The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework

ECJ 20 September 2016, Case C-8/15 to C-10/15, *Ledra Advertising et al.* v *European Commission and European Central Bank*

Paul Dermine*

Introduction

A central feature of the institutional response to the Eurozone crisis was the heavy reliance on the intergovernmental track, and the creation of new institutional structures outside the framework of the EU. The European Stability Mechanism paradigmatically embodies this trend. Called on to rule on the validity of such an initiative, the European Court of Justice gave its blessing in the famous *Pringle* decision.[1] In this seminal ruling, the Court failed, however, to clarify the nature and extent of the legal duties of EU institutions, when they are 'borrowed' by the European Stability Mechanism. The *Ledra* case, which emerged in the context of the Cypriot bail-out, gave the European Court of Justice the perfect opportunity to resolve the issue. In September 2016, it held that the European Commission and the European Central Bank remain fully bound by EU law, and by the Charter of Fundamental Rights of the European Union, when they act as agents of a distinct international organisation such as the European Stability Mechanism, and may consequently be held liable under Articles 268 and 340(2)(3) TFEU if the acts they contribute to negotiating and adopting violate a rule of European law. This note seeks to decipher the meaning of this important ruling, and

*MA (College of Europe), LLM (NYU), PhD Candidate in EU Law, Maastricht University. I am grateful to Professor Monica Claes and Professor Elise Muir for their comments on an earlier draft. Any remaining errors are my own.

[1] ECJ 27 November 2012, Case C-370/12, *Pringle* v *Ireland*.

European Constitutional Law Review, 13: 369–382, 2017

doi:10.1017/S1574019617000074

addresses some of the many issues it raises as to the integrity of EU law and the protection of fundamental rights in the framework of the new economic governance of the EU.

Factual Background

Bailing-in the Cypriot Banking System: the European Stability Mechanism to the Rescue of Nicosia

In June 2012, the Cypriot banking sector was on the brink of collapse, as its two main institutions, the Bank of Cyprus and the Cyprus Popular Bank (commonly known as 'Laïki'), were close to insolvency and needed emergency re-capitalisation. With its back to the wall, the Cypriot Government requested financial assistance. The Euro Group welcomed the request, and recommended the launch of talks between the European Commission (in liaison with the European Central Bank and the International Monetary Fund)[2] and Cyprus on the terms and conditions of the assistance.[3] In March 2013, a political agreement was reached between Cyprus and its future creditors on a draft Memorandum of Understanding, encapsulating the details of the macroeconomic adjustment plan Cyprus would be entering. The Euro Group welcomed the deal in a statement of 16 March 2013.

On 22 March 2013, the Cypriot Parliament finally agreed to the bail-out terms, and most notably, to the controversial bank re-structuring and re-capitalisation operations. The Law on the resolution of credit and other institutions was passed.[4] In a statement of 25 March 2013, the Euro Group announced that an agreement had been reached on the key elements of the future macroeconomic adjustment plan. On the same day, the Central Bank of Cyprus put Bank of Cyprus and Laïki into resolution. Decrees No. 103[5] and 104[6] were published on 29 March 2013 for that purpose.

On 24 April 2013, the European Stability Mechanism Board of Governors formally agreed to grant stability support to Cyprus for up to €9 billion. The Board approved the draft Memorandum of Understanding negotiated with the

[2] As provided by Art. 13(3) ESM Treaty, which itself codifies what had been the practice since the start of the Eurocrisis.

[3] *See* Euro Group statement of 27 June 2012.

[4] Law on the resolution of credit and other institutions, EE, Annex I(I), No. 4379, 22 March 2013.

[5] Decree of 2013 on the bailing-in of *Trapeza Kyprou Dimosia Etaireia Ltd*, Regulatory Administrative Act No. 103, EE, Annex III(I), No. 4645, 29 March 2013, p. 769.

[6] Decree of 2013 on the sale of certain operations of *Cyprus Popular Bank Public Co. Ltd.*, Regulatory Administrative Act No. 104, EE, Annex III(I), No. 4645, 29 March 2013, p. 781.

Cypriot authorities, and mandated the Commission to formally sign it on behalf of the European Stability Mechanism, as foreseen in Article 13(4) of the ESM Treaty.[7] This was done two days later. After it signed the financial assistance facility agreement with the Cypriot authorities in May 2016, the European Stability Mechanism started disbursing the aid.

At stake in the present case is the plan, foreseen in the Memorandum of Understanding, for the restructuring of the Bank of Cyprus and Laïki.[8] Summarily, Laïki was to be resolved and the Bank of Cyprus re-capitalised. Viable assets and insured deposits of Laïki were put in a 'good bank', to be merged with the Bank of Cyprus. The uninsured deposits and overseas operations of Laïki were placed in a 'bad bank', which would ultimately be wound down. The Bank of Cyprus was to be re-capitalised via bail-in operations,[9] with full contribution from equity shareholders and bond holders. Uninsured depositors[10] at Bank of Cyprus and Laïki were also required to contribute and had to accept the conversion of 37.5% of their holdings into equity (the 'haircut'). Another part of the remaining uninsured deposits would be temporarily frozen, until the completion of an independent valuation of Bank of Cyprus's and Laïki's assets. On a softer note, paragraph 1.27 did, however, provide for a share-reversal ('buy-back' process) in case of over-capitalisation of the Bank of Cyprus.

An Unlawful Bail-in? Cypriot Account Owners before the European Judiciary

Plaintiffs in the *Ledra* series of cases were all account owners of Bank of Cyprus and Laïki forced to write-off a substantial portion of their holdings and who suffered significant financial losses.[11] They sought redress directly before the European courts.[12] Their claims were twofold. On the one hand, the plaintiffs

[7] *See* press release of the ESM, 'ESM Board grants stability support to Cyprus', 24 April 2013.

[8] Paras. 1.23-1.28 of the Memorandum of Understanding.

[9] Contrary to a bail-out, which involves the financial intervention of external actors (such as the relevant government or supranational organisations), a bail-in places the burden of the re-capitalisation of the failing financial institution on creditors, through debt write-down.

[10] Holding more than €100,000 on their accounts.

[11] Those losses ranged from €480,000 to €1,600,000. *See* Opinion of Advocate General Wahl, 21 April 2016, Case C-8/15 to C-10/15, *Ledra Advertising* v *European Commission and ECB*, para. 2.

[12] Six applications were lodged before the General Court. Orders in these cases (all identical in substance) were issued on 10 November 2014: Case T-289/13, *Ledra Advertising*; Case T-290/13, *CMBG*; Case T-291/13, *Eleftheriou and Papachristofi*; Case T-292/13, *Evangelou*; Case T-293/13, *Theophilou*; Case T-294/13, *Fialtor*. In the separate *Mallis* line of case, applicants in the same situation alternatively pursued the annulment of the 25 March 2013 Euro Group statement. Applications were dismissed by both the General Court and the Court of Justice. These rulings are not examined in this note. For further details, *see* ECJ 20 September 2016, Cases C-105/15 to 109/15 P, *Mallis et al.* v *European Commission and ECB*. Finally, it has been noted that other actions for damages related to the restructuring of the Cypriot banking sector are still pending before the General Court.

asked for direct annulment of the passages of the European Stability Mechanism-Cyprus Memorandum of Understanding related to the bail-in (paragraphs 1.23-1.27): they considered that the 'hair-cut' these provided for breached their right to property, as protected by Article 17 of the Charter. On the other hand, pursuant to Articles 268 and 340(2)(3) TFEU (non-contractual liability of the EU), the claimants requested from the Commission and the European Central Bank financial compensation for their losses, equivalent to the diminution in value of their deposits at the Bank of Cyprus and Laïki.

All claims were entirely rejected by the General Court. The annulment actions were swiftly dismissed on admissibility grounds.[13] The Court considered it lacked jurisdiction to examine, under Article 263 TFEU, the legality of an act, the European Stability Mechanism-Cyprus Memorandum of Understanding, to which none of the Union's institutions, bodies, offices or agencies is formally adherent. On the compensation claims, the question the Court faced was complex: could the involvement of the Commission and the European Central Bank, in the negotiation and conclusion of a Memorandum of Understanding to be entered into by the European Stability Mechanism and a Eurozone Member such as Cyprus, imply that they, as EU institutions, might have engaged their extra-contractual responsibility, by approving terms of a Memorandum of Understanding that, allegedly, led to the violation of a fundamental right? Relying on a formal approach, the General Court believed not. It considered that it had no jurisdiction to consider a claim for compensation based on the alleged illegality of an instrument, the European Stability Mechanism-Cyprus Memorandum of Understanding, that was not formally authored by the EU or one of its institutions.[14] The General Court went on to address the further objection of the plaintiffs, who had argued that, despite this lack of authorship, the failure of the Commission to guarantee that the Memorandum it had contributed to negotiating and concluding on behalf of the European Stability Mechanism complied with EU law (and with the Charter), constituted unlawful conduct in itself, which sufficed to engage the Commission's extra-contractual liability. Entering into the substance of the compensation claim, the Court moved on to determine whether the triple condition for incurring non-contractual liability[15]

See Case T-161/15, *Brinkmann (Steel Trading) et al.* v *European Commission and ECB*; Case T-149/14, *Anastasiou* v *European Commission and ECB*; Case T-150/14, *Pavlides* v *European Commission and ECB*; Case T-161/15, *Vassiliou* v *European Commission and ECB*.

[13] *Supra* n. 12, paras. 56-60.

[14] *Supra* n. 12, paras. 42-47.

[15] Unlawful conduct, a harm incurred and a causal link between the conduct and the harm alleged. *See* K. Lenaerts et al., *EU Procedural Law* (Oxford University Press 2014) p. 508-544; K. Gutman, 'The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection', 48 *CMLR* (2011), p. 695.

was satisfied *in casu*. It examined specifically the existence of a causal link between the Commission and the European Central Bank's conduct (unlawful or not) and the harm alleged. The Court considered that the complainants had not proven the existence of a direct link between the conduct of the Commission and the European Central Bank in the framework of the conclusion of the Memorandum of Understanding, and the reduction in the value of their deposits, thereby suggesting that such a link was missing.[16] From the Court's perspective, as the Memorandum was not signed until 26 April 2013, i.e. almost a month after the reduction in the value of the applicants' deposits occurred, the Commission's and the European Central Bank's conduct could not have possibly caused the financial losses suffered by the plaintiffs.[17]

Subsequently appealed against before the Court of Justice, these orders were confirmed by Advocate General Wahl.[18] Addressing the first line of argument of the plaintiffs,[19] he confirmed the findings of the General Court: despite the fact that they take part in the negotiation and conclusion of Memoranda of Understanding under the European Stability Mechanism Treaty, the Commission and the European Central Bank lack authorship of these instruments.[20] Turning to the second line of the plaintiffs' argument, Advocate General Wahl went on to determine whether the Commission was bound to ensure that the Memoranda of Understanding it negotiates and concludes on behalf of the European Stability Mechanism comply with EU law, and if the breach of such obligation could give rise to Union's liability.[21] Advocate General Wahl made his view very clear: as a matter of principle, 'even when acting outside the EU framework, EU institutions must scrupulously observe EU law'.[22] This also holds true regarding the Charter, as its Article 51(1) 'does not contain any limit as to the applicability of the Charter with respect to the EU institutions'.[23] Such an obligation is not, however, so extensive 'that it may be considered that an obligation as to the result is imposed on the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities and any EU rule which may be

[16] *Supra* n. 12, para. 54.

[17] This reading, it could be argued, gives too much weight to the strict chronology of events, and fails to understand the political background against which they unfolded.

[18] *Supra* n. 11.

[19] The plaintiffs argued that their damage found its root in the European Stability Mechanism-Cyprus Memorandum of Understanding which in their view, could be attributed to the Commission and the European Central Bank , because of their active part in its negotiation and conclusion.

[20] *Supra* n. 11, paras. 49-59.

[21] A question the General Court had left aside.

[22] *Supra* n. 11, para. 69.

[23] *Supra* n. 11, para. 85.

applicable to the situation'.[24] As to the Charter, the Commission is similarly not 'required to impose [its] standards on acts which are adopted by other entities or bodies acting outside the EU framework'.[25] As put in *Pringle*,[26] the negotiation, adoption and implementation of a Memorandum of Understanding do not consist in the 'implementation of EU law', and the Charter therefore does not apply to European Stability Mechanism interventions as such. As a consequence, if it were to impose that the conditionalities enshrined in a Memorandum of Understanding fully complied with the Charter, the Commission would go beyond its own duties under the Charter, and would be acting in breach of its limited scope of application as defined in its Article 51(1). At most, therefore, this obligation of EU institutions to guarantee compliance with EU law when they step in as agents of the European Stability Mechanism consists of a mere best-efforts obligation,[27] and certainly not of a performance obligation.

The Decision of the Court of Justice

On 20 September 2016, the Grand Chamber of the Court issued, in *Ledra Advertising*,[28] an important ruling which in many ways contrasts with its past approach in this area of EU law.

On the issue of authorship of European Stability Mechanism acts, the Court restated its holding in *Pringle*. The Commission and the European Central Bank may well play a significant role under the European Stability Mechanism framework, this is not enough to attribute, for the purpose of judicial review, authorship of acts of the Mechanism (such as the European Stability Mechanism-Cyprus Memorandum of Understanding) to those institutions, as they ultimately lack the power to make decisions of their own. As a consequence, European Stability Mechanism acts cannot be imputed to the EU, and fall outside EU law.[29] Conditionalities enshrined in a Memorandum of Understanding, such as the Cypriot haircut, still evade direct annulment under Article 263 TFEU.

However, contrary to what the General Court primarily held, and in contrast to what Advocate General Wahl suggested in his opinion, such lack of authorship cannot per se prevent unlawful conduct from being committed by the

[24] *Supra* n. 11, para. 70.

[25] *Supra* n. 11, para. 86.

[26] *Supra* n. 1, paras. 178-181.

[27] AG Wahl speaks of a duty 'to deploy its best endeavours' to prevent conflicts between the substance of a Memorandum of Understanding and EU law and, for the Charter, of a duty 'to promote' its application (*supra* n. 11, paras. 70 and 85).

[28] ECJ 20 September 2016, Case C-8/15 to C-10/15, *Ledra Advertising et al.* v *European Commission and ECB*.

[29] *Supra* n. 28, paras. 52-54.

Commission or by the Central Bank when acting within the European Stability Mechanism framework, and from being subsequently found and compensated by the Court under the regime of non-contractual liability.[30] The Commission has a clear duty to 'refrain from signing a memorandum of understanding whose consistency with EU law it doubts'.[31] This duty to ensure the compliance with EU law[32] of the European Stability Mechanism acts it contributes to negotiating and concluding, is stronger than the mere 'best efforts' obligation advocated by Advocate General Wahl. It is a true performance obligation, which the Court justifies on three different grounds:[33] first, its holding in *Pringle* that the conferral by the European Stability Mechanism Treaty of tasks on the Commission and the European Central Bank is conditional upon the non-alteration of the essential character of their powers under the EU Treaties;[34] second, Article 17(1) TEU and the Commission's overarching role as Guardian of the Treaties;[35] third, Article 13(3) of the European Stability Mechanism Treaty, which entrusts to the Commission the task of negotiating Memoranda of Understanding that are fully consistent with EU law.[36]

On that basis, the Court ruled that the General Court had wrongly overlooked the true nature of the Commission's and the European Central Bank's obligations under the European Stability Mechanism Treaty, and set aside the orders under appeal.

Turning to the substance of the compensation claims, the Court examined the (un)lawfulness of the Commission's and the European Central Bank's conduct. More specifically, the Court sought to determine whether the Commission (in liaison with the Bank), by inserting the haircut in the European Stability Mechanism-Cyprus Memorandum of Understanding it would later conclude on the European Stability Mechanism's behalf, contributed to a sufficiently serious breach of the plaintiffs' right to property. The Court found that all the conditions under which the right to property may be lawfully restricted were satisfied in casu. Relying on Article 12 of the ESM Treaty, and pointing to the deep integration of

[30] *Supra* n. 28, para. 55.

[31] *Supra* n. 28, para. 59.

[32] For the Court, this clearly involves the Charter too, which binds EU institutions in whatever capacity they act. *See supra* n. 28, para. 67.

[33] *Supra* n. 28, paras. 56-58.

[34] *Supra* n. 1, para. 162.

[35] The Court's reliance on Art. 17 TEU, and its clear focus on the European Commission, may seem to suggest that its core holding is limited to that institution only. Such 'singling out', however unfortunate it may be, solely echoes the prominent role played by the Commission under the European Stability Mechanism framework (as compared to the more limited tasks entrusted to the European Central Bank), and has in my view no bearing on the scope of the Court's holdings, which apply indistinctly to all EU institutions, including the Central Bank. In this regard, *see supra* n. 32.

[36] *Supra* n. 1, para. 164.

the European banking sector and its centrality for the economy, the Court first considered that the measures met an objective of general interest, namely the preservation of the stability of the banking system of the Euro area as a whole.[37] The Court then turned to the substance of the measures at stake and, considering them in toto, found that, in view of the stability objective, and 'having regard to the imminent risk of financial losses to which depositors with [Bank of Cyprus and Laïki] would have been exposed if [they] had failed', those measures did not amount to a disproportionate and intolerable interference impairing the very substance of the plaintiffs' right to property as protected by Article 17 of the Charter.[38] As a consequence, having found no unlawful conduct on the part of the Commission and the European Central Bank, the Court ruled the non-contractual liability of the Union could not be engaged and logically dismissed the action for compensation.

While the Court of Justice ultimately reached the same conclusion as the General Court – the dismissal of both the annulment and compensation claims – it did so following a different logic. Its reasoning is indeed based on a premise that the General Court rejected as a general rule: EU institutions have a performance obligation as to the compatibility of Memoranda of Understanding with EU law, and may be found liable if a specific Memorandum of Understanding fails to be compatible, despite their lack of formal authorship thereof. As a consequence, the Court of Justice deemed it an unavoidable duty[39] to engage in a full liability assessment, and an examination of the substance of the measures under scrutiny.[40] Of course, the difference between the two approaches may not be as significant as the Court of Justice made it sound by setting aside the General Court's orders, perhaps in order to maximise the resonance of its own ruling. It remains that these approaches rest on opposite legal premises, and reflect strongly divergent views on the duties of EU institutions when borrowed by a distinct international organisation.

Comments

After Ledra – *Borrowed Institutions and EU Law: The End of European Stability Mechanism Impunity?*

In its *Ledra* ruling, the Court of Justice has taken upon itself to address an issue it had left wide open in *Pringle*. In this seminal decision, the Court indeed remained silent on the applicability of European law to EU institutions when they act under

[37] *Supra* n. 28, para. 71.
[38] *Supra* n. 28, para. 74.
[39] And not a mere side exercise as in the General Court's approach.
[40] A task the General Court clearly avoided by focusing on the causation issue.

https://doi.org/10.1017/S1574019617000074 Published online by Cambridge University Press

the European Stability Mechanism umbrella, despite strong calls from Advocate General Kokott to confirm such applicability and draw all the consequences from it.[41] The *Ledra* ruling resolves this uncertainty, and brings a clear answer on the matter: because they are EU institutions, the Commission and the European Central Bank remain bound by EU law, and by the Charter, under any circumstances (even when stepping in as agents of the European Stability Mechanism),[42] and may therefore be held liable if their actions under the European Stability Mechanism fail to comply with EU rules and standards. This holding, unprecedented in the Court's history, should be welcomed, if only because it clarifies the state of the law, and settles the doubts on this important question.[43] More fundamentally, the Court's decision should be seen as a positive evolution, as it contributes to filling the legal vacuum in which the EU institutions had been operating in the field of financial assistance since the eruption of the Eurocrisis. Whether in the framework of the European Financial Stability Facility or the European Financial Stabilisation Mechanism before 2013, or under the European Stability Mechanism Treaty later on, the Commission and the European Central Bank, despite their key responsibilities related to the provision of financial assistance, and the negotiation and implementation of the strict conditionality attached to such assistance, have been evading any kind of legal accountability for their actions. The main cause for such evasion was the formal barrier erected between the EU institutions and the new international bodies on whose behalf they intervened *vis-à-vis* the Member States requesting financial assistance. *Ledra* partially tears down that barrier (which the Court itself had contributed to erect, or suggested might have to be erected).[44] It brings the actions

[41] Opinion of Advocate General Kokott in Case C-370/12, 26 October 2012, *Pringle* v *Ireland*, para. 176. For a similar view, *see* S. Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework', 9 *EuConst* (2013) p. 37 at p. 51-53; P. Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance', 9 *EuConst* (2013) p. 263 at p. 281-282.

[42] This note focuses on the European Stability Mechanism context, but it goes without saying that *Ledra*'s (horizontal) significance is much wider and encompasses all other settings where EU institutions act outside or at the margin of the formal EU framework.

[43] As a side note, the decision of the Court on the merits of the case is not, however, beyond criticism. One may deplore the fact that the systemic requirement in the stability rationale (the financial stability of the Euro area *as a whole*) was ultimately overlooked. Moreover, the Court's proportionality analysis appears far too succinct, if not deeply elusive. The restrained approach favoured by the Court, and its deference to political choices made three years earlier in the middle of a financial crisis, did not, in my view, exempt the Court from exposing the reasoning that brought it to its conclusions. As a point of comparison, *see* the substantial proportionality assessment carried out by the Strasbourg Court in a similar case: ECtHR 21 July 2016, Case Nos. 63066/14, 64297/14, 66106/14, *Mamatas et al.* v *Greece*, para. 106-120.

[44] *See* text to n. 55, *infra*, for the case law on measures related to the Portuguese and Romanian bailouts, and the Court's refusal to recognise a link between these measures and EU law.

of the Commission and the European Central Bank under the European Stability Mechanism framework, back within the ambit of EU law. Such actions can now be put to the test of EU law standards, and consequently reviewed by the Court of Justice, if only under the non-contractual liability regime. Such 're-Unionisation' of European Stability Mechanism agents is certainly welcome, as it will contribute to disciplining their interventions and increase their legitimacy. One can also hope that the strong signal sent by the Court will be understood and trigger an overall upgrade of the status of fundamental rights under the European Stability Mechanism framework.

With this ruling, one may argue that the Court of Justice decided to abandon its past, formalistic approach, and go beyond the textual divide between the EU and the European Stability Mechanism. Various considerations may have led the Court to make this bold but welcome move. Taking institutional considerations first, the actual operation of the European Stability Mechanism almost entirely rests on the European Commission (acting in liaison with the European Central Bank). All strategic decisions are taken by the Board of Governors of the European Stability Mechanism, which brings together the finance ministers of the Eurozone, and thus has exactly the same composition as the Euro Group. The organic and institutional intertwining is thus strong. Second, there are regulatory considerations. A few months after the European Stability Mechanism started operating, Regulation No. 472/2013[45] entered into force. The Regulation brings the core of European Stability Mechanism conditionality back within the scope of EU law, by requiring the translation of the backbone of Memoranda of Understanding into Council Implementing Decisions, thus adding substance to the intertwining.[46] Finally, the outrage that the EU's conditionality strategy vis-à-vis bailed-out countries has triggered throughout European public opinion and the mounting pressure on the Union may have given the Court further impetus to adopt a more ambitious stance on those issues.

Beyond Ledra – *Alternative Avenues for Conditionality Challenges*

Ledra opens up a new judicial avenue for challenging conditionalities imposed on bailed-out States. But will litigants be able to secure concrete successes, or is *Ledra*

The orders of the General Court in the *Ledra* series of cases, and AG Wahl's Opinion, are also representative of such a tendency.

[45] Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability, [2013] OJ L 140/1. *See* M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', 74 *ZaöRV* (2014) p. 61.

[46] For further details, *see* text to n. 51, *infra*.

just a Pyrrhic victory that will never produce tangible results? Substantive hurdles may make it difficult for litigants to succeed on the merits of their compensation claims.[47] Actions for damages are subject to relatively generous rules of standing and time limits compared to annulment actions. But the threshold to win a case in that setting is much higher than in annulment actions. Indeed, since *Bergaderm*,[48] only a 'sufficiently serious breach of a rule of law intended to confer rights on individuals' can give rise to non-contractual liability under the Treaties,[49] whereas plaintiffs in annulment actions may rely on any kind of unlawfulness. The threshold is indeed high, and the post-*Ledra* era will thus not necessarily be brighter for plaintiffs.[50]

With this in mind, it is legitimate to push the reflection further and investigate whether, beyond *Ledra*, alternative judicial channels exist to challenge the legality of Memoranda of Understanding. Or are actions for damages the only avenue possible? Successively, the potential of annulment actions and preliminary rulings are examined below.

The Court in *Ledra* has put it very explicitly: due to the lack of formal EU authorship, it does not have jurisdiction to rule on annulment actions directly brought against a Memorandum of Understanding under Article 263 TFEU. This is undisputable, but the adoption of Two-Pack Regulation No. 472/2013 in May 2013 may have unlocked the situation. The Regulation's main aim is to bring back European Stability Mechanism conditionality within the EU legal order.[51] In that framework, its Article 7 requires States which have benefited from financial assistance to prepare a Macroeconomic Adjustment Programme, which is to reproduce the backbone of the Memorandum of Understanding previously concluded with their creditors, and which will ultimately be subject to the formal approval of the Council *via* an Implementing Decision. In the case of Cyprus, this was done through Decision 2013/463.[52] Such Council Decisions are fully-fledged

[47] *See* A. Hinarejos, 'Bail-outs, Borrowed Institutions and Judicial Review: Ledra Advertising', *EULawAnalysis*, 25 September 2016, <eulawanalysis.blogspot.be/2016/09/bailouts-borrowed-institutions-and.html>, visited 23 March 2017.

[48] ECJ 4 July 2000, Case C-352/98, *Bergaderm and Goupil* v *European Commission*, paras. 41-42.

[49] For further details, *see* Lenaerts et al., *supra* n. 15, p. 512-528.

[50] Damage actions are used in *Ledra* as a gap-filling device. Experience has, however, shown the practical limits of private enforcement of EU law through Union or State liability (the conditions of which are now fully aligned since *Bergaderm*). The aftermath of *Köbler* (ECJ 30 September 2003, Case C-224/01, *Köbler* v *Austria*) is quite telling in that regard. *See further* T. Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after *Francovich*', 49 *CMLR* (2012) p. 1675.

[51] In this regard, *see* Peers, *supra* n. 41, p. 53; C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They are not EU Law?', 10 *EuConst* (2014) p. 393 at p. 404-405.

[52] Council Implementing Decision No. 2013/463 of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU, [2013] OJ L 250/40.

EU acts, perfectly reviewable under Article 263.[53] This setting would offer the perfect opportunity for the Court to directly examine the compatibility of European Stability Mechanism conditionalities with EU law. Interestingly, such alternative judicial avenue has been explicitly advocated by Advocate General Wathelet in an Opinion he issued in the *Mallis* series of cases.[54]

The preliminary ruling procedure (Article 267 TFEU) may constitute a second possible avenue. It has already happened that the measures a bailed-out Eurozone Member State adopted to implement the Memorandum of Understanding that it had concluded with its creditors were somehow challenged before a national court, which subsequently asked the European Court of Justice to rule as to the compatibility of such measures with European law. The key challenge for litigants in that context is to establish that the Member State in question was, in adopting those national measures, acting within the scope of EU law or, in the case of a fundamental rights challenge, 'implementing EU law' within the meaning of Article 51(1) of the Charter. The Court of Justice has taken a position on this issue in the framework of (pre-European Stability Mechanism) financial assistance to Romania and Portugal, and ruled that those States were not implementing EU law when carrying out Memorandum of Understanding-inspired reforms.[55] This strict stance, which has been criticised,[56] is surprising, in that it starkly contrasts with the Court's traditionally generous approach regarding the applicability of the Charter to Member States.[57] Arguably, it can no longer hold

[53] Of course, the issue of standing under Art. 263 TFEU remains. As the case law of the Court of Justice suggests, non-privileged applicants (such as trade unions, civil society organisations or affected individuals) will struggle to meet the procedural requirements of an annulment action. The role of institutional actors and, most notably, the European Parliament, may prove crucial in that regard. *See* Kilpatrick, *supra* n. 51, p. 415-417; L. Fromont, 'L'application problématique de la Charte des droits fondamentaux aux mesures d'austérité: vers une immunité juridictionnelle', 4 *Journal européen des droits de l'homme* (2016) p. 469 at p. 484-488.

[54] Opinion of Advocate General Wathelet, Case C-105/15 to C-109/15, 21 April 2016, *Mallis et al.*, paras. 85-98. *See also* K. Lenaerts, 'EMU and the EU's Constitutional Framework', 39 *European Law Review* (2014) p. 753 at p. 759.

[55] *See* ECJ 14 December 2011, Case C-434/11, *Corpul National al Politistilor* v *MAI*; ECJ 10 May 2012, Case C-134/12, *MAI et al.* v *Corpul National al Politistilor*; ECJ 15 November 2012, Case C-369/12, *Corpul National al Politistilor* v *MAI*; ECJ 14 December 2011, Case C-462/11, *Cozman* v *Teatrul Municipal Targoviste*; ECJ 7 March 2013, Case C-128/12, *Sindicato dos Bancarios do Norte et al.* v *BPN*; ECJ 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Fidelitate Mundial*; ECJ 21 October 2014, Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Via Directa*. *See also* the *Florescu* case (C-258/14), currently pending before the Court.

[56] *See* Peers, *supra* n. 41, p. 53; C. Barnard, 'The Charter in Time of Crisis: a Case Study of Dismissal', in N. Countouris, M. Freedland (eds.), *Resocializing Europe in a Time of Crisis* (Cambridge University Press 2013) p. 250 at p. 267-277; Kilpatrick, *supra* n. 51, p. 399-406.

[57] *See*, for example, ECJ 7 May 2013, Case C-617/10, *Aklagaren* v *Akerberg Fransson*.

under the European Stability Mechanism framework, especially since Regulation No. 472/2013 has further imbricated the European Stability Mechanism with the EU legal order. National courts ought to be able to question the European Court of Justice as to the compatibility of Memorandum of Understanding-driven national law with EU law, so that the level of EU influence in this area is finally matched with an appropriate degree of supranational judicial control.

Conclusion – *Ledra* and Legal Discipline: Repercussions beyond the European Stability Mechanism?

Ledra sent a strong and welcome signal. As such, the ruling's direct impact is confined to the European Stability Mechanism's action and that of its EU agents (including, it is submitted, the European Central Bank).[58] One may, however, hope that the Court's message will resonate beyond that limited context, and percolate through the entire post-crisis economic governance framework of the EU.

A look at that framework reveals that fundamental rights do not enjoy the central status they legally deserve.[59] This can be explained by the deficient policy methods of decision-makers, which fail to internalise fundamental rights concerns, and the lack of openness of the governance process towards the very actors that are most likely to strive for their preservation (parliaments, social partners and the civil society). As a consequence, rights are not given real political consideration, and have so far failed to act as efficient guidelines and credible constraints for the action of policy makers under the new economic governance of the EU. This is particularly true for social and economic rights, which have never managed to challenge, or even soften, the overarching neo-liberal narrative of fiscal consolidation and budgetary discipline which has driven policy reforms since the eruption of the Eurocrisis.

This worrying trend has only been growing since 2010 and has spread to all key aspects of European economic governance: the European Stability Mechanism, the European Semester, budgetary surveillance under Regulation No. 473/2013, etc. It has raised awareness and outrage. Confronted with mounting pressure, the EU seems finally to have got a sense of both the significance and the pervasiveness of the problem, and now looks willing to address it. Several initiatives have been launched in order to bring citizens, and their rights, back to the heart of

[58] *See supra* n. 35.

[59] For an extended analysis, *see* O. De Schutter and P. Dermine, 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union', *European Journal of Human Rights* (forthcoming).

socio-economic decision-making.[60] *Ledra* can be read as the Court's first contribution to this emerging trend towards an overall rebalancing of socio-economic governance in Europe.

Ledra triggers legal accountability and lays down the basis for a law-based and rights-based approach to economic governance in Europe. As such, it is relevant for all supranational actors involved in that governance process, beyond the sole European Stability Mechanism and its agents. They all ought to take stock of the signal sent by the Court, revise their working methods and policy-making processes and make sure they live up to their legal commitment under EU law. An issue *Ledra* does not really settle is what that commitment exactly entails, especially in the field of fundamental rights. Let us now hope that the Court will build upon *Ledra* in future rulings to provide further substantive guidance. Mere lip service will not be satisfying in the longer term.

[60] One could mention, for example, the launch of the 'European Pillar of Social Rights' initiative by the European Commission in March 2016.

https://doi.org/10.1017/S1574019617000074 Published online by Cambridge University Press