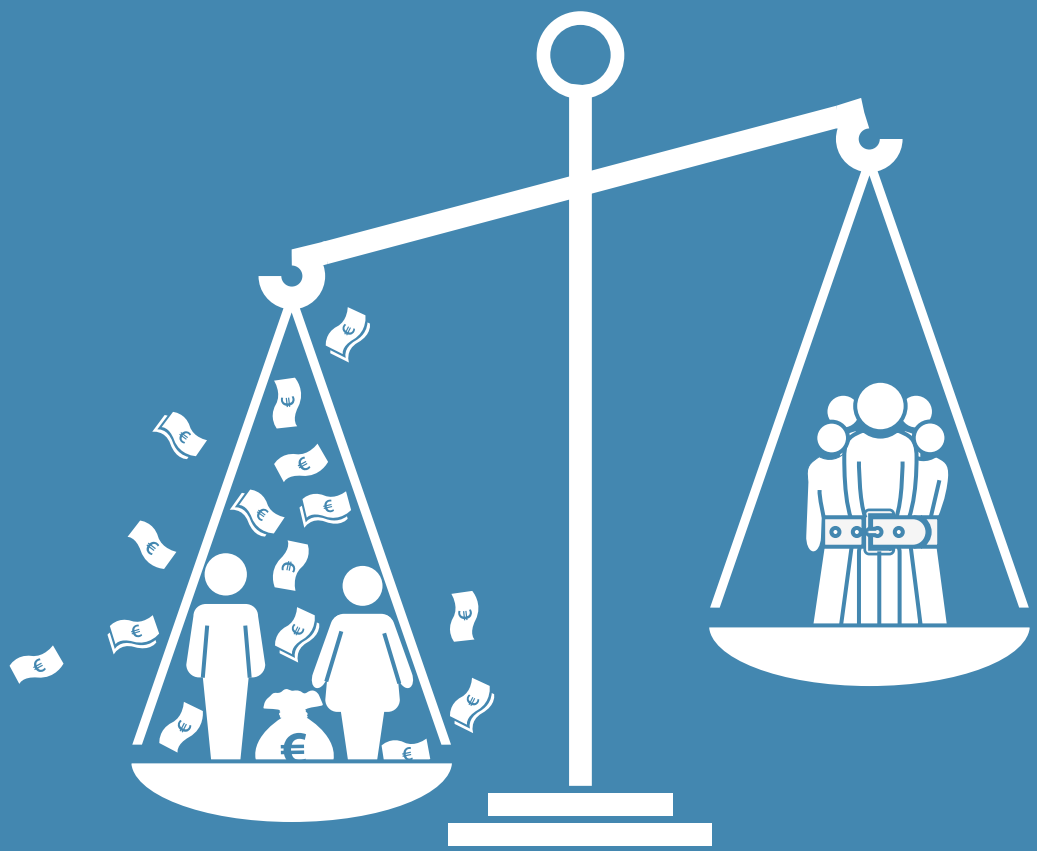
CAN THE **AUSTERITY MEASURES** BE CHALLENGED IN **SUPRANATIONAL COURTS?**

The cases of Greece and Portugal



CONFEDERATION SYNDICAT EUROPEEN TRADE UNION

UNIVERSITY OF MANCHESTER

An analysis for the ETUC

Aristea Koukiadaki 6/30/2014

CONTENTS

1. INTRODUCTION[1]

The European sovereign debt crisis is having profound consequences for the labour law and industrial relations systems of the debt-affected member states and for the role of social policy at EU level. Driven by the need to initiate a process of 'internal devaluation' so as to restore the competitiveness of the national economies, public deficit reduction measures have been coupled with in-depth structural labour market reforms in a number of EU Member States, including Greece, Ireland and Portugal. The latter are not only aimed at ensuring wage moderation but also at amending essential features of the industrial relations systems via changes in employment protection legislation and collective bargaining.[2] The paper provides an evaluation of the scope and extent to which the austerity measures that have been introduced in EU Member States on the basis of the structural adjustment programmes implemented with the support of the 'Troika', i.e. the European Central Bank (ECB), the European Commission (EC) and the International Monetary Fund (IMF), can be legally challenged before supranational judicial bodies. In doing this, the analysis concentrates on the cases of Greece and Portugal and assesses the scope for the development of litigation involving specifically the Court of Justice of the European Union (the Court) and the European Court of Human Rights (ECtHR). Four sets of issues that should be addressed when examining the possibilities for legally challenging the measures are examined. These are: 1. Whose acts may be challenged; 2. The standing of various parties to seek a challenge; 3. The range of acts subject to challenge, and; 4. The grounds for the challenge. It will be argued that despite the veneer of complexity associated with the instruments used during the crisis, there are sufficient links between the legal values at EU and ECHR levels and the austerity measures at national level that provide scope for the establishment of judicial dialogue between domestic courts and supranational courts as well as for using the supranational legal framework at domestic level as an additional legal basis for assessing the lawfulness of the austerity reforms.

The structure of the paper is as follows. Section 2 assesses the legal status of the 'Troika', identifies the EU institutions that have issued acts in the context of the economic crisis and discusses the competence of the Court. Section 3 then examines the nature of the parties that may bring proceedings before the Court on the basis of Articles 263 and 267. This is then followed by an examination in section 4 of the range of acts that can be subject to challenge. In this context, the analysis distinguishes the different forms of the financial assistance programmes that have been adopted in the Eurozone and then proceeds to examine in more detail the conclusion and implementation of the programmes in Greece and Portugal, paying attention to the role of the EU institutions in reviewing the programmes of implementation and the extent to which, if available, social partners were consulted during the period for the conclusion of the programmes. Section 5 then focuses on the main acts used for the implementation of the reforms, i.e. Council Decisions and MoU, with the objective of identifying links between individual bailouts and conventional EU legal sources. Following this, section 6 examines a range of legal grounds for litigation. These involve the compatibility of the austerity measures with EU competences in the social field, with the EU Treaties' social objectives and with the EU Charter of Fundamental Rights (EUCFR). The analysis then turns in section 7 to identify possible subject-areas for litigation and section 8 assesses the scope for involving the European Court of Human Rights. Section 9 concludes.

1 I would like to thank Claire Kilpatrick for insightful discussions on the topic and Wiebke Warneck for constructive comments on previous versions of the paper.

2 S. Deakin, and A. Koukiadaki, The sovereign debt crisis and the evolution of labour law in Europe, In N. Countouris and M. Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge: Cambridge University Press, 2013).

2. WHOSE ACTS CAN BE CHALLENGED?

The Treaty provides that each institution of the Union is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.[3] The relevant EU institutions that have adopted acts in the context of the Eurozone sovereign debt crisis are: the (Ecofin) Council (of Ministers), the European Commission (Commission) and the European Central Bank (ECB).[4] Among the EU institutions, it is the European Commission that is the primary guardian of the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), the two founding treaties of the EU.[5] The European Council does not usually adopt legal binding acts. If it does, then its acts intended to produce legal effects vis-à-vis third parties can also be challenged, like similar acts of the European Parliament.[6] In *Pringle*,[7] the Court found that on the basis of Article 13(1) and Article 267 TFEU it had jurisdiction to examine the validity of a decision of the European Council. The Euro Area Summit is not an institution of the EU but an *ad hoc* gathering without Treaty status at least until the ratification of the so-called fiscal compact treaty, the Treaty on Stability, Coordination and Governance in the economic and monetary Union (TSCG). The Euro Group, the gathering of the Euro Area Ministers of Finance does have Treaty status[8] and a permanent chairman, but is not competent to adopt legally binding acts. It is important to add that the Troika is recognised as an *ad hoc* informal hybrid of IMF, EC and ECB whose members are high-level staff appointed by each institution respectively but acts as a *consortium* without having a distinct legal personality.[9] Its basis rests upon the strategic political decision of the coordination of the three institutions for conditionality purposes that is reflected in the various conditionality documents but its internal operations have received no formalisation. Therefore it is not possible to rule on the validity of the acts of the Troika as such, but only of its constituent institutions.[10] Aside from EU institutions, the acts of EU Member States can be challenged as well, as they are required to implement EU legislation.

Besides these considerations, it is important to add here that the methods employed by the Member States and EU institutions in countering the crisis[11] not only require policy changes to be reflected in successive amendments to legal instruments but also allow challenges of acts of ratification before national courts.[12] So far, it is actually domestic courts in various Member States that have predominantly dealt with challenges against the austerity measures, albeit with mixed results.[13] Among the earlier cases, an application for a judicial review was lodged before the Council of State against government decisions in Greece that provided for wages and pensions cuts and established the income policy for 2010, on the basis that the (first) loan agreement and Memorandum of Understanding (MoU) that necessitated these changes should have been ratified by a qualified majority of three-fifths of the Parliament. The case was rejected by the Council of State: [14] it was held that reasons of overriding public interest necessitated the loan agreement, that full compliance with the principles of proportionality and necessity was achieved and that the legislation did not need to be adopted by the Parliament by a qualified majority, as the loan agreement did not constitute

3 Article 13(2) TEU.
4 R. Smits *Judicial Challenges of Measures to Overcome the Crisis*, (2012) available at http://renesmits.eu/Judicial%20challenges%20of%20measures%20to%20overcome%20the%20crisis.pdf
5 Article 17 TEU and Article 258 TFEU.
6 Article 263 TFEU.
7 C-370/12, *Thomas Pringle v Government of Ireland,* Judgment of the Court (Full Court) of 27 November 2012.
8 Article 137 TFEU and Protocol No. 14 on the Euro Group.
9 Smits, n 4 above.
10 Smits, n 4 above.
11 See below sections 3 and 4.
12 Smits, n 4 above.
13 For a detailed discussion of these and related cases, see C. Kilpatrick and B. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, LAW 2014/05 (Florence: EUI, 2014).
14 Council of State, 668/2012.

an international agreement under Article 28 of the Greek Constitution. In contrast, in a series of cases brought before the Portuguese Constitutional Court, a range of measures changes, including those related to dismissals, the cancellation of clauses in collective agreements and reductions of rights and benefits of public employees and pensioners, have been found to be in contradiction of the Portuguese Constitution.[15] Importantly, in neither of the cases brought before these courts in Portugal and Greece has there been any full assessment of the compatibility of the measures with EU law and specifically the EUCFR.[16]

In this context, it is necessary to outline the main jurisdictional issues in this area. On the basis of the Treaties, the Court is competent to rule on the validity of legal acts having binding effect adopted by the EU institutions and the governments of EU Member States.[17] With respect to the issues at present, jurisdiction is conferred on the Court to rule on disputes between the Member States concerning the interpretation and the application of all three inter-governmental instruments used in the bail-outs provided to Member States of the Eurozone.[18] In the Greek I facility, the Court is empowered to rule on any dispute concerning the legality, validity, interpretation or performance of either the loan facility agreement or the inter-creditor agreement.[19] In the European Financial Stability Facility (EFSF), Member States undertake to submit their disputes to the jurisdiction of the Court.[20] For its part, the European Stability Mechanism (ESM) Treaty confers on the Court jurisdiction to rule on disputes between the parties, or between the parties and the ESM, on the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that Treaty.[21] Recital 16 of the preamble to the ESM Treaty explicitly stipulates that the attribution of jurisdiction to the Court of Justice is operated by means of Article 273 TFEU. According to this provision, the Court shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.[22]

To summarise, only the acts adopted by the ECB, the Commission, the Council of Ministers and the European Council (in cases where it adopts legal binding acts) can be challenged. The Court has jurisdiction to hear cases concerning not only legal acts adopted by the EU institutions and the governments of EU Member States,[23] but has been also conferred competence to rule on disputes between the Member States concerning the interpretation and the application of all three inter-governmental instruments used in the financial assistance programmes provided to Member States of the Eurozone.

15 Use was made of the principle of equality, as formulated in Article 13 of the Portuguese Constitution (1976). On this, see A. Monteiro Fernandes, Regressive Labor Legislation – The Magic Potion for all Crises: The Case of Portugal, (2013) 35 *Comparative Labor Law and Policy Journal*, 3, 397.

16 On this issue, see below sections 6 and 7.

17 Article 263(1) and (2) TFEU.

18 See below section 3 for an analysis of the different financial assistance mechanisms used in the Eurozone bail-outs.

19 Article 14(2). The applicable law in case of disputes is English (Article 14(1)). Article 6 of the loan agreement also specifies that if the Court rules that the agreement violates EU law and it is not possible to resolve this violation, then the financial assistance is cancelled immediately and irrevocably.

20 Article 16(2) of the EFSF Framework Agreement between the Eurozone Member States and the EFSF.

21 Art. 37(3) ESM Treaty.

22 Article 273 TFEU aims at avoiding a situation where courts or bodies other than the Court of Justice interpret issues related to EU law and adopt decisions binding for the Member States.

23 Article 263(1) and (2) TFEU.

3. THE LEGAL STANDING OF THE PARTIES

Article 263 TFEU[24] provides scope for a judicial review by the Court of the legality of acts of the EU institutions. A distinction is made in the Treaty between complaints by 'privileged' and 'non-privileged' applicants. It is widely accepted that the Treaty makes it much easier for 'privileged' applicants (Member States, the EU institutions, including the European Commission, the European Parliament and the Council) to challenge the acts of the EU which may also be concerned with employment and industrial relations.

It is much more difficult for 'non-privileged' applicants (individuals and organisations) to complain to the Court concerning the legality of acts of these EU institutions.[25] Even though the possibility of legal challenge by individuals and companies has been broadened by the Lisbon Treaty, binding legal acts of EU institutions are not susceptible to judicial challenges from parties that consider themselves affected but that cannot persuasively demonstrate that they are directly and individually concerned. 'Non-privileged' applicants, who may include individual workers, employers and trade unions, can directly complain to the Court about acts of the EU institutions, but only under certain conditions. The basis of standing in such cases is derived from Article 263(4) TFEU, which stipulates that 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, 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'. The Court has interpreted the possibility for non-privileged applicants to bring a complaint very strictly. In the area of labour law, more specifically, the Court has refused to accept that collective organisations representing their members qualify as individually and directly concerned.[26] For example, the Court refused in the past to hear two cases where French works councils complained against decisions of the Commission allowing mergers between French companies to proceed,[27] and again in a case where a works council complained about a Commission decision condemning state aid to an industry.[28] On the basis of these developments, it may be argued that the extent to which the Court is willing to consider complaints made by individuals against actions of the EU institutions, even where these affect employment and industrial relations, may be limited.

With respect to the measures discussed at present, the reference to 'an act addressed to another person' in Article 263(4) TFEU clearly includes a decision addressed to another person, including a Member State or Member States that have been the addressees of EU acts with respect to the crisis.[29] For the present purposes, it thus includes Council Decisions addressed to the Member States

24 Article 263 (ex Article 230 TEC) reads: '[1]The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. [2] It shall for this purpose have jurisdiction in actions brought by a ember State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. [3] The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives. [4] Any natural or legal person may, under the conditions laid down in the first and second paragraphs, 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. [5] Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. [6] The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. In terms of process, the General Court first decides, whereupon appeal lies with the CJEU (Article 256(1) TFEU).

25 On this, see B. Bercusson , European Labour Law (Cambridge: Cambridge University Press, 2009).

26 Bercusson, n 25 above.

27 *Comité Central d'Entreprise de la Société Générale des Grandes Sources v. Commission*, Case T-96/92 [1995]; *Vittel v. Commission*, Case T-12/93 [1995].

28 *Comité Central d'Entreprise de la Société Générale des Grandes Sources v. Commission*, Case T-96/92 [1995]; *Vittel v. Commission*, Case T-12/93 [1995].

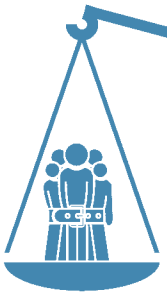
29 Smits, n 4 above.

that receive financial assistance. To challenge an act addressed to another person, the applicant must establish both direct and individual concern. Case law suggests that it may be difficult for the criterion of direct concern to be fulfilled in the case of individuals challenging Council Decisions addressed to Member States. This is because the latter have, even small, scope for discretion concerning the means for implementing the measures stipulated in the Council Decisions. This was illustrated in the cases brought before the General Court by the public sector union in Greece (ADEDY).[30] The applications concerned two Council Decisions[31] that were addressed directly to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit. The applications were made on the basis that the Decisions violated, among others, the principle of conferral.[32] The actions were dismissed by the General Court for reasons of lack of standing of the applicants. In both cases, the Court found that the applicants had failed to demonstrate that they were directly concerned by the challenged acts. This was because the measures were deemed general and required the adoption of implementing measures by the Greek authorities, for which the latter enjoyed a broad discretion. Aside from issues related to direct concern, an additional requirement in the case of non-privileged applicants is that the applicant must establish individual concern. This is potentially a more difficult barrier for arguing *locus standi* concerning the measures discussed at present. On the basis of *Plaumann*,[33] it is uncertain whether this can be fulfilled, as the Council Decisions affect a large number of individuals and not only the applicants.[34]

It is worth examining here the possibilities for 'privileged applicants', under Article 263, to challenge the measures. Privileged applicants, with unconditional access to make complaints to the Court, are defined as 'a Member State, the European Parliament, the Council or the Commission'.[35] Semi-privileged applicants, comprising the Court of Auditors, the European Central Bank, and the Committee of the Regions, have standing under Article 263 'for the purpose of protecting their prerogatives', in other words when their interests are affected. The position of the European Parliament is particularly interesting. The status accorded to it in review proceedings altered over time. Prior to the TEU it was not accorded any formal privileged status. However, in *Chernobyl*,[36] the Court held that the EP could have a 'quasi-privileged' status so as to protect its own prerogative. The Court regarded the institutional balance in the EU as requiring that the prerogatives of the European Parliament be respected, by, first, allowing Parliament to challenge acts, which threaten its prerogatives, and second, acknowledging that these prerogatives included the right to participate in the legislative process. On the basis that the European Parliament (EP) is now included in Article 263 as a 'privileged applicant' and on the basis of the discussion below concerning the requirements for engaging all major EU institutions when drafting and adopting EU legislation, it is worth exploring further the possibilities of engaging the European Parliament in the debate concerning litigation against the austerity measures. As argued below, a means to do this would be for the EP to challenge future EU acts on the grounds that they violate the principle of conferral.[37]

In addition to direct challenges before the Court, natural and legal persons may seek to address the legality of acts adopted during the economic crisis through national courts and, by way of the preliminary ruling procedure, arrive at the Court. Assuming a legal avenue for interested parties at national level through which they can access a national court with a challenge of measures taken in connection with the crisis, the national court may[38] refer the issue of validity or interpretation to the

30 Case T-541/10, *ADEDY and Others v Council,* OJ C 26/45, 26.1.2013; Case T-215/11, *ADEDY and Others v Council,* OJ C 26/45, 26.1.2013.
31 Council Decision 2010/320/EU and Council Decision 2011/57/EU.
32 Article 5(2) TEU.
33 See above n 27.
34 On the treatment of similar issues by the European Court of Human Rights (ECtHR), see below section 8.
35 Article 263 TFEU.
36 Case C-70/88 *European Parliament v Council (Chernobyl)* [1990] ECR I-2041.
37 Article 5(2). See below section 6.1 for a discussion on this.
38 In the case of the highest court of the Member State: should.



Court. In Pringle,[39] the Court reiterated that any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for preliminary ruling. Nonetheless, the recognition of a party's right to plead the invalidity of an act of the Union presupposes that the party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act.[40] On this basis of the discussion above concerning the strict test of legal standing in the case of non-privileged applicants, it can be argued that the condition specified in the Court's case law will be fulfilled with respect to some of the acts discussed at present.

4. THE RANGE OF ACTS TO BE CHALLENGED

Before proceeding to an examination of the range of acts that can be challenged before the Court, it is necessary to clarify the legal nature of the bail-outs. As Kilpatrick has argued, "the less clearly a bail-out is based on standard EU sources, the less straightforward questions about its EU reviewability become."[41] As such, an assessment of the legal nature of the financial assistance programmes will help determine in turn the type of acts and EU institutions that can be challenged as well as the grounds for judicial review and preliminary references.

Overall, the financial assistance programmes that have been provided to EU Member States so far can be divided in the following categories:[42]

- Non-eurozone programmes: these have been introduced on the basis of article 143 TFEU.[43] This option has been used in the case of non-Eurozone Member States, namely Hungary, Latvia and Romania.[44]
- Eurozone programmes:

  a. Bilateral (Eurozone Member States set up bilateral loans complemented by an IMF stand-by arrangement): provided financial assistance in the case of Greece I (2010);[45]

  b. European Financial Stabilisation Mechanism (EFSM) (on the basis of article 122(2) TFEU):[46] provided financial assistance in the cases of Ireland and Portugal;

  c. EFSF (international agreement for the establishment of a private company under the control

39 See n 7 above.

40 See Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 35.

41 C. Kilpatrick, *An Economic Emergency? The Degradation of Basic Legal Values in Europe's Bailouts*, 2013 unpublished manuscript (copy with the author), 5.

42 For the analysis at present, attention will be paid specifically to the bail-outs provided to Greece and Portugal.

43 This provision concerns the situation where a Member State which is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy.

44 Council Decision of 4 November 2008 providing Community medium-term financial assistance for Hungary (Decision 2009/103/EC). Council Decision of 20 January 2009 providing Community medium-term financial assistance for Latvia (Decision 2009/290/EC). Council Decision of 6 May 2009 providing Community medium-term financial assistance for Romania (Decision 2009/459/EC) amended by Decision 2010/183. See also http://ec.europa.eu/economy_finance/eu_borrower/balance_of_payments/index_en.htm.

45 Greece was given a loan of 110 billion EUR by means of bilateral loans from the other Eurozone states (80 billion EUR) and 30 billion EUR from the IMF.

46 The EFSM was an emergency funding programme reliant upon funds raised on the financial markets and guaranteed by the European Commission, using the budget of the EU as collateral. Article 122(2) was used as the legal basis for Council Regulation 407/2010 ([2010] *OJ L*118/1), which stipulates the details of the mechanism.

of the Eurozone member states):[47] provided financial assistance to Ireland, Portugal and Greece II;

d. ESM (intergovernmental Treaty):[48] provided financial assistance to Cyprus.[49]

As it can be seen, some Euro-zone programmes, apart from Ireland and Portugal, took place outside the EU institutional context. This is the case for Greece I and II as well as Cyprus. Greece I was negotiated during 2010 by the Greek authorities with the European Commission, acting in liaison with the ECB and the IMF, as previously established by euro area Member States.[50] The main elements of policy conditionality have then been included in a Memorandum of Economic and Financial Policies, in a Memorandum of Understanding on Specific Economic Policy Conditionality and in a Technical Memorandum of Understanding.[51] In the case of Greece, the Memoranda were signed on May, 3 2010 between the Greek government and the European Commission, on behalf of the EuroArea Member States. On 6th of May the Greek Parliament adopted the MoU and voted a number of policy measures implementing it.[52] On May 8 2010, the Loan Facility agreement was concluded between the Member States whose currency is the Euro and the Hellenic Republic as well as an Inter-creditor Agreement. On May 10 2010, the Council adopted a Decision according to articles 126(9) and 136 TFEU including the main elements of the policy conditionality.[53] The MoU have been further specified in a series of 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. The second adjustment programme for Greece (Greece II) was negotiated by the same institutions, i.e. the European Commission, acting in liaison with the ECB and the IMF, as previously established by euro area Member States and the main elements of policy conditionality were also included in the MoU.[54] However, the programme was established in the context of the EFSF, which is a Luxemburgish public limited liability company incorporated by the 16 countries sharing the euro in 2010 and was created following the decisions taken on 9 May 2010 within the framework of the Ecofin Council.

While both Greece I and Greece II are outside the EU institutional context, it is still appropriate to include them in the analysis for a number of reasons. First, a number of Council Decisions have been adopted in the case of Greece I on the basis of Articles 126 (paragraphs 6 and 9) and 136 TFEU.[55] Under Greece II, the EFSF loans are again subject to compliance with the Council Decision 2011/734/EU of 12 July 2011, as amended, the MoU originally signed on May 3, 2010, as amended by the Supplemental MoU of 6 December 2011, and as amended periodically. Secondly, under both Greece I and II, the Council, the Commission and the ECB have taken on significant monitoring roles. As we just saw, the Council has adopted a number of Decisions addressed to Greece. With respect to the Commission and the ECB, the EFSF Framework Agreement clearly establishes that the conditions attached to the financial assistance are to be included in a MoU negotiated by the beneficiary State with the Commission, acting together with the ECB and the IMF.[56] It is important also to stress that

47 Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union, Council Document 9614/10 of 10 May 2010. The European Financial Stability Facility (EFSF) was created by the euro area Member States following the decisions taken on 9 May 2010 within the framework of the Ecofin Council.

48 The ESM was preceded by an amendment of Article 136 TFEU to provide an explicit authorisation for the Member States to have a funding mechanism. At present, the ESM has been the main instrument to finance new programmes. The ESM borrows a number of EU institutions, such as the Commission, for certain tasks For instance, the signature of the agreement is the task of the Commission, on behalf of the ESM (article 13(4)).

49 The ESM was also the source of the Spanish assistance programme, which was provided to the financial sector only.

50 Statement on the Support to Greece by Euro Area Member States, Brussels, 11 April 2010.

51 The 25 March statement by the Member States had already declared that any disbursement on the bilateral loans would be subject to strong conditionality.

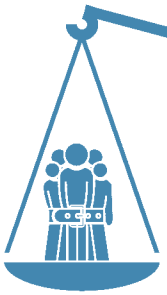
52 The MoU was attached as an annex to Law 3845/2010. The provisions of the latter broadly implement the MoU.

53 Council Decision addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010/320/EU) O.J. L145/6, 11.6.10.

54 The second MoU was attached as an annex to Law 4046/2012 (see also Act 6 of 28 February 2012 of the Ministerial Council (FEK 38 A/28.2.2012) and Guidance by the Ministry of Labour and Social Security 4601/304 (2012).

55 Council Decision 2011/734/EU of 12 July 2011 (which recast Council Decision 2010/320/EU of 10 May 2010 as amended) adopted on the basis of Articles 126(9) and 136 TFEU (OJ 2011 L 296/38) and its subsequent amendments;

56 Preamble 2 to the EFSF Framework Agreement.



while Greece II has as legal basis the EFSF, the latter was established at the same time and by the same institutions involved in the establishment of the EFSM, which was created on the basis of the EU Treaties.[57] Finally, the EFSF framework agreement clearly stipulates that 'the conditions attached to the provision of Financial Assistance by EFSF as well as the rules which apply to monitoring compliance must be fully consistent with the Treaty on the Functioning of the European Union and the acts of EU law.'[58]

In contrast to Greece I and II, the Portuguese programme took place on the basis of the EU Treaties.[59] In the context of the EFSM, Article 3 of Regulation (EU) no. 407/2010 establishes that the State seeking financial assistance is to submit an adjustment programme to the Commission and to the Economic and Financial Committee. The EFSM Regulation confers implementing powers on the Council to make decisions by qualified majority to grant financial assistance. The Council Implementing Decision[60] shall include: the amount of the loan, its length (maturity), its cost to the Member State as well as the conditions attached to the loan and approval of adjustments proposed by the Member State to meet those conditions.[61] In line with Article 3, these conditions are to be further detailed in a MoU concluded by the recipient State and the Commission while the ECB has a supporting role in managing the financial assistance. Article 4 also entrusts the Commission with the task of regularly verifying whether Members State's policies accord with the adjustment programme and, accordingly, to decide the release of further instalments. The Commission is required, again in consultation with the ECB, to re-examine the general economic policy conditions at least every six months. Changes to those conditions and the corresponding revised adjustment programme will be made by a new Council Implementing Decision acting by qualified majority on a proposal from the Commission. As Kilpatrick[62] argues, this means that each EFSM bailout takes the legal form of an original Council Implementing Decision (CID) tracking the Regulation's requirements and any change in the conditions is accompanied by a new amending CID.

In the case of Portugal, the Portuguese government requested financial assistance from the EU, the euro area Member States and the IMF on 6 April 2011. On 3 May 2011, an agreement was reached between Portugal and the joint Commission/IMF/ECB mission in respect of an Economic Adjustment Programme. The latter included a joint financing package of €78 billion.[63] The agreement on the programme was formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.[64] The Memorandum of Economic and Financial Policies ('MEFP'), the Memorandum of Understanding on Specific Economic Policy Conditionality ('MoU') and the Loan Agreement were signed thereafter.[65] Irrespective of the fact that some of the funding comes from the EFSF, the EFSF agreement makes it clear that these loans are subject to the EFSM legal regime and sources.[66] In line with Regulation 407/2010, the first Council Decision for Portugal specifies that the first disbursement of financial assistance should be released subject to the entry into force of the MoU and of the Loan Agreement.[67] The Decision also made the release of further instalments conditional upon a favourable review by the Commission, in consultation with the ECB, of Portugal's compliance with the general

57 Article 122(2) TFEU. See section 6.1 below for an analysis of the role of the EU institutions in this.
58 Preamble 2(2) to the EFSF Agreement.
59 A similar procedure was also followed in the case of Ireland, which is not examined at present (for an analysis of this, see C. Kilpatrick, *Legal Defences of Social Europe in the Crisis*, keynote lecture, ILERA Conference, Amsterdam: 21 June 2013, available at http://ilera-europe2013.eu/articles/keynotes
60 The Lisbon Treaty introduced the Council Implementing Decision. It is intended to involve executive rather than legislative power for which a delegated act would be needed (Kilpatrick, n 41 above at 10).
61 Article 3(3) Regulation 407/2010 (EFSM).
62 Kilpatrick, n 41 above.
63 On the European side, the programme would be financed within the framework provided by the EFSM and the EFSF (EU/EFSM – €26 billion, Euro area/EFSF – €26 billion, IMF – about €26 billion).
64 Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal, L 159/88, 17.6.2011.
65 This policy programme was supported by the two largest opposition parties.
66 See recital 4 in the preamble and Article 2(7) of the Master Financial Assistance Facility Agreement between EFSF and the Portuguese Republic.
67 Article 1(4).

economic policy conditions, as defined by the Council Decision and the MoU.[68] The Commission, in consultation with the ECB, is responsible for agreeing with the Portuguese authorities the specific economic policy conditions attached to the financial assistance[69] and it has also the role of managing the Union financial assistance.[70] The MoU specifies that if targets would be missed or expected to be missed, additional action would be taken and that the Portuguese authorities committed to consult with the European Commission, the ECB and the IMF on the adoption of policies that are not consistent with the MoU. On the basis of these, it can be argued that there is the involvement of EU institutions to the financial assistance programme of Portugal is wide-ranging and extensive.

Aside from the different links between the EU institutional framework and the measures in the cases of Greece and Portugal, another significant difference in the Council Decisions between Greece I and Portugal is that in the latter, a modification was introduced in 2012, which provides that, in carrying out its monitoring duties, the Commission, together with the ECB and the IMF, is to 'review the social impact of the agreed measures' and to recommend necessary corrections in order to 'minimise harmful social impacts, particularly on the most vulnerable parts of the society'.[71] This provision has been added, as it was not present in their original version, to CID 2011/77/EU[72] and CID 2011/344/EU[73] concerning respectively Ireland and Portugal.[74] This kind of provision cannot be found in the decisions addressed to Greece with respect to the first financial assistance programme. Neither was such a provision included in the Council Decision addressed to Greece concerning the second economic adjustment programme. Equally importantly, the MoU in the case of Portugal stipulates that 'reforms in labour and social security legislation will be implemented after consultation of social partners, taking into account possible constitutional implications, and in respect of EU Directives and Core Labour Standards.'[75] A similar provision was included in the 2012 MoU that accompanied the second financial assistance programme for Greece but there was no such provision incorporated in the first programme.[76] Whilst consultation rights have been recognised, the MoU falls short of explicitly stipulating that consultation should be with a view to an agreement or that negotiation should take place between the social partners or with the government with respect to the extent and nature of the reforms.

In the case of Portugal, there is evidence to suggest that discussions were held between a delegation of IMF, Commission and ECB officials with the employers' and trade union confederations soon after Portugal requested financial assistance.[77] Two agreements with the social partners (except the General Confederation of Portuguese Workers) have been reached in Portugal. The first, on 22 March 2011, contained a wide range of measures including: the reduction of severance payments to 20 days per year of service; the 12-month limit to benefits with the maximum payment equivalent to 20 times the minimum wage and the creation of a fund to manage the benefits.[78] These measures were

68 Article 1(4). The MoU also specifies that the reviews will assess progress made with the respect of Council Recommendations in the context of the Excessive Deficit Procedure.

69 Article 2(2).

70 Preamble 6 of Council Implementing Decision of 30 May 2011.

71 The paragraph reads: 'In order to ensure the smooth implementation of the Programme's conditionality, and to help to correct imbalances in a sustainable way, the Commission shall provide continued advice and guidance on fiscal, financial market and structural reforms. Within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, the Commission shall periodically review the effectiveness and economic and *social impact of the agreed measures*, and shall recommend necessary corrections with a view to enhancing growth and job creation, securing the necessary fiscal consolidation and minimising *harmful social impacts*, particularly on the most vulnerable parts of Portuguese society' (emphasis added).

72 Article 3(9).

73 Article 3(10).

74 On this, see F. Costamagna, *Saving Europe 'Under Strict Conditionality': A Threat for EU Social Dimension?* Working Paper 7 (Torino: Centro Einaudi, 2012),10.

75 http://economico.sapo.pt/public/uploads/memorandotroika_04-05-2011.pdf

76 Section 4 of the MoU states that 'reforms in labour legislation will be implemented in consultation of social partners as a rule, and in respect of EU Directives and Core Labour Standards.

77 The first meetings were held on 19 and 20 April 2011.

78 The agreement, entitled 'Tripartite Agreement for Competitiveness and Employment' was signed by the government, the confederations of employers, and just one of the trade union confederations (the União Geral de Trabalhadores (UGT)).

then included in the MoU that was concluded in May 2011.[79] However, the MoU introduced a number of additional reforms in the areas of working time and the industrial relations system, including the application of sectoral collective agreements and the conclusion of collective agreements by works councils. On January 18, 2012 and following extended negotiations, the Portuguese government reached a second agreement with the social partners, which addressed a series of structural reforms.[80] The agreement contained a series of measures concerning the revision of the Labour Code, as foreseen by the MoU, and substantially increased labour market flexibility by lowering severance pay, unemployment benefits and duration, easing the definition of fair dismissals, making working hours more flexible and facilitating collective agreements at company level. But, there was also evidence to suggest that no social dialogue took place between the Portuguese government and the social partners with respect to the introduction of certain reforms, most notably the introduction of new regulations on the criteria for extension of collective agreements.[81]

In contrast to Portugal, there was no consultation at all between the government and the national level social partners in Greece over the reforms that were to be introduced under the first financial programme. The Greek government justified the absence of consultation on the basis that 'it was not possible to accommodate participatory methods when Greece was about to default on its loans'.[82] In contrast, during the negotiations for the second financial assistance programme, the cross-sectoral social partners came to an agreement in February 2012.[83] In a letter sent to the domestic political actors but also the EU institutional actors, they outlined their agreement concerning the preservation of the thirteenth and fourteenth salary and the minimum wage levels, as stipulated by the national general collective labour agreement, and the maintenance of the after-effect of collective agreements. However, there was absence of due regard to the agreement by the Troika. On the basis that the outcome of the social dialogue to promote employment and competitiveness 'fell short of expectations',[84] the 2012 MoU stipulated a number of further amendments to labour law that were incorporated in subsequent legislation.

A further difference between Greece and Portugal is the extent to which the national governments have been ready to go beyond the reforms outlined in the MoU. There is evidence to suggest that the Portuguese government went further than what was agreed in the MoU and the Memorandum of Economic and Financial Policies (MEFP) with respect to some reforms. For instance, Law 46/XII stipulated a number of additional reforms in the area of working time, including, for instance, a reduction of bank holidays by four days and the termination of the possibility for employees to receive additional days of leave (up to three) on the basis of their attendance. Other areas where the Portuguese government has gone further than the MoU include the establishment of an additional surcharge on personal income tax affecting Christmas bonuses and plans concerning the creation of a 'single contract' for new employees. This has not been the case in Greece, where the extent and nature of all labour market reforms have closely followed the provisions in the original and revised MoU.

To summarise, while the arrangements in Greece and Portugal are similar in many respects, including the nature of reforms they promote in the area of the labour market, there are important differences with respect to the legal bases for the reforms as well as the process through which the latter have been introduced in the Member States in question. It is important to bear these in mind for the analysis below concerning the legal status of the acts to be reviewed, the role of the EU institutions in these, the legal bases for the development of litigation and possible subjects for litigation.

---

79 It seems that there is just one official version of the Memorandum—in English—and no official translation in Portuguese has been produced so far (Monteiro Fernandes, n 15 above).

80 This was the so-called 'Commitment for Employment, Growth and Competitiveness'.

81 Resolution No. 90/2012.

82 ILO, *Report on the High Level Mission to Greece* (Athens, 19-23 September 2011) at 27.

83 Letter from the three employers' organisations (SEV, GSEVEE and ESEE) and the GSEE to Prime Minister Loukas Papademos, 3 February 2012, Athens.

84 Ministry of Finance, *Memorandum of Understanding on Specific Economic Policy Conditionality* (Ministry of Finance, 2012), at 25.

5. THE STATUS OF THE ACTS TO BE CHALLENGED

The accompanying Council Decisions and the MoU clarify that key reforms of labour law are necessary as a condition for receiving financial assistance from the EU and the IMF. Because their provisions are much more intrusive to national systems of labour law,[85] it is worth examining here the scope for challenging them before the Court.

To illustrate this in the case of Council Decisions, the first Decision addressed to Portugal stipulated, among others, that 'Portugal shall promote wage developments consistent with the objectives of fostering job creation and improving firms' competitiveness with a view to correcting macroeconomic imbalances. Any increase in minimum wages will take place only if justified by economic and labour market developments. Measures shall be taken to address weaknesses in the current wage bargaining schemes, including legislation to redefine the criteria and modalities of the extension of collective agreements and to facilitate firm-level agreements.'[86] On the basis of the Decision, the MoU then specified in greater detail the following objectives under the 'labour market' heading: 'Revise the unemployment insurance system to reduce the risk of long-term unemployment while strengthening social safety nets; reform employment protection legislation to tackle labour market segmentation, foster job creation, and ease the transition of workers across occupations, firms, and sectors; ease working time arrangements to contain employment fluctuations over the cycle, better accommodate differences in work patterns across sectors and firms, and enhance firms' competitiveness; promote labour cost developments consistent with job creation and enhanced competitiveness; ensure good practices and appropriate resources to Active Labour Market Policies to improve the employability of the young and disadvantaged categories and ease labour market mismatches.'[87] It then went on to identify precisely and at a detailed level the nature and extent of changes in different areas of the labour market, including employment protection legislation.[88]

In the case of Greece, the first Council Decision stipulated, among others, the following with respect to the labour market: 'Greece shall adopt the following measures by the end of December 2010: … a law to reform the wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work, enhanced flexibility in the management of working time and allow local territorial pacts to set wage growth below sectoral agreements; (d) a law on minimum wages to introduce sub-minima for groups at risk such as the young and long-term unemployed, and put measures in place to guarantee that current minimum wages remain fixed in nominal terms for three years; (e) a reform of employment protection legislation to extend the probationary period for new jobs to one year, reduce the overall level of severance payments and ensure that the same severance payment conditions apply to blue and white collar workers, raise the minimum threshold for the rules on collective dismissals to apply, especially for larger companies, and facilitate a greater use of temporary contracts'.[89] In a similar manner to Portugal, the MoU in the case of Greece went on to prescribe in greater detail the manner and extent of changes in the areas of labour market and social policy.[90]

---

85 Costamagna, n 74 above.

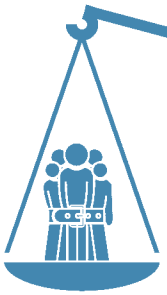
86 Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal, L 159/88, 17.6.2011, Article 3(k).

87 Memorandum of Understanding on Specific Economic Policy Conditionality, May 2011, part 4, available at http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf

88 For the Portuguese legislation, see Lei No. 64/B2011, Diario da Republica de Dec. 30, 2012 (in Portuguese), available at http://sifide.adi.pt/arq/fich/Lei_n.__64-B_2011.pdf

89 Council Decision addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010/320/EU) O.J. L145/6, 11.6.10, Article 2(3) (c), (d) and (e).

90 Memorandum of Economic and Financial Policies, in European Commission, *The Economic Adjustment Programme for Greece*, Occasional Papers 61, May 2010. http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf



While there are a number of successive Council Decisions addressed to both Greece and Portugal that outline a number of reforms, the debate both within the national domain but also at EU level has so far concentrated predominantly on the role of the MoU. As Kilpatrick suggests, the emphasis on the MoU in the presentation of the bailout sources first "hides the much more conventional EU legal sources firmly encasing individual bailouts. Second, it obscures the different legal roles MoUs play in different bailouts, so that the MoU is a more central source where there is no EU-law foundational bailout instrument (i.e. the two Greek bailouts and the Cyprus bailout".[91] A central question becomes hence the legal status of the MoU.[92] One approach would be to consider the MoU as agreements with legally binding effects for the parties. From an EU law perspective, article 216(2) TFEU provides that agreements concluded by the Union bind the Member States. In the agreement of the MoU between the Commission and the Greek government, the former does not act on behalf of the Union but of the Member States, which specifically delegated it to negotiate and sign the MoU.[93] On the basis of this, it can be argued that even if the MoUs can be considered agreements with legally binding effect, the MoU in the case of Greece are deprived of Article's 216 effect as the Union is not a contractual party to those. In the case of Portugal, the financial assistance facility agreement was concluded between the EFSF, the Portuguese Republic and the Bank of Portugal. In the MoU that was entered into between the European Commission, Portugal and the Central Bank of the Portuguese Republic, there is no specific reference that the European Commission is acting on behalf of the EU Member States.

With respect, in particular, to the contractual nature of the MoU, it has been argued that this is confirmed in Council Regulation 407/2010 of 11 May 2010 establishing the EFSM.[94] In the English version, Article 3(5) stipulates that 'the Commission and the beneficiary Member State shall conclude a Memorandum of Understanding detailing the general economic policy conditions laid down by the Council. The Commission shall communicate the Memorandum of Understanding to the European Parliament and to the Council.' However, in French, the wording of this is 'concluent un protocol d'accord'. The argument that the MoU are of a contractual nature may also be supported by the fact that the Council does not have the competence, under the EU Treaties, to impose a detailed programme of economic policy but it only has the right to determine the general economic conditions.[95] If this was different, then the Council would decide unilaterally on the basis of Articles 16(9) and 136 TFEU and the EU Member State would be obliged to adopt the detailed programme of economic policy, without the need for the conclusion of a MoU.[96] The same applies in the case of the ESM, where the legal character of the 'conditionality' is emphasised by both the ESM Treaty and the Court.[97] As such, MoU also constitute an 'act' within the meaning of Article 263 TFEU and as such can be challenged in proceedings under Articles 263 and 267 TFEU.[98]

With respect in particular to the status of the MoU as international agreements, the case of Ireland is interesting here. As discussed above, Ireland received financial assistance as well on the basis of the EFSM and EFSF. The then Irish government initially declined to introduce the loan agreement and the MoU for approval by the Dáil Éireann (the House of Representatives) on the basis that they were not international agreements, as they were covered by EU law and Regulation 407/2010.[99] However, following strong opposition from the other political parties, the process for

91 Kilpatrick, n 41 above at 10.

92 In his study, A. Fischer-Lescano argues that the MoU could be considered as a legal act sui generis or as a real act capable of interfering with fundamental rights (A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding*, Centre of European Law and Politics, University of Bremen (Baden-Baden: Nomos Verlagsgesellschaft, 2014) 32-37).

93 See May 2 Eurogroup Statement, Intercreditor Agreement article 2(1).

94 E. Marias, 'The Loan Convention of Greece and Eurozone Member States through the Prism of the Institutions and the Law of the European Union, (2010) 58 *Nomiko Vima*, 2204 (in Greek), 2217-2218.

95 See also below section 6.1

96 Marias, n 94 above.

97 On this, see Fischer-Lescano, n 92 above.

98 A. Fischer-Lescano, n 98 above at 54.

99 See, for instance, *Irish Times*, 'Coalition may be in breach of Constitution', says Rabitte, 30.11.2010.

ratifying international agreements on the basis of Article 29(5) was followed.[100] Similarly, in the case of Portugal, the Constitutional Court has stressed the legally binding effect of the MoU.[101] In the case of Greece, the third dissenting opinion in the Decision 668/2012 of the Council of State argued that the MoU were signed between subjects of international law, namely the Greek government and the European Commission, and that the European Commission as an organ of the EU exceeded its competence as per the EU legal order. The MoU then were agreements that amended the TEU and the TFEU with respect to Greece, and as such, it recognised competences of organs of an international organisation.[102]

Even if it is not accepted that the MoU are legally binding agreements,[103] it is important to examine the implications for the legal status of the MoU that may arise out of the interaction of the latter with the financial assistance programme agreements and the Council Decisions addressed to the Member States in question. With respect to the former, while the links between the MoU and the loan agreements, it has to be noted that compliance with the provisions of the MoU is rendered indirectly binding by virtue of the international obligation of Greece and Portugal to conform to the loan agreements.[104] The consequences arising from the connection of the MoU with the loan agreements presuppose that no legal problems arise with regard with the latter. However, concerns can be expressed with regard to the compliance of the loan agreements with EU law. From an EU law perspective, it can be argued that in both types of agreement (i.e. the inter-creditor agreement in the case of Greece and the EFSF agreement in the case of Portugal) Member States exercise their freedom of action that includes concluding agreements between themselves under both public international law and private law, if no ground to the contrary can be derived from EU law. However, by doing this they arguably sidestep the procedural requirements but also the European Parliament and national Parliaments, which have to be respected in amending the Treaties or in drafting and adopting secondary legislation.[105]

In terms of the interaction of the MoU with the Council Decisions, the incorporation of the measures included in the MoU in the Council Decisions addressed to the Member States affected by the crisis means that the MoU become the legal foundation for the Council Decisions.[106] In line with Articles 136 and 126(9) TFEU, the Council Decisions incorporate the essential components of the policy conditionality, which have been based on the joint programmes prepared by the Commission, the ECB, the IMF, the Greek and Portuguese authorities and laid down in the MoU. As Vlachou explains, "in a copy-paste method, the Council Decisions include identical measures and are set to attain the same aims with the MoU. The amendment process of the MoU is also reflected in the articles of the Council Decisions regarding monitoring, reporting and adjustment of the measures when needed. Indeed, almost any update of the MoU is followed by a respective amendment of the Council Decisions, so that the two documents are in line […] to the extent to that the Memorandum [in the case of Greece I] includes identical measures with the Council Decision, its content is rendered binding on Greece

100 Article 29(5) of the Irish Constitution stipulates that the state is not bound by any international agreement that encumbers the public fund, unless the provisions of the agreements are ratified by the Parliament and more specifically by the parliamentary body of the Lower House of the Irish Parliament. The ratification took place on 15.12.2010 (81 voted in favour and 75 against).

101 Tribunal Constitucional, Acórdão No 187/2013, Lei do Orçamento do Estado [2013], paragraph 29. See also the third dissenting opinion in the Decision 668/2012 of the Council of State in Greece, where it is argued that the MoU were signed between subjects of international law

102 For an analysis, see M. Panezi, Whose Crisis is it Anyway? Normative Frameworks in the Greek Financial Crisis (2014) 40 *Ohio Northern University Law Review*.

103 This would be on the basis that while the MoU in both cases dictate in mandatory language the adoption of legislative acts spreading all areas of national policy within strict time frames, not only Greece and Portugal ask for the support and voluntarily acceded to the MoU, but in addition they are not precluded in any way from withdrawing from them at any point in time they think it is necessary or desirable to do so (Vlachou, n above).

104 The loan facility agreements constitute implementing instruments, with the MoU being their legal foundations (I. Vlachou, *Memoranda sunt Servanda? The Legal Status of the Memoranda of Understanding of the Greek Bailout in the Hellenic, European and International Legal Order* (Leiden: University of Leiden, 2012), 24-25.

105 On this, see K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI Working Papers, Law 2012/28 (Florence: EUI, 2012). See also B. De Witte, *Using International Law in the Euro Crisis: Causes and Consequences*, ARENA Working Paper 4, June 2013 (Oslo: University of Oslo, 2013).

106 See, for instance, Article 1 and 2 of Council Decision 2010/320/EU addressed to Greece.

under the excessive deficit procedure and Article 136 TFEU and the general principles of EU law apply."[107] The fact that the Decisions incorporate the main content of the MoU in the EU order does not affect their character as legal acts which form part of EU law.[108] As a result, Greece and Portugal are under an obligation to adopt the measures included in the Council Decisions (and the MoU) on the basis of their status as Member States of the European Union.[109] Again, this interpretation concerning the creation of the obligations stipulated in the MoU of the EU Member States presupposes that the Council Decisions are compatible with EU law, which can be seriously questioned.[110]

It is important to add here that the recent Country-Specific Recommendations for Greece and Portugal have not stipulated additional recommendations but have generally recommended implementing their respective MoU, including the revised supplements.[111] In doing this, the CSRs for Greece and Portugal provide an additional linkage between the MoU and EU legal sources. This is because the Country-Specific Recommendations (CSRs) relating to economic policy and employment under the European Semester procedure are adopted on the basis of Articles 121 and 148 of the TFEU respectively.[112] The former commits EU Member States to economic policy coordination and dissuades them from implementing policies that could endanger the proper functioning of the Economic and Monetary Union. The latter brings employment to the centre of the EU economic policy and requires Member States to submit regular reports on their employment situation. The Semester is underpinned by a Treaty-based system of surveillance and ex-post monitoring and recognises specific roles for the European Commission, the Council and the European Parliament. In particular, the European Commission has a central role. On the basis of Regulation 1176/2011, it is responsible for preparing an annual report and identifying, on the basis of a qualitative economic and financial assessment, Member States that it considers may be affected by, or may be at risk of being affected by, imbalances.[113] On the basis of Article 5 of the Regulation, it can then undertake in-depth reviews of specific Member States if on the basis of this, it considers that the Member State concerned is affected by excessive imbalances the Council, on a recommendation from the Commission, may, in accordance with Article 121(4) TFEU, adopt a recommendation establishing the existence of an excessive imbalance and recommending that the Member State concerned take corrective action.[114] In addition, the Commission is responsible for monitoring compliance of the corrective action by the Member State in question.[115]

It is relevant to add here that the decision-making and coercive sanctions powers that the Commission has acquired contravene arguably Article 121(4) TFEU, which stipulates that a recommendation may be made by the Council when the economic policies of the Member States are not consistent with the broad guidelines referred to in paragraph 2 of the Article[116] or that they risk jeopardising the proper functioning of the Economic and Monetary Union.[117] Aside from this, part of the Semester's overarching framework relies on non-binding recommendations; this is the

107 Vlachou, n 104 above, 37 and 39, emphasis in original.
108 Tuori and Tuori, 237-238.
109 On this, see G. Katrougalos, 'Memoranda sunt Servanda? The Constitutionality of the Treaties with the IMF and EU for the Implementation of the Stabilisation Measures' (2010) 2 *Journal of Administrative Law*, 151 (in Greek).
110 See below section 6.
111 S. Clauwert, *The Country-Specific Recommendations (CSRs) in the Social Field* (Brussels: ETUI, 2013).
112 The recommendations referring to the Stability and Growth Pact are based on Council Regulation 1466/97 (OJ L 209, 2.8.1997) and those referring to the Macroeconomic Imbalance Procedure on Council Regulation 1176/2011 (OJ L 306/25, 23.11. 2011).
113 Article 3.
114 Article 7(2).
115 Article 9.
116 Paragraph 2 states: 'The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council. The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union. On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.'
117 For an analysis on these issues, L. Oberndorfer, *Europarechtliche Strategien gegen die neoliberale Krisenpolitik*, Sozialstaat – Spielball der Finanzmärkte? MEDEL-Konferenz, 21 June 2013, see http://www.medelnet.org/images/Oberndorfer.pdf

case for measures that concern structural reforms, for example, in the areas of welfare and labour markets. Nonetheless, the indicators coming from the EU become binding and may lead eventually to sanctions if a country is made subject to the Stability Pact's Excessive Deficit Procedure (EDP) and the Excessive Imbalance Procedure (EIP). Under the current framework, failure to meet the Stability and Growth Pact's deficit target in the coming years will activate the EDP, and, with it, a legislative process in which adjustment by the problematic Member States in question is mandatory. At the same time, failure to address structural problems that cause persistent macroeconomic imbalances will lead to the activation of the EIP, which is expected to rely on similar coercive methods to the EDP. However, it is arguable whether EU law allows for the imposition of sanctions for non-compliance with CSRs. As Seifert suggests, the sanction system of an interest-bearing deposit or of an annual fine under Regulation 1174/2011 does not have a legal basis in the TFEU. This is because Article 121(4) TFEU on which Regulation 1174/2011 is based limits potential sanctions to a warning and to recommendations that may be made public by the Council.[118]

An additional consideration here is the role of EU institutions that comprise the 'Troika' of creditors in the establishment and monitoring of the programmes and the compatibility of their involvement with EU law. As analysed earlier, all the intergovernmental and EU-based loan agreements concluded so far contain provisions on the tasks of not only Commission and the ECB but also the Court. Due to an explicit authorisation by the TFEU,[119] involving the Court in the intergovernmental agreements does not raise constitutional concerns. But issues could arise with respect to the Commission.[120] The Preambles to the Greek Inter-creditor Agreement, the EFSF Framework Agreement and the ESM Treaty refer to authorisation by the representatives of the Member States to entrust the Commission with tasks of implementation. However, in the view of Tuori,[121] it would be difficult to see what legal significance such authorisations possess, as they raise the constitutional problem of sidestepping EU legislation through intergovernmental agreements in assigning new tasks to EU institutions. In this context, it was argued that the tasks assigned to the Commission are wider than the *Bangladesh case*[122] and comprise, for instance, monitoring the beneficiary state's compliance with the conditions of assistance set out in the respective MoU. As Craig[123] has argued, the fact that an EU institution has a power under the Lisbon Treaty of EU legislation cannot per se legitimate use of the same or an analogous power under a different Treaty. The case of the involvement of the ECB in the design and implementation of the rescue packages could also be constitutionally problematic. First, the ECB is one of the EU institutions which 'shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.[124] But, as Article 130 TFEU makes clear, the ECB is supposed to function under an enhanced principle of independence, which arguably imposes additional restrictions on Member States' assigning new tasks to it. Moreover, the ECB's involvement in rescue packages is hardly based on any task assigned to it by the Treaties. It is unclear as to what constitutional grounds are for the ECB to demand certain actions from Member States particularly when these actions are outside the central banking area.[125]

---

118 A. Seifert, European Economic Governance and the Labor Laws of the EU Member States, (2014) 35 *Comparative Labor Law and Policy Journal*, 3, 311 at 321), 323.

119 Article 273.

120 Whereas the Council is responsible for setting the conditions for the Member States, the Commission plays an essential role since the Council acts only on its Recommendation (Article 126(13) TFEU). Both institutions share the supervisory role of monitoring the Member States' compliance with the Decisions.

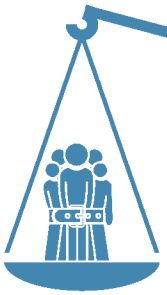
121 Tuori, n 105 above.

122 Joined Cases C-181/91 and C-248/91, *Parliament v. Council and Commission*, 1993 E.C.R. 3685; Case C-316/91, *Parliament v. Council*, 1994 E.C.R. 0625. The case concerned the Commission coordinating the aid given by member states outside the framework of the EU Treaties. The Court held that the fourth indent of Article 155 EEC did not prevent the member states from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council. Advocate-General Jacobs framed the principle as follows: in cases where member states decided to act individually or collectively in a field within their competence, there was nothing to prevent them from conferring on the Commission the task of ensuring coordination of such action. It was for the Commission to decide whether to accept such a mission, provided that it did so in a way compatible with its duties under the EC Treaty.

123 P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 European Law Review, 231.

124 Article 13(2) TEU.

125 This is based on the analysis by Tuori, n 105 above.



Against such arguments, the Court held in *Pringle*[126] that the Member States were entitled, in areas not falling within the exclusive competence of the Union, to confer tasks on the institutions, provided that the new competences did not alter the essential character of their powers under the EU Treaties. In reaching this conclusion the Court relied on settled case-law going back to *Bangladesh* and found that the powers conferred upon the ECB and the Commission by the ESM Treaty were in line with the authority already conferred upon them by the EU Treaties. The fact that the *Bangladesh* case-law predated the rules on enhanced co-operation introduced by the Treaty of Amsterdam, the Court explained, did not imply that the Member States had to resort to that mechanism if they wanted to make use of Union institutions in the framework of the ESM Treaty. The rules on enhanced co-operation could only apply where the Union would have the powers to act in that domain, which is not the case for the establishment of a permanent stability mechanism such as the ESM. However, the Court made it a condition for the transfer of functions that the functions to be performed under the ESM do not conflict with EU law. With respect, in particular to the Commission, the Court stressed that the Commission must promote the general interests of the Union and ensure that the MoU is consistent with EU law.[127]As Fischer-Lescano points out, 'the Court thus establishes a series of conditions to be fulfilled in order for the specific mandate of the Commission and the ECB in the ESM activities to be lawful: (1) compatibility with the measures to coordinate the economic policies of the Member States; (2) no distortion of the allocation of competences in the EU by the introduction of new decision-making powers for the Commission and the ECB; (3) protection of the general interests of the Union.'[128]

Overall, it becomes apparent from the analysis above that there are different available means for providing sufficient linkages between the austerity measures introduced at national level and EU sources and institutions that were involved in the process for the establishment and monitoring of the financial assistance programmes in the cases of Greece and Portugal.

126 See n 7 above.
127 Para 164 of the decision, n 7 above.
128 Fischer-Lescano, n 92 above at 37.

6. GROUNDS FOR ACTION

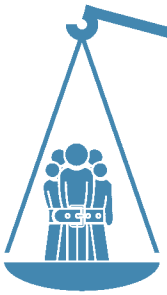
At present, the analysis concentrates on three distinct areas: the EU competences in the social field, the EU's social objectives, and the EU Charter of Fundamental Rights.[129]

6.1 The austerity measures and EU competences in the social field

As Costamagna[130] has suggested, "conditionality attached to the financial assistance programmes for Greece and Portugal touches upon many key aspects of national welfare regimes in a way that seems to go far beyond the limits imposed by the Treaties to the EU capacity to intervene in this field." Generally, the Treaty of Lisbon did not expand the EU's legislative competences. Better constitutional recognition of national interest is reflected in Article 5 TEU, which reaffirms the principle of conferral and the priority of Member States' competences.[131] The EU social policy competences also remain limited:[132] the EU can harmonize national law in relation to working environment and working conditions, social security and social protection of workers, and representation and defence of workers' and employers' collective interests.[133] These competences may only be used if coordination of national policies is not sufficient to achieve the aims pursued.[134] The EU can further legislate in favour of equality, equal opportunity and equal pay of women and men. Aside from these, the EU can also use competences designed to help completing the internal market to achieve social policy objectives. Next to specific competences relating to the economic freedoms,[135] general competences for establishing and ensuring the functioning of the internal market can and have been used.[136] The Treaty of Lisbon added competences to legislate in favour of (social) services of general interest[137] and for some aspects of health protection.[138]

Importantly, Article 153(5) TFEU rules out any EU intervention with the intention to harmonise issues on wages and collective bargaining. The exclusion of competence in the TFEU on wage policy can be posited against the observation that a recurring theme in MoU is the enforcement of wage moderation, imposed on national social partners in ways that may resemble, as the ILO points out, an undue invasion of collective autonomy, as well as a violation of core labour rights.[139] In terms of collective bargaining, the Commission has criticised in a number of revised MoU the Greek and Portuguese government for not doing enough to eliminate sectoral agreements and to replace them by firm-level contracts. On the basis of these interventions in national wage and collective bargaining policy, it can be argued that Article 135(5) TFEU is being circumvented. In general, the EU judiciary has traditionally shown reluctance to interfere in executive or policy decisions taken by institutions in complex economic questions as the Court allows the policy makers a margin of discretion and will largely confine themselves to finding manifest errors or

129 See also Costamagna, n 74 above.
130 Costamagna, n 74 above at 15.
131 The idea behind the principle of conferral is that 'it is the Treaties and only the Treaties that determine the material remit of the EU legal authority' (D. Chalmers, G. Davies and G. Monti, *European Union Law: Cases and Materials* (Cambridge: Cambridge University Press, 2010), at 212).
132 For an analysis on this, see D. Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: in Defence of a Transnational Dimension to Social Europe', (2013) 20 *Maastricht Journal of European and Comparative Law*, 185.
133 Article 153(1) TFEU.
134 Article 153(2) TFEU.
135 These are competences for facilitating workers' mobility among others through coordinating social security systems (Article 46 TFEU), for realizing freedom of establishment for specific activities (Article 50 TFEU), for facilitating the pursuit of self-employed activities (Article 53(2) TFEU) and free movement of services (Article 53(2) combined with Article 66 TFEU), for liberalizing specific services (Article 59 TFEU). Directive 96/71 on the posting of workers was based on the predecessor of Article 53(2) TFEU in combination with Article 66 TFEU, although one of its main aims is the pursuit of workers' rights (Schiek, n 132 above).
136 Articles 114 and 115 TFEU. Article 114 TFEU was used as legislative base for Directive 2011/24/EU of the European Parliament and the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L 88/45.
137 Article 14 TFEU.
138 Article 168 TFEU.
139 ILO Committee on Freedom of Association, case of Greece 9 February 2012.



procedural irregularities when executive decisions requiring complex economic assessments are challenged.[140]

However, it is questionable how convincing such arguments will be in the cases at present. In both Greece and Portugal, the interventions on wage policies and collective bargaining are extensive and "the explanatory linkages between such interventions and the EU project are not adequately presented and justified in the Council and Commission documents."[141] Barnard also raises a further question as to whether the EU has the power (in the case of Portugal) under Article 122(2) TFEU and Article 3(2) and (3) of Regulation 407/2010 to mandate such reforms to labour law, not least because traditionally labour law matters are not considered 'general economic policy conditions'.[142] In the case of Greece, the legal basis relied upon for the adoption of the contested decisions was Article 126(9) and Article 136 of the Treaty. Pursuant to Article 126 et seq. of the Treaties, the measures which may be decided upon by the Council under the excessive deficit procedure and included in its decisions cannot be prescribed specifically, explicitly and without room for deviation, since that competence is not conferred upon the Council by the Treaties.[143] On this basis, it can be argued that the powers of the Council conferred by the Treaties were exceeded in the adoption of the contested Council decisions. The fact that the Council exceeded its powers is evident when one compares Council Decision 2010/182/EE and Council Decision 2010/320/EU. The former only entailed suggestions and guidelines to the Greek government in order to achieve the EU objectives on fiscal discipline and stability. In contrast, Decision 2010/320/EU, which produces legal binding effects on the measures introduced through the MoU (giving them also EU law effect),[144] does not have a general character, nor does it simply establish quantitative criteria that Greece has to meet in order to obtain the loans, but it imposes the adoption of specific measures concerning pensions, social assistance funds, workers' right of association, provision of medical services and financing of national health systems.[145] Moreover, the fact that the measures were based on an agreement with the EU Member States in crisis cannot dispense the Council from its obligation to respect EU law.[146]

From a procedural point of view, the conditionality required by the Member States does not respect the diversity of national systems, including the role ascribed to social partners and the principle of democracy. With respect, in particular, to the role of the social partners, Article 152 TFEU reads 'the Union recognises and promotes the role of social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.'[147] As illustrated in the analysis earlier, there was complete absence of social dialogue during the negotiation and conclusion of the first financial assistance programme in Greece. Even more importantly, the Troika blatantly disregarded the social partners' framework agreement that was reached during the negotiations for the second loan agreement in the case of Greece. But even in the case of Portugal, where two agreements were concluded between the government and the majority of the social partners, it is questionable the extent to which genuine consultation was actually undertaken. Monteiro Fernandes has argued that 'the acceptance by the UGT was, or pretended to be, rather than the expression of a genuine consensus (in fact, nonexistent), a gesture of braking

140 Smits, n 4 above.

141 C. Barnard, 'The Charter in Time of Crisis: A Case Study of Dismissal', in N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge: Cambridge University Press, 2013).

142 Barnard, n 141 above. The lack of EU competence in these areas was accepted by the dissenting rapporteurs in the judicial review against the MoU and loan agreement in Greece I: See also sections 6.3 and 8 below for the relevance of the EUCFR and the ECHR in this. In addition, it may be argued that these measures are neither included in the list of measures that may be adopted in the context of Article 126(11) TFEU.

143 This issue was raised in two judicial actions (discussed in section 2 above) brought in front of the General Court by representatives of a Greek trade union seeking the annulment of some of the decisions addressed to Greece, on the basis that the Decisions violated the principle of conferral as established by Article 5 TEU. However, the General Court found the actions inadmissible due to lack of legal standing.

144 See above section 5.

145 On this, see E. Marias, n 94 above.

146 Costamagna, n 74 above, 15.

147 See also Articles 11(2) and (3) TEU.

and restraint against a wider and more harmful project to the interests of workers. However, the relevance of the Commitment is linked to the fact that it is – more than the text of the Memorandum – the true "lay-out" (and, at the same time, legitimizing instrument) of what became the 2012 labor law reform.'[148] In addition to the lack of respect of the diversity of national systems, there was absence of due regard to the democratic process at EU level due to the total exclusion of the European Parliament from the process for the establishment and monitoring of the programmes.[149] The lack of transparency and conduct of dialogue in the MoU negotiations was recently criticised in the resolution on the role of the Troika by the European Parliament, which stressed the possible negative impact of such practices on the stability of the political situation in the countries concerned and the trust of citizens in democracy and the European project.[150]

6.2 Conditionality and EU Treaties' Social Objectives

Since the Treaty of Lisbon, the EU's value base has strengthened its social goals and its redrafted objectives comprise a constitutional commitment to its unique socio-economic model.[151] For example, pluralism, non-discrimination, tolerance, justice, solidarity, and equality between men and women are expressly identified as values of the EU in Article 2 TEU. Perhaps more importantly, Article 3(3) TEU tasks the EU, among other things, with promoting social justice as well as social cohesion and with combating social exclusion: the Union shall 'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'. As a result, while the internal market is now an EU objective in its own right, it must be reconciled with these social objectives, which again are linked to these new social values.[152] Article 3(6) TFEU also provides that the Union pursues all its objectives, including the social ones, by 'appropriate means commensurate with the competences conferred on it'.

In addition to these, the TFEU now contains 'horizontal' social and discrimination clauses. Article 9 TFEU requires the EU to take promoting employment, social protection and combating social exclusion into account in all of its policies. This provision establishes that "in defining and implementing its policies, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". There is evidence to suggest that horizontal social clause has already informed case law.[153] In addition, Article 8 and Article 10 TFEU introduced 'mainstreaming' clauses requiring the Union in all its policies to promote gender equality and the elimination of status discrimination respectively on the grounds legislated for in EU law. Taken together with pre-existing provisions, and explicit social rights contained in Titles II and III of the EUCFR,[154] the EU's commitment to social justice and social cohesion has been enhanced, with a new emphasis on solidarity and social justice. It is true that the proclamation of these objectives has not been matched with the conferral to the EU of new social powers.[155] Despite this, the choice to grant constitutional status to social objectives is not meaningless, in so far as it imposes to European institutions to contribute to their achievement by, as a minimum, avoiding that the application of EU law could represent an obstacle to this end. Furthermore, this innovation calls EU decision-makers

148 Monteiro Fernandes, n 75 further above, 400.

149 Articles 2 and 10(1) and (2) TEU, 218(6) TFEU. See Fischer-Lescano, n 92 above at 39-40.

150 European Parliament resolution of 13 March 2014 on the enquiry of the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)), point 30.

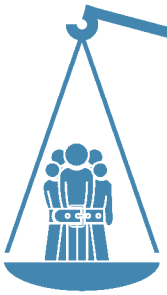
151 On this, see Schiek, n 132 above.

152 Schiek, n 132 above.

153 Schiek, n 132 above. See, for instance, Opinion of Advocate General Trstenjak in Case 382/10 *Dominguez*, Judgment of 6 October 2011, not yet reported, on the right to paid annual leave, para. 152; Opinion of Advocate General Cruz Villalón in Case C-515/08 *Santos Palhota* [2010] ECR I-09133, posted workers' rights, para. 52, also mentioning Article 3(3) TEU and Case C-544/10 *Deutsches Weintor*, Judgment of 6 September 2012, not yet reported, justifying limits to explicitly label wine with reduced acidity levels with consumer rights.

154 For an analysis of the EUCFR, see section 6.3 below.

155 See section 6.1



to find an adequate balance between objectives, economic and social ones that now enjoy equal status within the EU legal order.[156]

On the basis of these provisions and in light of the discussion above on the austerity measures, doubts arise as to the legitimacy of conditionality, at least in the way it has been applied in the context of EU-sponsored financial assistance packages. As Kilpatrick stresses, as the bailout measures have increased prohibited status inequalities, especially in relation to women and young people, these provisions have an important crisis interface.[157] Here, the focus is on the tensions between those measures and the value of solidarity and the objectives of social justice, social inclusion and social cohesion, which have been recognised in the Treaty of Lisbon. As Costamagna suggests, the severity of austerity measures to be adopted by the States receiving financial assistance are frustrating, on the one hand, the pursuit of objectives in Article 3 TEU, such as combating social exclusion or promoting social justice and protection, as wide-ranging cuts to social expenditure are reducing national authorities' capacity to meet basic needs of their population, increasing thus social exclusion.[158] On the other hand, the measures focus predominantly on financial stability without any effort to find a more appropriate balance between economic and social objectives, as required by Article 9 TFEU.[159]

As a result, the incompatibility of the conditionality clauses with the EU's social objectives may constitute an additional ground for challenging legally the austerity measures. Such an argument can complement the argument that the measures violate certain fundamental rights, as recognised in the EUCFR. In this context, it will be important to emphasise the following points with respect to the relationship between conditionality, as outlined in the cases of Greece and Portugal, and the social objectives of the EU Treaties. First, even though the programmes are of specific duration, a number of measures stipulated under these programmes are permanent in nature.[160] Secondly, the measures are particularly burdensome and disproportionate.[161] Thirdly, there is no reasonable relationship, nor measurable economic effect between the extent, the intensity and duration of restrictions and the desired effects.[162] Fourthly, the measures are not accompanied by necessary compensatory measures and guarantees for the protection of vulnerable groups within the countries from the effects of the economic crisis; in contrast they are accompanied by a significant increase in the prices for products, utilities etc. In relation to this, there is no evidence to suggest that there has been an *ex ante* assessment of the impact these measures have on key fundamental rights[163] or their distributional effects on particularly vulnerable groups.[164] Finally, they are unequal and favour discrimination against workers. For example, the differentiation in minimum wages by age that was introduced in the first MoU in the case of Greece might be difficult to justify under the prohibition of age discrimination,

156 Costamagna, n 74 above.

157 Kilpatrick, n 59 above. See also, ILO, *Report on the High Level Mission to Greece* (Athens, 19-23 September 2011). See as well the discussion at the end of this section concerning the complaint against Spain to the UN Committee on Economic, Social and Cultural Rights in 2012. See also CoE Parliamentary Assembly, *Austerity measures – A danger for democracy and social rights*, Resolution no. 1884 of 26 June 2012. Cephas Lumina, UN independent expert on foreign debt and human rights, observed that, with regard to Greece, "the implementation of the second package of austerity measures and structural reforms […] have a serious impact on basic social services and therefore the enjoyment of human rights by Greek people, particularly the most vulnerable sectors of the population, such as the poor, elderly, unemployed and persons with disabilities." See "Greek Austerity Measures Could Violate Human Rights, UN Expert Says", UN News Centre, 30 June 2011 (http://www.un.org/apps/news/story.asp/h%3Cspan%20class='pullme'%3EIn%20short,%20when%20you%20empower%20a%20woman,%20you%20change%20the%20world%3C/span%3Ettp://www.unfpa.org/html/www.unicef.org/realfile/story.asp?NewsID=38901&Cr=austerity&Cr1=#.Uo41s8TQDzg)

158 Costamagna, n 74 above, 18.

159 Costamagna, n 74 above, 18.

160 See, for instance, the reforms in the Greek system of collective bargaining (section 7 below).

161 Article 21 EUCFR.

162 Even the IMF has questioned the appropriateness of the measures for dealing with the crisis (see IMF, *Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement Individuals*, IMF Country Report No. 13/156, 2013).

163 The European Union Agency for Fundamental Rights stated: 'In particular, consolidation measures adopted by Member States, and guided by the EU under its Excessive Deficit Procedure, can have significant implications for the protection of key fundamental rights, including the rights to work, adequate remuneration, health and social assistance. Therefore, 'good practice', from a fundamental rights perspective, would require […] an ex ante assessment of the possible impact these deadlines may have on key fundamental rights (*Protecting Fundamental Rights during the Economic Crisis*, Working Paper 12 (2010), 47).

164 In relation to this, see s 3 above concerning the different requirements concerning the assessment of the potential impact of the reforms in the cases of Greece and Portugal.

given the Court's ruling in *Mangold*.[165] Similarly, the initial Council Decision on granting financial assistance to Ireland introduced a 10% pay reduction for new entrants into the public service:[166] "such a clause may introduce indirect wage discrimination based on sex or age, depending on the comparative proportion of women or younger people among new entrants and the general workforce."[167]

The case of Spain may be useful here as well.[168] Spain appeared before the United Nations Committee on Economic, Social and Cultural Rights in 2012 concerning the impact of the austerity measures on human rights. In its comments, the Committee expressed its concern over reductions in levels of protection afforded to the rights to housing, health, education, and work, among others, as a consequence of austerity measures. The Committee put particular emphasis on the inadequacy of measures adopted by the State to mitigate the negative impacts of the crisis felt by the most vulnerable and marginalized individuals and groups and notes a need for the State to make greater efforts to ensure that human rights guide its economic recovery strategies. The Committee also recommended Spain guarantee that all austerity measures taken maintain the current levels of economic and social rights' protection and are, at all times, temporary, proportional and non-detrimental to these rights. It may be argued that a similar situation has arisen in respect of other Member States that have received financial assistance in exchange for structural reforms. In this context, data on the deterioration in a range of economic and social rights indicators, including a sharp rise in levels of poverty and income inequality, combined with drastic cuts in social spending, may point to retrogression in the abovementioned rights, with disproportionate impacts on the lives of those most vulnerable.

6.3 Conditionality and the EU Charter of Fundamental Rights (EUCFR)

In line with Article 6 of the TEU, the fundamental rights obligations are enshrined in three different legal sources. First, there are the "rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union". Since the Treaty of Lisbon, these have the same legal value as the EU Treaties.[169] Then, there is the European Convention on Human Rights (ECHR), to which the EU is currently negotiating its accession, thereby following up on the obligation laid down in paragraph 2 of Article 6 of the TEU.[170] The EU may also ratify additional international human rights instruments as its ratification of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) shows. Finally, the obligation to respect fundamental rights arises "from the constitutional traditions common to the Member States" which shall constitute general principles of EU law.[171]

At present, the analysis will concentrate on the potential use of the EU Charter of Fundamental Rights (EUCFR) in litigation against the austerity measures.[172] As a result of the crisis and the austerity measures, those rights and freedoms that are recognised by the Charter and are most at

165 C-144/04 *Mangold* [2005] ECR I-09981. On this point, see Schiek, n 132 above. See section 7 below for a detailed analysis of the implications of this for the changes in the wage determination system for young workers in Greece.

166 Article 3(7).

167 Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, [2011] OJ L 30/34. On this issue, see Schiek, n 132 above.

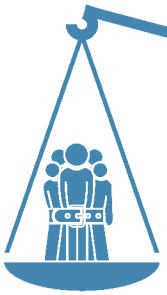
168 For details on how the case of Spain was presented to the UN Committee, see http://www.cesr.org/downloads/FACT%20SHEET%20SPAIN.pdf?preview=1

169 Article 6(1) TEU. See also Case C-555/07 *Kücükdeveci v Swedex,* [2010] IRLR 346, where the Court affirmed the legal status of the Charter.

170 For an analysis of the scope for developing litigation on the basis of ECHR, see below section 8.

171 Article 6(3) TEU. In addition, one of the key elements in the European Union's Strategic Framework and Action Plan on Human Rights and Democracy is respect for human rights throughout EU policy (Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, 11855/12, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf).

172 In neither the MoU, signed by the Commission, nor the Council Decisions addressed to Portugal and Greece has there been any reference to the European Social Charter, which is binding at the Member State level, and no reference is made either to the EUCFR. The Charter along with the 1989 Community Charter of the Fundamental Social Rights of Workers is explicitly invoked in Article 151 TFEU. In addition, the Court has included those in the common European constitutional tradition defining fundamental rights as general principles of EU law.



risk include:[173] human dignity;[174] the freedom of association;[175] the freedom to choose an occupation and the right to engage in work;[176] non-discrimination;[177] the right to information and consultation;[178] the right of collective bargaining and action;[179] protection in the event of unjustified dismissal;[180] social security and social assistance;[181] healthcare;[182] freedom of movement and of residence.[183] As evident, the austerity measures affect a number of areas, increasing thus the scope for a cumulative effect of the measures on working and living conditions.[184] However, there are a number of limitations mostly related to the reach of the EUCFR. Article 6(1) clarifies the limited scope of the Charter so that, 'the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties' and the rights, freedoms and principles in the Charter need to be read subject to its important general (or horizontal) provisions.[185] More importantly, Article 51(1) specifies that the Charter applies primarily to the institutions, bodies, offices and agencies of the Union (including thus the ECB, the Commission and the Council, which have been involved in the institutional architecture dealing with the crisis) and to the Member States (i.e. Greece and Portugal in this case) but only when they are implementing Union law.

There is evidence to suggest that in its emerging case-law regarding issues not related though to the economic and sovereign debt crisis, the Court has used the EUCFR in a way that could 'set the mood music which the Court may eventually listen to, and heed' with reference to a more supportive application of the Charter to austerity measures'.[186] At present though, the Court has shown overall reluctance in applying the EUCFR in cases involving austerity measures introduced in the context of the financial assistance programmes provided to EU Member States that face economic difficulties. The closest the Court has come to get involved in such cases was in Aziz, where it empowered Spanish courts to stop repossession claims if based on unfair terms in mortgage contracts, and thus allowed a better protection of the right to housing, even though this right was not mentioned in the reasoning of the Court.[187] According to Peers, the Court's reluctance to apply the Charter in austerity cases is incorrect even on a narrow interpretation of the definition of EU law, since there are Council measures pursuant to Articles 122 and 143 TFEU which expressly require the specific cutbacks to be made.[188] Furthermore, the EU's future 'two-track' legislation will likely link financial assistance conditionality even further to EU law, by means of Council approval of adjustment programmes.[189] So such conditionality in any event falls within the scope of EU law. [190]

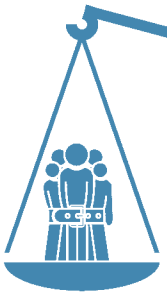
---

173 For an analysis, see also Fundamental Rights Agency, *The European Union as a Community of Values: Safeguarding Fundamental Rights in Times of Crisis* (Luxembourg, 2013).
174 Article 1 EUCFR.
175 Article 12 EUCFR.
176 Article 15 EUCFR.
177 Article 21 EUCFR.
178 Article 27 EUCFR.
179 Article 28 EUCFR.
180 Article 30 EUCFR.
181 Article 34 EUCFR.
182 Article 35 EUCFR.
183 Article 45 EUCFR.
184 On the treatment of this by other supranational bodies, see section 8.
185 Kilpatrick, n 41 above, 2.
186 C. Barnard, *The Charter, the Court – and the Crisis*, Legal Studies Research Paper Series Paper, no 18.2013, (Cambridge: University of Cambridge, 2013), at 8. Barnard refers as an example the decisions of the Court in C-515/08 *Santos Palhota* [2010] ECR I-000 and C-271/08, *Commission v Germany* (occupational pensions) [2010] ECR I-7091.
187 C-415/11, *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa*, 14.03.2013. For an analysis, see M. Gonzalez Pascual, Welfare Rights and Euro Crisis: The Spanish Case, in C. Kilpatrick and B. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, LAW 2014/05 (Florence: EUI, 20140).
188 S. Peers, 'The Use of EU Institutions outside the EU Legal Framework, (2013) 9 *European Constitutional Law Review*, 37.
189 COM (2011) 819, 23 Nov. 2011, Article 6.
190 Of course, as Peers (n 188 above) also contents, it does not necessarily follow that the relevant national decisions are in breach of the EUCFR, merely that they fall within its scope as the Member States in question are implementing EU law. However, as the analysis here attempts to show, it can also be argued that a number of measures are also in breach of the EUCFR. According to Seifert, 'the mere fact that the Member State concerned has agreed upon concrete reform measures does not justify not asking whether they are in line with the fundamental rights of the Charter, and the principle *volenti non fit injuria* does not apply in these cases' (Seifert, n 118 above, 326, emphasis in original).

In her analysis, Kilpatrick[191] offers four explanations for the failure so far of the EUCFR to provide a sufficient basis for legally challenging the austerity measures. Firstly, some of the cases have failed because of an inadequate link between a relevant EU source and a Member State action. This could explain the decision of the Court in *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios, SA*.[192] The reference raised the question whether 'the salary cut made by the State, by means of the Lei do Orcamento de Estado para 2011, applicable only to persons employed in the public sector or by a public undertaking, contrary to the principle of prohibition of discrimination in that it discriminates on the basis of the public nature of the employment relationship?' The Court rejected the request for a preliminary ruling on the basis that the provisions of the Portuguese Act under consideration were not implementing Union law in the sense of Article 51(1). Importantly, the preliminary reference concerned implementing measures prior to Council Decision 2011/344 on granting Union financial assistance to Portugal; in addition, the reference had failed to expressly identify any EU source that could be directly relevant to these measures.[193]

A different issue arose in the two preliminary references that were submitted challenging the austerity measures in Romania. As discussed in section 3, Romania received financial assistance on the basis of the EU Treaty.[194] Council Decision 2009/459/EC[195] that was addressed to Romania included a number of provisions clarifying that there should a MoU in place[196] for the implementation of reforms and that the disbursement is conditional on compliance with measures as well as that this would be reviewed by the Commission over time. The Council Decision outlined a series of conditions, including reducing the public sector wage bill and reforming key parameters of the pension system,[197] which were also included in the MoU. National legislation[198] was subsequently introduced explicitly as a package of measures designed to rebalance the books of the Romanian government and as a condition precedent for further instalments of money being lent to it by the EU/IMF/World Bank. In response to this, two preliminary references were submitted to the Court concerning two laws that had reduced public sector pay by 25%.[199] It was claimed that the cuts breached the fundamental rights to property, equality and non-discrimination[200] but none of the referring courts referred to specific EU bailout sources. The Court declared that it had no competence to decide the references. In relation to these cases, Barnard held that 'it may be that an inadequate drafted order for reference which failed to make express the links between the national reforms and bailout conditionality gave the Court an easy escape route to having to decide difficult cases.[201] But, Kilpatrick[202] instead argues that this approach by the Court is contrary to its established case law, under which it has been generous in reconstructing the relevant EU issues and refusing to consider the issues only when the matters is not connected in any way with EU law. In addition, the Court failed to consider the potential link between poor framing of the references to problems of acces-

191 Kilpatrick, n 59 above.
192 C-128/12, OJ C 151, 26.5.2012.
193 Kilpatrick, n 59 above.
194 Article 143(1) and 143(2) of the TFEU provide for the EU Council to grant assistance up to EUR 12 billion to a non-eurozone Member State when it is in difficulties or is serious threatened with difficulties regarding its balance of payments. To this extent, if immediate action is required, a loan or a facility providing medium-term financial assistance would be extended and it would be linked to economic policy measures designed to re-establish or ensure a sustainable balance of payments. The purpose of this facility is to serve the needs of non-eurozone member states until they adopt the euro. The loans are financed by recourse to the capital markets and financial institutions. Article 352 of the TFEU grants the powers for these loans to be financed exclusively with funds raised in the capital markets in lieu of funds from other member states. EU Council Regulation No. 332/2002 (OJ L53/1) repealed Regulation (EEC) No. 1969/1988 (OJ L 178). Currently, Romania, Latvia and Hungary have benefitted from this facility.
195 Council Decision of 6 May 2009 providing Community medium-term financial assistance for Romania (2009/459/EC), OJ L 150/8, 13.6.2009.
196 Preamble, recital 4 and Article 2(2) of Council Decision 2009/459/EC.
197 Article 3(5)(c)) and Article 3(5)(g) respectively.
198 Laws 118/2010 and 285/10.
199 C-434/11 *Corpul Naţional al Poliţiştilor*, Order of 14 December 2011; C-134/12 *Corpul Naţional al Poliţiştilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14 December 2012.
200 Articles 17, 20 and 21 EUCFR respectively.
201 Barnard, n 141 above.
202 Kilpatrick, n 59 above.



sibility and comprehensibility that stem from the complexity of the bailouts.[203] In relation to these issues, the way the Court will decide on the C-264/12[204] will be of particular interest. This case deals with the applicability of the principle of equal treatment, as stipulated in the EUCFR, on the removal of collectively agreed holiday and Christmas allowances by the Portuguese State Budget Act of 2012. In a similar manner to the cases described above, the national legislation refers to the Council Decision on granting financial assistance to Portugal and the MoU stipulates in clear terms that the loan is conditional on national reforms of this kind. According to Kilpatrick,[205] 'a full reconstruction of the Portuguese bailout sources actually shows a tight link between the challenged measures and EU sources'.[206]

Aside from issues related to the linkages between the bailout sources and national legislation and the clarity of the preliminary references, an important consideration when assessing the possibilities for relying on the EUCFR for challenging the austerity measures is that some bail-out mechanisms may not fall within EU law.[207] This is the case with the financial assistance programmes that have been implemented on the basis of the EFSF and bilateral loan agreements, such as in the case of Greece I and II. With respect to the ESM, the decision of the Court in *Pringle* is important in this respect. This is because the Court held that the conclusion of the ESM does not infringe the principle of effective judicial protection under Art 47 CFREU because 'the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where the [TEU and TFEU] do not confer any specific competence on the Union' to do so'. However, the reference to the non-applicability of the Charter is only made with respect to the Member States. The Court said nothing about the possible application of the EUCFR to the EU institutions in the context of the ESM Treaty, perhaps because it had taken the view that those institutions could not adopt binding acts pursuant to that treaty.[208] For her part, Advocate-General Kokott argued that as an EU institution, the Commission 'as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.'[209] This appears to assume that the EU institutions are bound by the EUCFR even if their actions take place outside the scope of EU law.[210] In addition, it is worth stressing that *Pringle* only referred to the establishment of the ESM and not its operation. In relation to this, recent case-law by the Court suggests that the EU Member States are bound by the Charter in any case where the measure is linked with situations, which are regulated by EU law. The Court has even ruled that even when EU Member States act outside of the EU, they still have an obligation to respect the rights recognised in the Charter.[211]

Assuming that it is possible to establish a link between the bailout sources and the EUCHR will eventually be considered to apply to acts taken by Member States as part of the conditionality of receiving a bailout, this raises the question as to how the Court might engage in a balancing exercise of competing rights.[212] According to Barnard,[213] there are two possibilities. The first possibility

203 Kilpatrick, n 41 above at 16.
204 Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial — Companhia de Seguros, S.A,* 2012/C 209/09.
205 Kilpatrick, n 41 at 12.
206 See CID 2012/658/EU of 9 October 2012 amending implementing Decision 2011/433/EU on granting Union financial assistance to Portugal (OJ L 295, 25.10.2012, p. 14) Article 2, amending Article 6(b) of the original CID; see also para 1.8 Memorandum of Understanding on Specific Policy Conditionality (see p. 86 of the Economic Adjustment Programme for Portugal, Second Review, Autumn 2011 (*European Economy Occasional Papers* 89, December 2011, Brussels).
207 Kilpatrick, n 59 above.
208 Peers, s 188 above.
209 Para 176 of her view. The Committee on Constitutional Affairs of the European Parliament has also held 'that the EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter of Fundamental Rights of the European Union, apply at all times' (Committee on Constitutional Affairs, Opinion, 11 February 2014, 2013/2277(INI), para 11).
210 In addition, according to Art. 13(3) of the ESM Treaty, "The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned".
211 See recently C-617/10 Åkerberg *Fransson,* [2013] 2 C.M.L.R. 46. In this case, the Court essentially equated 'implementation' with 'scope of application' and held that the applicability of European Union law entails applicability of the fundamental rights guaranteed by the EUCFR.
212 For a detailed analysis of this, see Fischer-Lescano, n 92 above.
213 Barnard, n 186 above, 14-15.

is for the Court to address the issue directly and substantively, using the means of the 'margin of appreciation', and work out how to balance the competing interests, e.g. in the case of dismissal reforms between those inside work (but possibly losing their jobs) and those without job.[214] A second possibility, according to Barnard again,[215] is to adopt a procedural approach. This means verifying whether, in introducing the changes, the state, in accordance with its industrial relations tradition, had consulted the relevant parties, in particular the social partners, in advance of taking the decision.[216] Translating this into reviewing reforms of national labour law for their compatibility with the EUCFR, the role of the Court would be to check that the state had engaged in appropriate discussions with interested parties prior to deciding on the reforms necessary.[217] Such an argument may be particularly useful in cases where the MoU and Council Decisions specify consultation procedures and have not been implemented.[218]

A final justification for the potential limited usefulness of the Charter against the austerity measures that needs to be considered at present is that the Court may accept that there is no breach of fundamental rights in the bail-outs.[219] On the basis of the policy actions adopted so far by the EU institutions involved in the bailouts, it can be argued that such assumptions concerning the nature of social rights have been prevalent.[220] But while, as seen earlier, there is a vacuum of case law safeguarding social rights in situations where EU Member States are bound by conditionality, there is developing case law by other supranational institutions suggesting a more supportive reading for the protection of social rights. In this context, a number of non-EU case law sources have already emphasised the non-compatibility of the austerity measures with fundamental rights, including the ILO High Level Mission,[221] the ILO Committee on Freedom of Association, the European Committee of Social Rights and the UN Committee on Economic, Social and Cultural Rights.

To conclude, while so far the Court has rejected becoming involved in an assessment of the austerity measures vis-à-vis the EUCFR, this does not preclude the development of litigation against the austerity measures on the basis of the EUCFR. Indeed, the emergence of a supportive reading of the protection of rights affected by the austerity measures under the EUCFR[222] as well as the fact that the crisis has now entered a less critical stage may prompt a different interpretation by the Court.[223]

---

214 The Court's case law on discrimination, which referred to arguments based on intergenerational fairness and creating opportunities for younger people to get into the employment market by removing older workers (see e.g. Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531) might provide a basis. According to Barnard (n 186 above), 'this might suggest that the Court will give priority to any measure which will facilitate job creation. Yet, there is little evidence that cutting labour standards does improve competitiveness' at 14.

215 Barnard, n 186 above at 14-15.

216 According to Barnard, n 186 above, some support for a more procedural approach by the Court of Justice can be seen in *Volker and Schecke* (case C-92/09 and C-93/09 *Volker and Schecke*, judgment of 9 November 2010).

217 Barnard, n 186 above at 14.

218 See section 4 above.

219 Kilpatrick, n 59 above.

220 See also the critique by Fischer-Lescano, n 92 above.

221 ILO, n 82 above.

222 See, for instance, the analyses by Peers (n 190 above), Barnard (n 141 above) and Kilpatrick (n 41 and n 13 above).

223 Another possibility is on the basis of the non-contractual liability of the EU (Article 340(2) TFEU). This provides any natural or legal person who has suffered damage as a result of the activities of the Commission and the Council at present to seek redress. Such damage may, for example, be caused by a servant of the EU in the performance of their duties. It may also result from the legislative activities of the European institutions, such as the adoption of a regulation. The non-contractual liability of the Union complies with uniform rules which have been developed by the case-law of the CJEU (the most important case here is Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm v Commission* [2000] ECR I-5291). Actions may be brought by individuals or Member States who have suffered damage and wish to obtain compensation. The deadline for acting is five years from the date on which the damage occurred. The Court of Justice shall recognise the liability of the Union when three conditions are met: the conduct of the institution must infringe a rule of law intended to confer rights on individuals; the breach of EU law must be sufficiently serious; there must be a direct causal link between the damage suffered by the claimant and the illegal act of the European institutions or their agents. With respect to the first condition, general principles of EU law, fundamental rights and the doctrine of misuse of powers have been held to be norms that will lead to liability (see, among others, Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens v Commission* [1995] ECR II-2941). >

7. EXAMPLES OF POSSIBLE LITIGATION AREAS

The measures introduced in Greece with respect to the determination of wages for young workers constitute a breach of EU law.[224] With the objective of promoting youth employment, significant changes regarding minimum wage levels of young people aged 15–24 were introduced in the 2010 and 2011 MoU. The 2011 MoU stipulated that the national minimum wage for young workers under 25 years old should be reduced by 32%.[225] This new provision abolished the provision that had been introduced by the 2010 MoU and Act 3863/2010,[226] which provided that in the case of new entrants into the labour market aged up to 25, remuneration would correspond to 84% of the minimum or daily wage.[227] Further, the 2011 legislation alters, with respect to the wage levels, article 74(9) of Law 3863/2010, which stipulated that young workers of 15–18 years could be employed under contracts of 'apprenticeship' with extended probationary periods and receive 70% of the minimum wage established in the relevant national collective agreement. It is important to stress that under such apprenticeship contracts, the workers are excluded from the protective provisions of labour legislation on permissible working hours, the start and end of the working day taking into account course schedules, obligatory periods of rest, obligatory paid annual leave, time off for attending school, studying and sick leave.[228] The reforms in this area are arguably in contradiction with the Employment Equality Framework Directive 2000/43/EC, which prohibits age discrimination in employment, and which has been transposed in Greece via Law 3304/2005.[229] Apart from the fact that there is no evidence to suggest that the measures have been suitable for reducing youth unemployment,[230] the measures are arguably against the principles of necessity and proportionality in the strict sense. This is because the reductions are applicable to all workers under 25 years old, irrespective of their employment status, level of education or family situation.[231] In this context, the exemptions in the Directive providing justification of differences of treatment on grounds of age should be interpreted as related to measures of positive and not negative discrimination.[232]

Further, the reforms are in direct contradiction with the European Social Charter. In the complaint 66/2011, the European Committee of Social Rights found that introducing "special apprenticeship contracts" between employers and individuals aged 15 to 18 with lesser labour law and social security rights violates Art.1(1), 7(2), 7(7), 7(9), 10(2) and 12(2) of the 1961 Charter. In addition, measures concerning the employment of new entrants to the labour market aged under 25 (remuneration below minimum wage) violates Art. 4(1), taken in conjunction with Art. 1(2) of the 1961 Charter. It is important that the Committee emphasised in this respect that measures taken to

> With respect to the second condition, the breach must be sufficiently serious and would involve the EU institution 'manifestly and gravely' exceeding the limits on its discretion. The final condition is the presence of a direct causal link and is often a significant hurdle for the applicants. However, Article 41(3) of the EUCFR, which recognises the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, may persuade the Court to adopt a less stringent approach to the conditions for non-contractual liability. At present, the admission by the IMF that it made mistakes in handling Greece's first loan programme may provide a basis against the ECB and the Commission (IMF, *Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement Individuals*, IMF Country Report No. 13/156, 2013). Member States may also be liable in the case of damage caused by European law being poorly applied. However, actions taken against Member States must be brought before the national courts.

224 On this, see F. Dermitzaki, 'The Unfavourable Treatment of Young Workers in terms of Wages according to Memorandum II, *Revue du Droit de Travail*, (2012) 71, 537 (in Greek).

225 Article 1(2) of Law 4046/2012.

226 Article 74(8).

227 The 2011 MoU also seems to alter the level of wages, as set by Law 3845/2010 (article 2, paragraph 6), according to which remuneration in the case of a contract for acquisition of work experience of up to one year's duration for unemployed persons up to 24 years of age registered with the Manpower Agency of Greece services should correspond to 80% of the minimum/daily wage.

228 Articles 74(8) and (9) of Act 3863/2010.

229 See also Article 21 of the EU Charter of Fundamental Rights.

230 Instead, the opposite has been observed, as, of course, levels of youth unemployment have increased significantly.

231 See also C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346.

232 Katrougalos, n 109 above.

encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations.' The wage reductions for young workers are also in contravention of ILO Conventions 111 concerning discrimination in respect of employment and occupation and 138 concerning minimum age for admission to employment.[233] In respect to this, the ILO High Mission to Greece, which was published before the conclusion of the second loan agreement reducing further the level of wages, stated with respect to the issue: 'Based on statistical information provided by the Hellenic Statistical Authority (EL.STAT) and EUROSTAT, the poverty level in Greece was at €6,000–7,000 per year. On this basis, it was considered that a young person could cover basic needs with a subminimum wage of €584 per month. This amount also corresponded to what was paid in terms of unemployment benefits.' However, following the reforms associated with the second loan agreement, the minimum wage level for young workers now stands at €510.95 for young persons, i.e. significantly lower than €584.'[234]

A second area that may be examined is the compatibility of the changes in dismissal law with the EUCFR. Article 30 of the Charter provides that 'every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'. This issue is particularly acute in respect of reforms required to public sector pay, since also Article 153(5) expressly excludes EU competence in respect of pay.[235] Barnard discusses this possibility in the context of the changes in Portugal on the basis that the express reference made in the Council Decision 2011/344/EU to reform of dismissal law and severance payments would tend to suggest that these reforms are 'covered by EU law'.[236] According to her account, there are two possible lines of argument that could be run to challenge dismissal reforms necessitated by the Troika. The first is to argue that the reforms are so major that they undermine the essence of the right to protection against dismissal. However, in her view, this does not stand much chance as some of the reforms are based on bringing national law in line with the EU average. A second line of argument, which holds more potential, involves reading the Charter in the light of the objectives of the EU identified in Article 3 TEU and Article 151 TFEU.[237] Barnard suggests that reading of these two provisions combined, together perhaps with notions of EU citizenship, mandate a raising of the standard of living, particularly since the Article 117(1) EEC, upon which Article 151 TFEU is based, expressly stated that 'Member States agree on the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'.

A further area is the so-called 'labour reserve' reforms that have been introduced in Greece.[238] Successive MoU stipulated the following: 'Before end-2011, about 15 000 staff currently employed

233 On this, see A. Kazakos, Collective Labour Agreements and Arbitration in light of the Act of the Ministerial Council 6/28.2.2012, (2012) 71 *Revue du Droit de Travail*, 593 at 610-611 (in Greek).

234 ILO, n 161 above at 19.

235 Although cf. the Monti II Regulation (COM(2012) 130) on strike action, another excluded area under Article 153(5), which was put forward under Art. 352 TFEU.

236 Barnard, n 186 above.

237 Article 3(3) TEU provides: The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. Article 151 TFEU provides: The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

238 For an analysis, see F. Dermitzaki, 'The Labour Reserve of Law 4024/2011 –European Union Law Issues, (2011) 22 *Revue du Droit de Travail*, 1481 (in Greek).

by various government entities are transferred to the labour reserve, while about 15 000 will be placed in pre-retirement. Staff in the labour reserve, and in pre-retirement, will be paid at 60 percent of their basic wage (excluding overtime and other extra payments) for not more than 12 months, after which they will be dismissed. This period of 12 months may be extended up to 24 months for staff close to retirement. Payments to staff while in the labour reserve are considered part of their severance payments. Approximately, 10 000 employees left the public sector under the pre-retirement scheme. As a result of merges and closers, 630 employees were shifted in the labour reserve. Additional redundant staff will be transferred to the labour reserve in the course of 2012, in connection with the identification of entities or units that are closed or downsized, and in case the recruitment rule is violated. Staff transferred to the Government from either state-owned enterprises or other entities under restructuring are considered as new recruitments. The same applies to staff in the labour reserve that is transferred to other government entities, after screening of professional qualifications by ASEP under its regular evaluation criteria. The overall intake in the professional schools (e.g. military and police academies) is adjusted in line with the staffing plans.' The labour reserve measure was introduced in Greek legislation via the Mid-term Fiscal Strategy Framework 2012-2015 (Law 3986/2011), which was applicable to employees in state-owned enterprises. Later, Law 4024/2011 extended the scope of the application to cover employees in the public sector. According to these provisions, the shift of employees to the labour reserve means that in principle the employees cease to perform their duties and cease to progress in their career and salaries. During the time in which they are in 'labour reserve', they receive 60% of the basic salary they used to receive before, without any additional benefit. It can be argued that the criteria introduced in the legislation for the application of the labour reserve measure to public sector employees contravene a number of EU provisions. To the extent to which the criterion of proximity (in terms of time) to retirement is used, the measure contravenes Council Directive 2000/78/EC, which prohibits discrimination against older employees. In addition, the labour reserve measure is arguably contrary to Council Directive 98/59/EC and Council Directive 2002/23/EC to the degree to which it is applicable to employees of organisations that are abolished, merge or cease to operate.[239]

Aside from the lack of incompatibility of measures related to individual labour law, reforms in collective labour law may also be contravention of EU law. In particular, the reforms in the collective bargaining systems in both Greece and Portugal are in contravention of Article 28 of the EUCFR but also ILO Conventions.[240] In brief, the reforms are centred around a radical restructuring of the systems of collective bargaining, including changes to law governing asymmetry in arbitration, suspending the favourability principle and the automatic extension of sectoral agreements to those not represented in the negotiations, allowing for company-level derogations, reducing the 'grace period' of the collective agreements and introducing additional channels of employee representation. On top of these reforms concerning the process of bargaining, flat percentage reductions were introduced in Greece to existing wage rates that had been the outcome of collective bargaining between the representative social partners (i.e. the National General Collective Labour Agreement or else 'EGSEE'): Act 4046/2012 in conjunction with Board of Ministers' Act 6/2012 stipulated that from February 2, 2012 onward, the minimum monthly and daily wage set by the EGSSE in force would be decreased by 22% and by 32% for young persons under the age of twenty-five. In addition, salary increases by collective agreements have been prohibited in the public sector in Greece. Against this context, the recognition of the fundamental right to negotiate and conclude collective agreements in Article 28 EUCFR is significant. Article 28 not only extends the already existing guarantee of this right under the national laws of the Member States to the level of EU law but when read in conjunction with Article 52(3) EUCFR it provides a basis for interpreting the right in line with the recent jurisprudence of the ECtHR that recognises that the

239 Dermitzaki, n 238 above.

240 On this, see, N. K. Gavalas, 'The Memorandum from the Council of State to the ECtHR', (2013) 72 *Revue du Droit de Travail*, 756 at 759 (in Greek).

right to freedom of association under Article 11 of the ECHR implies the right to collective bargaining.[241] While Seifert refers to 'controlled decentralisation' when describing the collective bargaining reforms under the austerity measures, it is argued here that the reforms are actually intended to promote a form of 'disorganised decentralisation',[242] as they are not accompanied by any procedural guarantees for the effective establishment and operation of bargaining and do not respect the autonomy of the social partners in setting wage levels through collective agreements.[243]

8. THE EUROPEAN COURT OF HUMAN RIGHTS[244]

Unlike the EUCFR, the ECHR does not guarantee economic and social rights. But still there are a number of possible legal bases for the development of litigation before the ECtHR concerning in particular the implications of the crisis for poverty:[245] the principle of fair trial (Article 6);[246] the right to the peaceful enjoyment of possessions (Article 1 of the First Additional Protocol to the ECHR);[247] the right to private and family life and respect of the home (Article 8);[248] the potential recognition of the right of housing;[249] the prohibition of inhuman and degrading treatment;[250] and the freedom of association, including the right to collective bargaining.[251]

Article 1 of the First Protocol of the ECHR, which protects the right to property, including earnings from wages and pensions. The ECtHR's constructive interpretation of Article 1 of the First Additional Protocol has led to some remarkable developments in social protection. The leading decision in Stec v. the United Kingdom[252] summarised and expanded upon the existing case-law, accepting that the notion of "possessions" contained in that Convention provision could extend to all social security

241 On this, see Seifert, n 118 above, 327. See also the analysis in section 8.

242 On the distinction between disorganised and organised decentralisation, see F. Traxler, 'Two logics of collective action in industrial relations?', in C. Crouch and F. Traxler (eds.), *Organised Industrial Relations in Europe: What Future?* (Aldershot, Avebury, 1995).

243 For the case of Greece, see C. Ioannou and K. Papadimitriou, *Collective Negotiations in Greece during 2011-2012: Trends, Changes and Prospects* (OMED, 2013).

244 On this, see K. D. Ewing, 'Austerity and the Importance of the ILO and the ECHR for the Progressive Development of European Labour Law', in Däubler/Zimmer (eds.), *Arbeitsvölkerrecht. FS für Klaus Lörcher*, (Baden-Baden, 2013).

245 This is based on the analysis provided by F. Tulkens, *The European Convention on Human Rights and the Economic Crisis: the Issue of Poverty*, Academy of European Law (European University Institute, 2013). See, primarily, *Jahn and Others v. Germany*, judgment (GC) of 30 June 2005; *Poltoratski v. Ukraine*, judgment of 29 April 2003; *Orchowski v. Poland*, judgment of 22 October 2009; *Samaras and Others v. Greece*, judgment of 28 February 2012; *Burdov v. Russia*, judgment of 7 May 2002; *Nencheva and Others v. Bulgaria*, judgment of 18 June 2013; *Koufaki and Adedy v. Greece*, decision on the admissibility of 7 May 2013; *N.K.M. v. Hungary*, judgment of 14 May 2013.

246 *Airey v. Ireland*, judgment of 9 October 1979; *Laskowska v. Poland*, judgment of 13 March 2007; *Kreuz v. Poland*, judgment of 19 June 2001; *Bakan v. Turkey*, judgment of 12 June 2007; *Mehmet and Suna Yiğit v. Turkey*, judgment of 17 July 2007; *Stankov v. Bulgaria*, judgment of 12 July 2007; *Cour v. France*, judgment of 3 October 2006; *Collectif National d'information et d'opposition à l'usine Melox-Collectif stop Melox et Mox v. France*, judgment of 12 June 2007.

247 *Gaygusuz v. Austria*, judgment of 16 September 1996; *Koua Poirrez v. France*, judgment of 30 September 2003; *Niedzwiecki v. Germany and Okpisz v. Germany*, judgments of 25 October 2005; *Luczak v. Poland*, judgment of 27 November 2007; *Stec and Others v. the United Kingdom*, decision (GC) of 6 July 2005; *Willis v. the United Kingdom*, judgment of 11 June 2002; *Wessels-Bergervoet v. the Netherlands*, judgment of 4 June 2002; *Koua Poirrez v. France*, judgment of 30 September 2003; *Stec and Others v. the United Kingdom*, judgment (GC) of 12 April 2006; *D.H. and Others v. the Czech Republic*, judgment (GC) of 13 November 2007

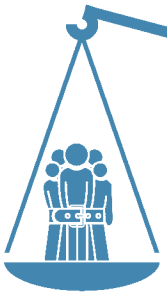
248 *Moldovan and Others v. Romania* (no. 2), judgment of 12 July 2005; *Stankova v. Slovakia*, judgment of 9 October 2007; *Wallová and Walla v. the Czech Republic*, judgment of 26 October 2006; *Havelka and Others v. the Czech Republic*, judgment of 21 June 2007; *R.M.S. v. Spain*, judgment of 18 June 2013; *McCann v. the United Kingdom*, judgment of 13 May 2008; *Bah v. the United Kingdom*, judgment of 27 September 2011; *Yordanova and Others v. Bulgaria*, judgment of 24 April 2012.

249 *James and Others v. the United Kingdom*, judgment of 21 February 1986; *Mellacher and Others v. Austria*, judgment of 19 December 1989; *Hutten-Czapska v. Poland*, judgment (GC) of 19 June 2006; *Almeida Ferreira and Melo Ferreira v. Portugal*, judgment of 21 December 2010; *Société Cofinfo v. France*, decision of 12 October 2010; *A.M.B. and Others v. Spain* (no. 77842/12), communicated to the Government on 12 December 2012, pending.

250 *Khokhlich v. Ukraine*, judgment of 29 April 2003; *O'Rourke v. the United Kingdom*, decision of 26 June 2001; *Larioshina v. Russia*, decision of 23 April 2002; *Budina v. Russia*, decision of 18 June 2009; *M.S.S. v. Belgium and Greece*, judgment (GC) of 21 January 2011; *Hirsi Jamaa and Others v. Italy*, judgment (GC) of 23 February 2012.

251 *Demir and Baykara v Turkey* [2008] ECHR 1345; *Enerji Yapi-yol Sen v Turkey* [2009] ECHR 2251.

252 *Stec and Others v. the United Kingdom*, nos. 65731/01 and 65900/01, ECHR 2005-X



benefits, whether contributory or non-contributory. This does not mean that the States Parties to the Convention are required to guarantee social security benefits that do not exist within their legal system.[253] However, Article 1 of Protocol No. 1, read in conjunction with Article 14 of the Convention, precludes refusing such benefits, where they exist, on grounds of sex,[254] marital status[255] or nationality.[256] This combination is, according to Tulkens,[257] even more effective since the recent case-law of the ECtHR has produced an interpretation of Article 14 particularly favourable to the protection of groups that are structurally vulnerable, whether by accepting the legitimacy of positive action,[258] asserting the prohibition of indirect discrimination[259] or ruling that the burden of proof regarding discrimination must be shared.[260]

It has to be stressed here that the ECtHR has ruled that Article 1 of the First Protocol of the ECHR does not guarantee any right to a particular amount of pension.[261] However, the cumulative effect of the restrictive measures in combination with the procedures adopted to put them into place may mean that the principle of proportionality have not been observed in some of the reforms discussed at present.[262] A supportive decision to such an interpretation was issued by the ECtHR in the *N.K.M. v Hungary* judgment of 14 May 2013 concerning the unexpected imposition of a high rate of tax on severance payment.[263] The applicant, a civil servant with thirty years' service, was dismissed. She had a statutory entitlement to severance pay on dismissal, amounting to eight months' salary. Some weeks before receiving notice of her dismissal new legislation was introduced imposing a 98% tax on severance pay exceeding a certain threshold. For the applicant, this represented an overall tax burden of approximately 52% on the entirety of the severance, about three times the general personal income tax rate. The applicant complained under Article 1 of Protocol No. 1 – read alone and in conjunction with Article 13.The ECtHR found that in the circumstances of the instant case, the applicant had been required to bear an excessive and individual burden.[264] This was because she had to suffer a substantial loss of income at a time when she had been made redundant, which was at variance with the very aim of a severance package. Moreover, the new legislation was introduced very shortly before the applicant's dismissal, leaving her with little time to adjust to a new and extremely difficult financial situation, which situation she could never have anticipated. The ECtHR also criticised the fact that the law was targeted at a defined group of government employees and that the majority of citizens were not obliged to contribute to the same extent to the State budget.[265] The ECtHR also highlighted in its finding that the applicant's statutory entitlement to severance pay amounted to 'possessions', that the law should protect the trust placed in statutory commitments.[266] It observed that good government depends upon trust between the governed and the governor, and unless that trust is sustained and protected, governments will not be believed and civil servants will not order their affairs on that assumption as required by their heightened loyalty.[267]

253 Ibid, at para 54.
254 *Willis v. the United Kingdom,* no. 36042/97, ECHR 2002-IV. 22.
255 *Wessels-Bergervoet v. the Netherlands,* no. 34462/97, ECHR 2002-IV. 23.
256 *Koua Poirrez v. France,* no. 40892/98, ECHR 2003-X.
257 Tulkens, 2013 n 244 above.
258 *Stec and Others v. the United Kingdom,* nos. 65731/01 and 65900/01, ECHR 2006-VI, esp. paras 61 et seq. 25.
259 *D.H. and Others v. the Czech Republic,* no. 57325/00, ECHR 2007-IV. 26.
260 Ibid.
261 See, among many authorities, *Maggio and Others v. Italy* (nos. 34929/11).
262 On this, see also the recent decisions of the European Committee of Social Rights in five cases concerning pension schemes in Greece: ECSR, Decision on the Merits, 7.12.2012, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012, para. 83; ECSR, Decision on the Merits, 7.12.2012, *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Complaint No. 77/2012, para. 79; ECSR, Decision on the Merits, 7.12.2012, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Complaint No. 78/2012, para. 79; ECSR, Decision on the Merits, 7.12.2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, Complaint No. 79/2012, para. 79; ECSR, Decision on the Merits, 7.12.2012, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No. 80/2012, para. 79.
263 No. 66529/11, ECtHR 14-May-2013.
264 Para 42.
265 Para 71.
266 Para 37.
267 Para 37.

This decision can be contrasted with two recent decisions by the ECtHR, which cast some doubts concerning the potential for the use of Article 1 of the First Additional Protocol against austerity measures in the case of Greece.[268] In Koufaki and ADEDY v Greece,[269]the Court considered the issue of the reduction of the salaries and pensions of civil servants, which took place with Laws 3833/2010, 3845/2010 and 3847/2010.[270] The applicants argued that these reductions, coupled with the abolition of allowances of Christmas and Easter bonuses, constituted deprivation of property, thus violating the second sentence of the first paragraph of Article 1 of the First Additional Protocol. In its judgment, the ECtHR declared the case inadmissible. In line with the established case-law in this area, the ECtHR recalled that article 1 of the First Additional Protocol does not recognize a right to a specific amount of pension or remuneration. Having accepted that the reasoning of the Explanatory Report to Law 3833/2010 about 'the biggest crisis of the public finances of the last decades' and 'the national duty for Greece' to achieve the fiscal consolidation with objectives following a precise timetable',[271] the ECtHR applied a proportionality test and found that the measures met a fair balance between the need to counteract the crisis and human rights' protection.[272]

Shortly afterwards, the ECtHR considered a case brought by two applicants (Antonio Augusto da Conceicao Mateus and Lino Jesus Santos Januario) challenging the pension cuts imposed by the Portuguese legislation implementing the MoU obligations of Portugal.[273] The applicants, pensioners eligible to receive social security benefits under the Portuguese public pension scheme, had to suffer reductions on their holidays and Christmas allowances. These reductions were inflicted by the State Budget Act of 2012 and had resulted in cumulative losses of 10,8% and 10,7% of the applicants' respective total annual pension payments, including the holiday and Christmas allowances.The ECtHR adopted similar approach to that in *Koufaki and ADEDY v Greece*. In order to assess the financial situation of Portugal, the ECtHR relied on the EU's assessment of the economic situation of Portugal, and in particular the working paper of the European Commission and the subsequent Council Decision of May 17th, 2011 allowing an 'ambitious but realistic' program of financial assistance to Portugal.[274] Referring to the decision in *Koufaki and ADEDY v Greece*, the ECtHR considered that the cuts 'were clearly in the public interest within the meaning of Article 1 of Protocol 1. Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were temporary'.[275] Then the ECtHR proceeded to assessing whether a fair balance had been struck between the general interest of the community and the requirement of the protection of the applicants' fundamental rights,[276] and going again back to the Greek case, it considered that the applicants' right to the peaceful enjoyment of their possessions, this time limited in time and in quantitative terms, was not disproportionate.[277] It finally found that 'in the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and temporary effect of the reduction of their holiday and Christmas allowances' the applicants did not bear a disproportionate and excessive burden,[278] therefore their application was manifestly unfounded and was inadmissible.[279]

---

268 For an analysis of the compatibility of the measures associated with the first loan in Greece with the ECHR, see G. I. Kasimatis, The Loan Agreements of Greece with the EU and the IMF (Athens, DSA: 2010) (in Greek).

269 No. 57665/12, Decision/Décision 7.5.2013 [Section I], no. 57657/12, Decision/Décision 7.5.2013 [Section I].

270 These laws were adopted in the content of the first MoU. They had been the subject of a judicial review before the Council of State (see above section 2).

271 Para. 37.

272 In arriving at this conclusion, the Court took into account both the government's explanatory reports accompanying the legislation, as well as the decision by the Greek Council of State (668/2012).

273 *António Augusto Da Conceicao Mateus against Portugal and Lino Jesus Santos Januario against Portugal*, nos. 62235/12 and 57725/12.

274 Para 11.

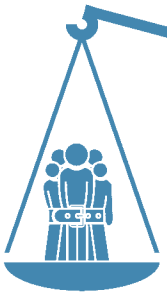
275 Para 26.

276 Para 27.

277 Para 28.

278 Para 29.

279 Para 30.



While owing to its established case law in this area the way the ECtHR considered the Greek and Portuguese cases was somewhat expected, it does not mean that there is no longer space for developing litigation strategies involving the ECtHR. It is important to stress first that the application brought by ADEDY arguably suffered from rather abstract and weak argumentation, as it was brought on behalf of all its members, i.e. both those with high incomes and those with low ones.[280] Correspondingly, the ECtHR found that the applicants had not invoked in a particular way how their situation has deteriorated to such an extent that their existence is compromised.[281] The second interesting observation is that the ECtHR seemed to accept in the Greek case that the right to a decent standard of living, with respect in particular to the safeguarding of the basic salary, can be also recognised in relation to the property rights that are protected by article 1 of the First Additional Protocol. As such, although the ECtHR does not recognize, as noted before, the right to a certain amount of salary, it indirectly implies that a minimum amount sufficient to secure the right to a decent life for the individual constitutes the *ultimum refugium* for individuals against the choices made by the government in the area of social policy.[282] Moreover, both the Greek and Portuguese cases refer only to measures affecting public sector employees; as such, their outcome cannot be extrapolated to cases involving employees in the private sector.[283]

In addition, it is important to stress that none of the applications so far has raised the issue of the compatibility of the reforms in collective labour law with Article 11 on freedom of association. This is particularly interesting in the case of *Koufaki and ADEDY v Greece*, as ADEDY had raised the argument in the application for judicial review that Law 3833/2010, which prohibited any increase in the salaries of employees in the public sector, contravened Article 11 but this was rejected by the Council of State.[284] On the basis of the recent case law of the ECtHR, it may be argued that the right to collective bargaining as recognised in Article 11, in conjunction with Article 6 of the European Social Charter that protects collective freedom and the respective content of Article 28 EUCFR, has been violated by the austerity reforms that intrude upon the principle of free and voluntary collective bargaining, whereby the determination of the bargaining level should essentially be left to the discretion of the parties and not be imposed by law or decisions to that effect.[285]

To conclude, there are a number of possible legal bases for the development of litigation before the ECtHR concerning in particular the implications of the crisis for poverty but also collective rights, and especially the freedom of association and the right to collective bargaining.

280 On this see, Gavalas, n 233 above.

281 The Court mentioned that the salary cut of Ms Koufaki the first plaintiff from 2435,83 € to 1885,79 € is not of a "level that risks to put the plaintiff in front of difficulties incompatible with Article 1 of Protocol 1' (paras 45 and 46).

282 On this, see S. Christoforidou, *Case note on ECtHR, Koufaki v Greece and ADEDY v Greece, Applications nos 57665/12* ΚΚΚ *57657/12*, 07/05/2013, available on http://www.constitutionalism.gr/site/esda-mnimonio-koufaki-adedy-christoforidou/ (in Greek).

283 On this see, Gavalas, n 240 above.

284 Council of State 668/2012.

285 As Gavalas also points out, the failure of the Council of State in 668/2012 to accept the request by ADEDY to submit a preliminary reference to the CJEU concerning the compatibility of the measures with EU law is arguably contrary to Article 6 ECHR, see n 240 above.

9. CONCLUSION

The Greek sovereign debt crisis of 2010, which since then has affected most peripheral economies of the European Union, exposed not only the structural weaknesses of certain EU Member States but also the weaknesses of governance of the Euro-zone. As a result of wide-ranging structural reforms that have been stipulated in the financial assistance programme agreements and MoU agreed between the IMF, the ECB, the European Commission and the affected Member States, essential features of the national systems of labour law and social security have been subject to extensive changes. The labour market reforms have been consistent with the dominant view that the lack of competitiveness of the national economies was due to labour market rigidities and the high degree of employment protection legislation. However, there is increasingly evidence that the removal of internal barriers to growth through 'structural' reforms, including downgrading of the protections provided by the welfare state and further labour market deregulation, have dramatic implications for the level of living and working conditions and have also led to the deepening of economic recession.[286]

Aside from the economic and social implications of the crisis, there are significant legal implications that have arisen out of the response to the crisis formulated by supranational institutions and EU Member States. In terms of process, the financial assistance programme agreements and the accompanied MoU that have been used in the Member States mostly affected by the crisis are based on a mixture of EU-based and intergovernmental frameworks that have not allowed scope for the involvement of the social partners or parliaments at EU and national levels. In terms of substance, the interventions target a range of subject areas that are excluded from the competence of the EU and are in contravention of the EU Treaties' social objectives as well as the EUCFR. Despite the existence of strong links between the programmes and the EU legal and institutional framework, the review of these measures has been so far confined for its most part in domestic courts and on the basis of domestic principles and rights. On the basis of the analysis made above, it is argued here that there is scope for the establishment of judicial dialogue between domestic courts and the Court as well as scope for using the EU legal framework at domestic level as an additional legal basis for assessing the lawfulness of the austerity reforms. Beyond this, the signs of reconsideration in Europe and elsewhere[287] that policies of austerity are not going to lead to economic growth, and that the origins of the crisis lie in the institutions and mechanisms of the period of neoliberal ascendancy which preceded it, should lead to a reappraisal of conventionally accepted theories and prescriptions adopted by supranational but also domestic institutions regarding labour market rigidities.[288] The adoption of a solidaristic integration policy, involving deepening of EU integration on the basis of new forms of solidarity, involving an expansion of the European budget to deliver fiscal transfers from core to periphery, and replacement of the model of competition among national legal systems by the harmonization of the member states' social and fiscal laws, represents the Union's best option for the reduction in differentials in competitiveness between the member states, and hence for mitigating the social effects of uneven development between them.[289]

286 European Foundation for the Improvement of Living and Working Conditions, *Impact of the Crisis on Working Conditions in Europe* (Dublin: Eurofound, 2013).

287 See, for instance, the admission by the IMF that it made mistakes in handling Greece's first loan programme (n 223 above).

288 Deakin and Koukiadaki, n 2 above.

289 Deakin and Koukiadaki, n 2 above.

NOTES:

NOTES:

CONFEDERATION SYNDICAT EUROPEAEN TRADE UNION

European Trade Union Confederation

Boulevard du Roi Albert II, 5
1210 Brussels
Tel + 32 2 224 04 11
E-mail : etuc@etuc.org

www.etuc.org