THE JURISPRUDENCE OF THE CRISIS: THE UNCERTAIN PLACE OF EUROPEAN LAW BETWEEN PLURALISM AND UNITY

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Abstract
The economic and financial crisis of the last years has been addressed through a wide plethora of powerful supranational legal instruments of ambiguous nature, such as the EFSF, the EFSM, the ESM, the Fiscal Compact, various Memoranda of Understanding between national and supranational institutions. It must be noted that their natural ambiguity led to an equally ambiguous jurisprudence of the crisis, in particular by national constitutional courts: it stems from the context of crisis, and it may reveal the crisis of EU law. New opportunities, however, seem to be suggested by the recent caselaw of the European Court of Justice, and are yet to be explored.

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1. Is the crisis of the Union a crisis of EU law as well?

It is no secret that the economic and financial crisis of the past years strongly affected the European Union: for some, it even casted

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doubts on its future.[1] Renowned scholars, focusing on the legal implications of the phenomenon, wrote of an «existential crisis» of the Union, and described it as a multifaceted one, affecting its «economic, financial, fiscal, macroeconomic, and political structure».[2]

On the other hand, it is also well known how law provided a fundamental contribution – actually a *structural* one – for the construction of the European Union. Classic comparative studies explained in detail this fundamental role of law both as an *agent* and as an *object* of integration in the European project.[3] From a functionalist point of view, law served as a tool to promote the political goal of integration,[4] but at the same time it served as a tool of promote a «new legal order», of different nature[5], which was the other parallel goal of the integration process. From a certain phase onwards, integration *through* law and integration *of* law were simultaneous strategies and they have been openly pursued by the Union.[6]

The paper will try to make the two aforementioned points coexist, and reflect on the following research question: in addition to the current «economic, financial, fiscal, macroeconomic, political» crisis, is the EU experiencing nowadays a kind of *legal* crisis as well as a consequence of the Eurozone crisis, namely a crisis

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[1] See on this, among the many interesting debates, the one among J. Habermas, *The Crisis of the European Union: A Response* (2013), C. Offe, *Europe Entrapped* (2015), W. Streeck, *Small-State Nostalgia? The Currency Union, Germany and Europe: A reply to Jürgen Habermas*, 21 Constellations 2 (2014).

[2] A.J. Menéndez, *The Existential Crisis of the European Union*, 14 German Law Journal 5 (2013), 453, at 454 et seq.

[3] See M. Cappelletti, J.H.H. Weiler, M. Seccombe (eds.), *Integration Through Law*, Vol. 1 (1985) and, for recent reflections, A. Vauchez, '*Integration Through Law*': *Contribution to a Socio-History of EU Political Common Sense*, EUI Working paper RSCAS no. 2008/10 and D. Augenstein (ed.), '*Integration through Law*' *Revisited. The Making of the European Polity* (2012).

[4] See the classic analysis of E. Haas, *Beyond the Nation-State: Functionalism and International Organization* (1964), and the specific reflections by G. de Búrca, *Rethinking Law in Neo-functionalist Theory*, 12 Journal of European Public Policy 2 (2005).

[5] The obvious reference is Arrêt du 5 février 1963, Van Gend en Loos / Administratie der Belastingen (26/62, Rec. 1963 p. 3), para. n. 3.

[6] See in particular C. Mac Amhlaigh, *Concepts of Law in Integration Through Law*, in D. Augenstein (ed.), '*Integration through Law*' *Revisited. The Making of the European Polity*, cit. at 3, 69.

of its powerful legal leverage, i.e. the fundamental element on which the Union founded its constitutional evolution?[7] Answering such an existential question is interesting since other concurrent crises, like the migration or the rule of law crises, are unfolding in Europe and can lead to similar dynamics.

The article will proceed as follows. It will briefly illustrate the new legal measures adopted at the supranational level to cope with the last years' economic and financial crisis, first of all the recent international treaties adopted by many EU Member States since 2010 for rationalizing the European economic governance. It will then analyse the institutional dynamics and the first episodes of judicial adjudication stemming from those measures: so called austerity measures of various nature have been, in several national legal orders, the direct consequence of the new supranational obligations, and they gave birth to a relevant case-law by national constitutional courts and by the European Court of Justice as well.

This step-by-step analysis will lead to some conclusive reflections, which have to do with the feared mutation of EU law: is EU law losing certain connatural characteristics, is EU law risking losing its identity?

2. EU law and the new Treaties for the European economic governance

From 2010 onwards the answer of EU Member States to the economic crisis resulted in some very relevant new instruments aimed at strengthening and rationalizing common economic governance. I refer, in particular, to the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM), the European Stability Mechanism (ESM), the so called Fiscal Compact, and then, in a more general sense, to the various Memoranda of Understanding signed by countries dealing with financial assistance programmes, the European Commission, the European Central Bank, the International Monetary Fund.

[7] According to the well-known theorization by J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (1999).

The legal nature of many of these instruments is ambiguous, albeit their undisputed form of international treaties.[8]

The first two instruments, the EFSF and the EFSM, were created one soon after the other, at the same meeting between Members States' ministers of 9 May 2010. The ministers first gathered as an ECOFIN Council and created the EFSM on the basis of Art. 122(2) TFEU, and therefore by using powers provided by the existing EU Treaties for financial assistance to states; some minutes later, the then seventeen ministers of the Euro-area countries gathered again as mere representatives of their states for the creation of the EFSF as an additional temporary instrument, of pure international law nature and with no adherence to EU law. The facility took the form of a private company under Luxembourgish law. Both instruments were simultaneously and cumulatively used for providing financial assistance to Ireland and Portugal (while Greece was already assisted through bilateral agreements).

The reasons for such bold cumulative solution were evident, and they represent a first phenomenology of formal estrangement from the EU law and a first trace of inherent weakness of the Union. Given the stringent limits of EU budgetary resources,[9] at the time

[8] According to C. Kilpatrick, B. de Witte, *Introduction*, in C. Kilpatrick, B. de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Paper LAW 2014/05, p. 2, «the legal sources underpinning bailouts raise complex legal doubts, both as to their EU or international law pedigree and as to the legal obligations they produce»; interesting reflections are also offered by G. Itzcovich, *Disordinamento giuridico. Crisi finanziaria e sviluppi costituzionali dell'unione economica e monetaria europea*, in 17 Diritto & Questioni pubbliche 1 (2017), who describes the legal responses to the Eurozone crisis, the relevant case law of the European Court of Justice and their constitutional impact on the Member States of the European Union «as a process of "legal disordering", or legal disintegration, blurring the separation lines between international law, EU law and Member States' constitutional law»; see also the updated works collected in M. Cremona, C. Kilpatrick (eds), *EU Legal Acts. Challenges and Transformations* (2018).

[9] Such a classic and central topic was debated already in H. Langes, *Report for the Committee of Budges on the System of Own Resources in the European Union*, European Parliament Working Documents, A3-0228/94, 1994; see for recent reflections M. Poiares Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, EUI RSCAS Policy Paper 2012/11, and M. Monti (ed.), *Future Financing of the EU. Final report and recommendations of the High Level Group on Own Resources*, December 2016, available at the website http://ec.europa.eu/budget/mff/hlgor/library/reports-communication/hlgor-report_20170104.pdf.

the Union had not the minimal operational capacity to deal with a huge sovereign debt crisis independently from the states, and the creation of an instrument drawing in parallel from national budgetary resources became necessary; moreover, the use of community budget resources requires the involvement of all EU countries, and in this case this would have meant calling them to finance an operation aimed at ensuring the stability of the Euro-zone alone (political resistance quickly arose in this respect).[10]

The ESM was created between 2011 and 2012, as a treaty between the then seventeen Eurozone countries to permanently replace the EFSF. ESM perpetuates certain natural ambiguities. It was meant to be an implementation of Art. 136 TFEU, which was amended for this reason to provide the possibility to «establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole», for «granting (…) required financial assistance (...) subject to strict conditionality»;[11] nevertheless it is not an EU law instrument, and indeed it creates a different, albeit bordering, intergovernmental organization; and actually it is no secret that Art. 136 TFEU has been reformed and the ESM was created because objections were raised (especially in German circles) on the legitimacy of 2010 financial support systems vis-à-vis the "no-bailout" rule of Art. 125 TFEU and the creation of the EFSF by a simple intergovernmental agreement with no parliamentary ratifications. Moreover, the fulfilment itself of the criterion of «exceptional occurrences beyond» the «control» of national governments provided by Art. 122(2) TFEU was questionable in the case of the beneficiary countries, since their governments had contributed to the crisis of sovereign debts.[12]

Thus, the final decision was to avoid problems of interpretation of EU primary law: it was reformed, but at the same

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[10] See B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, ARENA Working Paper 04/2013, pp. 3-4, pointing at the veto threats of some national governments.

[11] See the Decision 2011/119/EU of the European Council of 25th March 2011, acting by unanimity, following the procedure of article 48(6) and after consultation of the European Parliament, the Commission and the European Central Bank; on this, B. De Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, Swedish Institute for European Policy Studies (SIEPS) Europapolitisk Analys/European Policy Analysis, 2011.

[12] B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 6.

time a different, separate treaty was enacted. This can be read as another episode of formal estrangement from the canons of EU law. Given this particular origin, the ESM Treaty became an interesting hybrid: it is not a formal EU law source, but it borrows to a large extent from the institutional structure of the European Union, in particular by providing for specific tasks for the EU Commission and the European Central Bank.

As per the Fiscal Compact, it was meant to introduce stricter versions of the criteria already laid down by EU primary[13] and secondary law, in particular with the so-called Stability and Growth Pact.[14] It also aimed at redefining the tools for the fulfilment of those constraints. In this sense, it was adopted to set new norms which are clearly in the scope of application of EU law, since they discipline material aspects which had been already treated (and are surely treatable) through EU law acts.[15] However, the final choice, here again, was to use a separate international treaty, and this is an even more obvious move of formal estrangement from EU law: in particular, this choice was presented as a strategic move to intensify the perception by Member States of the importance of the obligations provided in terms of constitutional constraints to a balanced budget, and to overcome the difficulties of an EU treaties amendment procedure which was initially proposed.[16] As well known, Article 16 of the Fiscal Compact foresees that «(W)ithin five years at most following the entry into force of this Treaty (…) the necessary steps shall be taken (…) with the aim of incorporating the substance of this Treaty into the legal framework of the European Union», and therefore provides for the possibility to insert its crucial content in formal EU law fabric. Still, the five-year deadline (1 January 2018) has passed, and the debate remains open: such a "constitutionalization" of the Fiscal Compact faces considerable criticism, in both political and legal terms,[17] also after the new package of the Commission of

[13] See Articles 121 e 126 of TFEU, and Protocol 12 on the excessive deficit procedure.

[14] See the Regulation by the Council (EC) 1466/97 and 1467/97.

[15] In the event of political difficulties, also through enhanced cooperation between some Member States.

[16] B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 8-9.

[17] See D. Fromage, B. De Witte, *The Treaty on Stability, Coordination and Governance: should it be incorporated in EU law?*, VerfassungsBlog, 6th November 2017,

December 2017 aiming to include the Fiscal Compact under EU law and to establish a European Monetary Fund.[18]

Several critical points on the existential compatibility of the aforementioned instruments (in particular ESM and Fiscal Compact) with EU law were raised. There have been doubts on the interference with the exercise of (exclusive) competences of the European Union; doubts for possible conflicts with specific provisions of EU primary and secondary law; criticism on the possibility of borrowing EU institutions in the decision-making processes provided by the new treaties. All in all, the new supranational measures' legitimacy was upheld by the European Court of Justice in the famous *Pringle* case of 2012,[19] in which it also insisted on the concept of *autonomy* of EU law vis-à-vis new treaties law and the *acquis communautaire*'s intangibility.[20] It must also be noted that an important role in the reform of European economic governance is also played by new EU secondary legislation, in particular the so called *six pack* of 2011[21] and the so called *two pack* of 2013.[22]

In any case, it is true that the new fundamental supranational law dealing with the economic crisis goes beyond the boundaries of proper European Union law, in the sense that it explicitly grows apart from it for functional reasons. As authoritatively stated by the Court of Justice in *Pringle*, this does not amount to a *legal* technical problem of compatibility with EU law: but the question remains open regarding the *political* convenience of such a phenomenon and

available at the website http://verfassungsblog.de/the-treaty-on-stability-coordination-and-governance-should-it-be-incorporated-in-eu-law/.

[18] See in general the Communication on further steps towards completing the Economic and Monetary Union - COM(2017) 821.

[19] Arrêt du 27 novembre 2012, Pringle (C-370/12, Publié au Recueil numérique) ECLI:EU:C:2012:756.

[20] See *ex multis* P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 Maastricht J. of Eur. and Comp. L. 1 (2013).

[21] Regulations n. 1177/2011 of 8 November 2011, n. 1173/2011, n. 1174/2011, n. 1175/2011 e n. 1176/2011 of 16 November 2011 and directive n. 2011/85/UE of 8 November 2011 amending the Stability and Growth Pact.

[22] Regulations n. 472/2013 e 473/2013 which introduced new procedures for coordination and control by supranational authorities on national budgetary procedures.

its consequences for the constitutional development of the Union, for its institutional balance.[23]

In this sense it can be argued that the new described trend of formal estrangement from proper EU law can represent a breakthrough in the EU constitutional development. The possibility of so called *inter se agreements* between Member States has been always provided by the Treaties since the 1950's, and there have been several and important ones;[24] but it is also true that, in the history of European integration, *inter se agreements* have gradually decreased in number, since they were originally meant to supplement the lacunae of the founding treaties in terms of conferred competences, especially in the common market project, but this necessity also progressively disappeared. A sign of this at the formal level is that the possibility of *inter se agreements*, expressly provided by the treaties for decades,[25] was at the end formally expunged from primary law with the Lisbon Treaty.[26] As the integration process advanced, and the powers conferred to the Union increased, the trend seemed to be towards a progressive and wise «constitutional maintenance» of the founding treaties, through a «semi-permanent review process»,[27] and the gradual disappearance of *inter se* pacts.

Today, however, the crisis seems to be a U-turn. The founding treaties are considered very difficult to amend in the current political climate. New important forms of *inter se agreements* come back to the fore: and they are not a necessitated substitution of EU law, like in the past, but they are the vehicle of a deliberate estrangement from EU law.

Moreover, in the perspective of the impact on the Union's constitutional nature, it was also highlighted that the new stability

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[23] See for a full understanding of the concept J.P. Jacqué, *The Principle of Institutional Balance*, 41 Com. Mkt. L.R. 2 (2004).

[24] See for instance the Schengen convention of 1990 or the Prüm Treaty of 2005.

[25] See the old Art. 293 of the Treaty of Rome and Art. 34(2) of the Treaty of Maastricht.

[26] The Court of Justice made clear in Pringle that inter se agreements are nonetheless still possibile, so that their formal expulsion from the Treaties' text is just a formal element to understand the historical trend towards the disappearance of such agreements; see on the point B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 2.

[27] B. De Witte, *Il processo semi-permanente di revisione dei trattati,* 22 Quaderni costituzionali 3 (2002).

mechanisms such as EFSF and ESM – since they operate as separate financial institutions outside the Treaty framework, «with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality» - are at odds with the most basic principles of Art. 1 TEU, which would require the construction of «an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as close as possible to the citizens». In fact the new treaties remain outside the scope of application of the EU law principle of transparency, and in general from the scope of EU secondary law: so that the «any control by the European parliament or national parliaments, not to mention civil society and the citizenry» could become extremely difficult.[28] In this sense, the formal estrangement from EU law becomes also an estrangement from the substantial protection of EU law transparency discipline: and one of the most veritable democratic safeguards for the European citizen is therefore lost.

In this view, one can maintain that the crisis seems to have determined a strong impact on the EU law institutional system as historically developed in the last twenty years.

3. EU law and the constitutional jurisprudence on austerity measures.

The aforementioned stability mechanisms are important tools for financial assistance for countries in difficulty;[29] they are, nevertheless, as per Art. 125 TFEU, structurally linked to the criterion of strict conditionality. To put in place those mechanisms, it is necessary to define measures to be taken at the national level for the rationalization of budgetary policies.[30]

Various so called austerity measures arose from the constraints of strict conditionality in almost each of the European countries in financial difficulties: they took the form of reductions to public expenditure and investments, rationalization of public

[28] In this sense K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI Working Papers, LAW 2012/28, at 47.
[29] See D. Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 Eur. L.J. 5 (2012), at 667: «The Union has been transformed into a political system redistributing significant wealth within its territory».
[30] See the aforementioned *Pringle* case at paras. 142-143 in particular.

services, increase in the burden on taxpayers, cuts in wages and pension treatments.

In this respect, important comparative studies dealt in the last years with judicial adjudication on austerity measures, in particular by focusing on constitutional complaints against those.[31] These studies aptly placed the new episodes of adjudication on austerity measures in the context of the historical debate on social rights justiciability[32] and judicial bodies' legitimacy vis-à-vis politically legitimated powers.[33]

These are customary and always relevant reflections, and are traditionally placed in a comparative perspective by scholars. However, there was a dimension of the problem that was less explored. What maybe missed in last year's comparative analysis is the other parallel dimension of the phenomenon: the potential interplay, in political and legal terms, with EU law. What was the role of supranational law in general and EU law in particular in envisaging and shaping austerity measures in debtor countries dealing with assistance packages? What could be, if any, the legal implications of this interplay?

All EU Member States are nowadays subject to the Stability and Growth Pact as reformed by the aforementioned *six-pack* and *two-pack* of 2011 and 2013: the consequent strengthened coordination mechanisms are, according to scholars, a veritable

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[31] *Ex multis*, see the refined works of X. Contiades, A. Fotiadou, *Social rights in the age of proportionality: Global economic crisis and constitutional litigation*, 10 International Journal of Constitutional Law 3 (2012); C.M. Akrivopoulou, *Striking Down Austerity Measures : Crisis Jurisprudence in Europe*, International Journal of Constitutional Law Blog, 26 June 2013, available at http://www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe; B. De Witte, C. Kilpatrick (eds.) *Social Rights in Times of Crisis in the Eurozone : The Role of Fundamental Rights' Challenges*, cit. at 8; C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, EUI Working Paper MWP 2014/25; X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (2013); D. Roman, *La jurisprudence sociale des Cours constitutionelles en Europe: vers une jurisprudence de crise?*, 45 Nouveax Cahiers du Conseil constitutionel (2014).

[32] See for recent comparative reflections on the theme M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); J. King, *Judging Social Rights* (2012).

[33] See for institutional and comparative reflections N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994); V. Abramovich, C. Curtis, *Los derechos sociales como derechos exigibles* (2004).

«process of co-government of debt and deficit» between national and supranational authorities.[34] The renewed Regulation 1467/97 provides for new excessive deficit procedures, stringent timelines for action and correction of budgetary policies, EU Council's detailed recommendations for the definition of annual budgetary targets and deadlines for achieving them, transparency requirements for the Member States in terms of adopted measures, possibility of sanctions imposed by the European institutions. Moreover, a number of EU Member States asked on the basis of the aforementioned new supranational instruments for extraordinary plans of economic and financial assistance: these were based on an even more stringent conditionality system, and were translated in Memoranda of Understanding, decisions adopted by the Council in the context of the excessive deficit procedure within the Stability and Growth Pact under Articles 126 and 136 TFEU and incorporating the essential components of the policy conditionality, recommendations addressed by supranational institutions to national authorities.

The austerity measures which have been challenged before courts for potentially hampering constitutional social rights come from this background: a background made of the interplay of national and supranational norms, where the first stem from the latter.

And given this background, it is relevant to highlight, in comparative perspective, a common resistance in national constitutional courts' case-law: the resistance to acknowledge the interplay of national and supranational norms in determining the content of austerity measures, and the resistance to evaluate the possible legal implications of this interplay.

National courts invested of constitutional adjudication on austerity measures resisted the possibility of coordinating their judicial *dicta* through preliminary ruling procedures according to Art. 267 TFEU to the European Court of Justice: and this happened despite the fact that they have been asked to do so, for instance by the parties. Quite on the opposite, many constitutional courts expressly denied or at least underplayed the connatural nexus of

[34] D. Chalmers, *The European Redistributive State and a European Law of Struggle*, cit. at 29, at 680: «[t]he finding of an excessive deficit brings Member States and EU institutions into a process of co-government of debt and deficits».

the austerity measures under examination with that supranational law which required them, sometimes through unconvincing arguments.

On the formal level, this tendency is surprising.[35] It is settled case-law of the European Court of Justice that, although Art. 288 TFEU provides for the non-binding nature of recommendations and opinions issued by EU institutions, recommendations are nevertheless undoubtedly EU legal acts that according to Luxembourg «cannot therefore be regarded as having no legal effect». Thus, national judges «are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions», and therefore also in the context of the interpretation and application of national law.[36] This is a traditional line of interpretation, which is even previous in time to the renewed central role guaranteed to recommendations as formal acts in the new system of European budgetary policies coordination: in the new system their role is reinforced, since they are supplemented by sanctions.

Still, the relevance of supranational sources in national constitutional adjudication on austerity measures is obliterated.

The Portuguese case is particularly relevant in this respect. As well known, the Tribunal Constitucional has played an important and contested role in recent years with numerous judgments on austerity measures.[37] Moreover, the Tribunal expressly assessed the scope and legal value of the obligations arising from the new supranational stability mechanisms. This happened in particular in the well known Acórdão nº 574/2014,[38]

[35] Although one could say that it is in line with thelow number of referral to the Court of Justice in particular by Constitutional courts: see in this respect the special issue of the German Law Journal n. 16/2015 devoted to *The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts*, available at the website http://www.germanlawjournal.com/volume-16-no-06.

[36] Arrêt du 13 décembre 1989, Grimaldi / Fonds des maladies professionnelles (322/88, Rec. 1989 p. 4407), paragraphs 18-19.

[37] A.M. Guerra Martins, *Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law*, 22 Maastricht J. of Eur. and Comp. L. 5 (2015).

[38] Acórdão no 574/2014 of 14th August 2014, available at the website http://www.tribunalconstitucional.pt/tc/acordaos/20140574.html.

which had to do specifically with Council recommendations issued within the excessive deficit procedure. The Tribunal raised several doubts on the disputed legal status of those recommendations, but it was careful not to ask for an interpretation on this to the Court of Justice: it merely underestimated the question by interpreting supranational obligations concerning public deficits as mere obligations of result and not of means - which is quite doubtful given the strict and specific nature of the new system. As a result of this interpretative move, the Tribunal, in an autarkist way, preserved its own right to judge the conformity of the adopted means (the austerity measures) to the results through its own classic proportionality test.[39] The possible interplay with supranational norm was obliterated through a purely national interpretation, leading to the differentiation between obligation of means and of result: but this is disputable, since, when the doubt of a possible unclear interpretation of EU norms is at stake, according to Art. 267 TFEU courts would be called to refer the question to the Court of Justice. In a certain sense, the Tribunal did not conceal its autarkist thoughts: it proposed an odd instrumental centralizing interpretation according to which, since the principles of equality, proportionality and legal certainty at stake in judging on the austerity measures are also principles of EU law and parts of the constitutional traditions common to the Member States, this would be sufficient to ensure that there cannot be - in general - a conflict between these principles and the disputed provisions.[40] This is again highly disputable: such an interpretative move ignores that different interpretations of the same principles are possible, and ignores possible conflicts that could emerge from different balancing of those principles by national and European courts.[41]

Greece is another relevant case study. As well known, the country had to implement stringent austerity measures. In the

[39] See M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, 4 e Pùblica – Revista Eletrònica de Direito Pùblico 1 (2017), at 9 et seq.

[40] Critical remarks on this in F. Pereira Coutinho, *Austerity on the Loose in Portugal: European Judicial Restraint in Times of Crisis*, 8 Perspectives on Federalism 3 (2016); still, as a contextualization, it must be clarified that the Tribunal Constitucional has never issued a preliminary reference to the Court of Justice.

[41] Ibidem, at 124. See also M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 11 et seq.

absence of a centralized system of constitutional adjudication, several complaints against those were lodged before the local Council of State in the form of complaints against administrative acts implementing legislative austerity measures. In a famous case concerning cuts in civil servants' salaries and pensions following the law ratifying the Memorandum of Understanding of 2010, the decision 668/2012 of the plenum of the Council of 20 February 2012,[42] the applicants asked for a preliminary reference to the Court of Justice: they sought a ruling on the compatibility of local measures and Council Decision 2010/320/EU with European Union law. In particular, the applicants sought a ruling on the compatibility of the abolition of seasonal pension bonuses for pensioners below 60 years and their reduction for pensioners above 60 years through Law 3845/2010 with Article 1 of Protocol 1 to the ECHR on the right to property, Article 17 of the Greek Constitution enshrining the same right, and Article 34 (social security and social assistance) of the Charter of Fundamental Rights (CFS) of the European Union:[43] in this last respect, they argued that the measures at stake stemmed directly from the obligations contained in the Council Decision 2010/320/EU expressely «addressed to Greece with a view to reinforcing and deepening the fiscal surveillance and giving notice to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit». The request for the preliminary ruling was rejected, and the complaints dismissed after a wide (but unilateral) contextualization on the value of Community obligations and the role of Greece in the EU integration process in the judgment. Here again, in the Greek Council of State's decision n. 668/2012 (which is the only Greek case where these questions were openly discussed), we can find the same dynamics of the Portuguese case: the Greek court did not fail to declare that the legal force of the Memorandum was only that of a «program for the Government to address the country's economic problems», «although it was the result of negotiations and agreements between Greece and certain

[42] Decision no 668/2012 of the Plenum of 20th February 2012, available at the website http://www.dsanet.gr/Epikairothta/Nomologia/668.htm.

[43] E. Psychogiopoulou, *Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges*, in C. Kilpatrick, B. de Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, cit. at 8, at 10-11.

international authorities».[44] Thus, here again, the value of supranational norms was obliterated by a unilateral, autarkist, interpretation: an interpretation that is reminiscent, not by chance, to the Portuguese one leading to the differentiation between obligation of means and of result.

The Cypriot case is also relevant, and similar. The local Supreme Court decided in 2014 two important cases on austerity measures,[45] actually in different ways, but in any case by strategically recalling the «European obligations» of the country as a mere contextualization without acknowledging them any formal legal value for the judicial adjudication, and with no reference to the European Court of Justice.

Latvia is another relevant example of debtor country: and it was actually one of the first in which a Memorandum of Understanding was negotiated,[46] and the first in which, in 2009, the local Constitutional Court had to rule on the compatibility of the consequent austerity measures with local constitutional principles.[47] The well-known judgment of the Latvian Court No. 2009-43-01[48] was yet another case in which linear cuts to the social security system were involved, and these were challenged and declared unconstitutional because alternative and more progressive measures were not foreseen by the political power. But the significance of the judgment for our purposes is in the arguments that the Court offered on the value of the country's

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[44] See the report by A.I. Marketou, M. Dekastros, *Greece*, available at http://eurocrisislaw.eui.eu/greece, in particular sub V.4.

[45] Maria Koutselini-Ioannidou et al. v. the Republic, 7 October 2014, available at http://www.cylaw.org/cgibin/open.pl?file=apofaseis/aad/mero; Law on pensions of state officials (General Principles) of 2011, N.88(I)/2011, available at http://www.cylaw.org/nomoi/arith/2011_1_88.pdf: see on this C. Demetrious, *The Impact of the Crisis on Fundamental Rights across Member States of the EU Country Report on Cyprus*, Directorate General for Internal Policies, European Parliament, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510017/IPOL_STU(2015)510017_EN.pdf, at 66-67.

[46] It must be noted that Latvia joined the Eurozone only in 2014.

[47] See on this D. Roman, *La jurisprudence sociale des Cours constitutionelles en Europe: vers une jurisprudence de crise?*, cit. at 31, 5.

[48] Judgment no. 2009-43-01 of 21st December 2009, available at the website http://socialprotection-humanrights.org/wp-content/uploads/2015/06/Latvia-2009-Constitutional-Court-Elders-Rights-Judgment.pdf.

international obligations arising from the assistance measures: despite the fact that in the Memorandum of Understanding of 13 July 2009 signed between Latvia, IMF and European Commission there were very detailed commitments signed by the local government for very specific cuts (defined even in the specific measure: «reduce pension costs of 10% for the unemployed pensioners and 70% for working pensioners»), again those commitments were considered as not legally binding and irrelevant for judicial adjudication, and the applicability of EU law and its principles and guarantees was not considered.

Finally, scholars[49] traced the same dynamics of substantial removal of links and bonds with supranational obligations on budgetary rationalization in the case law of the Romanian Constitutional Court:[50] in here too the national court has obliterated the question, albeit «implicitly»,[51] and this can be more fiercely criticized since the financial assistance provided to the country is based on Memoranda of Understanding but also on clearly binding EU law acts such as decisions of the Council.[52]

To sum up, comparative analysis can be also important in this area to show how several national constitutional courts of European debtor countries, when dealing with judicial adjudication on austerity measures imposed at the supranational level also through EU law acts, tend to obliterate the origin of those measures from EU law and underestimate the value of supranational obligations in general. The origin of austerity measures from the interplay between national and supranational norms, I argue, could

[49] C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, 10 EuConst 3 (2014), at 409.

[50] See the report by V. Vita, *Romania*, available at http://eurocrisislaw.eui.eu/romania/, and the list of cases quoted nn. 1414/2009, 1415/2009, 872/2010 e 873/2010 e 874/2010, 1655/2010, 1658/2010, 383/2011, 574/2011, 575/2011, 765/2011, 1533/2011; see also A. Zegran, T. Toader, *La Cour constitutionnelle de Roumanie*, 38 Les Nouveaux Cahiers du Conseil constitutionnel 1 (2013).

[51] C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, cit. at 49, at 409.

[52] See for instance 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, according to which: «the Commission shall agree with the 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 [...].».

at least justify the interpretative doubt whether to issue a preliminary reference to the Court of Justice – and it must be noted that, in these cases, according to Art. 267(3) TFEU such a doubt could lead to an obligation to issue the reference! As said, this did not happen in several debtor countries' jurisprudence.

One can speculate on the reasons for such a common move by national courts entrusted with constitutional adjudication, especially in a period in which preliminary references by constitutional courts seemed to be «on the rise».[53] The move is even more remarkable if one thinks that ordinary courts have instead repeatedly tried to reach the European Court of Justice, when judging on austerity measures, by pointing at the possible relevance of the Charter of Fundamental Rights of the Union – and thus by giving value to the supranational origin of those.[54] It can be argued that the constitutional courts' resistance come first of all from their fear of an intrusion by Luxembourg in the interpretation of national constitutional principles, leading to a harmonization of those: and in fact this could explain the common tendency to interpret supranational obligation as mere obligation of results, whatever their specificity and legal value, to leave the field open for autonomous/autarkic proportionality tests.[55] Other scholars argue that this is done by courts in an exercise of restraint, to cooperate with the political powers and safeguard austerity measures, by denying the idea of judging in the scope of application of EU law and therefore denying the possibility to apply the advanced

[53] See M. Dicosola, C. Fasone, I. Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, 16 German Law Journal 6 (2015), and M. Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 Ger. L.J. 6 (2015).

[54] See e.g. the Romanian cases Ordonnance du 14 décembre 2011, Corpul Național al Polițiștilor (C-434/11, Rec. 2011 p. I-196*, Pub.somm.) ECLI:EU:C:2011:830, Ordonnance du 10 mai 2012, Corpul Național al Polițiștilor (C-134/12) ECLI:EU:C:2012:288, Ordonnance du 14 décembre 2011, Cozman (C-462/11, Rec. 2011 p. I-197*, Pub.somm.) ECLI:EU:C:2011:831, and the Portuguese cases Ordonnance du 7 mars 2013, Sindicato dos Bancários do Norte e.a. (C-128/12) ECLI:EU:C:2013:149; Ordonnance du 26 juin 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-264/12) ECLI:EU:C:2014:2036; Ordonnance du 21 octobre 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-665/13) ECLI:EU:C:2014:2327.

[55] See M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 13 et seq.

protections provided by the Charter of Fundamental Rights of the European Union.[56]

Trying to understand the internal logics of collective bodies such as constitutional courts is at the end of the day a matter of speculation, at best. But comparative analysis suggests that a new trend is in place, analogous to that described in the previous paragraph: the national constitutional jurisprudence of the crisis is a new chapter of estrangement from EU law, this time put in place by judicial bodies and not by the legislator. This new chapter, again, can prove problematic: in obliterating the value of obligations stemming from EU acts in adjudication, the risk is to jeopardize the uniform and correct application of supranational norms in the Member States' territories – and thus a threat to another existential trait of EU law as applied in national legal orders.

Moreover, the coherence of assistance programmes and the equality in the consequent burdens bore by the citizens of the Union are also at stake. Briefly said, without any kind of harmonization austerity measures that in a certain setting are upheld by courts and imposed to citizens can be considered unconstitutional in another. Potentially, this can lead to discriminations in the burdens to be bore by European citizens. Furthermore, it shall be noted that we looked at how debtor countries' constitutional jurisprudence is based on a case-by-case analysis of the compatibility of austerity measures with national constitutional principles, with no will to harmonize the interpretation of those: it is therefore based on a sort of case-by-case conditionality to the commitment to supranational obligations. The irony is that the same can be said of creditor countries' constitutional jurisprudence: when we look, for instance, at the German or the Estonian constitutional cases pertaining to the participation to supranational anti-crisis stability mechanisms,[57] we

[56] See C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, cit. at 49, and F. Pereira Coutinho, *Austerity on the Loose in Portugal: European Judicial Restraint in Times of Crisis*, cit. at 40.

[57] See BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 on the ratification of the European Stability Mechanism; BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 on the OMT program, and Case 3-4-1-6-12 of 12 July 2012, on which see C. Ginter, *Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty*, 9 EuConst 2 (2013) and Evas Tatjana, *Judicial Reception of EU Law in Estonia*, in B. De Witte, J.A. Mayoral et al. (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Elgar 2016), chapt. 8.

notice that complaints are raised in those countries for possible violation of the principles of parliamentary democracy and the parliamentary budgetary powers, and the decisions of the local courts pose, in turn, case-by-case conditions to the subscription of capital stock of anti-crisis stability mechanisms. So the additional irony is that, at the same time, when put together, these case laws are not compatible. If on the one hand debtor countries' courts claim that they are bound by budget targets but are free on how to reach them, creditor countries' courts make the financial assistance dependent on a concrete involvement on how those funds will be spent: the debtors' and creditors' jurisprudences of crisis are not coherent, they are not harmonized and are transient in nature, they constitute an existential threat for the coherence of financial assistance programmes.[58]

4. Is the Court of Justice of the EU opening new paths?

From what said above, it is possible to argue that the Union's multi-faceted crisis affected EU law and its nature in at least two different ways. EU law has been employed only in a selective way and often set aside for strategic reasons; a comparative analysis of national courts' case-law on austerity measures reveals several examples of selective lack of application, so to say. The consequences are a threat to some of EU law's inherent characteristics, including the need of its correct and uniform application, and the risk of a weakening protection of the citizen vis-à-vis supranational anti-crisis and national austerity measures.

To complete the picture, it is necessary to look at the Court of Justice of the EU and its role. How did it act in such a problematic setting? Was the guardian and the authoritative interpreter of EU law simply inactive in this respect?

I already touched the point of the Court's role in judging the choice of the legal instruments for the construction of the new supranational stability mechanisms: in the celebrated *Pringle* case of 2012 the Court uphold the new systems and their legal nature, denied any incompatibility with primary law of the EU treaties, and

[58] The point is further developed in M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 29 et seq.

gave its *placet* to the new *inter se agreements* even in the absence of enabling primary norms. The Court just insisted in preserving the autonomy of the *acquis* vis-à-vis the use of EU institutions outside the proper scope of EU law treaties, which was in any case deemed legitimate. After all, it must be noted that the new supranational treaties confer new powers to the Court of Justice: it becomes the judge and authoritative interpreter of the ESM law as an autonomous body of norms (Article 37 of the ESM Treaty); it has the power to judge the disputes between states on the correct transposition of the Fiscal Compact rules on the balanced budget rules (Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union).

But what about the substantive interpretation of the new supranational *law of the crisis*?

As said, more and more applicants have attempted in the last years to reach the Court and make it judge on austerity measures: this especially happened through preliminary references.[59] As well known, the Court frustrated those attempts, rejecting the references for procedural reasons, on grounds of competence or admissibility. This approach was criticized by scholars,[60] since it was considered at odds with the traditional will of the Court to construct «a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions», by entrusting «such review to the Community Courts».[61] A doubt was raised: are there grey areas where the protection from EU law and of EU law is not possible, and where a substantial denial of justice is on the way?

For example, in terms of preliminary references on austerity measures, the Romanian and Portuguese national courts have

[59] See on this F. Costamagna, *The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights*, Carlo Alberto Notebooks n. 497 December 2016.

[60] Ibidem, 12 et seq.; see also C. Barnard, *The Charter in Time of Crisis: a Case Study of Dismissal*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis* (2013), 250, and R. Pye, *The EU and the Absence of Fundamental Rights in the Eurozone: a Critical Perspective*, in European Journal of International Relations (2017).

[61] Arrêt du 1er avril 2004, Commission / Jégo-Quéré (C-263/02 P, Rec. 2004 p. I-3425) ECLI:EU:C:2004:210, paragraph 30.

made several attempts in the years 2011/2014,[62] based on the possible applicability of the Charter of Fundamental Rights of the Union. These were all rejected by the Court which opposed its interpretation on the applicability of the Charter only in cases of implementation of proper EU law,[63] in line with the wording of Art. 51 of the Charter.

As for direct actions, a much discussed case was ADEDY,[64] where a Greek public sector union sought to obtain the annulment of two Council decisions addressed to Greece with a view to reinforcing and deepening the surveillance of its budgetary discipline and correcting excessive deficit. The applicants sought to challenge before the EU General Court the decisions by claiming their violation of the fundamental principle of conferral provided for in Art. 5 TEU; but, coherently with its traditional case-law on the locus standi of individual applicants, Court dismissed the action because the act did not concern directly and individually ADEDY.

Another relevant case in this respect was Ledra Advertising et al.,[65] where some holders of deposits in Cypriot banks subject to restructuring under the Memorandum of Understanding on Specific Economic Policy Conditionality agreed between the Republic of Cyprus and the ESM sought to obtain the annulment of such Memorandum and the subsequent acts and compensation for the suffered damages. They complained that the European Commission, as an institution of the ESM system *borrowed* from the EU institutional setting, was negligent in performing its enduring

[62] See again the Romanian cases Ordonnance du 14 décembre 2011, Corpul Național al Polițiștilor (C-434/11, Rec. 2011 p. I-196*, Pub.somm.) ECLI:EU:C:2011:830, Ordonnance du 10 mai 2012, Corpul Național al Polițiștilor (C-134/12) ECLI:EU:C:2012:288, Ordonnance du 14 décembre 2011, Cozman (C-462/11, Rec. 2011 p. I-197*, Pub.somm.) ECLI:EU:C:2011:831, and the Portuguese cases Ordonnance du 7 mars 2013, Sindicato dos Bancários do Norte e.a. (C-128/12) ECLI:EU:C:2013:149; Ordonnance du 26 juin 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-264/12) ECLI:EU:C:2014:2036; Ordonnance du 21 octobre 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-665/13) ECLI:EU:C:2014:2327.

[63] Arrêt du 26 février 2013, Åkerberg Fransson (C-617/10) ECLI:EU:C:2013:105.

[64] Ordonnance du 27 novembre 2012, ADEDY e.a. / Conseil (T-215/11) ECLI:EU:T:2012:627; Ordonnance du 27 novembre 2012, ADEDY e.a. / Conseil (T-541/10, Publié au Recueil numérique) ECLI:EU:T:2012:626.

[65] Ordonnance du 10 novembre 2014, Ledra Advertising / Commission et BCE (T-289/13) ECLI:EU:T:2014:981, para. 56-63.

task of guardian of Union's values and principles. According to the claimants, the Commission's unlawful behavior was substantiated in the inclusion of detrimental paragraphs in the Cypriot Memorandum of Understanding and an infringement of its supervisory obligation, to ensure that the Memorandum of Understanding was consistent with EU law. Here as well, the General Court rejected the action, by formally stating that neither the ESM nor the Republic of Cyprus are part of the EU institutions, bodies, offices and agencies whose acts can be reviewed under Art. 263 TFEU, and therefore the Court has no jurisdiction to examine the legality of the acts that they have adopted. Again, the rejection of all the complaints was based on a formal point.

But it was actually in the context of the appeal in the same case Ledra Advertising et al. before the Court of Justice[66] that, for the first time, new possible paths for the evolution of the case law on austerity measures found their way.[67] The Court of Justice adhered, in its judgment, to what the General Court decided in the first action of annulment, and it excepted again the Cypriot Memorandum of Understanding with ESM from the scope of the review exercised under Art. 263 TFEU. Actually, the Court also insisted in what already stated in Pringle, and therefore in saying that ESM acts do not fall into the scope of application of EU law, even if EU institutions such as the EU Commission and the European Central Bank are involved as borrowed institutions of that system.

Yet, Ledra Advertising et al. actually opens the door to new opportunities: The Court states that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by

[66] Arrêt du 20 septembre 2016, Ledra Advertising / Commission et BCE (C-8/15 P à C-10/15 P) ECLI:EU:C:2016:701.

[67] See the first interesting comments by I. Glivanos, *CJEU Opens Door to Legal Challenges to Euro Rescue Measures in Key Decision*, in Verfassungsblog.de, 21 september 2016, available at http://verfassungsblog.de/cjeu-opens-door-to-legal-challenges-to-euro-rescue-measures-in-key-decision/ and A. Hinarejos, *Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising*, in EU Law Analysis Blog, 25 September 2016, available at http://eulawanalysis.blogspot.it/2016/09/bailouts-borrowed-institutions-and.html; see also the critical remarks by F. Costamagna, *The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights*, cit. at 59, 18 ff.

the EU Treaties. The European institutions, even while acting as borrowed institutions in other international organizations and legal systems, retain all their roles and obligations towards EU citizens, so that the Commission, for example, as "guardian of the Treaties", should refrain when acting under ESM law from signing acts whose consistency with EU law is in doubt, including Memoranda of Understanding, and otherwise it could be held liable for damages under articles 268 and 340 TFEU.

For many, the judgment on appeal in Ledra Advertising et al. has a transformative potential: it paved the way for «legal challenges to the bailout programmes of the EFSF/ESM», in the form of actions for damages, «offering an avenue to a plethora of claimants to unpick the questionable legal underpinnings of conditionality and austerity policies».[68]

In fact, actions for damages before the Court of Justice are subject to less stringent requirements in terms of criteria of admissibility and time limits in relation to annulment actions; and since in Ledra Advertising et al EU law seems to reappear in the context of austerity measures adjudication, it must be noted that any breach of EU law, including for instance a simple provision of the Charter of Fundamental Rights, could lead the Court to declare an ESM act unlawful act and held an EU institution liable under Articles 268 and 340 TFEU. The potential scope of legal challenges framed in this way seems wide; and the idea of an organic completeness in judicial systems of protection against supranational measures is brought back to the fore.

Nevertheless, the path is still uncertain: only a serious breach gives rise to compensable damages under EU law, and Art. 52 of the Charter of Fundamental Rights as already interpreted in the context of Ledra Advertising et al. suggests that the pursuit of an objective of general interest such as ensuring the stability of the banking system of the Euro area as a whole could constitute a legitimate restriction on the exercise of EU law rights and freedoms. The existence of a legitimate objective of general interest would exclude the unlawfulness of an EU institution's behavior: and in fact, in Ledra Advertising et al., the novel rule was announced, but was not applied to the Commission.

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[68] I. Glivanos, *CJEU Opens Door to Legal Challenges to Euro Rescue Measures in Key Decision*, cit. at 67.

The same idea of uncertain opening is offered by the subsequent cases of the Court of Justice, Florescu[69] and Associação Sindical dos Juízes Portugueses,[70] two cases stemming from preliminary references.

In the first case, closed with a judgment on 13th June 2017, the referring Romanian court asked in essence whether the Memorandum of Understanding concluded between the European Community, represented by the Commission and Romania must be regarded as an act of an EU institution, within the meaning of Article 267 TFEU, which may be subject to interpretation by the Court. The Court replied in the affirmative, and therefore moved on in interpreting whether that act required the adoption of certain precise austerity measures and whether EU primary (Article 6 TEU and Article 17 of the Charter of Fundamental Rights of the European Union) and secondary (Article 2(2)(b) of Council Directive 2000/78/EC) law could be interpreted as precluding those certain austerity measures.

It is true that the Romanian Memorandum of Understanding was an act concluded simply between the European Community, represented by the Commission, and Romania, on the base of Article 143 TFEU (which gives the Union the power to grant mutual assistance to a Member State whose currency is not the euro), and did not involve other external institutions such as the ECB and the IMF. The Romanian case is therefore formally different from other European debtor countries. Still, the judgment argues that the Memorandum falls within the jurisdiction of the Court since it «gives concrete form to an agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU»: a rationale that can be applied to other cases as well (where the Troika is acting), so that, here again, new paths seemed to be open for legal challenges to austerity measures stemming from supranational obligations.

[69] Arrêt du 13 juin 2017, Florescu e.a. (C-258/14) ECLI:EU:C:2017:448.
[70] Arrêt du 27 février 2018, Associação Sindical dos Juízes Portugueses (C-64/16) ECLI:EU:C:2018:117.

This is so true that in the recently solved case Associação Sindical dos Juízes Portugueses, stemming from a preliminary reference of the Portuguese Supremo Tribunal Administrativo, an interesting opinion of the Advocate General Saugmandsgaard Øe was issued on 18 May 2017. The claimant seeks the annulment of certain administrative acts which introduced a transitional reduction in the remuneration paid to the persons working in the Portuguese public administration including judges; and argues that those remunerations' cut could undermine the judges' independence, protected under Art. 19 TEU as well.[71] The case was, therefore, not strictly about social rights: but it was again a clear test for the Court's jurisdiction on austerity measures. Unlike the aforementioned previous cases from Portugal of 2013-2014, where the Court always declined its jurisdiction,[72] the Advocate General today suggests to the Court to acknowledge that «that the Portuguese State was to adopt in 2014, 'in line with specifications in the Memorandum of Understanding', measures of a specific nature, and not just general measures, consisting in particular in that, within the framework of 'the 2015 consolidation strategy', 'the Government [was to] adopt a single wage scale during 2014 with a view to implementing it in 2015 and aimed at the rationalisation and consistency of remuneration policy across all careers in the public sector'». This would lead the Court to consider that the «adoption of the measures to reduce remuneration in the public sector provided for in Article 2 of Law No 75/2014, at issue in the main proceedings, constitutes an implementation of provisions of EU law, within the meaning of Article 51 of the Charter, and that the Court therefore also has jurisdiction to answer the request for a preliminary ruling in so far as it concerns» certain Articles of the Charter of Fundamental Rights allegedly violated by the consequent austerity measures. Furthermore, the Advocate

[71] Art. 19, par. 1 TEU reads as follows: «The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law».

[72] Ordonnance du 7 mars 2013, Sindicato dos Bancários do Norte e.a. (C-128/12) ECLI:EU:C:2013:149; Ordonnance du 26 juin 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-264/12) ECLI:EU:C:2014:2036; Ordonnance du 21 octobre 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-665/13) ECLI:EU:C:2014:2327.

General, by making reference to the AG opinion in Florescu, observes that «in a case which also concerned budgetary austerity measures adopted by a Member State in the context of undertakings given to the European Community, in order to determine whether the provisions of the Charter are applicable under Article 51 thereof, it is necessary to take into account not only the wording of the national provisions in question, but also the terms of the measures of EU law in which those commitments appear», and that it is not decisive that a margin of discretion is left to States in implementing supranational obligations, to decide on the measures best able to ensure compliance with certain commitments, «provided that the objectives of the relevant measures are sufficiently detailed and precise to constitute a specific rule of EU law in that respect, unlike mere recommendations adopted by the Council, on the basis of Article 126 TFEU, and addressed to Member States whose public deficit is considered excessive».

Associação Sindical dos Juízes Portugueses was decided by the Court in an even more *tranchant* way: it recognized its jurisdiction, and stated that Art. 19 TEU is a self-standing rule and can be a relevant parameter of review in itself, actually as «a crucial rule on the judiciary of the Union, understood in a federal sense, as a judiciary of the federation and its States».[73] The case of a temporary reduction in salaries of public sector employees could be easily read as a purely internal situation, therefore outside the material scope of EU law and the jurisdiction of the Court; still Art. 19 TEU demands the Member States to «provide remedies sufficient to ensure effective legal protection in the fields covered by Union law», using a specially broad phrase, the Portuguese referring Court clearly made the municipal law come within the ambit of EU law since the austerity measures were adopted in response to demands attached to EU financial assistance, and in this sense the Court of Justice remained vague by making no specific reference to obligations purportedly imposed by EU measures, but translating the considerations of the referring court as if «those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the

[73] D. Sarmiento, *On Constitutional Mode*, Despite Our Differences Blog, 6 March 2018, available at the website https://despiteourdifferencesblog.wordpress.com/2018/03/06/on-constitutional-mode/.

Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.».[74] In this regard, the Court expressly remarks that «the referring court observes that the discretion which the Portuguese State has in implementing its budgetary policy guidelines, acknowledged by the EU institutions, does not relieve it, however, of its obligation to respect the general principles of EU law, which include the principle of judicial independence, applicable both to Courts of the European Union and national courts»;[75] and in fact, it adopts this same view.

The Court at the end of the day found no breach of Art. 19 TEU and no serious threat to the Portuguese judges' independence. Nonetheless the case is another crucial step for the evolution of the supranational adjudication, for at least two reasons. First of all, the Court shows a new willingness to recognize its jurisdiction on austerity measures, even beyond the *ratione materiae* criterion traditionally intended, and by operationalizing the values of Article 2 TEU with a reference to Article 4(3) TEU on the principle of sincere cooperation. Moreover, the diverse crises of the Union seem to converge and be simultaneously tackled in Associação Sindical dos Juízes Portugueses: as already noted by some commentators,[76] in emphasizing the essential importance and mutual reinforcement of judicial independence, the rule of law, effective judicial protection, mutual trust, sincere cooperation and the decentralized enforcement of EU law by national courts, the Court is sending a signal for the rule of law crisis as well,[77] for the cases of Poland and Hungary, where more relevant threats to judicial independence are in place, where the European Commission is called to act in legal terms.[78]

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[74] Arrêt du 27 février 2018, Associação Sindical dos Juízes Portugueses (C-64/16) ECLI:EU:C:2018:117, par. 14 in particular.

[75] Ibidem, par. 15.

[76] M. Ovádek, *Has the CJEU Just Reconfigured the EU Constitutional Order*, Verfassungsblog.de, 28 February 2018, available at the website https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/.

[77] See L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 Cambridge Yearbook of European Legal Studies (2017); C. Closa, D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (2018).

[78] See the Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146

All in all, together with Florescu, Associação Sindical dos Juízes Portugueses can become a step towards the recognition that various national austerity measures stem from supranational obligations and therefore fall within the scope of application of EU law in general and of general principles of EU law and the Charter of Fundamental Rights in particular. This step would lead to the possibility of a protection of social rights in time of austerity before the Court of Justice, and permit the Court to perform its interpretative role for the uniform application of EU law. The centrality of the preliminary reference procedure would be restored: in fact, it must be noted that the solution offered by Ledra Advertising et al., based on actions for damages under Articles 268 and 340 TFEU, amounts to a purely privatized remedy, while procedures under Art. 267 TFEU would allow erga omnes and uniforming effects.

5. A tentative conclusion

In sum, the situation is unsettled and evolving. The Union's multi-faceted crisis affected EU law and its nature in at least two different ways. EU law has been employed only in a selective way and often set aside for strategic reasons; a comparative analysis of national courts' case-law on austerity measures reveals several examples of selective lack of application, so to say. The consequences are a threat to some of EU law's inherent characteristics, including the need of its correct and uniform application, and the risk of a weakening protection of the citizen vis-à-vis supranational anti-crisis and national austerity measures. The risk of undermining the role of EU law in the treatment of the financial crisis is to undermine the delicate balance of pluralism and unity that EU law with its canons and procedures is able to strike.

The European Court of Justice first shied away from a role in giving answers in terms of adjudication on supranational anti-crisis and national austerity measures, but progressively seemed to open

(C/2017/5320), the Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland COM (2017) 835 final, and, for an up to date discussion, M. Taborowski, *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, in Verfassungsblog.de, 13 March 2018, available at the website https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland.

new possibilities. It is also soon expected to give new answers; still, the path for future challenges to austerity measures in front of EU judicial bodies seems to be opened. Irony of fate, as often happens in times of multi-faceted crisis, different malaises can also come to be joined and simultaneously tackled in single cases, as the most recent evolution shows well.

EU law, which was threatened with oblivion, seems to be back to the fore. The new judicial moves are coupled with the recent initiatives at the political level to restore the centrality of EU law: by incorporating, among the other things, the major Fiscal Compact principles in a EU directive, and by establishing a European Monetary Fund (EMF) «anchored within the EU's legal framework» which will replace the well-established structure of the European Stability Mechanism (ESM) and provide the common backstop to the Single Resolution Fund and act as a last resort lender in order to facilitate the orderly resolution of distressed banks;[79] by re-stating rule of law against serious and sustained rule of law shortcomings in some Member States, since it is a necessary condition of effective cooperation between States in all is aspects, in terms of mutual trust, mutual recognition of judicial decisions, effective rights of free movements in the internal market and by EU citizens.[80]

After all, placing EU law again at the centre of the debate, in both judicial interpretative and political terms, is the only way to coordinate pluralism and unity in the treatment of the crisis.

[79] See again, in general, the Communication on further steps towards completing the Economic and Monetary Union - COM(2017) 821.

[80] Interesting discussions on the interplay of these factors are offered by J-W Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States*, 21 Eur. L.J. 2 (2015); A. Jakab, D. Kochenov (eds.) *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (2017); K.L. Scheppele, *Should the EU Care About the Rule of Law at Member State Level?*, Verfassungsblog.de, 3 March 2018, available at the website https://verfassungsblog.de/should-the-eu-care-about-the-rule-of-law-at-member-state-level.