MEASURES TAKEN IN ORDER TO TACKLE THE EURO CRISIS AND THE CASE-LAW OF THE EU COURTS

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As we all know, the European Union was not really prepared to face the great economic crisis, which started in the United States in 2008 and then hit the Eurozone in the form of a sovereign debt and banking crisis. The Treaties had created a monetary union. However, neither a common economic policy, nor efficient financial coordination and control mechanisms had been established at the same time. And of course, there is nothing in the Treaties about a common bank supervision system.

Necessity, however, is the mother of invention. The scope and intensity of the crisis led European political leaders to take under pressure a considerable number of important measures to reinforce the Economic and Monetary Union (the EMU) among the EU member states. These measures aim either at providing assistance to the states and undertakings that find themselves in difficulty or at strengthening European supervision over national economic policy and over crucial sectors of activity, such as the banking sector and the securities markets. In the choices made, the situation of the public opinion and internal political considerations, with often strong euro-sceptic parties, have played an important role, as they do not favour any new transfer of competences to the European level and, in any event, make it extremely difficult to adopt amendments to the European treaties that would be subject to ratification by all member states.

As a result, the measures that have been adopted are partly within, but also partly outside the framework of the EU. The main measure that has been adopted outside the framework of the Union is the European Stability Mechanism (the ESM), which provides financial assistance to member states in difficulty and which has been established through an international agreement among EU member states. Even measures adopted within the Union largely relied on inter-governmental cooperation rather than on the traditional Community method. One can mention here the considerable power acquired and the important decisions taken (in the so-called 'Euro-summits') by the heads of state and government of the states of the Eurozone as well as by their Ministers of Finance who meet within the Eurogroup. These developments have been criticized as resulting in a democratic deficit, mainly through the absence of any

substantial involvement of the European Parliament, and in a lack of effective judicial protection.

Under those circumstances, the courts of the European Union, namely the Court of Justice and the General Court, have an important role to play. In the last few years, a number of cases relating to the handling of the euro crisis have been either referred to the Court of Justice by national courts or have been the subject of direct actions before the General Court, some of them still pending at first instance or at the stage of appeal before the Court of Justice.

In this presentation of the relevant case-law of the EU courts, I shall concentrate on two groups of issues. The first relates to a number of questions of constitutional importance for the Union, which were mainly decided in a way which supports the capacity of the Union and of its member states to face the crisis. The second relates to effective judicial protection of European citizens and to whether such protection is achieved despite the political choices, that I have already mentioned, as regards the tools put in place by the Union and its member states to deal with the crisis. Before however going into the presentation of the case law, I believe that it is useful to outline very briefly some of the structural measures put in place by the Union and the member states.

I. A structural response to the Euro crisis

Without any doubt, the extraordinary gravity and the dramatically large impact of the euro crisis required a structural response from European political leaders. Unsurprisingly, therefore, many initiatives have been taken in order to redesign the structure of monetary and economic policies within the Union.

As I have already stressed, some of the measures that have been adopted fall within the scope of European Union law whereas others should be regarded as part of public international law. Such a difference in nature entails important institutional consequences as well as fundamental implications as regards the access to the jurisdictions of the European Union. I shall come back to these questions later.

To illustrate my point, I would like to briefly describe two treaties adopted outside the scope of application of EU law (1) before simply alluding to some of the most prominent measures adopted within the European Union during the crisis (2).

1. Treaties adopted by (some) Member States outside the scope of application of the EU

A first international agreement that warrants attention is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the TSCG, also known as the fiscal compact).

Although it has been ratified by all the Member States - with the exception of the UK and the Czech Republic - this Treaty is only binding for the euro area Member States, its purpose being to "foster budgetary discipline through a fiscal compact, to strengthen the coordination of the economic policies [of the Members] and to improve the governance of the euro area".

This treaty's most prominent measure is the obligation to introduce into a provision of national law (preferably of constitutional rank) the so-called "golden fiscal rule" according to which the budgetary position of the general government of the Member State concerned should, in principle, be balanced or in surplus. The Treaty also imposes the setting up, at national level, of efficient procedures aimed at guaranteeing respect of the golden rule as well as the creation of an automatic "correction mechanism" in the event of "significant observed deviations from" the budgetary objective.

The second and certainly the most important international agreement for the handling of the crisis in conditions of urgency is the Treaty establishing the European Stability Mechanism ('the ESM').

Signed on 2 February 2012 by the euro area Member States, this intergovernmental agreement creates an 'international financial institution' with the purpose of mobilizing funding and providing stability support to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems.

The adoption of the ESM Treaty was preceded by a revision of Article 136 of the Treaty on the Functioning of the EU, with the purpose of adding a third paragraph to this provision, expressly enabling the Member States whose currency is the euro to establish a stability mechanism subject to strict conditionality and to be activated if indispensable to safeguard the stability of the euro area as a whole (this is exactly what the ESM does). Article 136 TFEU was amended according to the simplified revision procedure which is laid down by Article 48 (6) of the Treaty on European Union. This simplified procedure may concern solely

provisions of Part III of the Treaty on the FEU, relating to Union policies and internal actions. We shall see the importance of this clarification later on.

An important element that must be borne in mind regarding the ESM is that, under Article 13 of the ESM Treaty, whenever an ESM Member addresses a request for stability support, the European Commission (an institution of the European Union), in liaison with the ECB, assesses whether there is a risk to the financial stability of the euro area or of its Member States and whether the public debt is sustainable. Then on the basis of this analysis, the ESM decides whether or not to grant stability support.

If the principle of a stability support is accepted, the European Commission, in liaison with the ECB and, wherever possible, together with the IMF (that is the so-called 'troika') will assume the task of negotiating with the Member States concerned a memorandum of understanding ("MoU") detailing the conditionality attached to the financial assistance. At the end of the negotiations, the Commission will sign the MoU on behalf of the ESM, subject to prior approval by its Board of Governors. It is then for the troika to monitor further compliance with the conditionality attached to the financial assistance facility granted.

2. Measures adopted within the EU

My presentation of the measures adopted within the EU will be much shorter, quite simply because I want to leave enough time for questions and discussion, but also because most of these measures, despite their practical importance, have nothing remarkable from a legal point of view (they are simply EU law measures like any other).

i. Legislative measures

As regards legislative measures, suffice it to say that the EU has now adopted a number of regulations and directives in areas where serious weaknesses came to light as a result of the crisis. Through the so-called 'six pack' in 2011, followed by the 'two pack' in 2013, European economic governance rules have been considerably strengthened. Also in 2013, a Single Supervisory Mechanism was adopted for the banking sector. This Mechanism, led by the ECB, is now charged with the supervision of more than 100 major financial institutions within the euro-zone. The banking union that was partially achieved through the Single Supervisory Mechanism has now been further completed through the creation, in 2014, of a Single Resolution Mechanism for the management of bank failures. The resolution of a bank can now be decided by the Single Resolution Board, which is an independent EU Agency.

ii. A new role for the EU institutions and agencies?

The creation of new agencies and the strengthening of the role of the ECB is the other aspect of the Union's response to the crisis. The Economic and Monetary Union (the EMU) had been initially designed as a rule-oriented policy of the Union. Member states largely maintained control over economic and fiscal policy, provided that they complied with common rules (they had, for example, to limit themselves to 3% public deficit and 60% public debt). The crisis proved that this was not enough, so the EMU has become more and more a policy-oriented field of the Union's activity.

One aspect of this is the creation of new agencies. I have already referred to one example. Another one which is worth mentioning is the creation of the European Securities and Markets Authority (ESMA), which has a role in supervising securities markets. The creation of ESMA gave the Court of Justice the opportunity to modernize its old *Meroni* case-law,[1] which dates back to 1958, regarding the delegation of powers. According to that case-law, when a delegated power implies a large margin of discretion, it replaces the choices of the delegator by the choices of the delegate, in contradiction with the distribution of powers vested in the Treaty. In the case of ESMA,[2] the United Kingdom challenged the power granted to that Authority to address decisions to natural or legal persons engaged in "short sales" (short sales being the selling of shares or debt instruments which do not belong to the seller at the time of the sale agreement, with the view to obtaining a benefit in the case of a subsequent drop in the price of the shares or debt instruments sold). The Court held that the powers granted to ESMA are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority, namely the European Commission,[3] and are not therefore in contradiction with the distribution of powers vested in the Treaty. [4]

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[1] Case 9/56.

[2] Case C-270/12, UK v. European Parliament and Council.

[3] Case C-270/12, para. 53.

[4] Actual text: "48 It follows from this that, before taking any decision, ESMA must examine a significant number of factors set out in Article 28(2) and (3) of Regulation No 236/2012 and the conditions imposed are cumulative.
49 Moreover, the two kinds of measure which ESMA may take under Article 28(1) of Regulation No 236/2012 are strictly confined to those set out in Article 9(5) of the ESMA Regulation.
50 [...] Thus, ESMA's margin of discretion is circumscribed by both the consultation requirement referred to above and the temporary nature of the measures authorised, which, established on the basis of best current practice in the field of supervision and sufficient information, are taken to address a threat calling for intervention at EU level.

Following that judgment, the EU legislator may now create, more safely than ever before, agencies which possess substantial executive powers, particularly in areas requiring specific professional and technical knowledge and experience.

The role of the European Central Bank strengthened

Let me now finish this brief overview of the measures taken to tackle the crisis with a reference to the European Central Bank (ECB). If there is one European institution that has emerged reinforced from the crisis, it is without any doubt the ECB. As its President, Mario Draghi, expressly stated at the height of the public debt crisis, the ECB was intended to do "whatever it takes" to save the euro area. Practically, the ECB was asked to intervene on two fronts: deepening the regulation of the financial and banking sector, on the one hand, while tackling the sovereign debts crisis, on the other.

Article 127 (6) TFEU enables the Council to confer specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions. On this basis, Regulations have been adopted, according to which the ECB has been given the power to subject financial institutions to an increasing economic review. As underlined before, the ECB is not only in charge of the supervision of the most prominent financial institutions within the euro zone, it also plays a prominent role in the Single Resolution Mechanism which should be applied to failing banks.

As regards the public debt crisis, I have already mentioned how the ECB is associated with the implementation of the ESM through its participation to the troika.

Furthermore, when it was faced with a dramatic increase of certain euro area Member States' sovereign risk premia (there were sudden variations in the interest rate spreads, that we started following in the same way that we follow the changing weather!), the ECB decided, in the summer of 2012, to envisage the implementation of the so-called Outright Monetary Transaction programme (the OMT programme), which entails purchasing sovereign bonds of some euro-area Member States on secondary markets "in the expectation that market financing conditions will improve", provided that the Member State concerned participates in a reform program. As AG Cruz Villalon pointed out, this selective measure "is at some

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53 It follows from all the foregoing considerations that the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with the requirements laid down in *Meroni* v *High Authority*."

remove from the ECB's standard practice". Unsurprisingly, this initiative, which was considered by many as a key measure in dealing with the sovereign debts crisis within the Eurozone, led to a legal dispute before the German Constitutional Court and subsequently before the Court of Justice, which I will refer back to in a few moments.

II. A structural response surrounded by major constitutional issues

So let me now come to the main object of this evening's presentation, which is the case-law of the European Union courts, starting with its first aspect, namely the constitutional issues that the said courts had to address in relation to the crisis. The shaping of a structural response to the euro crisis brought about multiple constitutional issues for the EU, a number of which arose in cases before the Court of Justice and the General Court. I would just like to mention five of them: (1) the scope of application of Article 114 TFEU, which is the main legal basis for the approximation of laws that are necessary for setting up the internal market of the Union: can that Article serve as a legal basis for measures addressed to individuals? (2) the issue of whether a state of necessity principle can exists in EU law, enabling a Member State to refuse to repay its sovereign debt in certain exceptional circumstances; (3) the potential impact of the sincere cooperation principle, guaranteed in Article 4 TEU, and whether it obliges a member state to take such measures as to assist another in its implementation of the set of measures adopted by the Union's institutions in order to tackle the sovereign debt crisis; (4) the distinction between the respective scopes of application of monetary and economic policies; and (5) the interpretation of the treaty-enshrined prohibition imposed on central banks to act as lenders of last resort of a member state, as well as the interpretation of the so-called 'no-bailout clause'.

For lack of time, I will limit myself to the last two issues, which have been at the heart of the two main cases of the Court of Justice relating to the crisis, namely *Pringle*[5] and *Gauweiler*.[6] On the other three issues, I will be happy, if you wish, to answer questions later on.

Regarding *Pringle* and *Gauweiler*, let me stress that, contrary to what we may think here in Cyprus, those who have sustained losses as a result of the measures adopted by the Union and its member states, mainly people from the Union's south, are not the only ones to seek remedy before the European courts. Politicians and citizens who found the measures taken to

[5] C-370/12

[6] C-62/14

be too generous, too costly for their countries or would have preferred the Union to take a different general orientation altogether, tried to see these measures annulled, arguing that, depending on the case, the Union or its member states had neither the competence nor the powers to take such measures.

1. *The Pringle and Gauweiler cases: Shaping the boundaries between monetary and economic policies*

Let us examine, in that respect, the first issue: the distinction between monetary and economic policies. Monetary policy for the Member States whose currency is the euro is an exclusive competence of the Union under the supervision of the ECB. Economic policy, on the other hand, is largely a matter for the states, the Union having only a competence to coordinate the economic policies of its member states. The delimitation of these two policies, was at the heart of the two resounding preliminary references made, respectively, by the Irish Supreme Court (the *Pringle* case) and the German Constitutional Court (the *Gauweiler* case).

In *Pringle,* the Court of Justice ruled on the validity of the European Stability Mechanism which I have already briefly presented and which constitutes the main instrument through which financial assistance is granted to member states in difficulties. Through its preliminary reference, made in the context of litigation initiated by Mr. Pringle, a member of the Irish Parliament, the Irish Supreme Court expressed doubts in particular as to whether Member States were allowed to conclude an international agreement such as the ESM Treaty whereas monetary policy had to be regarded as an exclusive power attributed to the EU. Given the importance of the ESM for preserving the stability of the euro area, as well as the importance of the legal questions that had to be answered, the Court of Justice dealt with the case in Full Court under the accelerated procedure and delivered its ruling in less than four months, on the 27th November 2012.

In this ruling, the Court focused primarily on the objectives pursued. It found that the objective pursued by the ESM, which is to safeguard the stability of the euro area as a whole, is clearly distinct from the objective of maintaining price stability which is the primary objective of the Union's monetary policy (paragraph 56). Furthermore, the financial assistance provided to a Member State cannot be regarded as an instrument of monetary policy (paragraph 57). As a result, the full Court pointed out that the establishment of the ESM, considering its purposes and its instruments, falls within the area of economic policy instead of monetary policy.

As the Treaties do not confer any specific power on the Union to establish a stability mechanism which could be analogous to the ESM (let me remind you that the only relevant article, Article 122 TFEU, only allows Union financial assistance to be granted to a Member State who's difficulties are caused by natural disasters or exceptional occurrences beyond its control), the Member States whose currency is the euro were thus entitled to conclude, outside the framework of the Union, the ESM agreement, provided that they did not disregard their duty to comply with European law when exercising their competences in that area. The Court did not see any risk on that side, given the conditionality clause which should accompany any financial assistance to a Member State under the ESM Treaty.

In its *Gauweiler* ruling, delivered in Grand Chamber on 16th June 2015, the Court of Justice examined the boundaries between economic and financial policies from the opposite perspective. The importance of the *Gauweiler* case relates of course to its substance, as it examined the validity of the ECB's Outright Monetary Transactions programme, the mere announcement of which, in September 2012, was decisive in bringing calm to the financial markets at the height of the euro crisis. But the importance of this case also has to do with the particular characteristics of the preliminary reference from which the case originates.

A constitutionality review of the OMT programme was carried out by the German Constitutional Court (the Bundesverfassungsgericht) as a result of a series of constitutional actions and dispute resolution proceedings between constitutional bodies, relating to the German Central Bank's participation in the implementation of the OMT decisions.

Supported by thousands of individuals, among whom Mr. Gauweiler, a German MP, the constitutional complaint resulted in the GCC's decision, for the first time, to make a reference for a preliminary ruling to the Court of Luxembourg. However, in its order for reference, the Constitutional Court made it clear that it had the most serious doubts about the compatibility of the OMT programme with the limitative competences afforded to the ECB as well as with the prohibition, laid down in Article 123 TFEU, that precludes the ECB from granting credit facilities to Member States and to purchase directly from them debt instruments.

Furthermore, as stressed by AG Cruz Villalon in his relevant conclusions, the German Constitutional Court seems to have reserved the right to not follow the operative part of the *Gauweiler* ruling pronounced by the Court of Justice. It should indeed be reminded that the preliminary reference was made in the context of "an *ultra vires* review of European Union

acts which have consequences for the constitutional identity of the Federal Republic of Germany", an area in which the GCC considers that it has the last word.

This is the reason for which, in its judgment on the case, the Court of Justice recalled its settled case-law, according to which "a judgment in which [the Court] gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question" (para. 16).

According to press reports, the debates before the German Constitutional court on the consequences of the Court of Justice's *Gauweiler* ruling are expected to take place in a few days (16 February 2016),[7] so we will have to wait and see what happens on that issue.

Coming back to the substance of the case, however, the question at stake was to ascertain whether the ECB could, without acting *ultra vires* (that is, without acting beyond the limits of its competence and at the same time beyond the limits of the competence of the EU), announce that it would implement an OMT programme, within which it would make selective purchases of sovereign bonds of certain euro area Member States on secondary markets, whereas it had no power to intervene in the field of economic policy, its mandate being directed primarily at the objective of ensuring price stability, which is clearly an issue relating to monetary policy.

For the Court of Justice, the OMT programme should be regarded as falling within the area of monetary policy in view of its objectives. The aim of the programme is to safeguard both an appropriate monetary policy transmission and the singleness of the monetary policy, both of which contribute to achieving the *objectives* of monetary policy (paras 47-50). The mere fact that the OMT may also be capable of contributing to the stability of the euro area, which is, as stressed in *Pringle*, a matter of economic policy, does not call that assessment into question (paras 51-52).

As regards the means employed by the ECB in order to carry out the OMT programme, the Court also stressed that the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase is undertaken by the ESM, but it did not mean that this should equally be the case when that instrument is used by the ECB. In that

[7] https://mninews.marketnews.com/taxonomy/term/166.

regard, the difference between the objectives of the ESM and those of the OMT programme is decisive. The latter may indeed be implemented only in so far as it is necessary for the maintenance of price stability whereas the ESM's intervention is intended to safeguard the stability of the euro area.

The Court concluded that a bond-buying programme could validly be adopted as part of monetary policy, provided however that the measures that it entails are proportionate to the objectives of that policy (Para 66). That led the Court to carry out an analysis of proportionality in order to conclude that that principle was not infringed.

2. *If the EU and its member states are competent, at least they should be prohibited to act! (Articles 123 and 125 TFEU)*

Another stumbling block, which was at stake in both the *Pringle* and *Gauweiler* cases, concerned the prohibitions laid down in Articles 123 and 125 TFEU. Article 123 TFEU, sets a prohibition to the European Central Bank and the national central banks to act as lenders of last resort for the member states, by prohibiting that they provide them with credit facilities and that they purchase directly from them debt instruments. As for Article 125, it contains the so-called 'no-bailout clause'. Namely, it precludes that the Union or a Member State may be liable for or may assume the commitments of another Member State. In both cases, the Court largely based its analysis on the objective of those provisions.

The 'no-bailout clause', enshrined in Article 125 TFEU, was directly at issue in the *Pringle* case. The Full Court held, in that respect, that this provision "is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State" (para 130). Given that the purpose of Article 125 TFEU is to encourage Member States to maintain their budgetary discipline by submitting them to the logic of the market when they enter into debt, the prohibition laid down by this provision only precludes the Union or the Member States from granting financial assistance to another Member State in a way that would encourage the latter to abandon a sound budgetary policy. This is clearly not the case for the ESM. Indeed, the financial assistance granted according to this mechanism amounts to the creation of a new debt, owed to the ESM by the recipient Member State, which remains responsible for its commitments to its creditors in respect to its existing debts (para. 139).

In *Gauweiler*, a similar issue arose with regard to article 123. The Court pointed out that the outright monetary transactions would have circumvented the objective of Article 123 (1) TFEU if they were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy (§ 109). After having scrutinized the modalities of the measures announced by the ECB, the Court stated that this was not the case.

Overall, the Court concluded in both *Pringle* and *Gauweiler* that the measures examined were compatible with EU law. In so doing, it reinforced the capacity of the Union and of its Member States to deal with the crisis under difficult institutional conditions due to the impossibility or lack of political will to amend the EU treaties.

III. EFFECTIVE JUDICIAL PROTECTION

Coming now to the last part of my presentation, is it possible to draw a similarly positive conclusion as regards effective judicial protection afforded to European citizens? In that regard, it must be noted that the supposed judicial protection deficit is, with the deemed lack of democratic legitimacy,[8] one of the main criticisms addressed to the measures adopted to put an end to the euro crisis. In order to assess the soundness of that criticism, it is necessary to very briefly examine judicial remedies available under national law (A) and at the level of the European Court of Human Rights (B), before examining the situation at EU level (C).

In that respect, I would like to refer to the Court's settled case-law that judicial review of compliance with the European Union legal order is ensured by the Court of Justice and the courts and tribunals of the Member States.[9] In proceedings before the national courts, individual parties have the right to challenge the legality of any decision or national measure relative to the application to them of a European Union act of general application, by pleading the invalidity of such an act.[10]

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[8] Former AG Poiares Maduro has even spoken of a "democratic failure" (M. POIARES MADURO, "La crise de l'euro et l'avenir institutionnel de l'Union européenne – capacité budgétaire et réforme politique dans l'union monétaire européenne", *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015)*, Bruylant, 2015, p. 415).

[9] C-583/11 P Inuit Tarapiit Kanatami, para. 90.

[10] Ibidem, para. 94.

A. An effective judicial protection at national level?

Rescue plans and the various structural measures elaborated with the aim of saving the financial sector and the euro area have triggered judicial proceedings at national level. This was, as we have already seen, the case in some "lender Member States", especially Germany, where *Gauweiler* is only one of a number of cases that came before the Bundesverfassungsgericht in order to examine the validity of various measures adopted during the crisis in the light of German fundamental constitutional principles. I will, however, stick here to litigation in Member States facing financial difficulties. For Cyprus there is little to say, as we all know that following the Supreme Court's decision in the *Myrto Christodoulou* case, a large number of cases has been filed before the civil courts and are in their vast majority still pending. Let me therefore concentrate on other two States gravely affected by the crisis, namely Portugal and Greece.

a) Portugal

By a judgment delivered on 5th July 2012, the Portuguese Constitutional Court struck down the salary and social benefit cuts imposed solely on civil servants by the Portuguese legislator, with the aim of fulfilling the requirements expressed in the Memoranda of Understanding concluded by the Portuguese authorities.

For the Portuguese Constitutional Court, although "some differentiation between those who receive money out of public funds and those who are active in the private sector is certainly admissible [...], the legislator's freedom in cutting the salaries and pensions of people who receive money from public funds, with a view to achieving budgetary balance, even in the context of a severe economic and financial crisis, can obviously not be unlimited". Importantly enough, the Constitutional Court ruled, as a matter of principle, that "the greater the effort imposed on citizens in order to satisfy general interests, the higher the demands for equality and justice in the distribution of those efforts should be."

Turning to the effects of the legislation at stake, the Portuguese Constitutional Court stressed that "the difference in treatment is so sharp and significant that the effectiveness of the measure adopted in order to reduce public deficit to the levels agreed in the memoranda of understanding does not justify [it], especially since alternative solutions for reducing the deficit could be envisaged either on the expenditure side (e.g. measures established in the

memoranda of understanding) or on the revenue side (e.g. through more comprehensive measures which would have the same effect as the reduction of income)."

Therefore the salary and social benefits cuts imposed solely on civil servants were declared unconstitutional.

b) Greece

In Greece, the leading case is case 668/2012, whereby the Council of State sitting in Full Court, rejected the recourse filed inter alia by the Athens Bar Association and ADEDY against the first memorandum of understanding signed by Greece. The said MoU was found to be neither an international agreement between Greece and the Member States of the Euro area nor such an agreement between Greece and the International Monetary Fund and it was not found to run counter to provisions of the Greek Constitution.

Of particularly importance is the fact that the Council of State found cuts imposed by the Memorandum on salaries, pensions and social benefits to be compatible with the provisions of the Constitution and of Article 1 of Protocol 1 of the ECHR. In that respect, the Council of State held that these measures "formed part of a wider programme of public finance adjustment and structural reform of the Greek economy which [...] was designed to meet the country's pressing financing needs and to improve its future economic and financial prospects" and thus "serve purposes of important public interest".

B. An effective judicial protection by the ECtHR?

After they have exhausted domestic remedies, individuals, affected by the implementing measures of the rescue plans elaborated for Greece and Portugal, brought their cases before the European Court of Human Rights. The applicants argued that the reduction of their salaries or their social benefits amounted to a violation of their right to peaceful enjoyment of their property. However, the success met by such applications has, to this day, been very limited.

For instance, in its *Koufaki and ADEDY v. Greece* decision, delivered on 7 May 2013, the Strasbourg Court upheld the global wages and pensions reduction in the public sector decided by the Greek legislator in order to implement the MoU signed by Greece in 2010.

The Court of Strabsourg relied to a large extent on the analysis made by the Greek Council of State in case 668/2012. For the European Court of Human Rights, the "aims [pursued through

those measures and through the wider programme of which the measures formed part] were in the general interest and also coincided with those of the euro area Member States".

Strikingly enough, when it came to ascertain whether Greece had struck a fair balance between this general interest and the requirements of the protection of the fundamental rights of the applicant, the Human Rights Court considered that "the extent of the reduction in the [...] applicant's salary was not such as to place her at risk of having insufficient means to live on". Therefore, the salary and social benefit-cuts at stake did not constitute a breach of Article 1 of Protocol n° 1 of the Convention (§ 46).

In two more recent decisions, concerning Portugal, the *Mateus* and *Da Silva* cases, delivered respectively on 8th October 2013 and 1st September 2015, the European Court of Human Rights took a fortiori the same view, given the temporary nature of the salary and social security benefits reduction at stake.

C. Effective judicial protection at EU level ?

Carrying out, at the EU level, a judicial review of the measures taken to save the financial sector and the euro area, especially a review of compliance with the European citizens' fundamental rights, gives rise to a double difficulty.

On the one hand, several measures taken at the European level during the crisis cannot be regarded as EU law measures and therefore fall outside the scope of application of the Charter of Fundamental Rights and the jurisdiction of the Court of Justice (1). On the other hand, the requirements that individual applicants have to satisfy in order to have the possibility to challenge, before the General Court, some aspects of the austerity plans elaborated at the European level are often very difficult to meet (2).

1. The scope of application of EU Law and the Charter of Fundamental Rights

As underlined before, an important part of the instruments that have been adopted with the aim of regulating the crisis do not fall within the scope of application of EU law, but constitute international agreements between Member States. As a consequence, by adopting such agreements, Member States cannot be said to be implementing EU law, within the meaning of Article 51 of the Charter of Fundamental Rights of the European Union. So their actions cannot be reviewed as to their compliance with the fundamental rights enshrined in the said Charter.

That is one of the conclusions that the Court of Justice reached in the *Pringle* case. The Irish Supreme Court asked whether the creation of the ESM was at variance with Article 47 of the Charter, guaranteeing the right to an effective legal remedy. After having recalled that, by adopting the ESM Treaty, the signatory Member States were not implementing Union law, the Court concluded that "the general principle of effective judicial protection does not preclude" the conclusion and the ratification of the ESM Treaty (§ 180-181).

In her View expressed on the case, AG Kokott arrived to the same conclusion but following a different reasoning. She took the view that it was in fact not necessary to ascertain whether the Charter was applicable to the ESM's activities, the right to effective judicial protection being sufficiently guaranteed by the preliminary reference proceedings, which would have enabled the Court to rule on the compatibility with European Union law of the acts of the Member States within the ESM. Furthermore, according to her, it follows from Article 19(1), second subparagraph, TEU that "Member States have provided for the required legal remedies to secure effective legal protection *at least with regard to the national application of the conditions*" imposed by the ESM when granting financial assistance (§ 194).

In any event, it is important to stress that, even when the action undertaken to tackle the crisis falls within the scope of application of EU law, and is therefore amenable to judicial review in the light of the fundamental rights enshrined in the Charter, it remains difficult for an individual applicant to effectively rely on such fundamental rights in a context of economic crisis, as it was confirmed by a recent judgment of the General Court (Judgment, 7 October 2015, *Accorinti v. ECB*, T-79/13).

In order to reject an action for damages introduced by several individual applicants who claimed to have been injured by a decision of the ECB adopted in the context of the Greek PSI (the haircut of Greek sovereign debt), the General Court pointed out that "private investors cannot rely on the principle of the protection of legitimate expectations or on the principle of legal certainty in a field such as that of monetary policy, the objective of which involves constant adjustments to reflect changes in economic circumstances". Therefore, "the private investors were deemed to have knowledge of the highly unstable economic circumstances which determined the fluctuation in the value of the Greek securities".

Let me now turn to my last point:

2. *The admissibility requirements before the General Court of the European Union*

The financial assistance afforded to the euro area countries which were the most affected by the crisis often went hand in hand with the obligation for them to take drastic economic measures with far-reaching financial consequences on individuals and undertakings. Unsurprisingly, those affected tried to challenge before the General Court the validity of the successive rescue plans that have emerged during these last years.

However, although they were somehow softened by the Lisbon Treaty, the conditions under which an individual applicant may lodge an action for annulment before the General Court, remain hard to satisfy. The General Court's judgment in the *Accorinti* case (T-224/12), delivered on 25 June 2014, warrants some attention in that regard.

Along with other individual applicants, Mr. Accorinti lodged an action for annulment of the ECB's decision to "make use [...] of Greek debt instruments which did not fulfil the Eurosystem's minimum requirements for credit quality thresholds" on the condition that Greece would provide "to national central banks [...] a collateral enhancement in the form of a buy back scheme".

For the General Court, the applicants had a legitimate interest to obtain the annulment of the decision challenged. They could indeed benefit from the elimination *ex nunc* of this decision, in the case where the duty to concede a collateral enhancement imposed by it would have created an unequal treatment at their expanse. Nonetheless, their action was declared inadmissible because the applicants were not directly concerned, within the meaning of Article 263 TFEU, by the obligation of "collateral enhancement" laid down by the decision at stake. Indeed, it was for Greece to provide this enhancement. In that regard, the General Court stressed that the decision challenged does not establish, on its own, specific criteria for the purposes of its implementation. Insofar as the ECB's decision leaves a margin of appreciation to Greece, there is no direct link, in the General Court's view, between the act challenged and the situation of the applicants.

Apart from the inherent difficulties of *locus standi* for individuals before the General Court,[11] potential complainants are also faced with procedural impediments related to the nature of the author of the act against which they want to lodge a judicial action. The *Mallis*[12] and *Ledra*[13]

[11] Art. 263 §4 TFEU: "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, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

[12] T-327/13, judgment of 16 October 2014.

judgments of the General Court are quite revealing in that regard. Both cases are connected with the application of the ESM to Cyprus.

The Malli spouses lodged an action before the General Court in order to obtain the annulment of the Eurogroup's statement of 25 March 2013 concerning the restructuring of the banking sector in Cyprus. In this statement, the Eurogroup pointed out that it had reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme supported by all euro area Member States and by the troika. The annex to this statement listed various measures which had to be adopted by the Cypriot authorities, one of which provoked a dramatic pecuniary loss for the Malli spouses.

As the Eurogroup is not an institution of the Union, being characterized by the relevant Protocol attached to the EU treaties as a forum where the finance Ministers of the Member States whose currency is the euro can meet informally when necessary, the Malli spouses chose not to direct their action for annulment against it. The applicants decided to introduce their action against the European Commission and the ECB, having regard to the role that these European institutions had played in designing and implementing the measures contained in the Eurogroup's statement.

In its order of 16 October 2014, the General Court rejected the action as inadmissible. On the one hand, it stressed that the «contested statement cannot be imputed to» the ECB or the Commission, since "the Euro Group cannot be regarded as being under the control of the Commision or the ECB [and does not act] as an agent of those institutions". On the other hand, the challenged statement was, according to the General Court's findings, deprived of any binding effects. Indeed, it was considered by the General Court as "purely informative", giving "a very general account of certain policy measures which had been agreed with the Republic of Cyprus in order to stabilize the country's financial situation".

In *Ledra*, bank accounts holders challenged before the General Court the legality of the MoU concluded by Cyprus. Two proceedings were simultaneously engaged: on the one hand, an action for the annulment of paragraphs 1.23 to 1.27 of the MoU (the ones referring to the banking sector) and, on the other hand, an action for damages against the Union.

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[13] T-289/13, judgment of 10 November 2014.

Once again, the General Court rejected the action for annulment as inadmissible for the reason that the MoU was adopted by Cyprus and the ESM, none of them being "among the institutions, bodies, offices or agencies of the EU". For the same reason, the action for damages was dismissed by the General Court, after it had recalled that "a claim for compensation that is directed against the EU and is based on the mere illegality of an act or course of conduct that has not been adopted by an institution of the EU or by its servants must be rejected as inadmissible".

An appeal before the Court of Justice is pending in both *Mallis* and *Ledra* cases. The hearing before the Court in Grand Chamber formation took place a few days ago. It is therefore quite obvious that I cannot say much more about these cases.

This brings me to a short CONCLUSION:

We have seen that the European Union and its Member States have taken measures to tackle the crisis of the euro. They have done so with some delay, but they have taken far-reaching measures. However, because of a lack of proper legal basis in the EU treaties, and because of a lack of political will to amend the treaties in order to create such a legal basis, some of the main measures taken were adopted outside the EU, through instruments of public international law.

For the time being, the main contribution of the case-law of the EU courts on issues relating to the euro crisis has been to set aside the legal obstacles to the adoption of effective measures. Both the European Central Bank and the Member States have been found to be competent to adopt the measures that they did, and the provisions of Articles 123 and 125 of the Treaty on the Functioning of the EU have not been interpreted in a way that would prevent them from doing so.

As for the effective judicial protection of European citizens, it is, in this field and in the light of current case law, mainly provided by national courts, largely on the basis of national rules.