

# **Procedural rights within the European Economic Constitution: which remedies for the rights and interests of those affected by the legal measures enacted to counter the economic crisis?**

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**Abstract:** This Chapter will examine the different legal remedies available under EU law for the legal persons whose position has been affected by the acts adopted by the EU institutions as a part of the different legal instruments built in order to counter the economic crisis. This will be done through an analysis of the recent case law of the Court of Justice, structured in three steps. In the first step, we will examine the possibility to obtain the annulment of the act, having regard of the main legal instrument provided by the Treaties for this purpose (the action for annulment in Art. 263 of the TFEU). In the second step, we will explore the possibility to invoke in front of the Court of Justice an action for damages against the institution concerned. In the third, concluding step, we will look at the remedies at national level, looking at two cases where the Court of Justice has scrutinized the validity of implementing national measures in light of EU law.

**Keywords:** social rights, procedural rights, borrowed institutions, economic crisis, non-contractual liability

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## **1. Introduction: legal remedies against the acts of the EU institutions adopted to contrast the economic crisis**

Since the introduction within the Lisbon Treaty of the action for annulment for individuals,<sup>1</sup> the panorama of remedies available for EU citizens against the acts of the EU institutions was considered to have been widened.<sup>2</sup> Before, it was generally acknowledged that, since the *Plaumann*<sup>3</sup> judgment, the possibility to seek for the review of the legality of European Union acts was, for private parties, considerably limited. Since, however, the large majority of the normative framework linked to economic and financial measures was (and currently is) directly addressed to the Member States, the issue of the legal remedies available to individuals was less of a concern for a long time. However, since the harshening of the economic crisis and the entrance into force of the measures enacted to counter its effects, the problem has been posed in various ways. This has been particularly true for those measures, as the Treaty Establishing the European Stability Mechanism and the Treaty on Stability, Governance and Coordination (whose Chapter III is known as Fiscal Compact) which have been adopted with a sharp shift from the Union method towards intergovernmentalism.<sup>4</sup> As further argued in the paragraphs of this Chapter, the remedies available under EU law are not necessarily broader than the ones available under the international treaties. It is however the policy object that leaves very few doubts: the Member States wanted to exclude the application of EU law (and, in particular, of its principles of solidarity and loyal cooperation)<sup>5</sup> from measure addressed to counter the economic and financial difficulties of other Member States. This, as widely known, had the effect of limiting the liability of the Member States to the cases (and the amounts) described in these instruments. History has revealed that these concerns were right, since the European Stability Mechanism has been called to provide

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<sup>1</sup> Art. 263 TFEU, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C326.

<sup>2</sup> Cfr. Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2015); Paul Craig, *EU Administrative Law* (OUP 2012); Trevor Hartley, *The Foundations of EU law* (OUP 2011). See also Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk (eds), *Specialised Administrative Law of the European Union: A Sectoral Treatment* (OUP 2018); Herwig C.H. Hofmann, 'General principles of EU law and EU administrative law' in Catherine Barnard, Steve Peers, *European Union Law* (OUP 2017); Herwig C.H. Hofmann, Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20 EPL 147; Herwig C.H. Hofmann 'Composite decision making procedures in EU administrative law' in Herwig C.H. Hofmann, Alexander H. Türk (eds) *Legal Challenges in EU Administrative Law* (Edward Elgar 2009) 136; Herwig C.H. Hofmann, Alexander H. Türk 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 ELJ 253; Herwig C.H. Hofmann, Gerard C. Rowe G. and Alexander Türk 'Administrative Law and Policy of the European Union' (OUP 2011).

<sup>3</sup> Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* EU:C:1963:17 [1963] ECR 199.

<sup>4</sup> Daniel Francis, 'From Utopia to Apology: The European Union and the Challenge of Liberal Supranationalism' (2018) 39 *Cardozo L.Rev.* 849, 2018.

<sup>5</sup> Cfr. Federico Casolari, 'EU Loyalty after Lisbon: An Expectation Gap to Be Filled?' in Lucia Serena Rossi, Federico Casolari (eds) *The EU after Lisbon: Amending or Coping with the Existing Treaties* (Springer, 2014) 93.

financial support to five Member States of the European Union in the years after 2008.<sup>6</sup> But has it provided the right remedies to address the rights of those individuals whose private interests have been compromised by the general public interest? This paper attempts to answer to this question.

## **2. The action for annulment, the economic constitution and the EU borrowed institutions**

The action for annulment is regulated within the Treaty by Article 263 TFEU. Art. 263(4) TFEU – marking a difference with respect to the previous case law – aimed at expressly recognizing the involvement of individuals in the action for annulment. In amount to that, it must be also said that, making explicit the meaning of the action for annulment in Article 263(4), the redactors of the Treaties wanted to avoid the uncertainty arising from the case-by-case interpretation of the Court of Justice. However, as it has been interpreted in the case law in the Court of Justice, the extent of the legal standing in actions for annulments is far than clear, and the amendment (which is in fact an addition) of the fourth comma did not stop the uncertainty over its meaning. This is the main reason why the analysis at hand is worth of a deeper examination. As widely known, due to the tendency towards intergovernmentalism, there has been in the last 10 years an impulse towards the outsourcing of the instrument used to counter the economic crisis. It is equally known that the choice – according to these instruments – was to confer to the EU institutions an executive role in providing a solution to the (actual or potential) situation of financial turmoil of certain Member States. This led certain scholars<sup>7</sup> to talk about EU “borrowed institutions” to define the role of the EU institutions acting outside the framework of the Treaties but, on the other side, within the framework and in the name of the economic and financial instruments of international law conceived to counter the crisis. This is the point where the debate on the legal remedies available for those affected by these economic and financial measures becomes relevant for the European Economic Constitution. The measures enacted to counter the economic crisis fall within the policy areas of the Economic and Monetary Union and,

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<sup>6</sup> The European Stability Mechanism intervened during the economic crisis in several Member States. It has provided financial support to Cyprus (2013) and Greece (2015), as well as to the banking system in Spain (2012). The predecessor of the ESM, the European Financial Stability Facility (EFSF), provided assistance to Portugal (2011) and Ireland (2010). While Spain, Portugal, Ireland (with, apparently, a broad success) and Cyprus have concluded the programmes of financial support, Greece remains the only country currently under a macro-economic adjustment programme. On this see Alessandro Gasparotti and Alice Zoppè, ‘European Stability Mechanism: main features, instruments and accountability’ (2018) European Parliament Research Service, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON\\_NT\(2014\)497755\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/497755/IPOL-ECON_NT(2014)497755_EN.pdf) accessed 1 November 2018.

<sup>7</sup>See Alicia Hinarejos, “*Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising*”, EU Law Analysis, 25 September 2016, <http://eulawanalysis.blogspot.it/2016/09/bailouts-borrowed-institutions-and.html> accessed 1 November 2018. Paul Dermine, ‘The End of the Impunity? The Legal Duties of ‘Borrowed EU Institutions’ under the European Stability Mechanism Framework’ (2017) 13 EUConst 369.

although adopted outside the EU legal framework, they display an important effect on the latter. The availability of legal instruments for individuals would be surely beneficial for underlining the commitment of the EU institutions and of the Member States to the respect of fundamental rights. At the same time another question is worthy to be raised: is the economic crisis comparable to other typologies of crisis, and consequently imposes the suspension of fundamental rights (as the right to an effective judicial protection) which characterizes the EU legal order? Has it been the recourse to tools of international law a way “externalize” the risks associated to the crisis?<sup>8</sup>

## 2.1 The action for annulment: elements and legal standing

The structure of Art. 263 TFEU is divided in three main parts, which corresponds to the quality of the appellants entitled to raise an action in front of the Court. The jurisdiction over the actions for annulment is, in general, competence of the General Court<sup>9</sup>, meaning that the Court of Justice *stricto sensu* is not always involved in the review of the acts of the EU institutions.<sup>10</sup> According to Art. 263 TFEU, comma n. 2 and 3, the Institutions can be privileged or semi privileged appellants in front of the Court of Justice. In particular, the Member States, the Commission, the Parliament and the Council - as privileged appellants - can always act in front of the Court to ask the annulment of the acts of the other institutions.<sup>11</sup> The European Central Bank, the Court of Auditors and the Committee of Regions – as *semi* privileged appellants - can only act as far as to “protect their prerogatives”.<sup>12</sup> The third

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<sup>8</sup> I.e. Uska Šadl, Mikael Rask Madsen, ‘Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis’ (2016) 22(1) ELJ 40. Alicia Hinarejos, ‘A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis’ (2016) 22(1) ELJ 61. Jùlia Lladós-Vila, Teresa Freixes ‘The impact of the crisis on fundamental rights across Member States of the EU Country Report on Spain’ (2015) Study for the LIBE Committee of the European Parliament, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510019/IPOL\\_STU%282015%29510019\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510019/IPOL_STU%282015%29510019_EN.pdf) accessed 1 November 2018.

<sup>9</sup> Art. 256 TFEU: 1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

<sup>10</sup> See however actions brought by a Member State against an “act or a failure to act” of the European Parliament, the Commission or the Council in cases listed in Art. 51 of the Statute of the Court of Justice: Protocol (No 3) to the Lisbon Treaty on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council [2012] OJ L 228, by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012] OJ L 112, by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council [2015] OJ L 341 and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants [2016] OJ L 200.

<sup>11</sup> Art. 263(2) TFEU.

<sup>12</sup> Art. 263(3) TFEU.

category of appellants is represented by those described in the aforementioned comma n. 4. This comma – introduced in the Lisbon Treaty – describes the standing of non-privileged appellants, individuals (legal and natural persons) who have an interest in the review of the act of the Institutions. According to Art. 263.4, individuals may apply for the review of an act of the institutions which is directly addressed against themselves or which is of individual and direct concern, or against a regulatory act that is of direct concern to them and does not entail implementing reasons. Although we do not ignore the extremely wide scholarship produced on the extent of Art. 263.4 TFEU, the objective of this paper is not to examine the extent of the application of the fourth comma, but rather to analyze the possibility, *in abstracto*, for individuals to challenge the legal acts produced by the EU Institutions. For the moment, we will accordingly focus on the possibility for those who have an interest in reviewing the acts of the EU “borrowed institutions”, namely those institutions acting outside the framework of the EU Treaties. In order to accomplish this objective, we will pursue a recognition of the recent case law of the Court of Justice on the remedies available to individuals, focusing in particular on the *Ledra* and *Mallis* decision of the Court of Justice.

## 2.2 The action for annulment in *Mallis*

The *Mallis* decision<sup>13</sup> originates from the attempt of a number of holders of bank-account of Cypriots banks to challenge a Statement<sup>14</sup> of the Eurogroup<sup>15</sup> that was detailing the necessary measures for the restructuring of the banking sector in Cyprus. The intervention of the Eurogroup was solicited by the Cypriot Republic in the beginning of 2012, when, in the impossibility to proceed towards the recapitalization of several Cypriot banks, the national government addressed to the European Stability Mechanism (ESM)<sup>16</sup> a “request for stability support”<sup>17</sup> to the Eurogroup in order to be authorized to seek for financial assistance. The appellants decided to challenge in front of the General Court the Statement of the Eurogroup (and this is a fundamental difference of this case with the following *Ledra*) instead of challenging the national measures enacted in the day following the Statement. After the rejection of the application by the General Court,<sup>18</sup> an appeal was lodged by the appellants

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<sup>13</sup>Joined cases C-105/15 P to C-109/15 P *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)* EU:C:2016:702 [2016].

<sup>14</sup> Eurogroup Statement on Cyprus (2013) [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/136487.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/136487.pdf) accessed 1 November 2018.

<sup>15</sup> The Eurogroup, as an informal articulation of the Council, is composed of the Ministers of Economics and Finance of the Eurozone.

<sup>16</sup> The legal basis of its functioning is represented by the Treaty establishing the European Stability Mechanism.

<sup>17</sup> Article 12 of the ESM Treaty: “If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions”.

<sup>18</sup> Case T-327/13 *Mallis and Malli v Commission and ECB* EU:T:2014:909 [2014].

in front of the Court of Justice of the European Union. In its order of rejection, the General Court judged that the Statement of the Eurogroup was not fulfilling the requirements to be considered as a challengeable act, as it was not an act of an EU institution. The General Court went further defining Eurogroup as “a mere forum for discussion”.<sup>19</sup> This consideration of the General Court drives us back to the core of the request of the appellants: as it seems, there is no other legal remedy to challenge but the Statement of the Eurogroup.

As the object of the decision of the Court of Justice in *Mallis* was an action for annulment on the validity of the Eurogroup Statement, we will proceed into a parallel analysis of the answer of the Court on the point in *Mallis* and in *Ledra* and, only subsequently, we will look into the action for damages.

In reviewing the decision (the Order) of the General Court, the Court of Justice was faced with the following questions: i) if the Statement should be rather interpreted as an act of the European Central Bank and of the European Commission, which were acting on a mandate of the Eurogroup within the ESM and ii) if a Statement of the Eurogroup is a challengeable act under 263 TFEU. The Court of Justice, following the path established by the General Court, confirmed that an act of the Eurogroup cannot be the object of an action for annulment and that, within the scope of the ESM, the European Commission and the European Central Bank, were acting outside the ambit of application of the EU Treaties.<sup>20</sup> The fact that the Commission and the European Central Bank participate, according to Protocol 14, into the meetings of the Eurogroup, is not as itself a sufficient reason to impute that Statement to the EU Institutions. In amount of that, the Statement of the Eurogroup was, according to the Court (and in line with the previous finding of the General Court)<sup>21</sup>, was of a merely informative nature, aiming at providing the public the knowledge on the agreement between the ESM and the Cypriot Republic. The Court of Justice also confirmed the hybrid nature of the Eurogroup,<sup>22</sup> pointing out that, being an “informal forum of discussion” between the Ministers of Economics and Finance of the Eurozone, the Eurogroup is not mentioned in the Rule of Procedure of the Council itself. The Advocate General shared the same view, arguing in amount that there are no evidences of the fact that the Eurogroup possesses legal personality and that therefore, not being included into the list provided for by Article 263 TFEU, its acts can not be considered as acts of the EU institutions.<sup>23</sup> This, as recognized by the Advocate General, leaves open the problem of the principle of effective judicial protection. The issue however is solved by the same Advocate General, finding that the Eurogroup does not produce binding acts that are sensible to have a direct and individual

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<sup>19</sup> *Mallis* (n 14 above) para 41.

<sup>20</sup> *Ibid.* paras 45-51.

<sup>21</sup> *Ibid.* para 59.

<sup>22</sup> *Ibid.* para 61.

<sup>23</sup> Opinion of AG Wathelet, *Mallis and Malli v Commission and ECB* EU:C:2016:294 [2016] para 65.

impact on third parts. The Court of Justice, however, does not quote this passage of the Advocate General in its legal reasoning, suggesting that, among the considerations of the Opinion, this is perhaps the most easily contestable, as it is extremely difficult to estimate the impact of Statements of the Eurogroup on individuals.

As further argued also in the subsequent *Ledra* decision, the lack of appellability of the acts of the Eurogroup is not simply a restatement of the *Pringle* doctrine.<sup>24</sup> It is rather a clear indication of the fact that, according to the case law of the Court of Justice, acts establishing or providing for austerity measures should not be challenged at the source (Eurogroup, ESM, Commission or ECB). They should be rather targeted at the level of the measures of implementation, be that at European or – most likely according to the current legal regime – at national level. This is the pathway followed in other decisions that have been given by the Court in the aftermath of the economic crisis, as in *Florescu*<sup>25</sup> and in *Associação Sindical do Juizes Portugueses*.<sup>26</sup> This position of the Court is not however free from criticism. The strict relationship between economic and financial measures to assist Member states experiencing a crisis and conditionality makes extremely difficult, for national courts, to annul implementing measures in as much as it is for the Court of Justice. This loophole cannot be hampered making reference to the interpretation of the text of the Treaties but should rather (as it is only partially done in *Ledra*) provides for alternatives in terms of effective judicial protection. Failing to do that would amount into recognizing increasing similarities between austerity measures and the law of emergency, where the suspension of the fundamental rights is openly acknowledged.

### **2.3 The action for annulment in *Ledra Advertising***

In *Ledra Advertising*,<sup>27</sup> the decision of the Court of Justice released on the same day, the essence of the case is very similar, although the fact were different. In this case, instead of attempting to challenge the Eurogroup Statement, the appellants decided to lodge an action for annulment against the points from 1.23 to 1.27 of the Memorandum of Understanding (MoU),<sup>28</sup> the agreement regulating the engagement of the Republic of Cyprus with the ESM and, accordingly, also the conditions at which the credit is laid out. Attacking the MoU is, from a point of view of the strategy, *prima facie* much more convenient than attacking the

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<sup>24</sup> Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, EU:C:2012:756 [2013]. See the comment of Bruno De Witte, Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability mechanism outside the EU legal order: Pringle’ (2013) 50 CML Rev. 805.

<sup>25</sup> Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* EU:C:2017:448 [2017].

<sup>26</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117 [2018].

<sup>27</sup> Joined cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:701 [2016].

<sup>28</sup> Memorandum of Understanding of 26 April 2013 on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and the European Stability Mechanism (ESM).

Statement of the Eurogroup. The MoU is, in fact, the last executive act at supranational level, which contains the practical measures to be taken by the Member State in order to obtain the financial or economic aid. In that case, the MoU thoroughly details the bail in of the Cypriot bank, that took the form of the conversion of a percentage (37,5%) of the “uninsured” deposits<sup>29</sup> into shares of the bank, in order to comply with the minimum credit requirements provided for by the Memorandum of Understanding.<sup>30</sup> It is not accordingly relevant, into these circumstances, the fact that the value of the communication was merely an “informative” one, as it was for the act under scrutiny in the previous decision, *Mallis*. In this case, also, was brought forward the argument, similarly to *Mallis*, that the acts of the ESM are imputable to the European Commission and the European Central Bank (again, contrary to what the Court stated in the *Pringle* doctrine). The appellants, in their pleadings maintain that the conditionality<sup>31</sup> attached to the measure was considered to be into the responsibility of the Commission and the ECB (and of the IMF).

The Court, in its reasoning, which lasts for ten dense paragraphs (where the Court joins the analysis of the admissibility of the action for annulment with the one for the action for damages), does little more than repeating the *Pringle* doctrine. This may be also easily inferred by the fact that, in little more than ten paragraphs, the Court quotes the *Pringle* precedent five times. According to the Court, the “duties conferred to the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, the activities pursued by those two institutions within the EMS Treaty commit the ESM alone”.<sup>32</sup> To ensure that the message is received, the Court repeats the same sentence, formulated in different ways, twice in the following two paragraphs.<sup>33</sup> The reasoning of the Advocate General is more elaborated, but reached a very similar conclusion.<sup>34</sup> The acts of the ESM have nothing to do with the European Union and the fact that the EU institutions have been “borrowed” for this purpose makes no difference. Although in legal terms this reasoning might sounds perfectly acceptable, policy concerns would portrait a different situation: being involved in the ESM decision-making process, the two EU institutions have

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<sup>29</sup> Deposits above 100.000 €. See Daniel Gros, ‘Principles for European Deposit Guarantee Schemes’ (2103) Monetary Dialogue: European Parliament Directorate General for Internal Affairs, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/507468/IPOL-ECON\\_NT%282013%29507468\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/507468/IPOL-ECON_NT%282013%29507468_EN.pdf) accessed 1 November 2018.

<sup>30</sup> Para 1.26 of the Memorandum of Understanding. The text of the MoU is quoted in paragraph 10 of the decision of the Court: *Mallis* (n 14 above).

<sup>31</sup> *Mallis* (n 14 above) para 43.

<sup>32</sup> *Ibid.* para 51.

<sup>33</sup> *Ibid.* paras 52-53.

<sup>34</sup> Opinion of AG Wathelet (n 23 above) paras 49 – 59. See in particular paras 52 and 53 where the AG recalls that the conferral of powers to the EU institutions in areas which falls outside the EU legal order has already taken place in the past (i.e. Common Foreign Security Policy, the Unified Patent Court).



undermined their independency and are being increasingly perceived by the public as the enforcers of decisions which are not democratically accountable.

Although it is noticeable that to translate this policy concern into a legal argument is an herculean fatigue, it cannot be denied that with this appeal the parties of the proceeding have clearly delimited the playing field. If the Court, as it has done, maintains that the MoU is not appealable, then only one practicable way rests for those who have been damaged by the “austerity measures”: the recourse to national remedies and the intervention of the Court through preliminary rulings. The other only option is, as the Court itself suggests with a sharp shift at paragraph 55 of its judgment, to judge the unlawful conduct of the institutions according to Art. 268 and 340 TFEU.

Before the conclusion of this first section, there is another point that is worth of an analysis. When, finally, the ESM will be incorporated within the EU institutions and the instruments proposed by the European Commission in its Roadmap of December 2017 will finally enter into force (including the creation of an European Monetary Fund)<sup>35</sup> in principle, the question of the admissibility of the action for annulment will not be posed anymore. The turning point will then become the question of the standing of the applicants in front of the Court of Justice of the European Union. However, it will not be easy to win the limits that the Court has posed within its case law in order to avoid the abuse of the action for annulment. Art. 263 does not represent a blank cheque for EU citizens to appeal every legislative or non legislative act, they should rather demonstrate i) that the act is addressed to them and ii) that the act is of direct and individual concern to them. For the first requirement established in Art. 263.4, the Court could relatively easily point out that the MoU is directly addressed not to the citizens but against the EU Member States. As to the second one, the appellants should dig inside the complex definition of an act of direct and individual concern, a definition whose meaning, despite the effort of the Court of Justice, remain unclear.<sup>36</sup>

### **3 The action for damages: the non-contractual liability of the EU institutions**

In the following paragraphs, we will analyze the action for damages for unlawful conduct of the EU institutions as a mean to find a judicial remedy against the acts (and the actions) conducted by the EU institutions while intervening to counter the economic crisis. The analysis will be done concentrating in first instance on a general portrait on the contractual and non-contractual liability, and, in second instance, on the case law of the Court of Justice – and in particular on the *Ledra* decision.

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<sup>35</sup> European Commission, *Further steps towards completing Europe's Economic and Monetary Union* COM(2017) 821 final.

<sup>36</sup> I.e. see: case C-599/14 P *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, EU:C:2017:583 [2017]. Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* EU:C:2013:625 [2013].

Before going into the next paragraph, it is necessary to recall briefly the essentials of the action for damages and its special relationship with the action for annulment.<sup>37</sup> As known, there are two main typologies of liability: contractual and non-contractual, reflecting a division that dates back to Roman law.<sup>38</sup> Contractual liability is the one that arises from legal relationships of private law (i.e. the liability for the breach of a contract) and is regulated by Art. 272 TFEU.<sup>39</sup> Extra-contractual liability arises from the mere act or fact that cause a damage to a natural or to a legal person. Art. 268 and 340 TFEU regulates the extra-contractual liability of the EU institutions.<sup>40</sup> In this paragraph and in the following one we will mainly focus on extra-contractual liability of the EU institutions, since this is the main typology of liability that may arise from the acts of the EU institutions developed to counter the economic crisis. In order to lodge an application for an action for damages, the applicant should in general be aware of the “procedural” and “substantial” elements of the action. Both classes of elements have been established by the Court of Justice, basing on the “*general principles common to the law of the Member States*”.<sup>41</sup> As a consequence – as often happens in EU law – we should navigate through the case law of the Court of Justice in order to discover the components of these requirements. The substantial requirements, pertains to the material acts and facts of the case. As we will see also in the next paragraph – where these characteristics will be discussed with reference to the *Ledra* case, the main substantive elements of the action are i) the sufficiently serious breach of a rule of EU law, ii) the actual damage and iii) the causal link between the damage and the institution. The procedural requirements are, on the other side, those characteristics of the action that pertain to the procedure to be followed in front of the Court of Justice. First, the jurisdiction over the action for damages pertains to the General Court, to whom this type of action should be addressed. Second, it must be taken into account the limitation period. The action can be introduced only within the five years following the taking place of the fact that gave rise to the damage, otherwise is time-barred.<sup>42</sup> Third, the proof of the act/fact which caused the damage should be substantiated by significant evidences. The action for damage is also, procedurally and substantially, intertwined with the action for annulment.<sup>43</sup> Although in the first decades of the Community there was the impression that the action for damages was depending on the

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<sup>37</sup> See in general Lenaerts et al. (n 2 above) 480; Craig (n 2 above); Hartley (n 2 above). Barnard, Peers (n 2 above); Andrea Biondi, Martin Farley, *The Action for Damages under EU law* (Wolters Kluwer 2009).

<sup>38</sup> David Johnston, ‘Limiting Liability: Roman Law and the Civil Law Tradition’ (1995) 70(4) *Chicago-Kent Law Review* 1515.

<sup>39</sup> Art. 272 TFEU [2012] OJ C326.

<sup>40</sup> Art. 340 TFEU [2012] OJ C326.

<sup>41</sup> Art. 340(2) TFEU [2012] OJ C326.

<sup>42</sup> As explained by Kathleen Gutman, ‘The evolution of the action for damages against the European Union and its place in the system of judicial protection’ (2011) 48 *CML Rev.* 695, 711 (note 90), it is not however always easy to know when the fact took place or, if the fact is protracted in time, when the damaging event firstly incurred.

<sup>43</sup> Lenaerts et al. (n 2 above) 488.

action for annulment, and that the damages might have been obtained only if the invalidity of the act was declared, eventually the action *ex Art. 268 and 340 TFEU* evolved autonomously. An action for damages can not however fulfil the same scope as of the action for annulment after the expiry of the very short time limit that is pursued by the Treaties. However, in the majority of cases, the two actions are brought together in front of the Court. This brief overview of the action for damages has revealed that it is not an easy-going accomplishment to introduce an action for damages in front of the Court of Justice. It is however indubitably an option in the arsenal of possibilities for individuals.

### **3.1 The action for damages in *Ledra Advertising***

In both of the judgments we have analyzed in the previous paragraphs, in *Ledra* and in *Mallis*, the Court of Justice appears to follow the Advocate General' approach. There is however a significant exception. In *Ledra*, the Court decides not to follow the position of the Advocate General as to the admissibility of the action for damages. According to the reasoning of the Court of Justice, the General Court erred in law in maintaining that the lack of admissibility of the action for annulment was also preclusive to the verification of the unlawful conduct of the EU institutions.<sup>44</sup> The Court of Justice, however, does not maintain that the admissibility of the action equals to the recognition of the liability of the EU institution. In order to be fully accomplished, the action for damages must fulfil the conditions established by the case law of the Court of Justice.<sup>45</sup> Art. 340 is in fact a mere framework norm that maintains that, in case of extra-contractual liability, the EU institutions shall make right any damage caused to third parties “*in accordance with the general principles common to the law of the Member States*”.<sup>46</sup> As mentioned in the previous paragraph, the case law of the Court has, to this respect, maintained that the conduct of an EU institution (in this case the Commission and the ECB) in order to be regarded as unlawful, should fulfil three conditions.<sup>47</sup> i) The conduct should be manifestly against the law of the European Union, ii) the fact of the damage should be proved and iii) there should be a causal link between the damage and the conduct.<sup>48</sup>

The Court starts, accordingly, examining the lawfulness of the conduct of the ECB and of the Commission. The applicants in *Ledra* invoked that the bail-in provided for by paragraphs 1.23 to 1.27 of the MoU was in breach of Art. 17 of the Charter (the right to property), and that the Charter was applicable, since it was addressed to the EU institutions and, in the argument of the parties, in this case the ECB and the Commission were acting in their

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<sup>44</sup> *Ledra* (n 26 above) para 60.

<sup>45</sup> Lenaerts et al. (n 2 above) 508. Gutman (n 41 above) 695.

<sup>46</sup> Art. 340 TFEU.

<sup>47</sup> *Ledra* (n 26 above) para 64.

<sup>48</sup> These are understood usually as the “substantial” requirements of the action for damages. See on this point K. Gutman, *The evolution of the action for damages against the European Union and its place in the system of judicial protection*, op. cit. p. 710.

capacity of EU institutions. Establishing what is a quite radical difference with the leading case law on the application of the Charter of Fundamental Rights,<sup>49</sup> the Kirchberg judges found, implicitly,<sup>50</sup> since the reason of the choice is not clearly deducible from the text of the decision, that the Charter is applicable to the facts of the case.<sup>51</sup> On the contrary, the Advocate General maintained, in line with the previous *Pringle* doctrine, the inadmissibility of the action for damage in the case. The Opinion of the Advocate General is also in line with the main precedent of the Court in *Accorinti*.<sup>52</sup> In the Opinion of Mr. Wahl, the Charter does not apply to the ESM nor it applies to the EU institutions, since they are acting on behalf of the ESM. Failing to recognize this passage would amount, in the reasoning of the Advocate General, “to circumvent the fact that the ESM and the ESM alone is responsible for the acts which it adopts pursuant to the ESM Treaty”.<sup>53</sup>

What is interesting, in the vision of the Court, is that despite of the fact that the Charter applies, the Court did not recognize the existence of the first element needed in order to evaluate the unlawful conduct of the institutions, since, in the opinion of the judges, the limitation to the right of property was justified. Article 17 of the Charter is, in fact, one of the few Articles of the Charter that is expressly limited for reasons of public interest. According to Art. 17 of the Charter<sup>54</sup>, “[t]he use of property may be regulated by law in so far as is necessary for the general interest”. This detail is important, since the right to property is, in the majority of European jurisdictions, a right that can be limited when a superior conflicting interest is found.<sup>55</sup> Art. 17 should be read together with Art. 52 of the Charter that essentially repeat with different words a similar concept: pursuing the objective

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<sup>49</sup>E.g. see case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 [2013] and, lastly, joined cases C-596/16 and C-597/16 *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa* EU:C:2018:192 [2018].

<sup>50</sup> At the beginning of paragraph 67 the Court of Justice says that, while the Charter is not applicable to the EU Member States acting beyond the limits of the Treaties, it is applicable, on the other side, to the EU institutions, also when they are acting outside the framework of the Treaty. In this passage the Court quotes, in support of its argument, paragraph 85 of the Opinion of the Advocate General. To the detriment of the quotation of the Court, unfortunately, in the subsequent paragraph the Advocate General clarifies better his thought, maintaining that “That does not mean – however – that the Commission is required to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework”. (Opinion of the Advocate General Wahl, *Ledra* EU:C:2016:290 [2016] para 86).

<sup>51</sup> *Ledra* (n 27 above) para 67.

<sup>52</sup> Case T-79/13 *Alessandro Accorinti and Others v European Central Bank* EU:T:2015:756 [2015]. However, in this decision the Court of Justice was faced with a different question, since the Greek crisis to whom the precedent is referred was managed using the tools available within the EU legal system.

<sup>53</sup> Opinion of the Advocate General Wahl, *Ledra* EU:C:2016:290 [2016] para 102.

<sup>54</sup> “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”

<sup>55</sup> I.e. Dolores Utrilla Fernández-Bermejo, ‘The multilevel protection of the right of property in Europe’ (2015) 4 *China-EU Law Journal* 75.

of general interest is not sufficient as such to justify a limitation of a fundamental right: it should also not represent an intolerable and disproportionate interference with the right at stake.<sup>56</sup> This is what the Court of Justice found in the present case, since the judges held that the objective of preserving the stability of the banking system pursues an objective of general interest: “Indeed, financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets.”<sup>57</sup> The Court, subsequently, went on in analyzing the circumstances of the bail-in and noted that the amount of deposits affected by the measures contained in the MoU was limited (the 37.5 %) and that was also limited the objective of the recapitalization of the bank.<sup>58</sup> The Court accordingly said that a limited interference in the rights to property (in this case, the liquidity of the uninsured account holders) is allowed under European Union law.

What can be learned from the analysis of this decision, read in light of the previous *Mallis* case but also in light of the precedent in *Accorinti*? First, the Court of Justice accepts to review the action for damages when an EU institution is acting outside the framework of the Treaties. Second, the Charter of Fundamental Rights applies to the EU institutions acting outside the framework of the Treaties. Third, the right to property can be limited in order to pursue the objective of the stability of the Eurozone. Fourth, the limitation should not constitute a disproportionate and intolerable interference of the fundamental right, meaning that measures which involves, for instance, the bail-in of the large majority of the deposits would not be acceptable by the Court of Justice. Read in light of this consideration, it should be interesting to see how the Court of Justice will judge the appeal in the *Accorinti* precedent.<sup>59</sup> In that case, in fact, the involvement of the EU institutions was to a far larger degree, and it was entirely conducted within the framework of the EU legal order. Certainly, it is unlikely that the Court will allow the recognition of the extra-contractual liability of the Eurogroup. However, if the Court decides to admit the action for damages and to carry out a proportionality assessment similar to the one in *Ledra*, it should not be taken as granted that the solution adopted by the ECB and the Commission, under the auspices of the Heads of state and Government of the Euro area, to solve the economic and financial crisis in Greece would be regarded as proportionate.<sup>60</sup>

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<sup>56</sup> Art. 52 of the Charter of Fundamental Rights of the European Union [2016] OJ C202.

<sup>57</sup> *Ledra* (n 27 above) para 72.

<sup>58</sup> *Ledra* (n 27 above) para 73.

<sup>59</sup> *Accorinti and Others v ECB* (n 52 above).

<sup>60</sup> In *Accorinti*, the conditionality envisaged to allow the Eurosystem central banks and the financial sector to purchase State bonds on the secondary market was an “haircut” of the 50% of the value of the credit of the private bond-holders. This is a radical difference in the intrusion of the right to property as compared with the 39,5% (converted in stocks of the bank) in *Ledra*. The problem, in this case, might be that State bonds are financial instruments exposed to a risk sensibly higher than a simple bank account.

#### **4. The third way: interpreting MoUs and austerity measures through preliminary rulings (and facing actions for damages at national level)**

As detailed in the previous paragraphs, the legal remedies available at European level for individuals against the acts (or the conduct) of the EU institutions acting in order to preserve the economic and financial stability of the Eurozone are not sufficient. For what pertains to the action for annulment, this consideration should be surely contextualized in the overall aim of the remedy, which is not intended to confer an indistinct right to judicial review to EU citizens. The action for annulment, pursued at European level, is also an *extrema ratio*: the domino effect of a declaration of invalidity on the implementing act could cause the failure of an entire bailout system, causing more harm than good. As to the action for damages, although the step further made in *Ledra* with the admissibility and the review of the action appears to increase the protection for individuals, the proportionality test pursued by the Court to judge the interference with the right to property appears way too much unpredictable to represent a valid legal remedy. The only way available for those affected by the so called austerity measures appears to be represented by legal remedies at national level. In this case, the main strategy would be twofold: i) to seek for the declaration of invalidity of the implementing act in front of national administrative Courts. If this is the case, the most important part is surely represented by the individuation of the right act to be challenged, a matter that should be sorted with the counsel of an expert at national level. At this point, the applicant should ask to the national court to forward a preliminary ruling on the interpretation or (even better) on the validity of the EU measure supporting the national implementing measure. Bearing in mind the fact that there is no obligation to raise a question for preliminary ruling to the Court of Justice until the case reaches the last instance courts,<sup>61</sup> according to this strategy one could pursue a twofold aim: to challenge the national act while at the same time putting into question the validity of the superior European act. The second possibility is ii) to ask damages for the unlawful conduct of the national institutions implementing EU law or, if it is the case, to ask to the national Courts to ascertain the non-contractual liability of the EU institution involved (but in this case one can always lodge an action for damages at EU level). In this paragraph we will analyze two decisions of the Court of Justice where the appellants decided to challenge the acts of the EU institutions in the framework of programmes to grant economic and financial aid to Romania and Portugal. The decisions deal with the reduction of the pensions of public employees as the condition to receive the above-mentioned economic and financial aid. The two decisions shares also the quality of the applicants: in both cases are the member of the judiciaries who have challenged the national legislation providing for cuts to the pensions of public employees (as judges are).

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<sup>61</sup> Art. 267(3) TFEU: “Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court”.

The first decision, *Florescu*, involves the request for financial aid made by Romania in 2009.<sup>62</sup> The request, done before the entrance into force of the Lisbon Treaty, refers to what is now Art. 143 of the TFEU, which regulates specifically targeted interventions for “*Member States [...] in difficulties or is seriously threatened with difficulties as regards its balance of payments*”.<sup>63</sup> This provision is referred only to those Member States whose currency is not the Euro (“*Member States with a derogation*”) and allows the concession of (relatively) small lines of credit. According to the procedure set out in Art. 143 as implemented by Regulation 332/2002/EC<sup>64</sup>, Romania and the European Community, represented by the Commission, concluded a Memorandum of Understanding<sup>65</sup>, where was expressed the commitment of the Member State to undergo structural reforms in order to receive economic support from the Council.<sup>66</sup> In this judgment, similarly to what happened in the *Accorinti* case, the temporary crisis was faced making use of the tools provided for by EU law instead of resorting to *ad-hoc* tools of international law. Hence, the object of the dispute was a national legislation introducing, in November 2009 (to implement the conditionality contained within the Memorandum of Understanding of June 2009), a limitation to the enjoyment of public pensions. The judges who act as applicants in the present proceeding were, in fact, into permanent individual contract to teach law into a public university. As stated into the bill of November 2009,<sup>67</sup> it was not allowed to those having a public pension to be simultaneously into a working contract with another entity and, accordingly, the right to pension was lost as long as the contract with the university was in force.

The applicants decided to challenge the law restricting their “right to pension” in front of national tribunals and ultimately reached the Court of Appeal of Alba Iulia, which raised a question for preliminary ruling to the Court of Justice on the interpretation of the Memorandum of Understanding.<sup>68</sup> In its question, the Romanian Court asks, in essence, if the Memorandum of Understanding was to be considered as an act of the EU institutions and if EU law, broadly intended, (and in particular the Charter of Fundamental Rights) requires the Member States to cuts on public pensions in order to comply with conditionality. The

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<sup>62</sup> *Florescu* (n 25 above).

<sup>63</sup> Art. 143(1) TFEU: “Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take”.

<sup>64</sup> Council regulation 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L 128.

<sup>65</sup> Memorandum of Understanding of 23 June 2009 between Romania and the European Community.

<sup>66</sup> Council decision 2009/458/EC of 6 May 2009, granting mutual assistance for Romania [2009] OJ L 150.

<sup>67</sup> Legea n. 329/2009.

<sup>68</sup> *Florescu* (n 25 above) para 28.

Court, which in this case followed the Opinion of the Advocate General Bot, gave an answer that consists in lights and shadows for the possibility to find a legal remedy against the acts of the EU institutions. In first place, the EU judges said, the MoU is to be considered as an act of the EU institution.<sup>69</sup> This could appear to be a revolutionary statement if it was not for the fact that, differently from the facts of the judgment in *Ledra* and *Mallis*, the MoU here was concluded, as said, within the scope of the Treaties. In second place, the Court tackled the compliance of the MoU with the Treaties and, in particular, with the Charter of Fundamental Rights. Recalling its traditional case law,<sup>70</sup> the Court recognized that implementing the MoU, EU Member States falls within the scope of application of the Charter:<sup>71</sup> however, this did not suffice for maintaining the MoU or the national legislation as being unlawful. As mentioned in the previous paragraphs, the Court carries out a proportionality scrutiny similar to the one in *Ledra*. Considering the overall aim and scope of this particular piece of national legislation (the Court stresses in particular on the fact that, in principle, this legislation is temporary), they maintain that the interference with the right to property is not disproportionate and attains an objective of general interest (similarly to *Ledra*, the equilibrium of the balance of payment).<sup>72</sup> What is however problematic, from the point of view of the remedies for individuals, is that the Court appears to strike down any extensive reading of the proportionality test in *Ledra*. In paragraph 51 of its decision, the Court seems to look at *Ledra* as a precedent that justifies a line of case law on the restrictions to the right to property (Art. 17 of the Charter), rather than as an isolated case.<sup>73</sup> This is sensible to reduce the relative optimism with which commentators have welcomed the decision of the Court.<sup>74</sup> Overall, the judgment reduces the possibility that the conditionality contained in the MoUs, implying the introduction of cuts to public spending can be judged as an unlawful conduct of the EU institutions; at the same time leaves the choice to the Member States, since the Court maintains: “*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*”.<sup>75</sup> The answer of the Court is therefore an extremely ambiguous one: the majority of restrictions to the right to property within the contest of measures addressed to counter the economic crisis are likely to be judged as proportionate,

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<sup>69</sup> *Florescu* (n 25 above) para 42.

<sup>70</sup> *Fransson* (n 49 above) and joined cases C-411/10 and C-493/10 *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865 [2011] ECR I-13905.

<sup>71</sup> *Florescu* (n 25 above) para 48.

<sup>72</sup> *Florescu* (n 25 above) para 58.

<sup>73</sup> Here we should open a parenthesis, since the CJEU quotes a precedent of the ECHR on pension rights (saying that there is no such a thing as right to pension) dealing with an ECHR state that is not part of the EU, without having regard of the fact that the doctrine of the margin of appreciation is applicable. Is the Court suggesting a similar “restrictive” interpretation of the right to property?

<sup>74</sup> See *Dermine* (n 6 above) 381.

<sup>75</sup> *Florescu* (n 25 above) para 57.



but Member States have to autonomously determine if a measure as such is appropriate to pursue the conditionality threshold provided for by the MoUs. The only answer that can be found is accordingly that EU law does not necessarily allow it does not necessarily prohibit measures as the one at issue in the case at hand. But, since the objective to be attained within the MoU is a percentage reduction on public spending, Member States are most likely to downsize where they proportionally spend more, namely on pensions, education and healthcare. The harshening of the economic crisis, supported by a similar case law of the Court, can thus mark the end of the rights arising from the welfare State in Europe.

Another decision where the Court has been asked by a national Court to interpret the acts of the EU institutions in the framework of the crisis is *Associação Sindical dos Juizes Portugueses*.<sup>76</sup> In this decision, the Court has been faced with the analysis of the measures introduced by the State to reduce the budget deficit in the aftermath of the economic crisis in Portugal. These measures<sup>77</sup> implied for a – temporary<sup>78</sup> - proportional downsize of the salary of various categories of public servants.<sup>79</sup> In the facts of the case at hand, however, was not posed into question the right of the public employees to the property of their wages (since it was limited in percentage and was likely, on the ground of precedents in *Ledra* and *Florescu*, to be dismissed) but was rather the effects of the measure on the independence of the judicial system as such. In particular, the question was if the measure was as such as to conflict with Art. 6 and 19 TEU, which enshrines the principle of effective judicial protection.<sup>80</sup> In this case, the Court had much less trouble to find that there was no interference of the measure with the general principle, and, accordingly, does not justify any action for damages as such.

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<sup>76</sup> *Associação Sindical dos Juizes Portugueses* (n 26 above).

<sup>77</sup> Law No 75/2014 putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility) of 12 September 2014 (Diário da República, 1st Series, No 176, of 12 September 2014, p. 4896, ‘Law No 75/2014’).

<sup>78</sup> According to the Opinion of the AG Saugmandsgaard Øe in *Associação Sindical dos Juizes Portugueses* EU:C:2017:395, paras 25-34, the Portuguese authorities have gradually repealed the cuts to the salary of public employees in 2016. This however not with retroactive effect, meaning that the national Court is still due to rule on the reduction of the salary incurring between 2014 and 2016.

<sup>79</sup> Article 2 of Law No 75/2014: “1 — Gross monthly income greater than EUR 1 500 of persons referred to in paragraph 9, whether already employed on that date or taking up their functions thereafter, in any capacity, shall be reduced as follows: (a) by 3.5% of the total amount of remuneration greater than EUR 1 500 and less than EUR 2 000; (b) by 3.5% of the amount of EUR 2 000 plus 16% of the amount of the total remuneration greater than EUR 2 000, coming to an overall reduction of between 3.5% and 10% in respect of remuneration equal to or greater than EUR 2 000 and up to EUR 4 165; (c) by 10% of the total amount of remuneration greater than EUR 4 165”.

<sup>80</sup> Article 19(1) and (2) TEU provides: “1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 2. [...] The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt [...]”.

From the two decisions analysed, that are surely only the first of a longer stream of case law on the compatibility of the “austerity measures” with EU law and fundamental rights, one can easily judge that not much space is left to the possibility to make good the losses provoked by the economic crisis either at national or European level. At the same time, the question of legal remedies available remains open, with a *caveat*. As we have attempted to demonstrate in this Chapter, there are many different legal remedies available for those individuals affected by the actions and decisions of the EU institutions. The right to effective judicial protection is not however an obligation of result. If one can surely disagree with the Court of Justice for not having found the measure (in *Ledra* as well as in *Florescu*) in contrast with the Charter, one cannot deny that the question was posed and analyzed. Legal remedies exists for individuals, but they do not perhaps lead to the end that was hoped (the compensation of the loss). What rests out of the picture is an obvious truth: our multi-layered legal order and the rights that have been originated in years of wealth can hardly resist the impact of another, harshened, economic crisis.<sup>81</sup>

## **5. Conclusion: from supranationalism to intergovernmentalism and back: which way forward for the rights of individuals?**

If, as we have committed, depart in our analysis from the perspective of individuals that have been affected by austerity measures, the situation is not heart-warming. The possibility to lodge an action for annulment is impaired both by its very strict limitation period as well as by its nature (i.e. limited standing in front of the Court): as said, such an action is not conceived to grant a diffuse “right to appeal” against EU legislation. The action for damages shows surely more promises, in terms of further development. But it is needed a strong precedent of favorable review, something that at the present date does not exist. Remedies at national level last longer and are more expensive than proceedings in front of the Court of Justice and do not ultimately reach a different outcome. If you however take into consideration the delicate balance that is at stake between the stability of the banking system (and, more importantly, of the balance of payments of the Member States) and the fundamental rights of individuals, a different conclusion can be reached. Protecting simultaneously the fundamental rights of individuals and the interests of the economic and financial system is an extremely difficult task, but this is not a reason to give up. The limited possibilities of the European Union and of the EU institutions, and the paradox of the fact that are the very same institutions to negotiate with the programme countries the conditionality which is the precondition for the financial support makes more necessary than ever a reform. In this sense, the Commission has launched, in December 2017, a complex and multi-layered reform of the Economic and Monetary Union that addressed some of the

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<sup>81</sup> See Francesco Costamagna, ‘The Court of Justice and the Demise of the Rule of law in the EU Economic Governance: the Case of Social Rights’ (2016) Carlo Alberto Notebooks n. 10/2016 20, <https://www.carloalberto.org/assets/working-papers/no.487.pdf> accessed 1 November 2018.

concerns which are at the basis of the present article.<sup>82</sup> First, the Commission proposed the establishment of an European Monetary Fund. This important step further should ultimately lead to the re-embodiment of the European Stability Mechanism within the European Union legal order, augmenting its financial capacity and reducing the conditionality that is a prerequisite of the intervention.<sup>83</sup> Question is if the measures envisaged by the Commission in its roadmap will be enough to rebalance the current asymmetry between the executive powers of the Commission and the powers of the Member States within the Economic and Monetary Union, and if they will foster accountability of the process. The three proposals of the Commission - the European Monetary Fund and the re-embodiment of the Treaty on Stability, Governance and Coordination, plus the informal establishment of an European Minister for Economy and Finance - require the consensus of the Member States within the Council, with only a limited involvement of the European Parliament. Hence, the proposal to establish an European Monetary Fund, if enters into force, will fill the gap and provide judicial review to the rights of the individuals affected by the crisis, bringing the ESM under the cap of the Treaties. This will reduce the need to borrow the EU institutions and will also rebalance the relationship of powers between the Commission and the Member States. What is at stake is however much more than the stability of the Economic and Monetary Union. It is the counter challenge to the seminal article of Fritz Scharpf on “why the EU will never be a social market economy”.<sup>84</sup> If the European Union wants to preserve the social rights of its citizens (pensions, healthcare system, as well as the judiciary), these changes are more than needed. The outcome of the legislative procedure where these initiative will be adopted will be the main playing field where the ability of the European Union to preserve its welfare State will be measured against.

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<sup>82</sup> European Commission, *Further steps towards completing Europe’s Economic and Monetary Union: a Roadmap* COM(2017) 821 final.

<sup>83</sup> See European Commission, *Proposal for a Council Regulation establishing the European Monetary Fund* COM(2017) 827 final.

<sup>84</sup> Fritz W. Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a ‘social market economy’ (2010) 8 Socio-Economic Review 211.