3

Financial Assistance Mechanisms

3.1 INTRODUCTION

After the Annual Meeting of the European Stability Mechanism (ESM) Board of Governors on 13 June 2019, the ESM Managing Director Klaus Regling stated in a press conference:

> For this Annual Report, we recalculated the annual savings that Greece derives from our assistance. The number is €13 billion in savings for the Greek budget in 2018. That represents 7% of Greek GDP. And this will happen again every year. It is the largest support and *largest solidarity ever given to any country in the world*.[1] (emphasis added)

From the creditor's point of view, the principle of solidarity appears to be the cornerstone of all financial assistance: money is given out of solidarity the creditors felt towards a Member State in trouble. This statement represents the mainstream view on solidarity in the EU, as direct help given to a Member State in need. But for such solidarity not to be mistaken for a transfer union, measures of financial assistance have been designed to ensure the principle of equality of Member States as articulated in Article 4(2) of the Treaty of the European Union (TEU). The principle of equality prevents the development of a transfer union, for example, by prohibiting monetary financing of national budgets (Article 123 of the Treaty on the Functioning of the European Union (TFEU)). In addition, the no-bailout clause (Article 125 TFEU) presumes that a Member State cannot be held liable for the debt of another, as all Member States are to be treated equally.

[1] See <www.esm.europa.eu/press-releases/klaus-regling-press-conference-after-annual-meeting-esm-board-governors>.

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A common denominator found in these measures is that they grant decision-making powers to national governments and ultimately reduce the influence of individuals in economic governance to national elections only. This looks like equality only on the surface: debtor governments and parliaments have had little power to negotiate the terms of financial assistance, unlike the power that was reserved for the creditor Member States. This is furthermore true given that the post-crisis economic governance is increasingly regulated through ad hoc and non-typical instruments, which results in both a decreased ability to use contestation fora at the EU level, as well as differentiation in terms of the variety of contestation routes and mechanisms at the national level.[2]

In this context, judicial review carried out by national courts and the Court of Justice in EU economic governance is problematic as it departs from focusing on individual rights, instead focusing on national budgetary sovereignty and the resulting conditionality embedded in measures of financial assistance. This is due to the legal nature of austerity obligations, which are outside the realm of EU law proper, remaining in the sphere of public international law.[3] Judicial review of measures of financial assistance at the EU level was initially light,[4] stemming primarily from the fact that each of those measures had a peculiar legal status, meaning that the Court of Justice was not able to apply the Charter of Fundamental Rights.[5] The Court of Justice appears to be changing its approach, by imposing an obligation on the Commission, when acting outside its Treaty-based functions, to ensure the Charter is respected.[6] The same obligation is now placed on the European Central Bank (ECB),[7] while national measures implementing austerity

[2] See, for example, Opinion of Advocate General Pitruzzella in Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* EU:C:2020:390 [48], [54].

[3] See, on this point, R Repasi, 'Judicial Protection against Austerity Measures in the Euro Area: Ledra and Mallis' (2017) 54 *Common Market Law Review* 1123, 1140.

[4] Case C-370/12 *Pringle* EU:C:2012:756. Initially, the review of financial assistance measures based on Memoranda of Understanding was rejected as inadmissible. See A Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis' in M Dawson, H Enderlein and C Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation* (Oxford University Press 2019) 119.

[5] Case C-370/12 *Pringle* (n 4) [180].

[6] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v Commission* EU:C:2016:701.

[7] Case T-107/17 *Steinhoff* EU:T:2019:353. The Court of Justice found the appeal against this decision is manifestly inadmissible and in part manifestly non-founded. See Case C-571/19 P *EMB Consulting SE v ECB* EU:C:2020:208.

requirements have been reviewed in limited circumstances.[8] Still, when it comes to the central institutions actually deciding on the conditions of financial assistance, legal accountability at the EU level remains weak. For example, the decision-making processes of the Euro Group are not amenable to judicial review by EU courts, as it is considered an informal discussion forum,[9] not affecting rights of individuals given that their decisions do not produce binding legal effects.[10] Individuals are required to take a number of indirect routes[11] that have as yet not resulted in successful judicial redress.[12]

Turning to the national level, not all national courts have the same position and powers in their constitutional set-up to review measures resulting from financial assistance. For example, the German Bundesverfassungsgericht (the German Federal Constitutional Court) is seen as the dominant national constitutional court in the EU, being one of the most cited courts EU-wide, and the most prominent in questioning the decisions of the Court of Justice.[13] However, the Bundesverfassungsgericht is also seen as pushing the ordoliberal agenda in the EU's economic policy,[14] therefore depriving citizens of other Member States of having any say in the economic rationale behind governance mechanisms. This ultimately means that the extent of contestation before national courts depends on their behaviour and position in national

[8] When reviewing a cut in judges' salaries, an austerity measure introduced to meet the requirements of the bailout, the Court of Justice did not mention the ESM or any other financial assistance mechanism in the legal context of the judgment, but focused solely on the interpretation of the principle of judicial independence from Article 19(1) TEU, which it concluded was not impaired by the measure in question. Case C-64/16 *Associação dos Juízes Portugueses* EU:C:2018:117. See also Chapter 2, Section 2.2.1.

[9] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* EU:C:2020:1028 [88].

[10] Opinion of Advocate General Wathelet in Joined Cases C-105/15 P to C-109/15 P *Mallis* EU:C:2016:294 [66]. On the concept of binding legal effects, see Chapter 2, Section 2.2.3.

[11] Opinion of Advocate General Pitruzzella in Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* (n 2) [32].

[12] See also P Craig, 'The Eurogroup, Power and Accountability' (2017) 23 *European Law Journal* 234, 248.

[13] G Anagnostaras, 'Activation of the *ultra vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) 14(7) *German Law Journal* 959, 959; R D Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 *Maastricht Journal of European and Comparative Law* 136, 136; F Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union: The German Constitutional Court's Lisbon Decision and the Changing Landscape of European Constitutionalism' (2011) 9(3) *International Journal of Constitutional Law* 757.

[14] C Joerges, '"Brother, Can You Paradigm?"' (2014) 12(3) *International Journal of Constitutional Law* 772, 780.

legal systems.[15] Fragmented judicial review of austerity measures therefore prevents a more homogeneous approach towards the social conflicts taking place across and within Member States.[16]

In essence, thus, this chapter looks at the intersection between the substance of the EU economic governance and the procedure by which EU citizens can and should be able to contest it. In so doing, the aim is to determine the position of individuals and their ability to make use of existing routes of judicial contestation in the current set-up of EU economic governance, characterised by its normative focus on the equality of Member States. It explores the role accorded to the principle of equality of Member States in the case law of the Court of Justice and national courts reviewing measures of financial assistance, while at the same time investigating the extent to which the common interest, as the expression of the principle of solidarity,[17] features as a consideration before those courts. In that sense, I will argue that courts are able to contribute to the overall state of accountability in the EMU by reinterpreting the normative preferences of the constitutional system and ensuring political equality of citizens. Methods for doing so include a teleological interpretation of rules on access and the scope of remedies, and a substantive interpretation of the common interest.

In what follows, Section 3.2 will offer a brief description of financial assistance measures to gain a sense of how their versatile nature influenced judicial review. Section 3.3 will look at the judicial review of the European Stability Mechanism[18] and the resulting Memoranda of Understanding at the national level. Section 3.4 will conduct the analogous exercise in respect of EU courts. Section 3.5 will finally reflect upon judicial interactions taking place between the EU and the Member States to connect the findings from the previous sections and comment on the overall status of legal accountability in financial assistance.

3.2 THE LEGAL FRAMEWORK OF FINANCIAL ASSISTANCE

The number, complexity, and variety of financial assistance mechanisms employed during the Euro crisis is well documented in the

[15] See also Transparency International, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017), <https://transparency.eu/wp-content/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> 36.

[16] See A Farahat and X Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Bloomsbury 2021).

[17] See Chapter 1 for a more detailed elaboration of this connection.

[18] Treaty Establishing the European Stability Mechanism (ESM Treaty) T/ESM 2012-LT/en 1.

literature.[19] What binds all these instruments together is their non-typical, hybrid,[20] legal nature, placed partially within and partially outside EU law, essentially transforming the Treaty-based EU method of action.[21] The sources considered here as instruments of financial assistance are the earlier European Financial Stabilisation Mechanism (EFSM)[22] and the European Financial Stability Facility (EFSF),[23] which was later replaced by the European Stability Mechanism (ESM).[24] Both have been accompanied by loans provided by the International Monetary Fund (IMF) as well as bilateral loans. However, to add to the complexity, the so-called Six-Pack[25] of EU law instruments, later

[19] E Chiti and P G Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 *Common Market Law Review* 683, 686; C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, 394; C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35(2) *Oxford Journal of Legal Studies* 325, 333; A Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991, 995.

[20] Poulou (n 19) 995.

[21] The political reasons behind these choices are also presented in detail in Chiti and Teixeira (n 19) 685 ff, and will not be covered here.

[22] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118) p. 1.

[23] The EFSF is a company governed by private law incorporated in Luxembourg. Full text available at <www.esm.europa.eu/system/files/document/20111019_efsf_framework_agreement_en.pdf>. See also U Forsthoff and J Aerts, 'Financial Assistance to Euro Area Members (EFSF and ESM)' in F Amtenbrink and C Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020).

[24] It should be added that the ESM Treaty has been reformed and was ratified by all its members except Italy. This reform will thus be excluded from analysis but will be reflected upon in the Conclusion. For more information, see <www.esm.europa.eu/about-esm/esm-reform>.

[25] Council Directive 2011/85/EU of the Council of 8 November 2011 on the requirements for budgetary frameworks of the Member States (OJ 2011 L306) p. 41; Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L306) p. 1; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L306) p. 8; Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L306) p. 12; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L306) p. 25; Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L306) p. 33. The Six-Pack is available in OJ 2011 L301/1, p. 1.

replaced by the 'Two-Pack',[26] was attached to the ESM to ensure consistency between the conditionality attached to financial assistance and economic and budgetary surveillance of euro zone countries.[27] Surveillance mechanisms are, however, pure EU law instruments, invoking different legal consequences than an international treaty such as the ESM. What is important to note is that each of the individual instances of financial assistance has been granted as a combination of one or more of these facilities.[28]

The actual financial assistance to be disbursed and the conditions attached to it are negotiated between the Troika (representatives of the Commission, the ECB, and the IMF) and the Member State in need of assistance. The ultimate conditions of the assistance are then agreed in a Memorandum of Understanding, another instrument without a clear answer concerning its legal nature.[29] The same conditions are then also confirmed by a Council Decision, which, however, does not contain the same amount of detail as the Memoranda of Understanding.[30] In sum, then, even this brief summary demonstrates the complex network of instruments in place. How judicial review before national and EU courts dealt with this complexity is presented in the following sections.

3.3 JUDICIAL REVIEW AT THE NATIONAL LEVEL

A feature shared by all national decisions on the ratification of the ESM Treaty is a focus on sovereignty and more specifically on parliamentary budgetary prerogatives as its most direct expression.[31] While the ESM Treaty regulates parliamentary involvement in decisions concerning the

[26] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ 2013 L140) p. 1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ 2013 L140) p. 11.

[27] Poulou (n 19) 995.

[28] Kilpatrick, 'On the Rule of Law and Economic Emergency' (n 19) 336.

[29] For an analysis and presentation of differing views in the literature, see M Markakis and P Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*' (2017) 55(2) *Common Market Law Review* 643, 654.

[30] Poulou (n 19) 1002.

[31] S Bardutzky and E Fahey, 'Who Got to Adjudicate the EU's Financial Crisis and Why? Judicial Review of the Legal Instruments of the Eurozone' in M Adams, F Fabbrini, and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) 347.

disbursement of aid at length, the case law makes hardly any mention of the Treaty's solutions concerning judicial review. This is not surprising, though: Article 37 of the ESM Treaty is the only provision concerning judicial review, providing that the Court of Justice is to decide on appeals against decisions made by the Board of Governors on the interpretation or dispute between ESM Members. At the national level, the ESM Treaty was challenged before the highest courts[32] in Austria, Estonia, France, Germany, Ireland, the Netherlands, and Poland. Only the Irish case resulted in a preliminary reference to the Court of Justice concerning the compliance of the ESM Treaty with EU law, in the now famous *Pringle* reference.[33] The following subsections seek to shed light on the impact of the ESM Treaty and other legal instruments developed to manage the eurozone crisis on judicial review and the role of courts at the national level. In that respect, I will first look at the procedural aspects of judicial review, more specifically the scope of access to courts by individuals and the remedies available to them. Second, I will analyse how national courts interpreted the principle of equality grounded in national budgetary sovereignty and the resulting conditionality of financial assistance, and whether the common interest of the EU has been taken into account.

3.3.1 *Access and Remedies*

The practice of national courts in respect of access to judicial review by individuals and available remedies will be the focus of this section. Certainly, the expectation of this exercise is not to establish that the diversity of access rules and remedies at the national level immediately results in political inequality of EU citizens. This would disregard decades of Court of Justice's case law on national judicial autonomy[34] and would reduce the argument to a need for full harmonisation in this area. The purpose is rather to provide an illustration of different rules in order better to understand the diverse thresholds in place for individuals to contest decision-making in economic governance before national courts.

Individuals challenged the ratification legislation in Germany and the Netherlands. The German ratification of the ESM Treaty was subject to

[32] Depending on the national judicial systems of constitutional review, these included both supreme and constitutional courts.

[33] The lack of a wider engagement in the preliminary reference procedure was heavily criticised by Bardutzky and Fahey (n 31) 354.

[34] M Dougan, *National Remedies before the Court of Justice Issues of Harmonisation and Differentiation* (Hart 2004).

several constitutional complaints, one of them by a group of private citizens seeking to protect their fundamental right to vote and parliamentary budgetary responsibility. The standard applied by the Bundesverfassungsgericht in order to admit a constitutional complaint is the 'injury to the permanent budgetary autonomy of the German Bundestag'.[35] After analysing the academic criticism concerning the wide access granted to individuals in challenging measures resulting from European integration,[36] the German court stated that it will not change its approach, as citizens must be able to challenge the transfer of competences as a way of defending the set-up of the Basic Law.[37] The complaint must substantiate the alleged erosion of the right to vote.[38] In the specific case of the ESM, this meant showing when guarantee authorisations might result in 'massive adverse effects'[39] for the Bundestag's budgetary autonomy. In that respect, while the access granted to individuals is wide, it is confined solely to the preservation of German-specific budgetary interests. In other words, a German citizen would not be able to challenge a measure that might have adverse effects on the stability of the eurozone as a whole, which may ultimately have consequences for the budgetary autonomy of the Bundestag. Yet, a measure applicable to a debtor Member State can produce effects on the remainder of the eurozone members, as evidenced by the Greek sovereign debt crisis.

In the Netherlands, the ratification bill of the ESM Treaty was challenged by members of parliament acting in their capacity as private citizens before the Hague Civil Court.[40] Importantly, one of the arguments put forward by the applicants concerns the silence of the ESM Treaty as regards judicial review and accountability.[41] This is particularly relevant in the context of the Dutch Constitution, which prohibits judicial review against the Constitution, resting upon a strong tradition of judicial self-restraint.[42] Accordingly, the court emphasised this point by stating that it is not the appropriate forum for

[35] Case 2 BvR 987/10 *ESM Treaty* Judgment of the Second Senate of 07 September 2011 [93].
[36] Connected to access in the Maastricht and Lisbon decisions (ibid [101]).
[37] ibid.
[38] ibid [102].
[39] ibid [103].
[40] *Wilders and Others v the Dutch State*, case no 419556 / KG ZA 12-523 Judgment in summary proceedings of 1 June 2012 [2.2], [3.1].
[41] ibid [3.3].
[42] Article 120 of the Dutch Constitution prohibits judicial constitutional review. See G van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?' (2010) 11 *German Law Journal* 175, 177; G Yein Ng, 'Judicialisation and the End of Parliamentary Supremacy: Shifting Paradigms in the Protection of the Rule of Law and Human Rights in the UK, France and the Netherlands' (2014) 3 *Global Journal of Comparative Law* 50.

assessing the ESM ratification bill as this is the role of the legislative branch.[43] The Dutch court did not put forward any legal standard for access but summarily addressed the main substantive points raised by the applicants.

In all other cases dealing with the ESM Treaty, the action was initiated by members of parliament (the remainder of German decisions and Ireland), the provincial government (Austria), the president (France), and the public prosecutor (Estonia and Poland). Thus, when it comes to challenging the ratification of the ESM Treaty at the national level, a clear dominance of privileged applicants is visible. It should be said that this does not immediately deteriorate the position of the individual, as her political representatives in the legislative branch are challenging the treaty in advance of its ratification to regulate any and all future measures of financial assistance.

Remedies that can be awarded as a result of judicial review of individual measures enacted as a requirement of financial assistance demonstrates a similar pattern. In Portugal, for example, the number of cases initiated by private individuals is not known, but the outcome of an individual case would not result in the invalidation of the national measure under review, as the decisions are binding only *inter partes*,[44] thereby excluding more general accountability effects for decision-makers.[45] When it comes to abstract constitutional review, all national measures challenged before the Constitutional Tribunal were initiated by privileged applicants, such as the president, members of the legislature, or regions.[46] While these decisions have *erga omnes* effects, such an outcome is only possible through indirect dependence of individuals on the constitutional organs of their Member State. In Greece, after the initial deadline for contestation before the Council of State expires, implementing administrative acts can be challenged as regards their constitutionality, but only for the purposes of the main proceedings, thereby also

[43] *Wilders and Others* (n 40) [3.3].

[44] According to Almeida Ribeiro, this legal solution is arcane and departs from traditional set-ups of constitutional review in Europe. G Almeida Ribeiro, 'Judicial Review of Legislation in Portugal: A Brief Genealogy' in F Biagi, J O Frosini and J Mazzone (eds), *Constitutional History: Comparative Perspectives* (Brill 2020) 4.

[45] M Canotilho, T Violante and R Lanceiro, 'Austerity Measures under Judicial Scrutiny: The Portuguese Constitutional Case-Law' (2015) 11 *European Constitutional Law Review* 155, 158.

[46] R De Brito Gião Hanek and D Gallo, *Constitutional Change through Euro Crisis Law: Report of Portugal* (2015) <https://eurocrisislaw.eui.eu/wp-content/uploads/sites/44/2019/05/Portugal.pdf>, Annex I. The reports were made as part of a research project carried out by the European University Institute.

limiting the effects to *inter partes*.[47] Even if the Council of State does find an administrative act unconstitutional, the precedent is not legally binding.[48]

Rules on access and remedies can be, and to some extent were, interpreted in a teleological manner. Legal innovation, or at least a novel interpretation of access and remedies, was in fact visible at the national level. For Germany, a broad interpretation of access was introduced in the Maastricht and Lisbon decisions.[49] In Portugal, the Constitutional Tribunal temporarily suspended the effects of its decision when it found the budget based on new austerity measures unconstitutional, also a novelty in its remedies.[50] Therefore, it is not inconceivable that the courts deciding a case can take into account specific interests that will possibly be affected by decisions stemming from financial assistance. In this respect, while the approach of the German court allows individuals to trigger constitutional review of legislation, it does so only in relation to possible deteriorations of budgetary powers of the Bundestag. In that sense, it would not be possible to initiate a constitutional complaint when interests of the eurozone, or a significant portion thereof, are jeopardised due to measures of economic governance.

The opposite would require a dynamic approach to judicial interpretation, demanding the decision-makers to justify their decisions based on EU-wide considerations. For example, in its recent decision concerning monetary policy in *Weiss*,[51] the Bundesverfassungsgericht argued that the European Central Bank did not sufficiently take into account the effects that its bond purchase programme would have on different societal groups, albeit its focus was regrettably on such groups only in Germany.[52] Yet, it is impossible to carry out such an analysis without looking deeper into the redistributive effects across Member States, thereby reducing the importance of the principle of equality of Member States. This aligns with the understanding of the common interest as presented in Chapter 1. It would also require courts conducting judicial review to demand more of the parties in terms of justifying their

[47] A I Marketou and M Dekastros, *Constitutional Change through Euro Crisis Law: Report of Greece* (2017) <https://eurocrisislaw.eui.eu/wp-content/uploads/sites/55/2019/05/Greece.pdf> section X.8.

[48] ibid.

[49] A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 95–106.

[50] De Brito Gião Hanek and Gallo (n 46) Annex I, 10.

[51] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* Judgment of 5 May 2020.

[52] M Dawson and A Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: *Weiss and Others*' (2019) 56(4) *Common Market Law Review* 1005.

decisions, using expert knowledge to corroborate or oppose the claims of decision-makers, all against the standards of the common interest.

3.3.2 *Solidarity and Equality*

In what follows, the case law concerning the crisis measures will be analysed by looking at how national courts interpreted the principle of equality of Member States and whether EU-wide considerations were of any relevance. It should be added that courts have not referred explicitly to the principle of equality of Member States. Rather, as explained in the Introduction, the logic of the principle of equality permeates the rules on conditionality as well as in treaty prohibition of monetary financing and the no-bailout clause. All these aim at protecting national budgetary sovereignty, and it is this jurisprudence that is of interest here. Thus, the following analysis will look at, on the one hand, the ways in which national courts have treated conditionality and national budgetary sovereignty, and, on the other hand, the stability of the entire eurozone as the expression of the common interest. In order to determine the latter, special attention will be paid to whether, and if yes, how, the principle of solidarity played a role in this interpretative process.

The near-universal commonality of the decisions under analysis is that sovereignty is preserved so long as the constitutionally granted powers of the national legislature remain intact. The individual is only ever mentioned in this context, most prominently in the German decisions, because the right to vote and the ensuing parliamentary budgetary sovereignty were considered a fundamental right, warranting direct interest necessary for the submission of a constitutional complaint.[53] This means that the variety of societal interests end up being conflated to one: that of participating in national elections. This, as was explained in Chapter 1, prevents the connection between EU citizens along lines different from the national ones. There is no possibility for the creation of an interest group along transnational socioeconomic lines and accordingly no platform exists for the expression of their regulatory preferences.

Another consequence of the focus on parliamentary budgetary responsibility is that the debate concerning the ESM focused more on the competence clashes between the EU and Member States concerning fiscal policy, to the detriment of transnational benefits that a stability mechanism may possibly carry. This very question then directed attention to the issue of conditionality

[53] Case 2 BVerfG 1390/12 *ESM Treaty II* Judgment of the Second Senate of 12 September 2012 [92].

in order to ensure that no debtor state abuses the aid given to it in times of need or departs from following a sound budgetary policy. The dangers of such an approach are now dominating the Italian debate on the reformed ESM Treaty and may be one of the reasons why there is no political support to ratify it.[54]

The principle of solidarity did not feature prominently in the case law of either creditor or debtor states. The German analysis in relation to the first aid package to Greece, later reiterated in the ESM review, mentions solidarity only in the following context: 'The Bundestag must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level.'[55] Consequently, aid is considered an act of solidarity and the decision does not dwell upon the importance of the aid for the stability of the eurozone as a whole. The consequences of conditionality, such as the inequality of representation and participation, remain unaddressed. Rather, the insular view of each Member State concerning budgetary sovereignty prevents austerity conflicts among different societal interests to be resolved transnationally by taking into account the interdependence of the euro area.

The need to regard the eurozone as a common project with shared risks was presented as a justification in the Greek decision of the Council of State concerning the first Memorandum of Understanding.[56] More specifically, when carrying out the proportionality test concerning the cuts in salaries, benefits, and pensions of public sector employees, the Council of State found these necessary for achieving the aim of consolidating public finances, an aim in the common interest of eurozone states.[57] Similarly, the Estonian Supreme Court's decision comes closer to viewing the eurozone as a risk-sharing area and the ESM as a tool necessary for preserving its stability to the benefit of all its members: 'Estonia is a euro area Member State and therefore a threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia.'[58] While solidarity is not mentioned, the approach taken is one where financial aid is not simply a handout but an investment in the prosperity of the euro area and all its members. Among creditor states, in the Dutch decision mentioned above,

[54] G Galli, 'The Reform of the ESM and Why It Is So Controversial in Italy' (2020) 15(3) *Capital Markets Law Journal* 262.
[55] Case 2 BvR 987/10 *ESM Treaty* Judgment of 7 September 2011 [128].
[56] Decision 668/2012, 20 February 2012.
[57] Marketou and Dekastros (n 47) section X.8.
[58] Estonian Supreme Court, *Constitutional Judgment 3-4-1-6-12 (ESM Treaty)*, 12 July 2012 [165].

an important consideration accepted by the Hague Civil Court was put forward by the State Secretary for Foreign Affairs, who stated that:

> The interconnectedness of the Member States, and in particular of the Member States whose currency is the euro, means that economic and budgetary policies in one Member State can have disproportionate consequences for the other Member States. The consequences of not supporting the Member State can have consequences for the other Member States that are greater than the consequences for that Member State alone.[59]

In the Portuguese line of cases before the Constitutional Tribunal, solidarity among the Portuguese people and between different regions of the country was used as a justification for limiting regional autonomy that were interfered with due to austerity measures.[60] In the same vein, an 'extraordinary solidarity contribution' imposed on pension contributions was considered constitutional in line with the principle of national solidarity.[61]

3.4 JUDICIAL REVIEW AT THE EU LEVEL

The individual has throughout the decades of European integration and the development of the Court's case law been a central figure, an important difference from other international organisations where relevant subjects are states. In that vein, the Court of Justice has early on[62] established the Union's system of judicial review:[63] privileged applicants[64] are entitled to initiate a direct action, whereas natural and legal persons can do so when an act is of a direct and individual concern to them.[65] In addition, the preliminary

[59] *Wilders and Others* (n 40) [1.9], [3.6].
[60] De Brito Gião Hanek and Gallo (n 46) Annex I, 6, 38, 57.
[61] ibid Annex I, 17, 20.
[62] Case 294/83 *Les Verts* EU:C:1986:166 [23]; Case 314/85 *Foto-Frost* EU:C:1987:452 [16].
[63] See also K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, 1626.
[64] According to Article 263(2) TFEU, these are Member States, the European Parliament, the Council, and the Commission. Article 263(3) TFEU accords to the Court of Auditors, the European Central Bank, and the Committee of the Regions the right to initiate a direct action for the purpose of protecting their prerogatives.
[65] The Treaty of Lisbon was revised in relation to individual concern when it comes to a direct action against regulatory acts that do not entail implementing measures (Article 263(4) TFEU). This sparked further problems into what exactly regulatory acts are, and the General Court defined them as 'all acts of general application apart from legislative acts' in Case T-18/10 *Inuit* EU:T:2011:419 [56]. On appeal, the Court of Justice confirmed this interpretation in Case C-583/11 P *Inuit Tapiriit Kanatami* EU:C:2013:625 [61]. For an overview, see M Kucko, 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon' (2017) 2 *LSE Law Review* 101.

reference procedure provides another avenue for natural and legal persons to question the validity of a Union act, when such a doubt arises before national courts.[66] In anti-crisis judicial review, both the preliminary reference procedure and direct actions were used in order to challenge measures of financial assistance. They will be analysed with regard to the interpretation of access and remedies and the developments concerning the review of the merits in relation to the common interest.

3.4.1 *Access and Remedies*

Compliance of the ESM Treaty with EU law and the validity of the Council Decision amending Article 136 TFEU was, as mentioned, tested through the preliminary reference submitted by the Irish Supreme Court. When discussing admissibility of preliminary references, the Court of Justice's case law established that it has jurisdiction when a connection to EU law exists in relation to the case at hand, whereas the questions must not be hypothetical in relation to the facts of the case.[67] A presumption of relevance is, in addition, attached to preliminary references.[68] In addition, a case must be referred to the Court when a national court considers that an EU act is invalid, as it has the exclusive jurisdiction to conclude on its invalidity.[69]

The Court's decision in *Pringle*[70] is relevant as regards two points. First, the Court's jurisdiction was widely questioned,[71] claiming that assessing the validity of the Council Decision amending Article 136 TFEU would breach Article 267 TFEU, which does not accord it the power to review primary law. The Court found that because the amendment was carried out through a simplified revision procedure, it is necessary to verify whether such a procedure was used for a proper purpose and under the prescribed conditions. Given

[66] The special role of the preliminary reference procedure in the system of judicial review of Union acts was confirmed explicitly in, for example, Case C-50/00 P *UPA* EU:C:2002:462 [40]; Case C-491/01 *BAT and Imperial Tobacco* EU:C:2002:741 [39].

[67] Case 244/80 *Foglia v Novello* EU:C:1981:302 [21]; Case C-343/90 *Dias* EU:C:1992:327 [18]–[19].

[68] For example in Case C-35/19 *Belgian State (Indemnité pour personnes handicapées)* EU:C:2019:894 [29].

[69] Case 314/85 *Foto-Frost* (n 62) [16].

[70] Case C-370/12 *Pringle* (n 4). For a comment on the implications of the decision on the crisis resolution itself, rather than issues of accountability presented here, see B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: *Pringle*' (2013) 50 *Common Market Law Review* 805.

[71] By Austria, Belgium, Cyprus, France, Germany, Ireland, Italy, the Netherlands, Slovakia, Spain, as well as the European Council and the Commission.

that Article 19 TEU grants it jurisdiction for ensuring 'that the law is observed', the Court concluded it has jurisdiction in this case.[72]

Second, the admissibility of the reference was questioned by Ireland, claiming that questions of validity should have been submitted by way of a direct action within the prescribed time limit, or within a reasonable time limit before a national court.[73] Conversely, the Court found the case admissible, by underlining that a time limit would be relevant only in the case when it is beyond doubt that the applicant would have standing under Article 263 TFEU.[74] As mentioned above, the threshold for direct action for natural persons is high, and the Court could not have established beyond doubt that Mr Pringle would have met its conditions.[75] Such a reading of standing for the purposes of admitting the preliminary reference procedure should be regarded positively from the perspective of the protection of the individual and her ability to challenge decision-makers at EU level, given the difficulties of accessing the Court directly. It also serves to include national courts in a participatory process of ensuring legal accountability through submitting preliminary references.

Turning to judicial review of the Memoranda of Understanding signed after agreeing on the conditions of financial assistance, questions of access and remedies available have not followed a steady course. As explained in the introduction to this chapter, measures of financial assistance were outside traditional EU acts, and when financial assistance was granted, its conditions were set out in the Memoranda concluded between the Member State receiving the assistance and the creditors. What needs to be pointed out is that Memoranda have been concluded in all areas of financial assistance, including balance of payment assistance and bailouts issued within the ESM Treaty framework, where the latter were placed within the EU legal order by way of a Council Decision. Different Memoranda have therefore followed various routes when it comes to their reviewability before EU courts.

When it comes to Memoranda of Understanding stemming from balance of payments assistance, the Court of Justice has initially rejected the admissibility of preliminary references questioning their validity, arguing that Portugal and Romania, the relevant Member States, were not implementing EU law.[76]

[72] Case C-370/12 *Pringle* (n 4) [33]–[37].
[73] ibid [38].
[74] ibid [41]. On this, see Case C-188/92 *TWD Textilwerke Deggendorf GmbH* EU:C:1994:90 [18].
[75] ibid [42].
[76] Case C-434/11 *Corpul National al Politistilor v MAI* EU:C:2011:830; Case C-462/11 *Cozman v Teatrul Municipal Targoviste* EU:C:2011:831; Case C-134/12 *MAI et al. v Corpul National*

A change took place with the Court's decision in *Florescu*,[77] where it found the case admissible, determining that the Memorandum of Understanding based on balance of payments assistance is an act of an EU institution.[78] This welcome development therefore extended judicial review to matters of interpretation and validity of Memoranda of Understanding, which have previously only been dealt with by the Court in cases of an indirect connection to EU law (such as an implementing Council Decision) or an action for damages against an EU institution.[79]

Another development concerns the question of whether a Memorandum of Understanding grounded in the EFSM is subject to the same treatment. The Court decided it is in *Juízes Portugueses*.[80] This unlikely champion of legal accountability in economic governance owes its importance to the current salience of judicial independence in the EU.[81] Namely, the association of judges in Portugal challenged a temporary reduction in their salaries, arguing it interfered with their independence guaranteed by Articles 2 and 19 TEU. The Court of Justice, arguably in need of establishing a legal precedent for its jurisdiction concerning the rule of law challenges taking place in Poland and Hungary,[82] found that Article 19(1) TEU, which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', is engaged and the preliminary reference is admissible. Rule of law issues aside, the decision of the Court nevertheless further extended access and remedies for Memoranda of Understanding grounded in the EFSM. Consequently, taking the analysed case law into account, Memoranda are susceptible to judicial review before the Court of Justice as regards their validity and interpretation and can also be subject to a possible action for damages resulting from actions of EU institutions in this context.

al Politistilor EU:C:2012:288; Case C-369/12 *Corpul National al Politistilor v MAI* EU:C:2012:725; Case C-128/12 *Sindicato dos Bancarios do Norte et al. v BPN* EU:C:2013:149; Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelitate Mundial* EU:C:2014:2036; Case C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa* EU:C:2014:2327.

[77] Case C-258/14 *Florescu* EU:C:2017:448.

[78] ibid [36].

[79] Markakis and Dermine (n 29) 651.

[80] Case C-64/16 *Juízes Portugueses* (n 8) [19]–[26].

[81] M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*' (2018) 14 *European Constitutional Law Review* 622.

[82] ibid 623.

The question of access and remedies for Memoranda of Understanding agreed under the ESM, a legal facility unequivocally outside the EU law framework, was addressed in *Ledra*[83] and *Mallis*.[84] Revolving around the haircut of deposits in order to secure emergency liquidity assistance to the banking sector in Cyprus, a number of deposit holders sought to annul the Euro Group statement that was the basis for the assistance and conditioned upon the haircut. In *Mallis*, the applicants addressed the action for annulment against the Commission and the ECB, arguing they are the real creators of the conditionality statement, given that the Euro Group is not formally recognised as an institution in the Treaties. In *Ledra*, the applicants sought to establish non-contractual liability of the Commission for the damage incurred as the result of the haircuts of deposits. They argued that the Commission and the ECB, based on *Pringle*, had an obligation to ensure the consistency of the Memoranda of Understanding with EU law.

In *Mallis*, the Advocate General dismissed the ability of individuals to seek judicial redress against the Euro Group, underlining that it is an informal forum for discussion.[85] In *Ledra*, another Advocate General equally dismissed the argument that the Commission has a strict obligation to ensure consistency with EU law in the negotiation of the Memorandum of Understanding.[86] The only redress available to individuals, according to the former Advocate General, would be attacking the Council Decision, which transposes the Memoranda of Understanding to EU law, however, through national judicial proceedings, as the applicants would never be able to meet the standard of direct concern required for direct actions under Article 263 TFEU.[87]

Following the Advocate General, the Court of Justice concluded in *Ledra*[88] that no act stemming from the ESM can be considered an act of an EU institution. However, the decision is important as it nevertheless obliges the EU institutions acting within the ESM (the Commission and the ECB) to act in compliance with EU law. This opened the door for individuals to seek

[83] Joined Cases C-8/15 P to C-10/15 P *Ledra* (n 6).
[84] Joined Cases C-105/15 P to C-109/15 P *Mallis* EU:C:2016:702.
[85] Opinion of Advocate General Wathelet in Joined Cases C-105/15 P to C-109/15 P *Mallis* (n 9) [66].
[86] Opinion of Advocate General Wahl in Joined Cases C-8/15 P to C-10/15 P *Ledra* EU:C:2016:290 [71], [72], [74].
[87] Opinion of Advocate General Wathelet in Joined Cases C-105/15 P to C-109/15 P *Mallis* (n 9) [91], [98].
[88] Joined Cases C-8/15 P to C-10/15 P *Ledra* (n 6) [52]–[54]. For a more general comment on the decision, see Repasi (n 3) 1123.

damages under Articles 268 and 340 TFEU when the Commission acts contrary to EU law while operating within the ESM.[89] Similarly to *Ledra*, the Court of Justice found in *Mallis* that a statement of the Euro Group within the ESM framework is not susceptible to judicial review despite the fact that the ECB and the Commission take part in it.[90]

A somewhat unexpected and revolutionary change in relation to the accountability of the Euro Group almost took place after the 2018 judgment of the General Court in *Chrysostomides*.[91] This litigation is based on the same financial assistance measures to the Cypriot banking system as in the *Ledra* and *Mallis* procedures. Dealing once more with the legal status of the Euro Group in relation to ESM conditionality, the General Court decided that, while it cannot be considered an institution in the sense of Article 263 TFEU, Article 340 TFEU does allow for such an interpretation:

> Article 137 TFEU and Protocol No 14 [...] annexed to the TFEU, make provision, inter alia, for the existence, the composition, the procedural rules and the functions of the Euro Group. [...] Those questions concern, under Article 119(2) TFEU, the activities of the European Union for the purposes of the objectives set out in Article 3 TEU, which include the establishment of an economic and monetary union whose currency is the Euro. It follows that the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union. The acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union.
>
> Any contrary solution would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability.[92]

In this remarkable move, the General Court, while not allowing a direct action against the Euro Group under Article 263 TFEU, considered nevertheless that the latter can be subject to non-contractual liability. As a result, individuals would be able to seek damages resulting from the harm attributable to the European Union. The General Court nevertheless decided that neither of the institutions under review (the Euro Group, the Commission, or the ECB) had breached EU law by way of a manifest error of assessment.[93]

[89] Joined Cases C-8/15 P to C-10/15 P *Ledra* (n 6) [55].
[90] Joined Cases C-105/15 P to C-109/15 P *Mallis* (n 84) [57].
[91] Case T-680/13 *Chrysostomides* EU:T:2018:486.
[92] ibid [113]–[114].
[93] ibid [295].

The Council appealed this decision and in December 2020 the Court of Justice overturned the finding of the General Court.[94] The Advocate General's Opinion is of relevance as it focuses on the informal nature of the Euro Group, thus finding that it has no power in making legally binding decisions.[95] The Advocate General argued that this outcome does not undermine effective judicial protection, as individuals are able to contest the decisions of the Commission, the Council, and the ECB instead.[96] The Advocate General also emphasised that these institutions remain bound by the Charter in carrying out their tasks, whether within or outside the framework of EU law.[97]

The Court of Justice followed the Advocate General[98] and overturned the finding of the General Court that the Euro Group can be considered an EU body for the purposes of establishing non-contractual liability of the Union under Article 340 TFEU.[99] Addressing the status of effective judicial protection resulting from this finding, the Court of Justice merely referred to the ability of individuals to seek damages against the Council, the ECB, and the Commission, in respect of their participation in the ESM, the agreement and implementation of assistance, and conditionality requirements.[100] The Court therefore re-emphasised the indirect route for individuals to access judicial review as the centre of legal accountability in the ESM, as the acts of the institutions in question can only bind the ESM.[101] This formalistic view of the Euro Group disregards the evolution of its role and influence from its creation throughout the financial crisis and up to today.[102]

3.4.2 *Solidarity and Equality*

When it comes to the substance of the decisions analysed above, and the way in which the Court of Justice approached the question of achieving the common interest (including the principle of solidarity), *Pringle* is again the starting point of analysis. An important issue considered in its decision was the applicability of the Charter, specifically its Article 47 providing for the right to

[94] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* (n 9).
[95] Opinion of Advocate General Pitruzzella in *Chrysostomides* (n 2) [89], [96].
[96] ibid [111], [113], [114].
[97] ibid [124].
[98] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* (n 9) [88].
[99] ibid [90].
[100] ibid [93]–[97].
[101] ibid [131].
[102] Craig (n 12) 248–249.

an effective remedy. While the ESM Treaty itself does not set forth any mechanisms of judicial control, the Court found that the Charter is not applicable to it as an instrument outside of EU law.[103]

However, the Court of Justice has incrementally opened up space for the Charter's applicability, namely in response to challenges concerning Memoranda of Understanding. The already mentioned decisions in *Florescu*, *Ledra*, and *Juízes Portugueses* are relevant in this regard. The first one considered the interpretation of the Memorandum of Understanding concluded based on balance of payments assistance to Romania and placed it within the scope of EU law. Consequently, it also found the Charter applicable and assessed whether the right to property protected by its Article 17 was breached.[104] In *Ledra*, while the Court found that Memoranda of Understanding under the ESM are not part of EU law, EU institutions participating in its decision-making are still bound by EU law,[105] and equally as in *Florescu* engaged in the analysis of a possible breach of Article 17 of the Charter. Finally, given the wide interpretation of judicial independence, the Court in *Juízes Portugueses* also found the Charter applicable, namely its Article 47.[106]

Nevertheless, when assessing the proportionality of the measures in question as a restriction to the right to property, the Court found in *Ledra* that 'ensuring the stability of the banking system of the euro area as a whole' is an objective pursued in the general interest and thus legitimate for curtailing the right to property.[107] In that respect, the common interest relating to the stability of the entire euro zone was acknowledged by the Court. In analysing the treatment of the common interest at the EU level, the decision of the Court of Justice in *Dowling*[108] is relevant. The Irish High Court submitted a preliminary reference seeking to ascertain whether its compliance with the conditions of financial assistance within the EFSM

[103] Case C-370/12 *Pringle* (n 4) [178]–[182].
[104] Case C-258/14 *Florescu* (n 77) [43]–[48].
[105] Joined Cases C-8/15 P to C-10/15 P *Ledra* (n 6) [67].
[106] Case C-64/16 *Juízes Portugueses* (n 8) [29], [35].
[107] Joined Cases C-8/15 P to C-10/15 P *Ledra* (n 6) [71]. In *Florescu*, given that it concerned Romania, a Member State not part of the eurozone, the context of the global financial crisis was used to justify the restriction to the right to property. Case C-258/14 *Florescu* (n 77) [56]. Similarly, the Court found Portugal's compliance with financial assistance conditions as a legitimate aim for interfering with salaries of judges. Case C-64/16 *Juízes Portugueses* (n 8) [49].
[108] Case C-41/15 *Dowling* EU:C:2016:836.

is a justifiable breach of Directive 77/91/EEC.[109] The Court of Justice stated that:

> The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, *with the objective of preventing a systemic risk and ensuring the financial stability of the European Union*.[110] (emphasis added)

Furthermore, and in the same vein as in *Dowling*, the stability of the Cypriot financial system and that of the euro area as a whole was accepted as a legitimate aim by the Court of Justice in *Chrysostomides*.[111] The applicants in that case argued that the General Court erred in assessing the principle of proportionality and the existence of a less restrictive measure. The General Court engaged in a substantive analysis of possible outcomes of alternative measures based on the acts and conduct of the Council as well as the Cypriot Republic. The General Court not only made an assessment of these measures and their effects on the banking system of Cyprus, but also how this would affect the entire euro zone, which was ultimately accepted by the Court of Justice as a proper proportionality analysis.[112] Two conclusions can be drawn from this analysis. First, the Court of Justice confirmed the analysis of the substance of the measures by the General Court and the alternatives proposed by the applicants in the first instance.[113] The General Court assessed this in relation to the specificities of the Cypriot situation and the characteristics of its financial sector. In this type of substantive review, courts should be tracing the fact-finding process of the decision-making institutions in detail and can demand that they take into account the relevant interests of a wide variety of social groups and interests.[114] While the courts may not possess the expertise relevant to make final conclusions on the feasibility of the measures

[109] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26) p. 1.

[110] Case C-41/15 *Dowling* (n 108) [51].

[111] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* (n 9) [161].

[112] ibid [163]–[164].

[113] Case T-680/13 *Chrysostomides* (n 91) [311]–[312].

[114] Dawson and Bobić (n 52) 1023–1024.

themselves, they are able to exercise peer-review by taking into account a variety of sources in the proportionality assessment, beyond the reasons stated by the decision-makers.[115]

Second, both courts took into account the common interest of the euro zone in conducting the proportionality analysis and the possible contagion effects in the absence of the measures under review, or in the context of alternative measures. This reasoning, while not altering the essential characteristic of aid disbursement to Cyprus being rooted in strict conditionality, opens the doors to common interest becoming a more prominent aim, rather than a merely transactional view of debtors and creditors. This may result in judicial review more generally placing emphasis on decision-makers to justify the assistance not in relation to ensuring that the aid granted be orderly returned, but rather that such measures generally benefit the whole euro zone. Taking into account the redistributive effects that conditions to aid have had in the debtor states, an approach which arguably surpasses a formal reading of equality of Member States can contribute to the interests of all citizens being taken into account in the creation of financial assistance mechanisms.

As regards the principle of solidarity more specifically, it has not been explicitly mentioned in any of the preliminary references or direct actions before the Court of Justice in the area of financial assistance.[116] It has only been mentioned by Advocate General Kokott in *Pringle*[117] as necessarily justifying the establishment of the ESM and its compliance with the no-bailout clause enshrined in Article 125 TFEU. According to Maduro's interpretation of the Court's decision in *Pringle*, solidarity cannot, in and of itself, justify financial assistance if the interests of the entire eurozone are not at stake.[118] This would be somewhat closer to the definition of solidarity proposed in Chapter 1. However, the Court of Justice insisted on conditionality as central to financial assistance in order to ensure sound budgetary policy being pursued by the Member State in question.[119] Given that the Court of Justice makes no mention of the principle of solidarity, but focuses strongly on conditionality, Maduro's interpretation of solidarity appears too generous.

[115] See Chapter 2, Section 2.3.3.
[116] On this point explicitly, see also the Opinion of Advocate General Campos Sanchez-Bordona in Case C-848/19 P *Germany v Poland* EU:C:2021:218 [67].
[117] View of Advocate General Kokott in Case C-370/12 *Pringle* EU:C:2012:675 [142]–[143].
[118] M P Maduro, 'EU Law and Sovereign Debt Relief' in K Lenaerts, J-C Bonichot, H Kanninen, C Naômé and P Pohjankoski (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019) 77.
[119] Case C-370/12 *Pringle* (n 4) [135]–[137].

3.5 ON JUDICIAL INTERACTIONS

The intensity of judicial interactions in the area of financial assistance progressed alongside the developments of the mechanisms under review themselves. What this means is that national constitutional review of an international treaty such as the ESM expectedly did not give rise to any significant number of preliminary references (save for *Pringle*). National courts were reviewing the ESM Treaty (and the revision of Article 136 TFEU) as they traditionally would for the ratification of an international agreement under their respective constitutional requirements.[120] However, as Memoranda of Understanding and the resulting Council Decisions proliferated, so did interactions in the form of preliminary references.

These developments are not surprising and they do not depart from regular judicial interactions in the EU, where Treaty revisions by domestic courts are not submitted as a preliminary reference to the Court of Justice. The legal status of a Treaty amendment naturally strengthens the position of national courts vis-à-vis the Court of Justice. First, it needs to be ratified by all Member States according to their respective constitutional procedures,[121] which allows national courts to determine constitutional limits as regards a particular Treaty amendment.[122] Second, they have the ability to reject the ratification of the amendment if it is contrary to national constitutional requirements. In addition, because Treaty amendments are acts awaiting national ratification, they are not (yet) in the system of binding EU law and therefore fall outside the exclusive jurisdiction of the Court of Justice.[123]

When it comes to the revision of Article 136 TFEU, a new dynamic can be observed. The Court of Justice has been put in a position to decide on conditionality requirements which increasingly concern areas of social

[120] For an overview, see 'Article 136 TFEU, ESM, Fiscal Stability Treaty Ratification Requirements and Present Situation in the Member States' European Parliament's Committee on Constitutional Affairs, June 2013, <www.europarl.europa.eu/meetdocs/2009_2014/documents/afco/dv/2013-06-12_pe462455-v16_/2013-06-12_pe462455-v16_en.pdf> 4–5.

[121] While the process of negotiation of the amendments varied for each Treaty amendment, the final process of ratification is done according to the respective rules of Member States on the ratification of international treaties. On the development of the former, see J Pollak and P Slominski, 'The Representative Quality of EU Treaty Reform: A Comparison between the IGC and the Convention' (2004) 26(3) *Journal of European Integration* 201.

[122] M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16(4) *German Law Journal* 917, 943.

[123] Case 314/85 *Foto-Frost* (n 62) [15].

security, labour rights, and protection of vulnerable societal groups[124] – areas only marginally within the scope of EU competence. Invariably this only takes place in relation to debtor states. This most certainly appears problematic from the perspective of equality of Member States, whereby the Court of Justice is intruding in the way debtor Member States exercise their competences, without doing the same in relation to creditor Member States.

The principle of solidarity, however, may justify differentiation[125] when it comes to intrusion into domestic policymaking, if conducted in the common interest. If we take into account the different access requirements and degrees of judicial engagement with the substance of anti-crisis measures at the national level, the use of the preliminary reference procedure appears as a helpful instrument setting common pointers and limits to the dynamic and teleological interpretation to be employed at the national level. At the same time, as was shown in the section concerning the EU level, preliminary references resulted in the Court of Justice expanding the applicability of the Charter and extending admissibility conditions to measures stemming from the Memoranda of Understanding. Another problem relates to the fact that while the Council Decisions confirming the Memoranda conditions are within the scope of EU law and thus subject to well-established routes of legal accountability, they do not always faithfully transpose the amount of detail contained in the Memoranda. Thus, in order for EU citizens impacted by conditionality requirements to be able effectively to hold the institutions participating in the Troika to account, the preliminary reference procedure appears as the necessary outlet, as opposed the exclusively institutional access that Member States have as part of their negotiations with the Troika. Using judicial review and the preliminary reference procedure to relocate the individual in EMU (a policy field otherwise dominated by states and EU institutions) could yet constitute a major contribution of judicial review to the wider system of accountability in the EMU.

Furthermore, judicial interactions between the EU and the national level may lead to improvements of review on the EU level in three ways. First, national courts are able to propose their own interpretation in light of the existing jurisprudence and relevant legal sources, providing the Court of Justice with a wide perspective on the issue at hand, while also ensuring the

[124] S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) 13(1) *European Constitutional Law Review* 23.

[125] For a proposal to formalise differentiation in the ESM through enhanced cooperation, see M Schwarz, 'A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation' (2014) 51 *Common Market Law Review* 389.

coherence of such review. By holding the Court of Justice to its standards, national courts are able to create long-term legitimate expectations, and ultimately, contribute to the uniformity and coherence of EU law.[126] Second, national courts can use their questions to direct the Court of Justice towards specific heads of review through their questions, thus ensuring that the common interest is served and a broad variety of societal interests taken into account. Finally, national courts can provide additional reasoning, interpretation, and (expert) evidence. The use of the preliminary reference procedure and the view of the referring national court may shed light on the differences in economic philosophies of Member States, which might find their place in the review stage, not least through the application of the national identity clause set out in Article 4(2) TEU.

However, any proposal placing reliance on the preliminary reference procedure as the locus of legal accountability is to be taken with a grain of salt. Can the Court of Justice be trusted to ensure that political equality of EU citizens is preserved simply due to the mere dynamic of centralisation of judicial review? As set out in Chapter 1, political equality of EU citizens at times requires differentiation, in particular between citizens of creditor and debtor Member States. In addition, varying traditions of social protection across Member States also lead to demands for context-specific interpretation of the common interest. For this purpose, issues of extreme salience in constitutional orders of individual Member States will benefit from judicial activity at the national level, which is arguably more assertive in protecting their constitutional traditions (as was the case in Portugal). This will in turn require the Court of Justice, when acting on the same issues, to apply deference to national constitutional courts, as applied in other areas of EU law.[127]

[126] A Bobić and M Dawson, 'Making Sense of the "Incomprehensible": The *PSPP* Judgment of the German Federal Constitutional Court' (2020) 57 *Common Market Law Review* 1953, 1985–1986.

[127] A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between the European Court of Justice and Constitutional Courts of Member States' (2017) 18(6) *German Law Journal* 1395, 1425–1426.