

Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?

Claire Kilpatrick*

European Union's 'social constitution' and bailout measures – Are the bailout measures EU law? – Do the bailout measures create legal obligations? – Legal nature of Memoranda of Understanding – Avenues for challenge – Call for recognition of the EU law nature of bailouts and the costs of such non-recognition

INTRODUCTION

Sovereign debt crisis measures are a new and highly significant source of social norms in the EU. Demands for rapid fiscal consolidation and structural reform have created a cascade of social instructions which have been particularly pointed and precise in those seven member states which have received or are receiving EU bail-outs (in order of their first bailout: Hungary, Latvia, Romania, Greece, Ireland, Portugal, Cyprus).

Indeed, a good case can be made that the bailout measures,¹ alongside the revamped macro-economic governance processes, are the most important social sources in the EU's history: in their extensive scope, their extraordinary detail, and in their rapid execution. Yet few would have anticipated that this EU contribution to national labour and social law would have been so sharply and insistently de-regulatory. Driven by the imperatives of rapid fiscal consolidation and structural reform, there have been: extensive cuts to, or limitations in who can access, health and education provision; reduced access to and levels of pensions and other social benefits; reductions in the size and pay of the public sector; a decentralising and dismantling of collective bargaining; cuts to minimum wages and related employ-

* Professor of International and European Labour and Social Law, EUI, claire.kilpatrick@eui.eu. I am extremely grateful to both Thomas Beukers and Bruno De Witte for comments on an earlier version and helpful discussions.

¹ By bailout measures I therefore mean the primary sources which are the *direct basis* for the grant of loan assistance and which lay out the conditions attached to disbursement of those loans. We shall see in what follows that other EU sources often mirror these loan conditions, sometimes providing an *indirect basis* for challenging the loan conditions.

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ment safety nets for vulnerable workers; and reduced employment protection. The crisis measures have impacted more sharply on disadvantaged groups: the young, women and minorities.²

For lawyers this raises an interesting and important question: how do these new bailout sources square with the EU's protection of social rights, a bundle of commitments I term the EU's 'social constitution'? The core components of the EU social constitution – the EU Charter of Fundamental Rights, the treaties' social constitutional clauses³ and its social *acquis* – show that there are no *prima facie* strong legal reasons for, and indeed many against, a marginalisation of constitutional social commitments, especially in post-Lisbon EU law.⁴

However, and crucially, important suggestions have been made, not least by the EU institutions themselves, that the EU social constitution *does not apply* to bailout measures. This analysis considers the cogency of these arguments against application of the EU social constitution to bailout measures. I focus on two dominant sets of doubts which I identify as EU doubts and legal obligation doubts.⁵

The first concern is characterisation of sources as 'EU' or as non-EU (domestic or international). This is difficult to resolve for a number of reasons. Sovereign loan mechanisms and other economic crisis measures are sometimes contained in international agreements (albeit only between subsets of EU member states). Yet a key role is played in all these mechanisms and measures by EU institutions. There are linkages which criss-cross between EU and non-EU sources. And many of the economic crisis mechanisms and measures have a mixed legal parentage as part of their DNA.

Yet the dominant narrative, strongly expressed by the EU institutions themselves, is that the bailout programmes fall outside the EU system. The process leading to an own initiative Report by the European Parliament on the operation of the Troika (European Commission, ECB and IMF) in programme countries has produced invaluable resources as to the views of EU institutions on the legal status

² See the excellent analysis in 'Safeguarding Human Rights in Times of Economic Crisis', *Issue Paper from Council of Europe Commissioner for Human Rights* (2013) para. 1.4.

³ Centrally Arts. 2 and 3(3) TEU; Arts. 8-10 TFEU. Additionally, the TEU Preamble confirms the 'attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers' and the desire 'to deepen the solidarity between their people while respecting their history, their culture and their traditions'. The TFEU Preamble notes that the signatory states are: 'RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe' while 'AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their people.'

⁴ The substantive application of the EU social constitution is dealt with in a forthcoming companion paper: C. Kilpatrick, 'The EU Social Constitution and the Bailouts'.

⁵ Another, economic emergency doubts, raises issues deserving a separate analysis.

of bailout measures.⁶ A questionnaire was issued as part of the process of preparing the Report to each of the troika members as well as the head of the Eurogroup and the European Council and the responses, alongside the Report itself, shed significant light on EU institutional views as to the legal nature of the Eurozone bailout measures.⁷

Hence the European Parliament's Economic Committee in its Report stated that it: 'Regrets that the programmes are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law'.⁸

This issue is also explored by the EP Committee on Constitutional Affairs contribution to the EP Report where it:

Deplores the way EU institutions are being portrayed as the scapegoat for adverse effects in Member States' macro-economic adjustments when it is the Member States' finance ministers who bear the political responsibility for the Troika and its operations; stresses that may lead to increased Euro-scepticism although responsibility lies with the national and not the European level.⁹

The second area of doubt concerns whether, even if their EU pedigree is established, and even if they come in legal wrappers, such loans with conditions can really create direct EU legal obligations. The doubters argue, for example, that in bailouts

⁶ *Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries* (EP Committee on Economic and Monetary Affairs, 28 Feb. 2014). See <<http://www.europarl.europa.eu/committees/en/econ/subject-files.html?id=20140114CDT77307>>.

⁷ The questionnaire was issued on 21 Nov. 2013 and responses received in Dec. 2013 and Jan. 2014 (although the ECB's is not dated). Of 29 questions, Q-5 and Q-18 are those most germane to the analysis in this paper. Q-5 asked: 'How much leeway did the countries concerned have to decide upon the design of the necessary measures (consolidation or structural reform). Please explain for each country. Q-18 asked: How many cases of infringement of national law challenging the legality of the decisions arising out of the MoU are you aware of in each country? Did the Commission and the ECB proceed to an assessment of the compliance and consistency of the measures negotiated with the Member States with EU fundamental rights obligations referred to in the Treaties?' A different questionnaire was sent to the government and Central Bank of each Eurozone state in a programme.

⁸ EP Report, *supra* n. 6, para. 80. See also paras. 59-60 (political rather than legal responsibility of the Eurogroup at core of bailouts) and para. 32 where the EP 'regrets the inclusion in the programmes for Greece, Ireland and Portugal of a number of detailed prescriptions for health systems reform and expenditure cuts; regrets the fact that the programmes are not bound by the Charter of Fundamental Rights of the European Union or by the provisions of the treaties, notably Article 168(7) TFEU'.

⁹ [60]. The ECB and Commission, in their questionnaire responses, correctly set out the legal bases of the various bailouts but do not draw out the expected legal consequences from that information.

member states *request* financial assistance, *agree* to conditionality and have *discretion*. Analyses centrally focus on the legal nature of the Memoranda of Understanding which set out the evolving actions, to use a neutral term, to be taken by member states over the life of the loan.

Hence the Commission and the ECB both respectively responded to the Questionnaire by stating that:

Given that the MoU is signed by the national authorities, who are also responsible for its implementation, the ultimate responsibility rests with them [...] it is for the Member State to ensure that its obligations regarding fundamental rights are respected.¹⁰

The final decision on concrete measures to be taken at national level is adopted by the concerned member states, acting in accordance with their constitutional requirements.¹¹

Both these doubts, the EU doubt and the legal obligation doubt, are of course highly relevant when considering the ordering of legality review between national and EU law. Take minimum or public sector wage-cuts as emblematic bailout measures. If these are an implementation of EU law, they can be challenged on various EU law grounds, including compatibility with the EU Charter of Fundamental Rights. Moreover, the Court of Justice alone has jurisdiction to decide on the legality of EU law measures so a national court faced with this issue is required to make a preliminary reference on EU law validity to the Court of Justice.¹² If however, the sovereign debt conditionality in the bailout measures is not EU law, national courts should assess these national measures against their domestic constitutional and fundamental rights' guarantees.

I argue that while each doubt raises highly interesting and complex issues deserving serious consideration, neither straightforwardly justifies non-application of the EU social constitution to bailout measures. Indeed, in almost all cases, very strong arguments are available to sustain application of the EU social constitution to bailout measures. An important contribution this analysis makes to these doubts is to discourage a reading of the bailouts in which they are all assumed to be identical or in which only a subset of bailouts is considered¹³; disaggregation of the bailouts recasts these doubts.

¹⁰ Commission Response to Question 5 (and almost identically Q-18) of the European Parliament Troika Questionnaire, Dec. 2013.

¹¹ ECB Questionnaire Response, p. 3; *see also* the Commission Questionnaire Response, p. 9, 'It is for democratically elected national governments to make the choices necessary to correct the accumulated balances, in line with programme targets.'

¹² Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

¹³ Hence, the interesting analysis by A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Bremen, ZERP 2014)

Given the dominance of these various doubts, and the rejection of all challenges to EU bailout measures to date by the Court of Justice, the conclusion that the EU social constitution can apply to bailout measures is highly significant on both strategic and broader legal-institutional-constitutional grounds.

In particular it reassesses the Court of Justice's rejection to date on admissibility grounds¹⁴ of all EU social constitution challenges to bailout and related macro-economic governance measures from Greek, Romanian and Portuguese unions and courts.¹⁵ Rather than viewing this as evidence supporting the non-applicability of the EU social constitution to bailout measures, dealing with the doubts instead opens a less-explored set of questions about the avenues offered by EU law to challenge the compatibility of bailout measures with the EU social constitution.

Accordingly, my analysis considers how the two key avenues for challenging EU measures – annulment actions and preliminary references – play out in the bailout context. Largely obscured in the debates to date by the dominant doubts concerning EU pedigree and legal obligation, this is where doubts actually do have a genuine foundation. Equally importantly, questions about avenue applicability precede and accordingly foreclose judicial consideration of the dominant doubts. My analysis will show that only the preliminary reference avenue is *de facto* available yet is made very problematic by a combination of the doubts and the Court of Justice's admissibility approach. Considering both preliminary references on the interpretation and on the validity of EU law, I indicate strategic litigation choices which would limit the Court's margin of manoeuvre to reject EU social constitution challenges to social bailout measures.

Lastly, given the unfounded nature of these doubts, it is important to reconsider what it means when an array of key EU institutions – the European Commission, the European Parliament, the ECB and the Court of Justice of the European Union – unite to publicly deny or contest in various ways the EU nature of the sovereign debt crisis measures. These doubts also permeate decisions of

focuses only on the ESM which is the source of only one of the seven bailouts to date; as we shall see the ESM cannot be used as a template for assessing all the bailouts. His analysis of ESM liability mainly concerns *international* human rights' law, though with references to some EU sources.

¹⁴ See below 'Avenues of Challenge'; and for further argument and detail C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', *Oxford Journal of Legal Studies* (forthcoming).

¹⁵ Greece: T-541/10 and T-215/11, *ADEDY and others v. Council supported by the Commission*, Orders of the General Court of 27 Nov. 2012. Romania: C-434/11 *Corpul Național al Polițiștilor*, Order of 14 Dec. 2011; C-134/12 *Corpul Național al Polițiștilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14 Dec. 2012. Portugal: C-127/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindicato Nacional dos Profissionais de Seguro v. Fidelidade Mundial*, Order of 26 June 2014.

national courts on bailout measures.¹⁶ I conclude by urging EU institutional recognition of the possibilities for EU-based challenges to bailout measures as well as indicating the costs of non-recognition.

ARE THE BAILOUT MEASURES EU LAW?

Let me make the doubters' argument first. It stresses that bailouts are based, exclusively or in part, on international agreements between EU states. Some of these are bi-lateral such as the UK loan to Ireland as part of its bailout in 2010 or the pooled bilateral loans to Greece which made up its first bailout in May 2010 (known as the Greek Loan Facility). Others are international agreements made by the Eurozone states. Hence the European Financial Stability Facility (EFSF) was established in May 2010 by an immediately effective international agreement.¹⁷ Greece's second 'eurozone' support programme was exclusively EFSF-based: in March 2012 a EUR 130 billion loan was agreed. The EFSF, designed for exceptional circumstances, was replaced for future bailouts in 2012 by the European Stability Mechanism (ESM), also established as an international agreement between the Eurozone states.¹⁸ It is the basis for the Cyprus bailout in May 2013.¹⁹

The EU doubters acknowledge that some bailouts have an additional EU law-based mechanism. Hence, the European Financial Stability Mechanism, created alongside the EFSF in 2010 is a creature of EU law.²⁰ The Portuguese and Irish

¹⁶ See e.g., Greek Council of State Decision 668/2012 of 20 Feb. 2012, discussed by A. Marcketou and M. Dekastros at n. 39–41 in their analysis of Greece in the EU's *Constitutional Change through Euro Crisis Law* project available at <<http://eurocrisislaw.eu.eu/>>.

¹⁷ Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Council Document 9614/10 of 10 May 2010. The EFSF was incorporated on 7 June 2010. For details of its lending to date see: <www.efsf.europa.eu>.

¹⁸ ESM Treaty agreed on 2 Feb. 2012. Requiring ratification by its 17 eurozone signatories, it came into effect on 27 Sept. 27 2012. For details of its lending to date see <www.esm.europa.eu>. For an unsuccessful legal challenge to its compatibility with the EMU Treaty provisions, see Case C-370/12 *Pringle*, judgment of 27 Nov. 2012.

¹⁹ Cyprus has been lent up to EUR 9 billion from the ESM and up to EUR 1 billion from the IMF. In June 2012, it requested euro-assistance; in March 2013, after difficult negotiations, agreement in principle was reached with the Eurogroup; on April 24 2013 the ESM Board of Governors approved in principle the stability support and approved the MoU prepared by the Commission in liaison with the ECB and the IMF; on 8 May 2013 the ESM Board of Governors approved Cyprus' Financial Assistance Facility Agreement. The loan is available until 31 March 2016.

²⁰ OJ L 118, 12 May 2010, p. 1. See <http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm>.

bailouts were based on funding from both the (international Eurozone agreement) EFSF and the (EU) EFSM.²¹ Accordingly they have a mixed legal parentage.

Nonetheless it is argued, or assumed, that because international agreements are dominant or in any event present in these loan agreements, they do not count as EU law to which the EU social constitution, in particular the EU Charter, is applicable. Hence, Cisotta and Gallo, generalising from the Portuguese bailout, argue:

The complex architecture set up to provide financial aid to Portugal – and the conclusion would not be *substantially* different for the other rescued States – is *avant tout* based on instruments, which, as to their legal nature, are to be qualified as international agreements (with a private contracting party, where the loans are granted by the EFSF). As just said, even the part of the loan granted under the EFSM – that is to say an EU law instrument – has to be understood as a segment of the machinery based on the [economic adjustment programme] and the conditionality terms are those established by the MoU and the other instruments mentioned. Therefore, the move of the Euro Area Member States aimed at rescuing Portugal is principally framed outside the EU legal order, even if links with that legal order nevertheless exist.²²

Doubters stress that member states need to be ‘implementing *Union law*’ under Article 51 EUCFR for its provisions to apply: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law.’²³

Relatedly, others rely on the Court of Justice’s summary rejection of preliminary references from Portugal and Romania on bailout measures’ compatibility with the Charter. These were rejected on the basis of no evidence that the measures challenged were ‘implementing EU law’. This is taken to support the view that bailout measures do not count as EU law but are instead based on national and

²¹ In fact Ireland’s EUR 67.5 billion loan consisted of EUR 22 billion from the EFSM, EUR 17.7 from the EFSF, EUR 4.8 from bilateral loans (from non-eurozone states such as the UK) and EUR 22.5 from the IMF. Portugal received the same loan amount from the IMF, the EFSM and the EFSF (EUR 26 billion from each).

²² R. Cisotta and D. Gallo, ‘The Portuguese Constitutional Court Case-Law on Austerity Measures: A Reappraisal’, in C. Kilpatrick and B. De Witte (eds.), *Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI WP 2014/5 at 85. See also K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014), at p. 237: ‘the relevance of the Charter for the austerity programmes imposed on the crisis states through the Memoranda of Understanding [...] might be questioned on the ground that the Commission and the ECB have not acted under their Treaty powers but under those conferred on them by intergovernmental agreements’.

²³ In this section, focussing on the EU law pedigree of the measures, we look at the ‘Union law’ part of that phrase; whether member states are ‘implementing’ what is established as Union law is considered in the next section.

international sources.²⁴ Although little analysis has focused on the constitutional social provisions beyond the Charter, doubters could certainly stress that the values, objectives and mainstreaming provisions of the EU treaties all firmly attach themselves to ‘the Union’, not to subsets of member states acting outside the EU framework.

Yet such arguments are incomplete and unpersuasive on a number of grounds. First, they leave out the three non-eurozone bailouts which are all firmly EU law-based. Hungary,²⁵ Latvia²⁶ and Romania²⁷ have all, since Autumn 2008, received assistance under an already existing Treaty provision (Article 143 TFEU) to set up a Facility to assist non-eurozone states with balance of payments difficulties liable to jeopardise the functioning of the internal market or the implementation of the Common Commercial Policy.²⁸ There is a clear and continuous EU-law trail for the non-eurozone bailouts, with every bailout component fully embedded in conventional EU sources.

Secondly, reliance on EU sources to encase loan conditions is also the case for Portugal and Ireland where, as we have seen, the bailouts have an EU-leg (the EFSM) and an intergovernmental-leg (the EFSF). Where the financial assistance

²⁴ Fischer-Lescano, *supra* n. 13, at p. 8; Cisotta and Gallo, *supra* n. 22.

²⁵ Council Decision of 4 Nov. 2008 providing Community medium-term financial assistance for Hungary (Decision 2009/103/EC). The EU balance of payments loan was up to EUR 6.5 billion (while the IMF’s was up to 12.5). The actual loan amount was lowered (5.5 out of 6.5 from the EU and 9.1 out of 12.5 from the IMF) and the loan period (Nov. 2008–Oct. 2010) was shortened by one year due to faster than expected recovery. In 2011, Hungary requested precautionary financial assistance; this was made politically conditional on Orbán’s Government committing to central bank independence and the judicial reforms recommended by the Venice Commission: European Commission – IP/12/407 25/04/2012. This financial assistance was not needed.

²⁶ Council Decision of 20 Jan. 2009 providing Community medium-term financial assistance for Latvia (Decision 2009/290/EC). Again the loan period and amount was shortened (from three to two years) though most of the EU balance of payments loan on offer was used (2.9 out of 3.1 billion on offer).

²⁷ Council Decision of 6 May 2009 providing Community medium-term financial assistance for Romania (Decision 2009/459/EC) amended by Decision 2010/183. Romania was granted up to EUR 5 billion under the Facility alongside just under EUR 13 billion from the IMF, EUR 1 billion from the World Bank and EUR 1 billion from the European Investment Bank and the European Bank for Reconstruction and Development. The full EU Loan Facility amount was used during the loan period (May 2009–June 2011). A second programme of financial assistance (March 2011–June 2013) entailing a precautionary credit line of EUR 5 billion (3.6 billion from the IMF; EUR 1.4 billion from the EU Facility) but not drawn upon. A third precautionary programme of EUR 2 billion was agreed in October 2013 (Decision 2013/513/EU) to run until end Sept. 2015.

²⁸ Art. 143 TFEU fleshed out in Reg. 333/2002 establishing a facility providing medium-term financial assistance for member states’ balance of payments. Pre-crisis, the latter made the maximum total available EUR 12 billion. Post-crisis this was increased to EUR 50 billion. The Treaty explicitly envisions such EU assistance being accompanied by IMF assistance as well as bilateral assistance from other states: Art. 143(2) TFEU.

has an EU-foundational component, alongside a non-EU foundational component, it is the *EU component* which is systematically and explicitly used to legally encase the loan conditionality in the MoUs. The EFSM Regulation (407/2010) confers implementing powers on the Council to make decisions by qualified majority to grant financial assistance. Crucially, the individual (international) EFSF agreements with Ireland and Portugal make it clear that these loans are subject to the (EU) EFSM legal regime and sources.²⁹ In other words, where bailouts have a mixed legal parentage, it is the EU sources containing the loan conditionality which are given pole normative position, not the international sources.

Thirdly, even where the Eurozone assistance entails no EU-leg, in that its foundation is either wholly bilateral (Greece I) or wholly intergovernmental (all assistance provided under either the EFSF, as for Greece II, or the ESM, as for Cyprus), the no EU law claim must be nuanced. At the same time it is important to acknowledge that the primary or original loan sources for Greece and Cyprus – bilateral agreements, the EFSF and the ESM – are certainly not EU-authored.³⁰ Yet for three distinct reasons this is not the end of the story.

On the one hand, the decision to grant assistance has, albeit in varying ways and extents, been linked to the creation of an EU law source. The sources pointed to for Greece and Cyprus are Council Decisions based on the excessive deficit provisions in Articles 126 and 136 TFEU.³¹ Hence, the excessive deficit Decision of 10 May 2010 addressed to Greece includes the text of the measures set out in the first MoU so that, for instance, by December 2010 Greece shall adopt: ‘A law on minimum wages to introduce sub-minima for groups at risk such as the young

²⁹EFSF assistance is made dependent on the Guarantors deciding on the basis of the Commission/ECB assessments *under the original CID and the EFSM Regulation* that the Beneficiary Member State’s economic policy accords with the original CID made pursuant to Art. 3(3)(b) of the EFSM Regulation: Preamble Recital (4) and Art. 2(7) of the Master Financial Assistance Facility Agreement between EFSF and the Portuguese Republic; the same provisions in the equivalent agreement with Ireland.

³⁰See earlier cases where authorship of legal acts was attributed to the member states acting qua member states, rather than as members of the Council. When this occurred to grant financial aid to be administered by the Commission on behalf of the member states, this was found not to be an act authored by the EU but by the member states: the *Bangladesh* case: C-181/91 and C-248/91 *EP v. Council* [1993] ECR I-3865.

³¹For some this is conclusive: F. Costamagna, ‘Saving Europe “under Strict Conditionality”: A Threat for EU Social Dimension?’, *Centro Einaudi, Working Paper LPF* No. 7 (2012) at p. 14, sustaining that Greece’s adjustment programme ‘has been embedded in a series of decisions adopted in the context of the excessive deficit procedure’; see also Tuori and Tuori, *supra* n. 22 at p. 237-238: ‘the main contents of the MoUs have been repeated in Council decisions under Arts. 126 or 136 TFEU, which the Charter clearly covers’.

and long-term unemployed, and put measures in place to guarantee that current minimum wages remain fixed in nominal terms for three years.³²

The excessive deficit links do not appear conclusive as the primary loan sources are not based on EU law. Nonetheless it is a much more compelling argument in relation to Greece than to Cyprus for two distinct reasons. First, the EFSF sources expressly and continuously link to these Decisions³³ while the ESM sources do not.³⁴ Second, one needs to pay careful attention to the excessive deficit source itself. It is well-known that Article 126 TFEU sets out a long chain of steps to be taken before excessive deficit sanctions may be imposed on a member state. In that chain under Article 126, Article 126(6) entails a Council Decision that an excessive deficit exists, Article 126(7) entails a Recommendation on how to address that deficit, Article 126(8) allows that Recommendation to be made public in the event of inadequate action while Article 126(9) is the beginning of legally binding measures against states with excessive deficits.³⁵ This is significant in the cases of Greece and Cyprus as the excessive deficit Decisions addressed to Cyprus are at the Article 126(6) declaratory stage of the procedure whilst those addressed to Greece are at the binding Article 126(9) stage of the procedure. Accordingly it can be argued that the Greek loan conditions are set out in two sources: the non-EU law loan and the binding Decision under Article 126(9) TFEU. Of course it can still be counter-argued in relation to Greece that the core source is the non-EU source particularly as not all the actions listed cohere closely with the objective to

³² Art. 3(d) of Council Decision 2010/310/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit.

³³ See Art. 2(1) EFSF Framework Agreement; Recital (7) Preamble Master Financial Assistance Facility Agreement EFSF-Greece: 'The availability and the provision of financial assistance under this Agreement [...] shall, unless otherwise specified, be conditional upon (i) the Beneficiary Member State's compliance with the measures set out in the MoU and (ii) the Guarantors deciding favourably, on the basis of the findings of the regular assessments carried out by the Commission in liaison with the ECB in accordance with the Council Decision of the European Union on the basis of Articles 126(9) and 136 of TFEU on 12 July 2011 (which recast the former Council Decision 2010/320/EU of 10 May 2010 as amended), that the economic policy of the Beneficiary Member State accords with the adjustment programme and with the conditions laid down by the Council in the Decision and any other conditions laid down by the Council or in the MoU.'

³⁴ Art. 13(3) ESM Treaty provides only for MoU consistency with EU economic governance sources: the MoU shall be fully consistent with the measures of economic policy co-ordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendations or decision addressed to the member state concerned.

³⁵ Art. 126(9) TFEU provides: 'If a Member States persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy this situation.'

decrease the excessive deficit, especially as prior to its Six-Pack amendment at the end of 2011 the excessive deficit procedure did not encompass debt.³⁶

However, instead, there is a new central EU source to be considered: this is the link between loan instruments and one half of the two-Pack of EU legislation which came into force on 30 May 2013.³⁷ From that date, just after Cyprus' loan was agreed, any euro member state requesting *or already receiving*³⁸ loan assistance under the EFSF or ESM or from any other source shall have its Macro-Economic Adjustment Programme approved by the Council acting by qualified majority. The Commission shall ensure that the MoU signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the Macro-Economic Adjustment Programme approved by the Council.³⁹ Changes to the programme shall also be decided by the Council acting by a qualified majority on a proposal from the Commission.⁴⁰ This means the law applicable to bailouts has changed: for Greece and Cyprus it brings (or will bring) loan conditionality inside EU law. The MoU under the EFSF or ESM and the Macro-Economic Adjustment Programme state the same or at any rate strongly similar requirements, one under an international agreement and the other under the EU Regulation. But, as the European Economy Occasional Paper exploring this part of the Two-Pack clearly states, 'without compliance with the Macro-Economic Adjustment Programme' which is an EU law source, 'the financial assistance cannot be disbursed'.⁴¹ Hence the Macro-Economic Adjustment Programme can be directly challenged. However, pressing questions about the legal and temporal effect of this Regulation remain. Most importantly, this is the case for Greece for which no Macro-Economic Adjustment Programme (MAP) has yet been made under this Regulation, unlike Cyprus, Ireland and Portugal.⁴² The questions raised are therefore whether prior to creation of a MAP for Greece, the Regulation can still be the basis for an EU

³⁶Six-pack Reg. 1177/2011 inserting new Art. 2(1)(a) Reg. 1467/97: debts over 60% shall comply ('be considered sufficiently diminishing') provided the gap with the 60% reference value has decreased by one-twentieth per year.

³⁷The most relevant 'half' is Reg. No. 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. See also B. De Witte and T. Beukers, 'Case-Note *Pringle*', 50 *CMLRev* (2013) p. 805 at p. 836-837.

³⁸This is the effect of Art. 16 Reg. 472/2013: 'Member States in receipt of financial assistance on 30 May 2013 shall be subject to this Regulation as from that date.'

³⁹Art. 7(2) of Reg. No. 472/2013.

⁴⁰Art. 7(5) of Reg. No. 472/2013.

⁴¹EEOP 147 May 2013, *The Two-Pack on economic governance: Establishing an EU framework for dealing with threats to financial stability in euro area Member States*.

⁴²The Council has already adopted Decisions under Art. 7 of Reg. No. 472/2013 in respect of Cyprus, Ireland and Portugal but not yet Greece (as of 21 July 2014): see further COM(2014)61 final, 6 Feb. 2014, *Communication from the Commission to the European Parliament and the Council on the application of Regulation (EU) No. 472/2014*.

law challenge to Greek bailout measures? And, following creation of a Greek MAP, can it be used to challenge bailout measures adopted prior to its adoption?

These arguments focus on finding an EU law basis for those loans based exclusively on international loan mechanisms. Yet the obverse of this argument – which starts by accepting their international law status – is also important to consider. This sustains that the fact that some of the bailout funds were set up by international agreement between the Eurozone states does not straightforwardly translate into an absence of EU law constraints and controls in their intergovernmental activities. This is the nub of the legal challenge in *Pringle* to the European Stability Mechanism.⁴³ To find the ESM lawful, the Court of Justice considered its compatibility with the economic and monetary provisions of the EU treaties. On this issue the Court found that the member states have the power to conclude amongst themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the member states who are parties to such an agreement *are consistent with EU law*.⁴⁴ EU law evidently embraces not just the EMU provisions at issue in that challenge but the EU social constitution too. However, this argument needs to be qualified in two ways. First, we need to disaggregate the components of the EU social constitution. Member states are evidently bound by their EU law obligations, in particular EU social legislation but also the constitutional social Treaty provisions in Articles 8-10 TFEU. However, the Charter applies only to the member states when implementing EU law which is not the case when their action consists of entering into commitments with one another to set up financial assistance mechanisms. Second, when the financial assistance mechanism takes the form of an international organisation (the ESM) or a private company (the EFSF) the veil of these entities will need to be pierced to hold the member states responsible for the actions of these IOs as a matter of EU law.⁴⁵

Fourthly, the central role of EU institutions especially the European Commission in managing every single bailout, whether it has an EU or international law basis, needs to be underlined and analysed.⁴⁶ The Commission is fully in control

⁴³ *Supra* n. 18.

⁴⁴ See especially paras. 109 and 121 judgment in *Pringle* (C-370/12, judgment of 27 Nov. 2012). See also C-55/00 *Gottardo* [2002] ECR I-413 at [33]: ‘When giving effect to commitments assumed under international agreements [...] Member States are required [...] to comply with the obligations that Community law imposes on them.’ And see the interesting analysis and further references in De Witte and Beukers, *supra* n. 37, especially p. 829 and further references therein.

⁴⁵ I am especially grateful to Bruno De Witte for discussions on this point.

⁴⁶ Art. 13 TEU. It is worth noting acknowledgment by the Commission of its fundamental rights commitments as an EU institution. Hence in response to Q-18 of the EP questionnaire, *supra* n. 7, it stated, ‘When negotiating the conditionality, the Commission also has a role in ensuring that the *acquis communautaire*’ is respected. It has also made sure that fundamental rights were

of management of the non-eurozone bailouts.⁴⁷ Article 3 of the EFSM Regulation makes clear the key role of the Commission and, in a supporting role, the ECB in managing financial assistance for Ireland and Portugal.⁴⁸ In the Greek and Cypriot bailouts the Commission is given the task, again in liaison with the ECB, of negotiating, signing and compliance monitoring MoUs.⁴⁹ This is critical because the EU/international nature of the bailout mechanism does not suffice to settle the issue of EU responsibility: instead the involvement of EU institutions in those mechanisms can be decisive in the application of EU law.

This institutional link is especially important for two reasons. First, whatever the pedigree of bailout sources, preliminary references can be made under Article 267(1) TFEU concerning 'acts of the EU institutions'. Secondly, when it comes to application of the EUCFR the EU institutions' link is essential. Those who focus on excluding Charter application because it requires member states to be 'implementing Union law' fail to stress that Article 51 EUCFR makes clear that the Charter applies to all institutions, offices, bodies and agencies of the Union without limiting its application to when these EU institutions are 'implementing Union law'.⁵⁰ Quite apart from fitting with the natural reading of Article 51 EUCFR, such a reading makes sense for at least two other reasons. To limit EU institutions' responsibility under the Charter to when they are 'implementing Union law' would be dramatically to limit the Charter's application to what have always been presented as its primary addressees.⁵¹ Moreover, a broad reading of the Char-

complied with'. However, this sits poorly with its doubts about EU responsibility for the measures raised consistently in its other responses.

⁴⁷ See, for example, Council Decision of 20 January 2009 providing Community medium-term financial assistance for Latvia (Decision 2009, 290/EC) Article 2(1): 'The assistance shall be managed by the Commission.'

⁴⁸ Initial discussions from the member state take place with these two EU institutions; the Commission defines the conditionality in consultation with the ECB leading to a Memorandum of Understanding of those conditions concluded with the member state receiving the financial assistance. Compliance with the conditions laid down, and hence the release of further instalments, are to be verified by the Commission to whom the member state shall provide all the necessary information and full co-operation. The regulation requires the Commission, again in consultation with the ECB, to re-examine the general economic policy conditions at least every six months. Changes to those conditions and the corresponding revised adjustment programme will be made by a new Council Implementing Decision acting by qualified majority on a proposal from the Commission.

⁴⁹ For Greece see Art. 2(1)(a) EFSF; for Cyprus see Arts. 5(6)(g), 13(4) and 13(7) ESM. Note that while in the EFSF the EU institutions act on behalf of the euro-area states, in the ESM the Board of Governors mandates MoU negotiation, signature and monitoring by the Commission but itself approves the MoU.

⁵⁰ See also S. Peers, 'Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework', 9 *EuConst* (2013) p. 37.

⁵¹ It would also lead to the surely nonsensical outcome that such an interpretation would exclude Charter review of legislative acts: thanks to Thomas Beukers for this observation.

ter's applicability with regard to actions of Union institutions rather than member state action makes sense as in the former case, unlike the latter, concerns of protecting national autonomy from EU overreach do not arise.

Let me summarise my arguments. All of the bailout measures, other than those for Greece and Cyprus, have an exclusive⁵² or predominant⁵³ basis in EU law. A series of links – complex but clear – between EU sources and international sources in the cases of Greece and Cyprus make a number of arguments available that a parallel EU law source containing loan conditions also applied to the member state in question.⁵⁴ Moreover, in relation to Greece and Cyprus, the *Pringle* judgment stresses that intergovernmental action by EU member states, especially in bailout agreements directly contiguous to core EU objectives, should comply with EU law commitments. This argument works especially well with the social *acquis* but not with the EU Charter because of inbuilt limits on its sphere of application to member states. Finally all bailouts, including those of Greece and Cyprus, entail the involvement of EU institutions and this is highly relevant for application of the EU Charter.

DO THE BAILOUT MEASURES CREATE LEGAL OBLIGATIONS?

The *legal* quality of loan conditionality is questioned in various ways.⁵⁵ It is suggested that the *law* element is not established: the loan conditions are non-law or not legally binding. One argument focuses on member states *requesting* loans and *agreeing* loan conditions to question whether such conditions can create legal effects. A second argues that because loan conditions are typically found in MoUs they are not legally binding. A third is that loan conditionality leaves too much discretion to member states to provide challengeable legal instructions.

Requesting and agreeing: an obstacle to their legal effect?

What of arguments that the bailout states *request* funding and *agree* to the loan conditions? Does this deprive the loan conditions of legal effect? In essence this is

⁵²The three non-eurozone bailouts.

⁵³Ireland and Portugal.

⁵⁴This has the effect that although the international bailout source is not directly challengeable under EU law, it provides for an indirect challenge via an EU law source which repeats the loan conditions.

⁵⁵The basis for this assertion of non-legality is rarely fully developed by institutional actors or academic commentary (*see e.g.* Commission, *supra* n. 10) so this analysis reconstructs in the best possible light all the possible reasons for this assertion.

an argument about whether the potentially *contractual* characterisation of the loan conditions removes them from review under the EU (Social) Constitution.⁵⁶

It is indeed the case that acts have been found unreviewable under Article 263 TFEU where the Court found the challenged act to be in the nature of a contract rather than an EU use of its public authority in a legislative or administrative act. At the same time, it is equally evident that member states *requesting* EU funds and proposing initiatives linked to those funds which are approved by the Commission is a typical EU law activity in the context of the structural funds⁵⁷; only in truly exceptional aspects have Commission acts in respect of those funds been found non-reviewable.⁵⁸ So it is clearly not the case that a member state's request of funds or agreement of objectives related to release or indeed suspension of payments of those funds *per se* places the EU acts outside the category of legal acts subject to EU validity review. What then remains is to locate the loan conditions in sovereign debt assistance in this contractual/legislative framework of analysis.

The situations where the Court determined a contractual rather than legislative/administrative categorisation concern the Commission clearly entering into contractual arrangements, generally following tendering processes, to for instance deliver an agreed number of fruit juices and jams to ex-Soviet states.⁵⁹ It is a public authority making private law contracts. When the Commission took a decision creating a contractual dispute, the contractor tried to bring an annulment action rather than an action under the contract. In most cases, the contractual rather than public prerogative nature of the Commission's activity is beyond dispute.

⁵⁶For more general consideration of governance by contracts in post-crisis EU EMU, though not focusing on its EU legal consequences, see K.A. Armstrong, 'Differentiated Economic Governance and the Reshaping of Dominion Law', in M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart 2014) at p. 77-78.

⁵⁷For example, in the current Structural Funds Regulation (Reg. 1303/2013 of 17 Dec. 2013) each member state draws up an *Agreement* based on the criteria in the Reg. (Art. 15). These are then *approved* by Commission Decision and any subsequent member state amendments to matters covered by the agreement require approval in a new Commission Decision (Art. 16). The Commission can also request amendments to agreements (to comply with euro-crisis law) and failure to adequately react by the member state can lead to suspension of payments (Art. 23).

⁵⁸An excellent example is C-301/03 *Italy v. Commission* [2005] ECR I-10217 with a very thoughtful Opinion by A-G Jacobs. This case concerned a challenge to Commission meetings and letters concerning a small part of the Structural Fund programming expressly in full control of the member states. The Commission documents were expressly stated to be non-binding, the Commission was given no role in this part of the programming to impose binding requirements and the letters departed from the dates required by the Structural Fund Regulations: no EU legal act was found to exist.

⁵⁹T-186/96 *MAAS v. Commission*; for further examples see the list in K. Lenaerts et al., *EU Procedural Law* (OUP 2014), para. 7.15.

In some cases,⁶⁰ the Court expressly distinguished the contractual arrangements, where the financing was only loosely linked to a broadly framed Regulation,⁶¹ from those under the Structural Funds which, by contrast, are closely based on the provisions of a Community rule under what is now Article 288 TFEU (the provision identifying the legislative acts of Regulation, Directive and Decision in EU law).

The sovereign loan assistance agreements between the EU and its member states resemble much more closely the Structural Funds in their legal organisation and their public regulatory goals. Agreement on loan conditionality is an EU-authored⁶² condition precedent to the first loan disbursement and further disbursements are made conditional on review of compliance with the conditions set out in the Council Decisions and MoUs. Loan conditions are closely based on the provisions of a Council Decision. These are not contracts to deliver goods or coordinate a project for the European Commission but public law agreements to achieve legislative and administrative reforms as a condition for receiving public loans.

Are MoUs, or loan conditions, legally binding?

The Greek and Cypriot bailouts pose this question most acutely because of the international law basis of their foundational instruments. While the other bailouts contain linked EU sources, the Greek and Cyprus bailouts have a much shorter and simpler chain of three sources. Greece II, for example, comprises the EFSF Framework Agreement, the EFSF-Greece Financial Assistance Facility Agreement and the evolving MoU.⁶³ Hence, the loan conditionality, setting out the social changes accompanying loan instalments, is found only in the MoUs which are not directly connected to any source other than the international loan agreement. This

⁶⁰T-314/03 and T-378/03 *Musée Grévin SA v. Commission* [2004] ECR II-1421 concerning contractual arrangements with national banks to administer money to support joint ventures between Community and Eastern European states post-1989.

⁶¹In *Musée Grévin* the PHARE programme based on Reg. 3906/89 'merely sets out the general conditions for Community aid [...] in particular the areas in which the actions must be undertaken and the form of that aid. On the other hand, the regulation does not lay down any of the general or specific procedures according to which each individual action is financed' (para. 68).

⁶²For Greece, until the two-pack is used in relation to its bailout, the alternative formulation 'internationally' should also be read in. Clearly, in so far as this is the case, it will not be reviewable under EU law. I leave aside here arguments related to the Excessive Deficit Procedure's sources: on this *supra* n. 31-36 and accompanying text.

⁶³Cyprus also has three steps: the ESM Treaty, the ESM-Cyprus Financial Assistance Facility Agreement and the MoU. Though note the application of the two-pack to Cyprus, discussed *supra* at text accompanying n. 37-42.

makes the legal status of the MoUs crucial for these two bailout states, especially Greece.

At the same time, the legal status of MoUs as international agreements is well-established as *non-binding*. Aust, in his extensive analysis of MoUs, stresses the main reason states use them is when they choose not to create binding legal commitments. Because states are entirely free to choose to enter, or not to enter, into binding agreements with other states an absence of intention to create binding obligations results in an absence of enforceable commitments between the parties. MoU is the international shorthand for such agreements which are also described as ‘political agreements’, ‘gentleman’s agreements’, non-legally binding agreements, non-binding agreements, *de facto* agreements, non-legal agreements.⁶⁴ Here then is the central source of doubts about the binding quality of MoUs and, by extrapolation, of the social conditions imposed to obtain loans.

Again, disaggregating the bailouts and looking at their legal structure more carefully makes this claim much more narrowly circumscribed in the EU bailout context. Although each bailout has MoUs, that does not mean the legal status of MoUs is the same in EU bailouts and international euro-area bailouts. That is a legal issue to be assessed, not assumed.

In making that assessment, the well-established stance developed by the Court of Justice in considering whether a given measure can be reviewed under EU law should be underlined: ‘An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.’⁶⁵

Surveying the case-law, Klabbers contrasts the international law presumptions with those in EU law: ‘It can easily be seen that the [international law] presumption that “agreements are not legally binding, unless the opposite can clearly be shown”, was not adopted by the Court of Justice [...] It could well be argued, then, that what the Court in effect did, amounted to a reversal of the presumption.’⁶⁶

EU bailouts and MoUs

In EU-based bailouts loan conditionality is not contained only in the MoUs but in entirely standard EU sources too, Council Decisions and Council Implementing Decisions. The Romanian bailout, for instance, is based on Decisions adopted under Regulation 332/2002, which fleshes out Article 143 TFEU. The Decision setting out loan conditions provides that ‘the Commission shall agree with the

⁶⁴ A. Aust, *Modern Treaty Law and Practice*, 3rd edn (CUP 2013), p. 17-23 and chap. 3.

⁶⁵ Case 22/70 *Commission v. Council (ERTA)* ECR [1971] 263 at [42].

⁶⁶ J. Klabbers, ‘Informal Instruments before the European Court of Justice’, *CMLRev* (1994). See also the interesting analysis of Joanne Scott on the status of post-legislative guidance in EU law: ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’, 48 *CMLRev* (2011) p. 329.

authorities of Romania [...] the specific economic policy conditions as laid down in Article 3(5). Those conditions shall be laid down in a Memorandum of Understanding [...].’ Article 3(5) of the Decision then lays down the economic policy conditions which can further be specified in MoUs. Subsequent Decisions and Supplemental MoUs adapt the conditions.⁶⁷ The original Romanian MoU of 22 June 2009 was accordingly amended by four Supplementary MoUs during the disbursement period.

Of course, pointing to a foundational EU law source (Article 143 TFEU, the EFSM) does not suffice to banish questions about the ‘law’ status of loan conditions in EU bailouts, especially when they are primarily contained in documents called MoUs. But nor does pointing to the non-law status of MoUs in international law settle the question of their status as an *EU law source*. Instead, the legal status of social loan conditions in EU bailouts can usefully be evaluated by dividing them into three groups: those wholly contained in EU Decisions, those partly contained in an EU Decision and partly in an MoU and those wholly contained in MoUs.

Can a social loan condition wholly contained in an EU Decision and repeated in an MoU be challenged under EU law? The original Portuguese Council Implementing Decision, for instance, required measures to be taken ‘to address weaknesses in the current wage bargaining schemes, including legislation to redefine the criteria and modalities of the extension of collective agreements and to facilitate firm-level agreements’ while the amending CID of 2 March 2012 amends this to say that until such measures are taken ‘the application of extensions shall be suspended’.⁶⁸ This is straightforwardly a standard EU *law* measure open to challenge on all relevant EU social constitution grounds via the standard EU avenues, discussed in the next section.

What if the social loan instruction falls into our second group so that it is partly contained in an EU law source and partly in an MoU? This is perhaps the most typical case in the EFSM/EFSF bailouts.⁶⁹ Assuming for the moment that

⁶⁷ E.g. Council Decision of 16 March 2010 amending Decision 2009/459/EC providing Community medium-term financial assistance for Romania, OJ L83/19, 30 March 2010.

⁶⁸ CID of 30 May 2011 on granting Union financial assistance to Portugal (2011/344/EU, OJ L 159, 17 June 2011, p. 88). This was amended by three CIDs in 2011, four further CIDs in 2012 and again in 2013. CID of 29 March 2012 amending Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal (2012/224/EU, OJ L 115, 27 April 2012, p. 21).

⁶⁹ See e.g. the original Portugal CID which provides in Art. 3(5)(j) that ‘Regulations on overtime pay shall be eased and increased flexibility of working-time arrangements introduced in line with the Memorandum of Understanding’ or the evolution of the Portuguese CID and MoUs on the issue of severance pay: see the evolution from the original CID which states that ‘the system of severance payments shall be brought in line with practices in other EU Member States, based on the specification in the MoU’ (Art. 3(5)(i)) in the subsequent CIDs of March 2012, July 2012, June and November 2013).

the MoU is not considered to be law, what relationship will the MoU have with the EU Council Implementing Decision? Going on established case-law there are strong signals that it could be read into the EU source. Atypical acts such as Declarations of the Council (and Commission) adopted when a particular legislative act is adopted, especially when referenced in that EU legislative act, can be used to interpret it.⁷⁰ An alternative is that both the EU law source and the MoU can be defined as legally binding acts.

This is especially important when the challenged social loan condition is contained wholly in the MoU, our final possibility.⁷¹ The Romanian preliminary references on the Charter's application to bailout measures provide an illustration. These challenged a 25% pay cut for public servants introduced by a law of 30 June 2010 and an emergency decree of 30 August 2010. This can be linked to the 2nd Supplementary MoU of 2 August 2010 which required, before disbursement of the third tranche of the loan:

'Rigorous implementation of further expenditure reducing measures, including:

– *A 25% reduction in the public sector wages, bonuses and other compensation paid to all public sector employees from 1 July onwards, while providing a minimum wage of 600 RON.*

An MoU is certainly an atypical act in the EU legal order. It is not one of those acts listed in the nomenclature of legal acts provided for by Articles 288-292 TFEU. Yet not being listed does not tell us whether it is legally binding or, even if non-binding, an act with legal effects. Many atypical acts have been found by the Court to be legally binding acts⁷²: Codes of Conduct, Commission Communications, internal Commission instructions, agreements short of a formal instrument, Coun-

⁷⁰ Klabbers, *supra* n. 66, at p. 1009 gives the examples of *ex parte Antonissen* (C-292/89 [1991] ECR I-745) and *Egle* (C-310/90 [1992] ECR I-177).

⁷¹ This is more likely for the three non-eurozone bailouts as the amending Decisions say little to nothing about loan conditions leaving this to the MoUs; in the EFSM bailouts (Ireland, Portugal) the Council Implementing Decisions typically set out in quite some detail the loan conditions, making them more likely to fall into one of the first two categories.

⁷² It does not work to argue that these cases all concerned acts adopted by EU institutions whereas MoUs also involve an international organisation, the IMF, thereby raising complex side-issues of the continuing validity of such MoUs in international law. This is not the case because in fact separate Memoranda are agreed by the member state with the IMF, on the one hand, and the EU institutions, on the other. Indeed the Memoranda are separate documents with different names and are printed separately at the back of the *Economic Adjustment Programme Occasional Papers* tracking each country's bailout. The EU Memorandum is the MoU on Specific Economic Policy Conditionality whilst the IMF Memorandum is the Memorandum of Economic and Financial Policies.

cil Conclusions and Budget Allocation Rules of the European Parliament.⁷³ The language used in a source may help identify it as a legal source: the MoUs refer to their ‘entry into force’ and ‘compliance’ with their conditions.⁷⁴ Moreover the Court has a clear position that the ‘choice of form cannot alter the nature of a measure’.⁷⁵

Even if the Court finds EU-based MoUs not to be legally binding, *expressly non-binding* EU measures, such as Recommendations, have been found by the Court to have *legal effects* ‘where they are designed to supplement binding Community provisions’.⁷⁶ There is a compelling argument, based on the wording of the Council Decisions and Implementing Decisions and the MoUs, that the latter supplement and specify the former which are certainly legally binding.

In sum, bailouts other than those to Greece and Cyprus do not raise the issue of the legal status of MoUs in the way it arises in international law. There is a strong argument that the loan conditions, for the reasons given above, are straightforwardly binding in all these other bailouts.

International euro-area bailouts and MoUs

But what of Greece and Cyprus? Although it is useful and important to show that loan conditions are legally binding in five out of the seven EU member states which have so far had bailouts, Greece and Cyprus are important exceptions on a number of counts. The two Greek bailouts have undoubtedly produced the most extensive social rights’ challenges of any of the bailouts: not to be able to challenge these under the EU social constitution would accordingly create a highly significant zone of its non-application. And any future Eurozone bailouts which occur will use the same legal mechanism as the Cyprus bailout – the ESM – so that the legal status of the loan conditionality contained in MoUs is of great significance going forward.

In part, these worries are answered by the changed legal situation created by the Two-Pack analysed in the previous section. Rather than relying on the MoU

⁷³ Codes of Conduct (C-303/90 *France v. Commission* [1991] ECR I-5315); Communications (C-325/91 *France v. Commission* [1993] ECR I-3283, C-57/95 *France v. Commission* [1997] ECR I-1627); Internal Commission instructions (C-366/88 *France v. Commission* [1990] ECR I-3571); agreements short of a formal instrument (Case 22/70 *Commission v. Council* (ERTA) [1971] ECR 263); Council Conclusions (C-27/04 *Commission v. Council* [2004] ECR I-6649 (excessive deficit abeyance)); Budget Allocation Rules of EP (Case 294/83 ‘*Les Verts*’ v. EP ECR [1986] 1339).

⁷⁴ The language used is stressed as a relevant factor by A-G Tesouro who delivered Opinions in almost all of these cases: see e.g. his Opinion in C-57/95 [16]. See C-333/90 at [14] in which the Commission unsuccessfully argued a Code of Conduct was not a legal act because the expressions ‘implementing guide’, ‘negotiated consensus’ and ‘gentleman’s agreement’ used to describe the Code confirm that it is not intended to have new binding legal effects.

⁷⁵ Case 322/88 *Grimaldi* [1989] ECR 4407 [14].

⁷⁶ *Grimaldi*, *ibid.*, [18].

as the basis for a legal challenge future challenges can be made on the basis of the EU-law based Macro-Economic Adjustment Programme.⁷⁷ Yet this does not help for all those changes made prior to creation of a Macro-economic Adjustment Programme, a very significant and indeed ongoing period for Greece. Again, the argument outlined above based on the excessive deficit decision can be used with special force in relation to Greece.⁷⁸ Moreover, it is worth arguing that the MoU, even if it does not create direct legal obligations, creates legitimate expectations between the parties so that Greece could contest non-payment of a loan tranche on the basis of allegations it contests that loan conditions have not been fulfilled.⁷⁹

Content of loan conditions: discretion to the member states?

The argument here goes that the looser the link between the bailout source and the national act, the greater the discretionary space left to the state and the weaker the claim that the challenged national action was implementing the bailout source. Again closer examination of different bailout source possibilities against existing EU law radically weakens the strength of this argument.

One possibility is generality. For instance, Cyprus is asked to achieve ‘control of the growth of health expenditure in order to strengthen the sustainability of the funding structure and the efficiency of health-care provision’.⁸⁰ Were loan conditionality typically to be framed at this level of generality, it would be difficult to sustain that the challenged national action was implementing Union law. Nonetheless, even measures framed in so general a fashion could be challenged as cumulatively amounting to a breach of the bundle of constitutional values, objectives and general clauses which form a central component of the EU social constitution. Take centrally the post-Lisbon commitment in Article 9 TFEU that: ‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.’

The critical feature of these ‘mainstreaming’ clauses modelled on the first of them to be introduced, the gender equality mainstreaming clause in the Amsterdam Treaty, is that they apply to all the EU institutions in all their policies and activities. Moreover, they are certainly constructed as binding legal norms.⁸¹

⁷⁷ See *supra* n. 37-42 and accompanying text.

⁷⁸ See *supra* n. 31-36 and accompanying text.

⁷⁹ Aust, *supra* n. 64 at p. 49, 54; Fischer-Lescano, *supra* n. 13 at p. 32-33.

⁸⁰ Art. 2(9)(b) Council Decision of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth.

⁸¹ See J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010), p. 311 stating that Art. 9 TFEU, ‘is a legally binding clause for the institutions and, as such, its respect by the

A different possibility is a specific EU measure which leaves discretion to the member state. It is clearly established that this does not have the effect of excluding that EU measure from EU legality review. Moreover, the Court has found that a Union act could not in itself respect fundamental rights if it required, or expressly or implicitly authorised, the member states to adopt legislation not respecting those rights.⁸²

Furthermore, in considering whether *national action*, such as provisions in a Portuguese budget law cutting public sector pay or dismissal protection, is an implementation of EU law, it is important to bear in mind the very broad set of national measures the Court has found in other contexts to constitute such an implementation for the purposes of EUCFR application. A significant recent example is *Fransson*.⁸³ There are two key components to this decision. The Court makes clear that the Charter applies whenever ‘national legislation falls within the scope of EU law’ rather than the potentially narrower formulation of ‘implementing EU law’. Secondly, what falls within the scope of EU law is generously defined; there is no need for the national measure to be adopted to transpose an EU measure. In the dispute, it sufficed that the Swedish tax offences regime being challenged by Mr Fransson connected in part to breaches of his obligations to declare VAT which was sufficiently linked to a provision in a VAT Directive that ‘Member States may impose other obligations which they deem necessary for the correct allocation of the tax and for the prevention of evasion.’

In any event, loan conditionality in the bailouts is not typically so broadly framed when the full set of relevant sources is considered. Many are astonishingly precise and follow minutely national developments over time.

Again, let me summarise. This second part of my analysis has endeavoured to clearly demonstrate how doubts about the legal nature of bailout measures are almost entirely dispelled by closer more careful analysis. I have shown doubts based on the agreed nature of the loan conditions to be without foundation, reduced to

EU institutions is subject to the control of the Court of Justice’; C. Barnard, ‘The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interests’, in S. de Vries et al. (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013), p. 37 at 56; P. Vielle, ‘How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming’, in N. Bruun et al. (eds.), *The Lisbon Treaty and Social Europe* (ETUI/Hart 2012), p. 105 at 121: ‘The [horizontal social] clause is binding on all the European institutions, which means, of course, on the Commission and the Council, but also on the European Parliament and the Court of Justice. It thereby serves to place several emblematic social policy areas safely beyond the reach of economic law.’ For M. Ferrera, assessing the Lisbon Treaty’s social component, Art. 9 is ‘the most important innovation’: ‘Modest Beginnings, Timid Progresses: What’s Next for Social Europe?’, in B. Cantillon et al. (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2011), p. 29.

⁸² C-540/03 *EP v. Council (Family Re-Unification)* [2006] ECR I-5679 [22]-[23].

⁸³ C-617/10 *Fransson*, Grand Chamber judgment of 26 Feb. 2013.

a potentially resolvable Greek-only problem doubts about the binding nature of loan conditions, especially MoUs, and rejected doubts based on the extent and relevance of member state discretion regarding loan conditionality. In short, neither of the dominant doubts about the applicability of the EU social constitution to social bailout measures stands up to sustained and careful scrutiny.

Yet this is not the end of the story as genuine obstacles, of a real-*politik* as well as legal-procedural nature, become apparent when we look at how the avenues to challenge the legality of EU measures play out in relation to bailout measures.

AVENUES FOR CHALLENGE⁸⁴

We have placed these after the doubts in order to clarify and better emphasise that dominant doubts about the applicability of the EU (Social) Constitution to bailout measures are misplaced. The real difficulties lie instead in the avenues for challenge offered by EU law as interpreted by the EU Courts.

We will show that, as EU law stands, the annulment avenue is unavailable. Hence the only avenue for challenging bailout measures compatibility with the EU social constitution is the preliminary reference avenue. Yet, to date, the preliminary reference avenue has not worked well for reasons we explore. Unions, affected workers and civil society associations need to go to their national courts with well-crafted arguments showing clearly the applicability of the respective components of the EU social constitution and the incompatibility of measures adopted with what the EU social constitution requires.

Such litigation before the EU Courts has important functions not fulfilled by findings by non-EU human rights' courts and bodies: *EU accountability* to those whose lives are dramatically affected by these measures, judicial assessment of the *EU legality* of the social bailout measures, and the integrity and evolution of the *EU Constitution* post-crisis, especially its social components.

Annulment action: article 263 TFEU

This is the primary avenue for challenging EU measures as breaching the EU social constitution. Yet it is nigh on impossible to conceive of circumstances in which the only likely challengers of bailout measures, civil society associations, trade unions and affected individuals in bailout states, would meet the procedural requirements for mounting such a challenge. The EU annulment action makes it easy for states and EU institutions to mount such challenges – as privileged applicants they need only meet a two-month time-limit for instituting proceedings.

⁸⁴ For a useful and up-to-date general overview see K. Lenaerts et al., *EU Procedural Law* (OUP 2014), especially chaps. 7 and 10.

However, it is not easy to imagine either a member state or an EU institution taking an annulment action against bailout measures; this is what makes the European Parliament's position on the measures, noted above,⁸⁵ especially important as it is perhaps the only EU institution which could conceivably consider such a challenge.

Everyone else (the non-privileged applicants) needs to be able to establish direct and individual concern: 'Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them' (Article 263(4) TFEU). The Greek unions' annulment action against the excessive deficit decision linked to the Greek bailout⁸⁶ demonstrates perfectly how the direct concern limb of these requirements operates to prevent annulment actions concerning bailout measures. ADEDY, the Greek civil servants' confederation, challenged EU excessive deficit decisions addressed to Greece from 10 May onwards as invalid for their negative effects on the income and working conditions of Greek civil servants.⁸⁷ Both the union and its leaders, in their quality as individual civil servants, took the action. They challenged certain specific provisions in the excessive deficit Decisions as well as the Decisions as a whole. The orders focus entirely on the conditions under which natural and legal persons are entitled to bring annulment actions.⁸⁸ That is to say, there is no discussion of the dominant doubts: the legal or EU nature of the acts attacked.

Although the case-law applied is as well-established as it is controversial, the factors applied by the Court to negate the union's 'direct concern' bear emphasis, especially as they bring up some seemingly similar issues to the doubts discussed above. Two cumulative criteria must be met for individuals to establish direct concern: the measure must directly affect the legal (rather than factual) situation of the person concerned and it must also leave no discretion in its application to the person to whom it is addressed (here Greece) so that its implementation is purely automatic and results from the Union rules without the application of other intermediate rules.

The Court first considered whether the applicants, the union and individual civil servants, were directly concerned by a provision stating that 'Greece shall adopt [...] before the end of June 2010 [...] a reduction of the Easter, summer and Christmas bonuses paid to civil servants with the aim of saving EUR 1500 million for a full year.' This failed both limbs of the direct concern requirement as although establishing a clear objective for Greece to attain, it left the details of

⁸⁵ See *supra* n. 8-9 and accompanying text.

⁸⁶ *Supra* n. 32 and accompanying text.

⁸⁷ T-541/10 and T-215/11, *ADEDY and others v. Council supported by the Commission*, Orders of the General Court of 27 Nov. 2012.

⁸⁸ *ADEDY* [59].

its implementation, such as the categories of civil servants to whom it would apply, to be determined nationally. Hence, it neither produced direct legal effects on the union or individual civil servants nor left discretion to Greece. Similar arguments were used to deny that the applicants were directly concerned by requirements to dramatically modify the Greek pension system and to replace only 20% of retiring employees in the public sector.⁸⁹ The latter measure, in so far as it would make the working conditions of civil servants worse, affected only their factual and not their legal position.⁹⁰ A broader evaluation of the measures as a whole failed on the same grounds.

It is also worth noting that the Court refused to adjust its direct concern jurisprudence to proceed to examine the substance on the basis of arguments by the Greek union that the measures challenged raised issues so grave that they risked undermining the confidence of EU citizens in EU institutions. For the Court of Justice, these measures called for business as usual as far as the Court's admissibility criteria for direct actions by individuals were concerned.⁹¹

When challenged about the absence of effective legal protection, the Court noted that the Greek union or individually affected civil servants could challenge the measures by raising a validity challenge to the EU law measures in the course of a challenge to their national implementation before a Greek court which could then make a validity reference to the Court of Justice.⁹² This means that the preliminary reference avenue, considered below, is in practice the only avenue of challenge for bailouts for non-privileged applicants. Even if it were possible to find a loan condition surmounting the 'direct concern' hurdle, the requirement that unions or workers also show individual concern would prove fatal.⁹³

⁸⁹ *ADEDY* [74-76], [77-78].

⁹⁰ On this issue, and more generally on direct concern, see C-386/96 P *Dreyfus v. Commission* [1998] ECR I-2309 concerning emergency loan assistance given by the EC to the former Soviet Union to finance contracts to supply food and medical supply imports. The applicant had signed a wheat supply contract with the Russian authority, not the Commission, and the Court of First Instance had on that basis denied direct concern. This was overturned by the Court of Justice which found direct concern. The case is of interest for its findings on discretion in the context of an EU loan agreement with an MoU. On direct concern see [45]. On the loan agreement/MoU see [48].

⁹¹ *ADEDY* [96]. Contrast with its decision in *Dreyfus*, *supra* n. 90 where the Court used broader contextual information to read the legal sources [50] 'That detail is corroborated by the socio-economic context in which the supply contract was concluded: as stated in the third and fourth recitals in the preamble to Council Decision 91/658, the economic and financial situation of the recipient republic was critical, and the food and medical situation was deteriorating. In those circumstances it was legitimate to take the view that the supply contract was entered into only subject to the obligations assumed by the Community, in its capacity as lender, in regard to the [Russian agent], once the commercial contracts had been recognised as being in conformity with Community rules.'

⁹² *ADEDY* [89]-[90].

⁹³ C-321/95P *Greenpeace* [1998] ECR I-1651 where the Court of Justice famously refused to adjust its restrictive *Plaumann* (Case 25/62, [1963] ECR 95) 'closed class' test for individual con-

Preliminary references: article 267 TFEU

Despite the Court's reliance on preliminary references to supply effective judicial protection in *ADEDY*, there are three major problems with relying on preliminary references as the 'royal road' for challenging compliance with the EU social constitution by bailout measures.

The first is that the doubts, about EU law provenance and 'legal' obligations, combined with a series of marked accessibility problems with these sources,⁹⁴ have a demonstrable chilling effect on the making of preliminary references on validity.⁹⁵ Hence, the national constitutional challenges to bailout measures, most famously those before the Portuguese Constitutional Court,⁹⁶ could on a different reading and reconstruction of the EU sources be seen as requiring validity challenges to the EU sources rather than constitutional review of the national measures taken to obtain EU loans.

The second is that those same doubts and accessibility problems lead to references made often being poorly framed. This is evident from the Court of Justice's preliminary rulings in fundamental rights' challenges to bailout measures from Romanian and Portuguese courts.⁹⁷ All three Romanian cases concerned a challenge to two Romanian laws from 2010 cutting public sector pay. Public sector employees and their representatives claimed these pay cuts breached fundamental rights protected under the EU Charter of Fundamental Rights, centrally the right to property in Article 17 and the rights to equality and non-discrimination in Articles 20 and 21 EUCFR. In *Sindicato dos Bancários do Norte* the Portuguese Court asked whether a public sector pay cut of 10% introduced from 1 January 2011 was compatible with the EU principle of non-discrimination, with the right to collective bargaining in Article 28 EUCFR and with the guarantee in Article 31(1) EUCFR to protect a worker's dignity. None of the referring courts referred to EU bail-out sources let alone linked them closely to the national measures taken.

The third is that the Court has to date taken an ungenerous approach to admissibility in considering preliminary references on bailouts' compatibility with the EU social constitution. The Court of Justice found itself without competence to

cern (whereby the applicant must be able to demonstrate that the measures affect it in a manner which differentiates the applicant from all other persons) in order to allow challenges for associations protecting the environment; associations protecting workers face the same obstacle.

⁹⁴ See Kilpatrick, *supra* n. 14.

⁹⁵ Joanne Scott notes parallel problems in her analysis of post-legislative guidance: *supra* n. 66 at 345-346.

⁹⁶ See e.g. Ruling No. 353/12 of 5 July 2012 and Ruling No. 187/13 of 5 April 2013. See further the analyses of Portugal in Kilpatrick and De Witte, *supra* n. 22.

⁹⁷ All referenced, *supra* n. 15.

rule on all these preliminary references. It relied on Article 51(1) EUCFR providing that the Charter applies only when member states are 'implementing EU law' and Article 6(1) TEU under which the Charter neither creates new EU competences nor modifies existing ones. As the referring courts provided no elements from which it could be considered that the contested national provision implemented EU law, the Court had no competence to decide the reference. These references were halted long before reaching questions of substance such as the doubts considered earlier. The Court of Justice failed to grant them the treatment it has applied in comparable references where it offered a creative reformulation of the questions referred in order to make them admissible.⁹⁸

Nonetheless these problems, unlike those relating to direct challenges, are highly amenable to carefully prepared strategic litigation. References fully setting out the EU legal sources and how they are implemented by national law and which squarely raise matters covered by the EU social constitution, will reduce the margin of manoeuvre for the Court of Justice to avoid engaging in questions of substance. The degree of discretion the EU measure allows will help determine whether it is better to make a preliminary reference based on its validity or on its interpretation.

The potential strategic value of preliminary references on the interpretation of EU law (rather than its validity) should be underlined. This is of special interest where a clear EU social obligation conflicts with an EU/international bailout demand. A preliminary reference on interpretation can ask the Court how to resolve the presence of contradictory EU/bailout norms, one requiring social protection, the other demanding the opposite. This is exemplified by the legal treatment of young workers in Greece although other important examples could also be developed. Article 3 of the EU Young Persons at Work Directive,⁹⁹ largely reproduced as a fundamental right in Article 32(2) EU Charter of Fundamental Rights, provides that:

Member States shall ensure in general that employers guarantee that young people have working conditions which suit their age.

⁹⁸ For example C-396/11 *Radu*, judgment of the Court of 29 Jan. 2013: this concerned a reference from a Romanian court on the European Arrest Warrant. Although the reference is poorly framed, mingling the EUCFR and the European Convention of Human Rights in unclear questions, the Court rewrites the questions on the basis of its settled case-law that references concerning EU law 'enjoy a presumption of relevance' (para. 22). For a much more generous understanding of Art. 51(1) EUCFR, see C-617/10 *Fransson*, judgment of the Court of 26 Feb. 2013. For criticism of the Court's approach, see Kilpatrick, *supra* n. 14.

⁹⁹ Directive 94/33/EC on the protection of young people at work (OJ L 216, 20 Aug. 1994, p. 12-20).

They shall ensure that young people are protected against economic exploitation and against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardize their education.

The EU Working-Time Directive requires all workers covered to receive four weeks' annual paid holidays.¹⁰⁰

A Greek law of July 2010 introduced 'special apprenticeship contracts' for individuals aged 15-18 whereby they do not receive normal labour law protection outside the area of health and safety and are also almost entirely excluded from social coverage in relation to the risk of illness.¹⁰¹ This includes exclusion from annual paid holiday entitlement. A preliminary reference concerning a challenge to the July 2010 law on the basis that it fails to comply with one set of EU obligations (the Young Workers' Directive, the Working-Time Directive) but was introduced to comply with another set (the loan conditions)¹⁰² would create an important test-case for the co-existence of contradictory social norms in the EU legal order. Even if the challenged loan norms are not found to be EU norms, a preliminary question on interpretation can obviously be made on the compatibility of the Greek law and the international loan requirements with these EU law requirements.

CONCLUSION – A CALL FOR RECOGNITION OF THE EU LAW NATURE OF BAILOUTS AND THE COSTS OF SUCH NON-RECOGNITION

This analysis has had three key goals. One is to tackle head-on the view held by many, including centrally the European Commission and the European Parliament as well as it seems by many national courts, that bailout norms are immune to challenge under the EU social constitution because they are not EU law. The second has been to demonstrate the limits and possibilities of the avenues of challenge under EU law for social loan conditions. The third, in conclusion, is to assess

¹⁰⁰ Directive 2003/88, Art. 7(1): 'Member States shall take the measures necessary to ensure that every worker is entitled to annual paid leave of at least four weeks [...].'

¹⁰¹ This was found to breach a series of provisions (entitlement of under-18s to three weeks' paid holiday in Art. 7§7, right to vocational training in Art. 10§2, right to social security in Art. 12§2, right to fair and non-age discriminatory remuneration in Art. 4§1) in the 1961 European Social Charter by the European Committee of Social Rights in Complaint 66/2011 *GENOP-DEI and ADEDY v. Greece*, Decision of 23 May 2012. The applicants are two unions representing national electricity company workers and civil servants.

¹⁰² The first Greek MoU requires the introduction of sub-minimum wages for young people. Other measures may have been agreed: the Letter of Intent of July 2010 states (para. 20), 'Labour market reform is almost completed. Substantive legislative changes were introduced in July easing employment protection legislation [...].'

the implications of the EU institutions being central promoters of the ‘bailouts are not EU law’ view.

A highly unusual occurrence, it calls for a clear, prompt and sufficiently publicised EU institutional clarification that challenges to the social components of bailout measures are possible under EU law. The alternative is to perpetuate the erroneous view that bailout measures are somehow ‘outside’ or ‘beyond’ EU law. The costs of such a stance are not insignificant. My particular concern is to ensure proper EU accountability for binding measures adopted by the EU with significant and negative social impacts. But there are evidently more diffuse costs in propagating inaccurate views on the applicability of EU law. Where measures similar to the bailout measures in any of the respects identified in this analysis are adopted, it will be possible to argue, and difficult for the EU institutions to deny, that they are not ‘EU’ measures or not ‘legally binding’. That is to say, there are costs to the vision of EU law painstakingly constructed over the last fifty years by the Court of Justice¹⁰³ and largely accepted by the member states, including their courts, whereby the EU law nature of a measure, and its reviewability as such, is not an optional characterisation.



¹⁰³ See in particular *C-27/04 Les Verts*, *supra* n. 73 [23]: ‘It must first be emphasized [...] that the European Economic Community is a Community based on the Rule of Law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’