard, it is also interesting to note that the Court did not see fit to rely on the European Social Charter and the body of case law developed by the European Committee of Social Rights (ECSR) on the right to social security and the right to pension (Art. 12).[104]

Nevertheless, admittedly, it is fairly hard to disagree with the conclusion reached by the Grand Chamber. The applicants in the main proceedings were not deprived of their pension entitlements. The temporary suspension of pension payments only applied in those cases where the pension was higher than the national gross average salary, on the basis of which the State social security budget was drawn up. The persons affected by the impugned law could always choose to terminate their employment relationship and start receiving their pension again. In these circumstances, it is hard to conclude that the impugned measure did not respect the essence of the right to property.

Moreover, the Court rightly held that the Member State concerned ought to be given a broad margin of appreciation when assessing the suitability and necessity of an economic policy measure essentially adopted for the purposes of combating the financial crisis. There is not much to be said about the suitability of the impugned measure, as this is a fairly straightforward case of cutting costs to bring the budget deficit down, and supranational and/or international courts are not keen on taking sides with respect to economic arguments in favour of or against austerity. The outcome of most of these cases typically turns on the necessity of the contested measure, and the broad margin

of Art. 1 of the Protocol 1); *Maggio and Others* v. *Italy*, Appl. Nos. 46286/09, 52851/08, 53727/08, 54486/08 & 56001/08, judgment of 31 May 2011 (on the method of calculation of old-age pensions); *Stefanetti and Others* v. *Italy*, Appl. Nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 & 21870/10, judgment of 15 Apr. 2014 (the circumstances of the case are analogous to those in *Maggio and Others* v. *Italy*, but the applicants in *Stefanetti* had suffered a 67% loss of their respective pensions); *Béláné Nagy* v. *Hungary*, Appl. No. 53080/13, judgment of 13 Dec. 2016) (on the complete deprivation of the applicant's entitlement to a disability allowance; violation of Art. 1 of Protocol 1).

104. See especially, in the context of the euro crisis, ECSR, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions* (*ADEDY*) v. *Greece,* Collective Complaints Nos. 65–66/2011, decisions of 23 May 2012 (concerning "special apprenticeship contracts" with workers aged 15–18 and the reduction in the minimum wage for young workers); ECSR, *Federation of employed pensioners of Greece* (*IKA-ETAM*) v. *Greece, Panhellenic Federation of Public Service Pensioners* (*POPS*) v. *Greece*, *Pensioners' Union of the Athens-Piraeus Electric Railways* (*I.S.A.P.*) v. *Greece*, *Panhellenic Federation of Pensioners of the Public Electricity Corporation* (*POS-DEI*) v. *Greece*, *Pensioners' Union of the Agricultural Bank of Greece* (*ATE*) v. *Greece*, Collective Complaints Nos. 76–80/2012, decisions of 7 Dec. 2012 (on a reduction in holiday, Christmas and Easter bonuses; pension cuts; a levy entitled "the pensioners' solidarity contribution"; and a reduction in the social solidarity benefit paid to private sector pensioners). We are grateful to Kilpatrick for this observation.

of appreciation accorded to the State concerned often operates as a "safety valve".[105]

Furthermore, in assessing whether the applicants in the main proceedings were made to bear an excessive and disproportionate burden, the fact that they were top judges did not seem to help either.[106] According to the EctHR case law, the nature of the benefit, as well as the particular circumstances of the case and the applicants' personal situation, are crucial for assessing the proportionality of the contested measure.[107] In assessing whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the applicants in the main proceedings, it is important that the applicants did not bear an excessive individual burden. The extent to which a person's means of subsistence or living standards are affected by the discontinuance, reduction or – in this case – suspension of pension payments constitutes an important factor in the ECtHR's assessment of the proportionality of such measures.[108] This also follows from the most recent case law of the ECtHR on the suspension of old-age pension payments on the grounds that the applicant continued to be employed in the public sector – i.e. a case where the factual circumstances were analogous to those in *Florescu*.[109] It will be recalled that, according to Article 52(3) of the Charter, the ECJ ought to have regard to the case law of the ECtHR. To be sure, this Charter provision does not prevent the EU Courts from according more extensive protection to individuals. However, in light of the foregoing considerations, the ECJ was right, in our opinion, to conclude that the impugned measure was not disproportionate to the attainment of the objective pursued.

6. Conclusion

In retrospect, *Florescu* is a very welcome ruling. By holding that MoUs concluded between the EU and the Member States in receipt of

105. The fact remains, however, that after several years of austerity-related litigation, the ECJ has failed, unlike many of its counterparts at the national or international level, to suggest any kind of red line that public authorities may need to beware of when combating an economic crisis and seeking to preserve or restore macroeconomic and financial stability.

106. See e.g. ECtHR, *Valkov and Others* v. *Bulgaria*, Appl. Nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 & 2041/05, judgment of 25 Oct. 2011, para 97.

107. ECtHR, *Da Silva Carvalho Rico* v. *Portugal*, Appl. No. 13341/14, judgment of 1 Sept. 2015, para 42.

108. ECtHR, *Béláné Nagy* v. *Hungary*, Appl. No. 53080/13, judgment of 13 Dec. 2016, para 78.

109. See the unanimous Grand Chamber ruling in ECtHR, *Fábián* v. *Hungary*, Appl. No. 78117/13, judgment of 5 Sept. 2017 (no violation of Art. 1 of Protocol 1).

balance-of-payments assistance qualify as "acts of an EU institution" which may be subject to interpretation by the Court under Article 267 TFEU, the judgment brings some much-awaited clarity on the nature of this peculiar kind of instrument in the EU legal order. Similarly, in finding that national measures adopted in furtherance of an MoU do implement EU law within the meaning of Article 51(1) of the Charter and are to comply with its provisions, the Court turns its back on a much controversial line of cases issued when the euro crisis was in full swing, and reconnects with its well-established case law on the scope of application of the Charter. Strictly speaking, the ruling only pertains to the balance-of-payments assistance mechanism. However, we have argued that *Florescu* should resonate beyond its specific factual circumstances, showing that there is a strong case in favour of the application by analogy of its key findings to other financial assistance mechanisms.

Some unanswered questions remain, however: is the MoU with the Commission (Art. 143 TFEU) legally binding or simply "mandatory" in the sense that the disbursement of financial assistance is linked to the fulfilment of the conditions in the MoU? Is it only subject to interpretation by the Court pursuant to Article 267 TFEU (as would be the case for EU soft law measures) or could it also be declared (wholly or partially) invalid pursuant to Article 267 TFEU or 263 TFEU? Is it possible to extend the Court's findings in *Florescu* to MoUs with the EFSM? Furthermore, as regards the financial mechanisms placed outside the EU legal order, would it be possible to argue that the conditionality linked to the MoUs with the EFSF and the ESM may be subjected to judicial scrutiny thanks to the Council Decisions adopted under the Excessive Deficit Procedure and "two-pack" legislation? Would there equally be a link to the EU Charter of Fundamental Rights in the case of such Council Decisions (Art. 51(1) of the Charter)? We have sought to provide a tentative answer to these questions in this annotation, but it is clear to us that one needs to await the future development of the ECJ's case law before anything could be said with a high degree of certainty.

Read in conjunction with the *Ledra* ruling, *Florescu* suggests the Court's new readiness to close the many "accountability gaps"[110] that the euro crisis left wide open in the field of economic governance – in this case, as regards legal accountability. One can only applaud such evolution, and hope that it will be continued. Because it matches the unprecedented influence that the EU has gained in the field of economic policy with the possibility of supranational judicial review. Because it puts fundamental rights considerations back at the

110. Dawson, "The legal and political accountability structure of post-crisis EU economic governance", 53 JCMS (2015), 976–993, 986–988.

heart of economic decision-making.[111] And because in doing so, it reconnects the EU with its founding nature as a political project grounded on the rule of law.

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111. On the interplay between fundamental rights and economic governance, see De Schutter and Dermine, "The two constitutions of Europe: Integrating social rights in the new economic architecture of the Union", 11 *European Journal of Human Rights* (2017), 108–156, 114–127.

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