ESM, Union Institutions and EU Treaties: A Symbiotic Relationship

ECJ 20 September 2016, Joint Cases C-8/15 P to C-10/15 P (*Ledra Advertising Ltd* et al) and ECJ 20 September 2016 Joint Cases C-105/15 P to C-109/15 P (*Mallis and Malli* et al)

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1. Introduction

On 20 September 2016 the Grand Chamber of the Court of Justice delivered two landmark judgments pertaining to the bail-in measures that applied to two Cypriot banks (Bank of Cyprus and Popular ("Laiki") Bank) in 2013.[2] The judgments deal with three novel constitutional issues relating to judicial protection: First, the legal status of the Eurogroup, the reviewability of its output and the role of the Union institutions involved therein. Second, the EU Treaties' limitations on the participation of Union institutions in the European Stability Mechanism (ESM) and the Union institutions' liability when acting in that context. Finally, the permissible restrictions on the right to property under the EU Charter in the light of a bail-in. These rulings aim to reduce the legal uncertainty within the EMU's governance. They are part of the litigation generated by the euro crisis which can be divided in two categories: First, the litigation pertaining to the normative and institutional developments in the EMU's governance (see *Pringle*,[3] *Gauweiler*[4]); second, cases challenging the macroeconomic conditionality accompanying the financial assistance programmes to member states and respective austerity measures (e.g. *ADEDY*,[5] *Sindicato*,[6] *Corpul National al Politistilor*[7]). These cases are novel from another point of view; it is one of the rare occasions[8] that a case brought before the Union Courts in respect of austerity measures adopted to remedy the effects of the crisis passes the gates of admissibility.[9]

2. Legal background

In March 2013, two Cypriot banks were subjected to a bail-in in an attempt to address the banking and sovereign debt crisis in Cyprus.[10] The bail-in was implemented

1. I am indebted to Takis Tridimas and Tuomi Tuominen for their comments on earlier versions of this work. Any mistakes or omissions are the sole responsibility of the author.
2. For a brief account of the bail-in measures and the event preceding and following the resolution of the two Cypriot banks, see M. Kaplan, "Playing with Fire: The Cyprus Banking Crisis", 33(1) *Review of Banking & Financial Law* (2013), p. 41.
3. ECJ 27 November 2012, Case C-370/12, *Pringle*.
4. ECJ 16 June 2015, Case C-62/14, *Gauweiler and Others*.
5. GC 27 November 2012, Case T-541/10, *ADEDY and others v Council*; GC 27 November 2012, Case T-215/11, *ADEDY and Others v Council*.
6. ECJ 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and others*; ECJ 29 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*.
7. ECJ 14 December 2011, Case C-434/11, *Corpul Național al Polițiștilor*; ECJ 10 May 2012, Case C-134/12, *Corpul Național al Polițiștilor*; ECJ 15 November 2012, Case C-369/12, *Corpul National al Politistilor – Biroul Executiv Central*.
8. See also the unsuccessful application for compensation before the Union Courts in respect of the 2012 Greek Private Sector Involvement programme (PSI), under which the Greek Government and some private bondholders agreed on a voluntary "haircut" of 53.5% of the securities held by them; GC 7 October 2015, Case T-79/13, *Accorinti and Others v ECB* (*Accorinti II*). By contrast, similar previous actions for annulment and compensation had been found inadmissible; GC 25 June 2014, Case T-224/12, *Accorinti e.a. v ECB* (*Accorinti I*) and GC 5 October 2015, Case T-38/14, *Kafetzakis and Others v Parliament and Others*.
9. Previous actions or requests for preliminary rulings in respect of austerity measures were dismissed by the Court. See *ADEDY* cases, *supra* n. 4. In *Sindicato*, *supra* n. 5, the Court rejected the request for a preliminary ruling on the basis that the contested national act providing for a reduction on the salaries of public sector employees and similar measures were not implementing Union law in the meaning of Article 51(1) EU Charter that would trigger its application. Similarly, the *Corpul National al Politistilor* cases (*supra* n. 6) involved preliminary ruling references by Romanian courts in respect of national laws reducing the salaries in the public sector; a condition that was included in a MoU agreed between Romania and the ESM. The Court again rejected the relevant requests from the Romanian courts on the basis of lack of sufficient link between the national measures in question and EU law. Also, ECJ 14 December 2011, Case C-462/11, *Cozman*.
10. For an overview of the Cypriot financial crisis and its causes, see inter alia S. Zenios, "The Cyprus Debt: Per-

in a legal context that differs enormously from the one applicable at the time of writing. Back in 2013, there was no bank resolution framework at EU level; the Bank Recovery and Resolution Directive (BRRD) had not yet been adopted and the Single Resolution Mechanism was not operational. Similarly, the ESM's framework for the provision of financial assistance to member states in need, whose function required the involvement of the Commission and the European Central Bank (ECB), had not yet been incorporated into the EU legal order.(11) In sum, the Cypriot bail-in occurred at a regulatory vacuum from an EU law perspective.

At the same time, complex legal arrangements were made available. They involved players governed by EU law and international law and entailed both hard law and soft law instruments. The member states established the ESM, a hybrid intergovernmental framework, which is based on an international treaty (the ESM Treaty) but also confers tasks upon EU institutions. The use of international law outside the Union's legal framework is hardly an unusual means for organising the cooperation between Member States and furthering European integration.(12) The euro crisis has not been an exception to this rule; on the contrary it has given birth to several such legal edifices.(13) The affirmation of its compatibility with EU law by the ECJ in *Pringle*(14) placed ESM into the epicentre of the euro-crisis literature(15) and generated an interesting debate pertaining to its implications on the Union's constitutional and institutional integrity.(16) Second, an unofficial body which widely became known as the "troika" (and later "the institutions"), comprised of the Commission, the ECB and the International Monetary Fund (IFM), was established within the ESM and assigned primarily the responsibility for conducting the negotiations on behalf of the ESM on the conditionality of the financial assistance with the concerned member state. The ESM Treaty provides that certain tasks are to be carried out collectively by the troika (e.g. the conduct of the negotiations) but also addresses certain tasks exclusively to each of the institutions comprising it (e.g. the signing by the Commission of the Memorandum of Understanding (MoU) containing the conditionality). Following the Court of Justice's judgment in *Pringle*, the general compatibility of the tasks conferred upon Union institutions under the ESM Treaty is no longer questioned. However, important aspects have been left open pertaining *inter alia* to the limits imposed by EU law on Union institutions in the exercise of their tasks within the ESM. The annotated judgments shed some light in this respect. Finally, the politico-economic considerations pertaining to the euro crisis, including the financial status of individual member states, were widely debated within the Eurogroup. Established under Protocol 14 to the EU Treaties, the Eurogroup is a forum where the euro area finance ministers meet informally to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission and the ECB also attend the Eurogroup meetings. The annotated cases, being the first actions pertaining to a Eurogroup act, attempt to draw a clearer picture on the legal status of this body and the reviewability of its output.

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fect Crisis and a Way Forward", 7(1) *Cyprus Economic Policy Review* (2013), p. 3-45; M. Clerides and C. Stephanou, "The Financial Crisis and the Banking System in Cyprus", 3(1) *Cyprus Economic Policy Review* (2009), p. 27-50; A. Orphanides, "The Euro Area Crisis: Politics over Economics", MIT Sloan School Working Paper 5091-14 (June 2014), papers.ssrn.com/sol3/papers.cfm?abstract_id=2448197; A. Michaelides, "Cyprus: From Boom to Bail-In", 29:80 *Economic Policy* (2014), p. 639-689; V. Shiarly, "Statement submitted on 10th January 2014 to ECON on the role and operation of Troika regarding the financial assistance programme for Cyprus".

11. Regulation (EU) No. 472/2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *OJ* L 140/1, 27.5.2013.
12. A. Dimopoulos, "Taming the Conclusion of *Inter Se* Agreements between EU Member States: The Role of the Duty of Loyalty", 34 *Yearbook of European Law* (2015), pp. 286-318, 288.
13. B. De Witte, "Using International Law in the Euro Crisis: Causes and Consequences", ARENA Working Paper 4/2013.
14. *Pringle*, supra n. 2.
15. See *inter alia* M. Schwarz, "A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and A Possible Way Out: Enhanced Cooperation", 51 *Common Market Law Review* (2014), pp. 389-424; A. Gregorio Merino, "Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance", 49 *Common Market Law Review* (2012), p. 1613, 1621-1623; C. Ohler, "The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area", 54 *German Yearbook of International Law* (2011), p. 47; S. Peers, "The Stability Treaty: Permanent Austerity or Gesture Politics?", 8 *European Constitutional Law Review* (2012), p. 404; E. Chiti, P.G. Teixeira, "The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis", 50(3) *Common Market Law Review* (2013), pp. 683-708; J.-V. Louis, "The unexpected revision of the Lisbon Treaty and the establishment of a European Stability Mechanism", in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union After the Treaty of Lisbon*, CUP, 2012, pp. 284-320.
16. A. Dimopoulos, "Taming the Conclusion of *Inter Se* Agreements between EU Member States: The Role of the Duty of Loyalty", 34 *Yearbook of European Law* (2015), pp. 286-318, 287; P. Craig, "The Stability, Coordination and Governance Treaty: Principle, politics and pragmatism", 2 *European Law Review* (2012) 231; A. Dimopoulos, "The use of International Law as a tool for enhancing governance in the Eurozone and its impact on EU institutional integrity", in M. Adams, P. Larouche and F. Fabbrini (eds), *The Constitutionalisation of European Budgetary Constraints*, Oxford, Hart Publishing, 2014, 41.

3. A brief narrative of the Cypriot banking crisis

In October 2011, it became apparent that Popular Bank, one of Cyprus's largest banks, was no longer able to provide sufficient collateral to seek funding from the ECB's monetary policy operations. As a result, it requested Emergency Liquidity Assistance (ELA), which was granted by the Central Bank of Cyprus with the approval of the ECB. Yet, Popular Bank's debt problems kept deteriorating. Eventually, in June 2012 the Government of Cyprus, being no longer able to finance Popular Bank's debt, submitted a formal request for assistance from the ESM to cover its financial needs. Negotiations commenced between the Cypriot Government and the troika and in November 2012 a draft MoU was produced. The purpose of these negotiations was to agree on the macroeconomic conditionality accompanying the financial assistance to Cyprus, which would be recorded in the form of an MoU.

Following the passing of several pieces of legislation in Cyprus, on 21 January 2013, the Eurogroup welcomed the progress that had been made in implementing the measures agreed with the troika and stated that an agreement on a financing programme was expected to be reached soon. Based on this statement, the ECB extended the provision of ELA to the Popular Bank until 21 March 2013. On 16 March 2013, the Eurogroup agreed on a financial assistance programme for Cyprus and set the conditions under which the ESM would lend up to EUR 10 billion to Cyprus. The most significant condition was the implementation of a bail-in plan in the Cypriot banking sector. This plan faced the resistance of the Cypriot parliament and was eventually rejected on 19 March 2013. This led to the temporary closure of the banks. In light of the rejection of the plan by the Cypriot parliament, the ECB decided to retain the existing level of ELA provision for a few days, until 25 March and to consider an extension only if an EU/IMF programme was agreed that would ensure the solvency of the Cypriot banking sector. Faced with the imminent risk of collapse of the country's economy, in the end, the Cypriot parliament adopted a law providing for the resolution of the Cypriot banks facing difficulties, which conferred the power upon the Central Bank of Cyprus to implement a bail-in. Following this, on 25 March 2013, the Eurogroup announced that an agreement was reached on a financial programme for Cyprus. It also welcomed the envisaged restructuring measures of the financial sector mentioned in an Annex that was attached to the Eurogroup's statement. The new plan provided for a slightly diverse version of the bail-in scheme that had been previously rejected by the Cypriot parliament. In short, Popular Bank would be resolved and split into a good bank and a band bank, the latter to be run down over time. The good bank would be folded into Bank of Cyprus (BoC) and take EUR 9 bn of ELA with it. BoC would be recapitalised through a deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bondholders. Immediately thereafter, the Cypriot authorities issued Decrees No. 103 and No. 104 in implementing the bail-in plan.[17] As a result, Deposits in Laiki Bank over EUR 100.000 were essentially extinguished, while in BoC were subjected to a "haircut" amounting to almost 50%. In parallel, cash withdrawals limits and freezing of parts of deposits were imposed. The number and value of shares and bonds owned in both Banks were decreased tremendously. Subsequently, in a meeting held on 24 April 2013, the ESM Board of Governors decided to grant financial assistance to Cyprus and mandated the Commission to sign the MoU on behalf of the ESM. Two days later, on 26 April 2013, the MoU was signed by the Republic of Cyprus and the Commission on behalf of the ESM.

4. The litigation before EU Courts

Following the resolution of the Cypriot banks, depositors, shareholders and bondholders of BoC and Popular Bank commenced litigation both at national[18] and EU level challenging the lawfulness of

17. The Bailing-in of Bank of Cyprus Public Company Limited Decree of 2013 (Decree No. 103/2013), *Official Gazette of the Republic of Cyprus*, 3rd Annex, Part I, Regulatory Administrative Acts Issue No. 4645, Friday, 29.03.2013, 769 and the Sale of Certain Operations of Cyprus Popular Bank Public Co Ltd Decree of 2013 (Decree No. 104/2013), *Official Gazette of the Republic of Cyprus*, 3rd Annex, Part I, Regulatory Administrative Acts Issue No. 4645, 29.03.2013, 781.

18. On 6 June 2013, the Supreme Court of Cyprus dismissed several hundreds of actions for annulment in respected of national measures (Decrees Nos 103/2013 and 104/2013) providing for the bail-in (Supreme Court of Cyprus 7 June 2013, Case No. 553/2013, *Myrto Christodoulou and Others v Kentriki Trapeza Kyprou and Others a.o.*; Supreme Court of Cyprus 9 October 2014, Case No. 1034/2013, *Vias Dimitriou and Others v Kentrikis Trapezas Kyprou and Others*); for a commentary, see J. Giotaki, "The Cypriot 'bail-in litigation': a first assessment of the ruling of the Supreme Court of Cyprus", (28)8 *Journal of International Banking and Financial Law* (2013), p. 485. In a highly controversial ruling, the Supreme Court of Cyprus held, by majority, that the depositors who were affected by the bail-in measures had no direct interest in bringing an action for annulment against the Decrees in question. In its view, the contested Decrees were addressed solely to the Cypriot banks and were not directly concerned with the relationship between the state and individuals. Furthermore, the Cypriot court found that the question of lawfulness of the contested acts was an issue pertaining to private law rather than public law, therefore, it fell outside its competence.

the bail-in measures and claiming compensation for the losses suffered. In October-November 2014, the General Court[19] dismissed two series of actions for annulment and damages brought by depositors against the Commission and the ECB. The applicants in those actions requested the annulment of first, the Euro Group Statement on Cyprus of 25 March 2013 containing references to a bail-in of the concerned Cypriot banks (*Mallis and Malli*) and second, certain provisions of the Cypriot MoU making reference to the implementation of a bail-in (*Ledra Advetising*). Appeals were filed against the above orders before the ECJ. Upon request from the Court, AG Wahl and AG Wathelet delivered their respective Opinions for each of the two series of cases on 21 April 2016.[20]

5. Overview of the General Court Orders

The applicants in *Mallis and Malli* argued that the bail-in was attributable to the Union on two grounds: First, the national acts imposing the bail-in were essentially implementing prior decisions of the Eurogroup. The Eurogroup Statement of 25 March 2013 was a decision of the ECB and the Commission.[21] Second, by issuing the said Decree, the Central Bank of Cyprus acted as a representative or agent of the European System of Central Banks.

The General Court rejected the applicants' claims by considering the characteristics of the Eurogroup and its relationship with the Commission and the ECB in the prism of the content of the contested Statement.[22] First, it held that the Eurogroup is a discussion forum for the ministers of member states whose currency is the Euro and not an institution capable of issuing decisions.[23] Being an informal forum, the Eurogroup aims to facilitate the exchange of views on certain issues of common interest for the participating member states. Despite its organisational structure, which includes its own President, the Eurogroup does not comprise part of the Commission or the ECB's organisational structure.[24] Second, it considered that the Commission and ECB's participation to the Eurogroup meetings as well as the Commission's contribution to the preparation of those meetings do not suffice to question the informal status of Eurogroup meetings.[25] Finally, the Commission/ECB are not empowered to exercise control over the Eurogroup.[26] In light of the above, the General Court concluded that it was not possible to attribute the Eurogroup statement, such as the contested act, to the Commission or the ECB.[27]

Furthermore, the General Court went on to examine whether the contested Eurogroup Statement could, in any event, be attributed to the ESM. This was necessary because, if the ESM was found to be controlled by the Commission and the ECB, the contested Eurogroup statement would, by extension, be regarded attributable to those institutions.[28] Relying on *Pringle*,[29] the General Court took the view that, although the ESM assigned certain tasks to the Commission and the ECB, nevertheless, the ESM Treaty could not be interpreted as providing for the transfer of the ECB and Commission's competences to the ESM, or that the said institutions have the power to exercise control over the ESM.[30] Hence, even if it was assumed that the contested Eurogroup Statement could be attributed to the ESM and not to the Eurogroup, it would still not follow from this that the said Statement could be also imputed to the Commission or the ECB.[31]

In *Ledra Advertising* the applicants put forward two main claims: First, they requested compensation equivalent to the deposits lost as a result of the bail-in. Second, they requested the annulment of certain sections of the MoU, which made reference to the restructuring and resolution measures of the two Cypriot Banks.[32] In this sense, the said actions comprised applications both for compensation and/or annulment on the basis of Articles 268 and 340 TFEU as well as 263 TFEU respectively. More specifically, the applicants argued that the MoU was attributable to the Union and that its content breached EU primary law, particularly the right to property as guaranteed by the EU Charter. Consequently, by signing the MoU, the Commission acted in violation of the Treaties and failed to observe its obligation, pursuant to Article 17 TEU, to ensure

19. GC 10 November 2014, Case No. T-289/13, *Ledra Advertising v Commission and ECB*; Case No. T-290/13, *CMBG v Commission and ECB* and Case No. T-291/13, *Eleftheriou and Papachristofi v Commission and ECB*. Also, GC 16 October 2014, Case No. T-327/13, *Mallis and Malli v Commission and ECB*; Case No. T-328/13, *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*; Case No. T-329/13, *Chatzithoma v Commission and ECB*; Case No. T-330/13, *Chatziioannou v Commission and ECB* and Case No. T-331/13, *Nikolaou v Commission and ECB*. For a commentary of these judgments, see A. Karatzia, "Cypriot Depositors Before the Court of Justice of the European Union: Knocking on the Wrong Door?", 26(2) *King's Law Journal* (2015), p. 175.
20. Opinion of AG Wahl in ECJ 20 September 2016, Joint Cases Nos C-8/15 P to C-10/15 P, *Ledra Advertising et al.*; Opinion of AG Wathelet in ECJ 20 September, Joined Cases Nos C-105/15 P to C-109/15, *Mallis and Malli et al.*
21. *Mallis and Malli*, *supra* n. 18, para. 27.
22. *Ibid.*, para. 38.
23. *Ibid.*, para. 41.
24. *Ibid.*
25. *Ibid.*, para. 42.
26. *Ibid.*, para. 43.
27. *Ibid.*, para. 45.
28. *Ibid.*, para. 46.
29. *Pringle*, *supra* n. 2, para. 161.
30. *Mallis and Malli*, *supra* n. 18, para. 47.
31. *Ibid.*, para. 49.
32. *Ledra Advertising*, *supra* n. 18, para. 24.

that acts issued under the ESM Treaty are in conformity with EU law.[33]

The General Court began its analysis with discussing the admissibility of the claim for damages that were allegedly caused by the MoU. First, it observed that, even though the MoU was signed by the Vice-President of the Commission on the Commission's behalf,[34] the Commission's signature was affected "only on behalf of the ESM", pursuant to Article 13(4) of the ESM Treaty.[35] Accordingly, the MoU was essentially adopted jointly by the ESM and the Republic of Cyprus. Second, regarding the role of the Commission and the ECB, relying again on *Pringle*,[36] the General Court found that the Commission does not have any decision-making power per se within the ESM. In light of the above two findings, the General Court concluded that the adoption of the MoU could not be imputed to the Commission or the ECB.[37] Moreover, the General Court held that, to the extent the applicants' claim for compensation was based solely on the unlawfulness of certain MoU provisions,[38] it followed from the above analysis that it did not have jurisdiction to rule upon the matter concerned.

Next, the General Court went on to examine the applicants' second point pertaining to the alleged infringement by the Commission of its obligation to guarantee that the MoU is in conformity with EU law.[39] It focused its analysis on whether there was a direct causal link between the alleged unlawful conduct of a Union institution – here the alleged Commission's omission – and the damage suffered by the applicants.[40] The General Court observed that the bail-in of the applicants' deposits occurred by virtue of domestic law, i.e. the Cypriot Decree No. 103 which entered into force on 29 March 2013, that is before the signing of the contested MoU. Consequently, since the MoU entered into force after the reduction in value of the applicants' deposits, the General Court held that the applicants "did not establish with the necessary certainty that the damage [claimed] … to have suffered was actually caused by the inaction alleged against the Commission".[41] Having established that at least one of the conditions for the Union incur non-contractual liability under Article 340 TFEU was not fulfilled, the General Court rejected the applicants' claim for compensation as being partly inadmissible and partly manifestly lacking any foundation in law.

Finally, the General Court examined the applicants' request for the annulment of paragraphs 1.23 to 1.27 of the MoU. The Court relied on its previous finding that the disputed MoU was essentially signed between the ESM (represented by the Commission) and the Republic of Cyprus. Accordingly, since neither the ESM nor the Republic of Cyprus fall in the category of an institution, body, office or agency of the Union under Article 263(1) TFEU, the General Court concluded that it had no jurisdiction to examine the lawfulness of acts signed between the said parties, such as the disputed MoU.[42]

6. Overview of the ECJ Judgments

The ECJ dismissed the first series[43] of appeals (*Mallis and Malli*) relating to the actions for annulment of the contested Eurogroup statement as inadmissible. The Court rejected the applicants' claims before the General Court that the Eurogroup is controlled by the Commission/ECB, as well as that the former acts as an agent of the latter.[44] Instead, it upheld the General Court's finding that the Eurogroup Statement in question could not be regarded as a joint decision of the Commission and the ECB[45] and was of a purely informative nature.[46] In addition, the Court held that the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the Union in the meaning of Article 263 TFEU.[47] Moreover, the ECJ considered that the General court correctly held that the Cypriot legal framework providing for the restructuring of the banks concerned was not imposed by an alleged joint decision of the Commission and the ECB.[48]

The same day, the ECJ upheld the second series of appeals[49] (hereinafter *Ledra Advertising*) relating to actions for compensation and set aside the respective Orders of the General Court. It held that the fact that the activities entrusted to the Commission and the ECB within the ESM do not entail any power to make decisions of their own and commit solely the ESM does not prevent compensation from being claimed from the EU as a result of their possible unlawful conduct linked to the adoption of an MoU on behalf of the ESM.[50] Moreover, the tasks conferred on the Commission/ECB within the ESM do not alter the essential character of the powers

33. *Ibid.*, para. 48.
34. *Ibid.*, para. 44.
35. *Ibid.*
36. *Pringle*, *supra* n. 2, para. 161.
37. *Ledra Advertising*, *supra* n. 18, para. 46.
38. *Ibid.*, para. 47.
39. *Ibid.*, para. 49.
40. *Ibid.*, para. 51.
41. *Ibid.*
42. *Ibid.*, paras 57-58.
43. ECJ 20 September 2016, Joined Cases C-105/15 P, *Mallis and Malli v Commission and ECB*, C-106/15 P, *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*, C-107/15 P, *Chatzithoma v Commission and ECB*, C-108/15 P, *Chatziioannou v Commission and ECB*, C-109/15 P, *Nikolaou v Commission and ECB*.
44. *Ibid.*, para. 44
45. *Ibid.*, para. 57.
46. *Ibid.*, para. 59.
47. *Ibid.*, para. 61.
48. *Ibid.*, para. 60.
49. ECJ 20 September 2016, Joined Cases C-8/15 P, *Ledra Advertising v Commission and ECB*; C-9/15 P, *Eleftheriou and Others v Commission and ECB* and C-10/15 P, *Theophilou v Commission and ECB*.
50. *Ibid.*, paras 53-55.

conferred on the same institutions by the EU Treaties.(51) It follows, that the Commission retains, within its activities in the ESM, its role as the guardian of the Treaties under Article 17(1) TEU and thus, should refrain from signing an MoU whose consistency with EU law it doubts.(52)

Additionally, the ECJ decided to determine itself the merits of the claims in *Ledra Advertising,* which resulted in their dismissal. It held that the EU Charter is addressed to the EU institutions, including when they act outside the EU legal framework, such as under the ESM.(53) On this basis, the Commission is bound to ensure that the MoU is consistent with the fundamental rights guaranteed by the EU Charter. Notwithstanding the above, the Court considered that the first condition for establishing the non-contractual liability of the EU, i.e. the existence of a sufficiently serious breach of EU law, is not satisfied in this instance. The adoption of the MoU in question corresponded to an objective of general interest pursued by the EU, namely the objective of ensuring the stability of the banking system of the euro area as a whole.(54) In view of the said objective and the imminent risk of financial losses to which depositors of the two concerned Cypriot banks would have been exposed if the latter had failed, the ECJ concluded that the bail-in measures do not constitute a disproportionate and intolerable interference impairing the very substance of the depositors' right to property under Article 17(1) EU Charter; in other words, they cannot be regarded as an unjustified restriction of the right in question.(55)

7. Analysis

These cases pertain mainly to two issues: First, the attribution of the bail-in measures to the Union. Second, the lawfulness of the bail-in measures.

7.1. The legal status and liability of the Eurogroup: Is this the end?

The lack of a centralised EU bank resolution framework at the time of the implementation of the Cypriot bail-in gave rise to an important question: Who is the author of the bail-in? Determining whether the bail-in measures can be imputed to the Union is constitutionally significant for the Union's economic governance. To begin with, *Mallis and Malli* is the first judgment that sheds some light on the legal status of the Eurogroup in the Union's institutional order. The ECJ seals the Eurogroup's immunity from actions of annulment.(56) The finding that the Eurogroup does not constitute an EU body in the meaning of Article 263(1) TFEU leaves no room for suggesting that this is limited to the material facts of the case. Hence, it may be safe to suggest that the Eurogroup's output, irrespective of whether it takes the form of statement, press release, resolution or otherwise, cannot be the subject matter of an action for annulment. This outcome, which is in line with the General Court's conclusions,(57) affirms the dominant (but perhaps not unanimous(58)) position that the Eurogroup is an entirely political group whose output, cannot generally be subjected to judicial control. From one point of view, this is a judgment of institutional empowerment in the field of economic policy. It builds on the recent *Gauweiler* ruling, where the ECJ affirmed the ECB's competence in introducing a monetary policy tool, namely conducting sovereign bond-purchasing programmes in the secondary market that target member states in need of financial assistance. In that case, the Court applied a largely deferential approach by acknowledging the ECB's extensive margin of discretion both in justifying the measures in question as well as setting their conditions.(59) *Mallis and Malli* can be suggested to go further than *Gauweiler*, given that the ECJ here refuses as a matter of principle to exercise judicial review over the Eurogroup's output. Despite recognising the ECB's wide discretion in the field of monetary policy, in *Gauweiler* the ECJ had affirmed its competence to rule on the compliance of the ECB's OMT programme with primary EU law, despite that it had been announced in the form of a press release. From another point of view, these judgments entail significant differences. *Gauweiler* pertained to an act issued by an official Union institution under Article 263 TFEU. Moreover, the contested act in *Gauweiler* fell, in the Court's view, within the scope of monetary policy, which itself is an exclusive EU competence. *Mallis and Malli,* on the other hand, pertained to economic policy, which still remains widely in the hands of the member states. More importantly, the author of the contested act, the Eurogroup, is a forum whose power to issue binding legal acts is not expressly provided in the Treaties.

The outcome in *Mallis and Malli* has important implications on law, policy and governance. First, it fits within the Court's previous case-law pertaining to the resolutions of the European Council and the European Parliament which were regarded as of "purely political nature" and merely "expressing political will"; therefore,

51. *Ibid.*, para. 56.
52. *Ibid.*, para. 59.
53. *Ibid.*, para. 67.
54. *Ibid.*, para. 71.
55. *Ibid.*, para. 74.
56. Opinion of AG Wathelet, *supra* n. 19, points 61-66.
57. *Ledra Advertising*, *supra* n. 42, paras 41-44.
58. See European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI), point "G" of the non-operative part and para. 58, where it is stated that the Eurogroup is capable of issuing its own "formal decisions".
59. T. Tridimas and N. Xanthoulis, "A Legal Analysis of the *Gauweiler* Case: Between Monetary Policy and Constitutional Conflict", 23(1) *Maastricht journal of European and comparative law* (2017), p. 17.

not capable of producing binding legal effects.[60] In addition, the Court in *Pringle* found that both the acts of ESM and of Union institutions acting on its behalf cannot be attributed to the Union. More specifically, in *Pringle* it was held that the duties conferred on the Commission and the ECB within the ESM do not entail any power to make decisions of their own and acts of those institutions issued in that context commit solely the ESM.[61] In *Mallis and Malli* the Court essentially applies the same logic, only now in the Eurogroup's context. The participation of the Commission and the ECB to the Eurogroup meetings is not to be regarded as the former exercising control over the latter. Moreover, the Eurogroup's output cannot be attributed in any way to the Commission or the ECB.

Second, due to the lack of a comprehensive institutional framework for economic governance, euro area member states are expected to continue to take advantage of creative instruments of post-national character purporting to curb judicial review.[62] Put differently, euro area governments can agree on non-legally binding economic policy measures at Eurogroup level, without the fear of them being subsequently annulled, even if these measures generate tension with EU primary law, including fundamental rights. This is particularly important considering that the Eurogroup still remains the most influential political forum for the governance of the euro area, whose role was further strengthened since the euro crisis.[63] Predominantly, this outcome might further justify the establishment of additional informal decision-making fora or granting further powers to existing ones, making them the primary means of accomplishing policy aims. On the contrary, if the Court had taken the opposite view, it would, perhaps, call for a re-conceptualisation of the Union's model of economic governance. Had it acknowledged that the Eurogroup was capable of producing legally binding output or the contested Eurogroup's statement was a binding act producing legal effects, would likely increase the Eurogroup's overlapping competences with the ECOFIN. This would lead towards the Eurogroup's recognition as a *de facto* "euro area Council". Such an effect would probably not be welcomed by member states which have not adopted the single currency, particularly since the votes of the euro area member states already dominate within the ECOFIN. One could go as far as to argue that the euro area member states would in that scenario be empowered with a wide discretion to decide whether to discuss a euro-related matter at Eurogroup or ECOFIN level; essentially having the ultimate power to determine the forum which would issue legally binding EU acts.

Notwithstanding the above, there may still be an open window for judicial scrutiny of the Eurogroup's output. The Court in *Mallis and Malli* is silent on whether an action for compensation relating to a Eurogroup's act would be possible under Article 340(2) TFEU. It may indeed be hard to argue that the Eurogroup is not a body of the EU legal order. First, it is a body whose composition and function is provided by primary EU law. Second, its mandate on economic and monetary policy falls within the scope of the Union's competences. Third, it works closely with and depends on other EU institutions for fulfilling its function. Hence, it may not be a stretch to argue that the Eurogroup forms part of the Union's institutional framework whose output is attributable to the Union; therefore its status per se would not prevent an action for compensation to be brought. Taking the opposite view would render the Eurogroup completely immune from judicial control; an outcome that could be argued to come into tension with the right to judicial protection as guaranteed by the EU Charter, the general principles of EU law and the ECHR. Yet, even if this litigation path is assumed to remain open as a matter of principle, a successful compensation claim would be far from an easy task. Applicants bringing a claim in respect of a Eurogroup act would still have to prove, besides its unlawfulness, the existence of damage as well as the causal link between the damage in question and the contested act. Perhaps, the greatest challenge here would be to show that the damage was caused by the Eurogroup act *per se* rather than possible national measures implementing the general policies agreed within the Eurogroup. Despite the Eurogroup's output not being regarded as constituting legally binding acts for the purpose of Article 263(1) TFEU, it may be possible to conceive a situation where an announcement made by the Eurogroup can be argued to have caused damage to third parties. Notably, when the Court deals with an action for damages, it does not require for the alleged damage to have been caused by an act capable of producing legal effects. Provided that it can be attributed to a Union body, any type of conduct, even a physical act may give rise to liability. In the case of Eurogroup, such a circumstance may potentially arise if one could show, for example, that a Eurogroup statement caused a shift in the behaviour of important market players in the European economies, which in turn led to a reduction in the value of financial instruments held by other persons.

With regard to the role of the Union institutions within the Eurogroup, the ECJ recognises a limited involvement on their part by holding that they cannot be regarded as true authors of Eurogroup's output. It follows, that

60. See ECJ 3 February 1976, Case C-59/75, *Manghera and others*, para. 21; ECJ 17 December 2003, Case T-346/03, *Krikorian and Others v Parliament and Others*, para. 19.
61. *Ledra Advertising*, *supra* n. 48, para. 53 making reference to *Pringle*, *supra* n. 2, para. 161.
62. E. Fahey and S. Bardutzky Samo, "Judicial Review of Eurozone law: the Adjudication of Postnational norms in the EU courts, Plural. A Case study of the European Stability Mechanism", 34(4) *Michigan Journal of International Law* (2013), p. 101 at p. 106.
63. AG Wathelet acknowledged in his opinion in *Mallis and Malli* (*supra* n. 19, point 132) that the sequences of events showed "that the Euro Group clearly carries considerable political weight and that the member states feel bound by the agreements concluded within that forum"; yet "this is not sufficient to support the view that the contested statement produced legal effects".

neither the Commission nor the ECB's participation to the Eurogroup meetings can lead to the said institutions' liability for a Eurogroup statement. In this sense, the Court reaffirms the intergovernmental character of the Eurogroup as a forum dominated by the Eurozone's finance ministers. The Commission/ECB's involvement in the Eurogroup can be regarded as mirroring, to some extent, their role within the Euro Summit and the European Council; the latter being highly intergovernmental fora dominated by the head of states or governments of the euro area and EU respectively.

Finally, the Court's analysis in *Mallis and Malli* sheds some light on the conditions for attributing "financial crisis acts", such as the bail-in measures in question, to national authorities. The Court found in this instance that the adoption of the legal framework that made possible the resolution of the two banks was the sole decision of the Cypriot authorities.(64) In other words, it implied that the bail-in emanated from the sovereign will of a state (Republic of Cyprus) and could not be (as the applicants claimed) a condition precedent that was imposed by the Eurogroup to Cyprus for the provision of financial assistance to the latter. By endorsing the General Court's approach, the ECJ considered two factors in the course of its assessment: First, the content of the act concerned; in this instance; the text of the Eurogroup Statement. Second, the intention of the authors of the Eurogroup State; i.e. the euro area member states.(65) Notably, the ECJ in *Mallis and Malli* did not discuss whether the margin of discretion that is left to member states for implementing the crisis measures via subsequent national acts may affect the outcome of this assessment, a consideration that played a central role in the General Court's analysis in *ADEDY*.(66)

7.2. ESM, Union institutions and EU Treaties: A symbiotic relationship

The applicants in the cases in issue attempted to attribute the bail-in measures to the Union in two ways. In the previous section we saw how in *Mallis and Malli* the Court concluded that the Eurogroup Statement of 25 March 2013 could not be the subject of an action for annulment. The alternative doorway was the provisions of the MoU agreed between the Cypriot authorities and the ESM, which the applicants in *Ledra Advertising* alleged that could be imputed to the Union on the basis of the Union institutions' involvement in the ESM.

The claim in *Ledra Advertising* raises important questions pertaining to the relation between the ESM and the EU legal order. Here, the Court attempts to fill some of the gaps that were left open in Pringle(67) with regard to the participation of the Union institutions in the ESM, a complex but still not much investigated area in the literature, save for few but insightful pioneer works.(68) Although in *Pringle* the Court considered that the carrying out by the Commission and the ECB of certain tasks on behalf of the ESM is in conformity with the EU Treaties, it did not analyse to what extent EU law may pose restrictions on such activities.(69) In an attempt to address this issue, the Court in *Ledra Advertising* first, holds that the Commission is bound by its specific obligations under the Treaties, particularly Article 17 TEU as well as Article 13(3) and (4) ESM Treaty, when it carries out tasks on behalf of the ESM. Second, it accepts the applicability of the EU Charter in respect of acts of the Commission/ECB that fall outside the Union's legal framework, such as in the ESM context.(70) This is an important development that was not determined in *Pringle* and affirms AG Kokott's view.(71) The literature also pointed in the same direction.(72)

On whether its jurisdiction extends to acts of Union institutions which are adopted within the ESM the Court takes a balanced approach. On the one hand,

64. *Mallis and Malli*, *supra* n. 42, para. 60.
65. The General Court had also considered in *Mallis and Malli* that the measures provided in the Eurogroup Statement should be read in their "context". *Mallis and Malli*, *supra* n. 18, paras 54-61. Also, Opinion of AG Wathelet in *Mallis and Malli*, *supra* n. 19, point 133.
66. *Supra* n. 4. The *ADEDY* cases involved actions for annulment in respect of Council decisions reproducing commitments which the member state in financial difficulty (Greece) made in the MoU. The General Court found those actions inadmissible by holding that the Council decisions in question are not capable of being of direct concern to individuals under Article 263(4) TFEU.
67. *Pringle*, *supra* n. 2.
68. See e.g. P. Craig, "*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundation, Procedure and Substance", 9 *European Constitutional Law Review* (2013), p. 263; S. Peers, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", 9 *European Constitutional Law Review* (2013), p. 37. Also, B. De Witte, "European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order", in EP, DG for Internal Policies, *Challenges of multi-tier governance in the European Union – Effectiveness, efficiency and legitimacy* (EP, 2013), p. 78.
69. See *Pringle*, *supra* n. 2, para. 163, where the Court states the Commission's obligations under Article 17(1) TEU without, however, further clarifying how these would materialise in the light of its duties within the ESM.
70. *Ledra Advertising*, *supra* n. 48, para. 67. See also Opinion of AG Wahl in *Ledra Advertising*, *supra* n. 19, point 85. The EU Charter does not apply to member states, because they do not implement EU law in the context of the ESM Treaty; see *Ledra Advertising*, *supra* n. 48, para. 67, where the Court reaffirms *Pringle*, *supra* n. 2, paras 178-181.
71. Opinion of AG Kokott in *Pringle*, *supra* n. 2, point 176.
72. S. Peers, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *op. cit.*, at p. 51-53; P. Craig, "*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundation, Procedure and Substance", *op. cit.*, at p. 282.

it holds that such acts cannot be challenged via an action for annulment; for this purpose, it relies widely on *Pringle*.[73] It is worth summarising the reasoning of the Court on this point. The participation of the Commission and the ECB in the negotiations with the Cypriot authorities – by providing technical expertise, advice and guidance – as well as "in the procedure resulting in the signature" of the MoU took place within the limits of Article 13(3) ESM Treaty.[74] According to the Court, following *Pringle*, this provision cannot be interpreted as enabling the MoU to be classified as an act that can be imputed to the Commission or the ECB. As stated above, *Pringle* found that the duties conferred on the Commission and the ECB within the ESM do not entail any power to make decision of their own and acts of those institutions commit solely the ESM.[75] In other words, the role of the Commission and the ECB within the ESM does not alter the nature of the ESM acts, namely that are regarded as falling outside the EU legal order.[76] In essence, the Court here differentiates the Union institutions' involvement in the ESM from tasks that the Union institutions had carried out in other (extra-Union) contexts, which have been previously held to fall within the Court's reviewing competence.[77] This outcome ensures that – as with Eurogroup's output – ESM acts relating to the provision of financial assistance to member states are now safe from the threat of being annulled by the Court. The impact of such a development on the judicial protection of the applicants is profound. Following *Ledra Advertising*, there appears to be no judicial forum that is competent to review acts of public authorities, whether at national or supra-national level, that gave effect to the bail-in in the Cypriot banks. The Supreme Court of Cyprus's decision to find inadmissible the actions for annulment brought by depositors and shareholders of the Cypriot banks left any affected persons with the only option (at national level) to bring actions for damages before the domestic civil courts, against the relevant bank and/or the Republic of Cyprus, based on their contractual relationship with that bank. However, while the Cypriot civil courts are competent to award compensation, they cannot declare the contested acts invalid. As a result, the scope of the civil courts' jurisdiction appears not to be sufficient to satisfy the requirements of effective judicial protection under Article 19 TEU.[78]

By contrast, the Court considers that it has jurisdiction to examine the compatibility of acts of Union institutions under the Treaties, when the question arises in the context of an action for compensation.[79] As a result, the Court holds that Union institutions do not enjoy impunity and may be held liable if their acts breach EU primary law. This finding reverses the core of the General Court's conclusion in the first instance proceedings and also departs from the opinion of AG Wahl. More specifically, the Court, first, recognises a general limitation to the Commission's conduct within the ESM arising from its general task of overseeing the application of EU law under Article 17(1) TEU and Articles 13(3) and 4 ESM Treaty[80]. Second, it introduces a specific obligation to the Commission, namely to refrain from signing an MoU whose consistency with EU law it doubts, particularly if it comes into tension with fundamental rights guaranteed by the EU Charter.[81] Three important issues pertaining to the scope of the Commission's obligations under the Treaties require further clarification. First, the Court does not state whether the Commission's obligations under the EU Treaties extend beyond Article 17(1) TEU and the EU Charter.[82] Second, it does not provide any guidance as to how the terms "consistency" and "doubt" shall be interpreted in this context.[83] Should "consistency" here be read as synonymous to "compatibility"?[84] Finally, could the Commission be held liable if it failed to identify the inconsistency of a measure contained within the MoU with EU law, despite having put reasonable effort to prevent such conflict from arising?[85]. We have argued elsewhere that an affirmative answer should be given to all of the above questions[86]. Suffice it to state here that in *Ledra Advertising* the Court eventually proceeded to assess whether the provisions of the MoU were compatible with the right to property as guaranteed by the EU Charter. It follows, in our view, that Article 17(1) TEU has been interpreted by the Court as imposing a strict duty (and note a mere power) on the Commission to ensure that the MoU is consistent with the EU Charter. Furthermore, *Ledra Advertising* clarifies that

73. *Pringle, supra* n. 2.
74. *Ledra Advertising*, *supra* n. 48, para. 52.
75. *Ibid.*, *supra* n. 48, para. 53 making reference to *Pringle*, *supra* n. 2, para. 161.
76. *Ledra Advertising*, *supra* n. 48, para. 54 making reference to the Opinion of AG Wahl in *Ledra Advertising*, *supra* n. 19, point 53.
77. See e.g. *Lomé*, *supra* n. 69, paras 8-9.
78. See AG Wathelet, *Mallis and Malli*, *supra* n. 19, point 91 and note 36.
79. *Ledra Advertising*, *supra* n. 48, para. 55. AG Wahl had reached the opposite conclusion in his opinion; see Opinion of AG Wahl in *Ledra Advertising, supra* n. 19, point 95.
80. *Ledra Advertising*, *supra* n. 48, paras 56-58.
81. For a different view, see Opinion of AG Wahl in *Ledra Advertising*, *supra* n. 19, points 82-91.
82. See P. M. Rodríguez, "A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis", 12 *European Constitutional Law Review* (2016), pp. 265-293.
83. On this point, see Opinion of AG Wahl in *Ledra Advertising*, *supra* n. 19, points 65-81.
84. *Ibid.,* point 73.
85. *Ibid.*, points 70 *et seq*.
86. See N. Xanthoulis, "The Participation of Union Institutions in the European Stability Mechanism: Between International Law Competences and EU Treaties Restrictions", paper presented at the Jean Monnet Doctoral Workshop: Interactions Between European Union and International Law, City University London, 23 June 2016.

the Commission's obligation does not stem solely from Article 17(1) TEU but also from Article 13(3) and (4) ESM Treaty. This is welcoming first, because the respective opinions of AG Wahl in *Ledra Advertising* and AG Wathelet in *Mallis and Malli* differed on this matter[87]. Second, *Pringle* did not expressly refer to 'obligations' when describing the Commission's tasks under Article 13(3) and (4) ESM Treaty. Instead, the Court in that case stated that these provisions 'enable' the Commission to ensure that the MoUs concluded by the ESM are consisted with EU law.[88]

Furthermore, although the Court holds that an action for compensation could be directed against the ECB, it does not identify the specific limitations under the EU Treaties on the activity of the ECB within the ESM. Following *Ledra Advertising*, one could argue that the restrictions applicable in respect of the Commission are also applicable *mutatis mutandis* to the ECB, i.e. that it must ensure compliance of its conduct with the EU Charter and potentially with all primary EU law provisions. Indeed, *Ledra Advertising* may be read as providing for a uniform obligation to both the Commission and the ECB in this respect. Yet, counterarguments are also possible. The Commission's obligations in the ESM stem from its role as guardian of the Treaties under Article 17(1) TEU; this duty rests exclusively with the Commission under the Treaties. From another point of view, there is nothing preventing the Court from recognizing an equivalent duty to the ECB when acting in the ESM. In any event, the Treaties provide for certain duties which are relevant to the ECB's conduct in the ESM. Article 13(2) TEU places an obligation on each Union institutions to act "within the limits of the powers conferred on them in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". In this sense, the ECB is obliged to ensure that the powers that it exercises within the ESM do not exceed the competences and objectives that have been conferred upon it by the Treaties. Arguably, the scope of this obligation is more limited in comparison to the respective one of the Commission under Article 17(1) TEU.

Furthermore, it is submitted that the ECB's conduct in the ESM may be restricted if it comes into tension with certain activities which it may pursue under the Treaties. The Court in *Pringle* examined whether the tasks conferred on the Commission and the ECB under the ESM Treaty were incompatible with their Treaty obligations and gave a negative answer. To this effect, it considered the Union institutions' main competences and obligations under the Treaties, particularly the ones that had been raised in the case as being incompatible with their role in the ESM. However, the Court did not assess the compatibility of the Union institutions' tasks in the ESM with each and every ongoing or future activity of the Union institutions under the Treaties. Hence, it is not inconceivable for a specific activity undertaken by the Commission and the ECB within their competences under the EU Treaties to come into conflict with their roles under the ESM Treaty.[89]

Importantly, *Ledra Advertising* says nothing on whether the Commission's obligation to assess the consistency of the MoU with EU law extends beyond primary law.[90] Article 13(3) ESM Treaty requires the full consistency of the MoU with the "measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned". It follows, that the letter of the provision does not seem to require the compatibility of the MoU with "all aspects of EU law" but only with the "EU measures of economic policy coordination".[91] Interestingly, however, when assessing the compatibility of Article 13(3) and (4) ESM Treaty with Article 17(1) TEU, the ECJ in *Pringle* stated that the Commission's tasks enable it to ensure that the MoU is consistent "with European Union law",[92] thus not restricting the scope of the Commission's obligation only to measures of economic policy coordination. This was affirmed in *Ledra Advertising*, where the Court acknowledged that the Commission "should refrain from signing a memorandum of understanding whose consistency with *EU law* it doubts" (emphasis added).[93] One way to interpret the Court's statement in *Pringle* and *Ledra Advertising* is the following: The Court implicitly acknowledged that the Commission's obligation under Article 17(1) TEU to oversee the application of all aspects of EU law is independent from the tasks conferred upon it by virtue of the ESM Treaty. Notwithstanding that Article 13(3) and (4) ESM Treaty may be interpreted as providing for a more restricted duty for the Commission (i.e. to assess

87. AG Wahl's analysis concludes that the ESM Treaty provisions do not confer such an obligation on the Commission (AG Wahl, *Ledra Advertising*, *supra* n. 19, points 65-67). On the contrary, AG Wathelet considers that the Commission's tasks in question constitute a power under Article 13(4) ESM Treaty as well as a duty by virtue of its role as "Guardian of the Treaties" under Article 17(1) TEU (AG Wathelet, *Mallis and Malli*, *supra* n. 19, point 82.

88. *Pringle, supra* n. 2, para. 164; AG Wahl, *Ledra Advertising, supra* n. 19, point 65.

89. The implementation of the OMT programme and the role of the ECB in ELA provision may be regarded under certain circumstances as giving rise to such tension (and hence impose additional restrictions to) its troika-related conduct in the ESM.For a more detailed analysis, see N. Xanthoulis, *supra* n. 85.

90. Note the Opinion of AG Wahl in *Ledra Advertising*, *supra* n. 19, points 65-81. For a critical analysis, see N. Xanthoulis, "The Participation of Union Institutions in the European Stability Mechanism: Between International Law Competences and EU Treaties Restrictions", *op. cit.*

91. See also AG Wahl, *Ledra Advertising*, *supra* n. 19, para. 74. What follows after the "measures of economic policy coordination", in Article 13(3) ESM Treaty seem to be elements that classify within the type of those measures.

92. *Pringle*, *supra* n. 2, para. 164.

93. *Ledra Advertisding*, *supra* n. 48, para. 59.

the consistency of the MoU with only specific provisions of EU law), the latter would still be bound to comply with its wider obligation under Article 17(1) TEU (i.e. to assess the MoU's consistency with all EU law provisions). Overall, it may not be an exaggeration to suggest that, following *Ledra Advertising*, the Commission and the ECB are expected to refrain from undertaking any task within the ESM that is not in conformity with their obligations (at least) under the EU Treaties. Yet, this remains to be confirmed by the Court's case law.

Opening a door for judicial scrutiny of economic policy measures that are adopted in extra-EU law context is a significant development of the law. Had it taken the opposite view, the Court would imply that the participation of the Commission/ECB in the negotiations, drafting and monitoring the financial assistance programmes took place in a legal vacuum. Unrestricted from their obligations under EU law, there would be no judicial forum, whether at national or EU level, that could hold the EU institutions accountable.(94) It follows, that *Ledra Advertising* can be interpreted as sending a powerful message with two dimensions: First, the Union institutions' obligations and liability under the Treaties remain intact, even when they are acting outside the Union's legal framework, such as when carrying out tasks on behalf of an international organisation. The finding in *Pringle* that the Union institutions do not have the power to make binding decisions of their own does not mean that they can also enjoy impunity. Second, although the Court does not have direct jurisdiction to review the ESM's output, such as the MoU, by restricting the conduct of the Union institutions within the ESM, it may not be unreasonable to suggest that it could indirectly control the content and/or the effectiveness of the ESM's output, i.e. the macroeconomic conditionality. This may happen in two ways. First, it may deter the Commission from agreeing to the inclusion in the MoU of certain measures, when there is a risk of them subsequently giving rise to its non-contractual liability under the Treaties. Second, if the Court found the Commission liable for failing to prevent a violation of EU law by certain MoU provisions, it would be likely that this would lead to national and/or EU authorities taking steps to mitigate the effects of those measures to any affected persons. Such would have been the outcome, for example, if the ECJ had found in *Ledra Advertising* that the MoU provisions referring to the Cypriot bail-in was in breach of the right to property, as the applicants claimed.

Notwithstanding the Court's attempt in *Ledra Advertising* to draw a clearer picture of the legal framework governing the participation of the Union institutions within the ESM, additional important questions remain unanswered. One main issue pertains to the specific legal nature of the Union institutions' participation in the ESM. What is the authority under EU law that empowers the Commission/ECB to act within the ESM? Moreover, does the Commission/ECB have an obligation to undertake any of the tasks conferred upon them by member states under the ESM? If one assumes that their involvement is voluntary, can the Commission/ECB terminate unilaterally their participation in the ESM and if yes, under what conditions, if any?(95)

7.3. Scrutinizing the bail-in: Prova generale?

The other main disputed issue in these cases pertains to the conformity of the bail-in measures with EU law and gives rise to significant constitutional aspects, predominantly from a human rights perspective.

In assessing whether the conditions governing a claim for compensation under Article 340 TFEU are fulfilled, the Court engages with the question of lawfulness of the bail-in measures. By dealing solely with this condition, it avoids analysing the alleged causal link between the MoU provisions and the claimed damages which the General Court had rejected.(96) For the bail-in to be regarded as permissible interference with the right to property, Article 52(1) EU Charter requires that it genuinely serves an objective of general interest and is a proportionate mean to succeed the said objective.(97) The Court holds in this instance that the need to ensure the stability of the Eurozone's banking system is regarded as an objective of general interest not merely for the euro area but for the Union *per se*.(98) This finding draws on the ECJ's recent ruling in *Kotnik*, a case involving shareholders of Slovenian banks who were subjected to certain measures adversely affecting their property rights, where the same conclusion was reached. In that case, the Court stated that the "public interest in ensuring […] a strong and consistent protection of investors, […] cannot be held to prevail […] over the public interest in ensuring the stability of the financial system".(99)

Assessing the proportionality of the bail-in, the Court does not apply an intensive review.(100) It affirms what is commonly known as the "no-creditor-worse-off"

94. Notably, until now, the only means of judicial protection available for individuals seeking to contest the conditionality accompanying the ESM's financial assistance programmes were bringing actions before national courts and the ECtHR, where their compatibility with national constitutional law and ECHR would be assessed.

95. For a discussion on these questions, see N. Xanthoulis, *supra* n. 85.

96. *Ledra Advertising*, *supra* n. 19, paras 54-55.

97. *Ibid.*, paras 69-70 and the case law cited therein.

98. For the notion of financial stability in EU law, see G. LO Schiavo, *The Role of Financial Stability in EU Law and Policy*, Kluwer, 2016.

99. ECJ 19 July 2016, Case C-526, *Kotnik*, paras 69 and 91. Also, Opinion of AG Wahl in *Kotnik*, *ibid.*, points 80 *et seq*.

100. A. Tsiftsoglou, "The Cypriot Memorandum before the CJEU: When Politics Defies Law", *Efimerida Dioikitikou Dikaiou*, 2017, forthcoming, in Greek.

principle;[101] now the basic test under the new Bank Resolution Regime.[102] This principle essentially provides that no creditor shall incur greater losses than would have been incurred if the entity under resolution had been wound up under normal insolvency proceedings. Applying this test in the facts at hand, the Court considers that the imminent risk of financial losses to which the depositors in the Cypriot banks would have been exposed if the latter had failed and the need to secure the financial stability of the euro area justifies the bail-in that applied to the Cypriot banks. The Court strikes a familiar equilibrium here. While the Union institutions can, in principle, be held liable for their involvement in the financial assistance programmes, it would not be an easy task for the affected individuals to meet the required standard of illegality.[103] *Ledra Advertising* may have opened the gates of admissibility for individuals – a positive step towards enhancing judicial protection within the EMU – but the route leading to compensation is yet to be explored.

The application of the "no-creditor-worse off" principle can be problematic in practice. First, the use of hypothetical scenarios in legal argumentation – here, what would have happened under normal insolvency proceedings – can arguably provide limited protection for individuals, because it would be very difficult for an average depositor to challenge the valuation of the relevant assets. Second, Courts may feel uneasy to conduct detailed analysis of the financial status of the credit institutions concerned, particularly on the basis of different economic scenarios. Notably, *Ledra Advertising* addresses the matter with a remarkable haste; hence, we cannot draw safe conclusions. The Court does not rely on any valuation to determine whether the position of the applicants-depositors in the Cypriot banks concerned would be better-off had the banks be allowed to resolve under normal insolvency proceedings.[104] It is questionable whether such an approach would be followed by the Court in future actions challenging bail-in measures adopted under the new bank resolution regime.

8. Conclusion

These cases affirm the literature's hypothesis that the institutional and normative architecture of the euro crisis has given rise to important constitutional questions of EU law. They are also a paradigm of how such arrangements have made it difficult for affected individuals to identify the true authors of the euro crisis acts affecting their legal and factual positions. As a result, the accountability of the participating entities appears to be blurred both vertically, between the national and supranational actors as well as horizontally, between EU law and international law entities respectively. Against this background, the Court seizes the opportunity in the annotated cases to paint a clearer picture of the legal framework governing the function of the two main institutional players, namely the Eurogroup and the ESM and to some extent attempts to set specific limits to their conduct under EU law. On the one hand, it empowers the Eurogroup and the ESM by holding that their output falls outside the jurisdiction of the Court via an action for annulment. On the other, it leaves open the possibility that an individual may receive compensation for damage suffered as a result of acts adopted by the Eurogroup or within the ESM. While *Mallis and Malli* did not discuss the possible non-contractual liability of the Eurogroup, there are arguments in favor of this position. On the contrary, *Ledra Advertising* clearly recognizes the possibility of Union institutions participating in the ESM to be held liable to pay compensation to individuals that suffered damage caused by their conduct, such as approving measures in the MoU which are incompatible with EU primary law. Setting such limits and the Court's readiness to examine the compliance of the Commission and the ECB with their obligations under the Treaties is a natural and welcoming step towards building an effective legal accountability in the EMU governance. Yet, although the liability of the Union institutions in this context is now clearly established in law, it still remains unclear what the Court would require for it to be satisfied that the threshold of flagrant illegality has been met, effectively paving the way to the actual award of compensation. The Court's decision to deal with the merits of the case in haste does not allow one to draw further conclusions.

From a human rights perspective, in this instance, the Court gives clear precedence to the need to secure the financial stability of the euro area over the property

101. See also *Kotnik*, *ibid.*, paras 77-78.

102. Articles 34(1) lit. g and 73(b) BRRD; Article 15 SRM Regulation.

103. According to the settled case law of the Court, an individual bringing an action for compensation must prove that the defendant not only breached a superior rule of law for the protection of the individual but also the breach in question was flagrant, else put sufficiently serious. See Case C-352/98 P, *Bergaderm and Goupil v Commission*, EU:C:2000:361. For a list of the factors what would be taken into consideration in assessing the seriousness of the breach, see P. Craig, *EU Administrative Law*, Oxford, 2013, pp. 686-688, where the following are mentioned: the relative clarity of the rule which has been breached; the measure of discretion left to the relevant authorities; whether the error of law was excusable or not; and whether the breach was intentional or voluntary. Craig concludes that "[w]here the Member State or the EU institution has only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach". See e.g. Case T-16/04, *Arcelor v Parliament and Council*, EU:T:2010:54.

104. See Ph. Athanassiou, "Valuation in resolution and the 'no-creditor-worse-off principle'", 29 *Butterworths Journal of International Banking and Financial Law* (2014), p. 16.

rights of depositors. By doing this, it signifies a departure from the normative commitment to the right to property of depositors and the bail-out dogma; a shift that has also been sealed under the new Bank Resolution Regime, which provides for the participation of depositors in the resolution of credit institutions.(105) Furthermore, this outcome is in line with the ECtHR's recent case law justifying domestic austerity measures affecting the right to property of individuals on the basis of them serving the public interest in light of the extreme economic situation of the crisis.(106) From a different point of view, the outcome in *Ledra Advertising* approves the role of the troika in negotiating, drafting and monitoring the macro-economic adjustment programme agreed with the Cypriot government. This may be interpreted as providing further legitimacy both to the ESM, as the main forum for providing financial assistance to member states and to the Eurozone's austerity policy model more broadly.

The judgments are expected to affect other pending actions before Union courts related to the Cypriot bail-in, which involve other types of applicants (shareholders and bondholders of the bailed-in banks) and raise additional legal grounds pertaining to the principles of legitimate expectations and non-discrimination.(107) It remains to be seen whether the Court will re-affirm the legality of the bail-in and seize this opportunity to address the questions that have been left open in the annotated cases, towards building a more robust legal regime in the EMU's governance.

105. For an analysis of the bail-in tool under the new Bank Resolution Regime, see K.-Ph. Wojcik, "Bail-in in the Banking Union" 53 *CMLR* (2016), pp. 91-138.

106. See e.g. ECtHR 7 May 2013, Case Nos. 57665/12 and 57657/12, *Koufaki and Adedy v Greece* (dec.), paras 41 *et seq.*; ECtHR 8 October 2013, Case Nos 62235/12 and 57725/12, *António Augusto Daw Conceição Mateus and Lino Jesus Santos Januário v Portugal*.

107. See Case T-680/13, *K. Chrysostomides & Co. and Others v Council and Others*; Case T-786/14, *Bourdouvali and Others v Council and Others*. Other relevant pending actions include Case T-405/14, *Yavorskaya v Council and Others*; Case T-495/14, *Theodorakis and Theodoraki v Council* and Case T-496/14, *Berry Investments v Council*; Case T-149/14, *Anastasiou v Commission and ECB*; Case T-150/14, *Pavlides v Commission and ECB*; Case T-151/14, *Vassiliou v Commission and ECB*; Case T-152/14, *Medilab v Commission and ECB*; and Case T-161/15, *Brinkmann (Steel Trading) a.o. v Commission and ECB*.