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Human Rights Accountability in European Financial Assistance

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12.1 INTRODUCTION

Affected by the European financial crisis that erupted in 2008, several EU Member States were dependent on financial assistance beyond the financial markets. In order to have access to financial assistance, EU Member States had to adopt structural adjustment programmes aiming inter alia at the reduction of public expenditures. As a consequence, a number of social security benefits were reduced and a great number of structural reforms were introduced, since expenditures on social security benefits and public healthcare were considered to have a strong impact on the public budget's macroeconomic balances.[1] Despite their differences, common feature of all financial assistance schemes was the combination of supranational and international legal instruments and institutions. Newly created financial assistance mechanisms, such as the European Financial Stability Facility (EFSF) and European Stability Mechanism (ESM), were created under international law and all financial assistance packages included the participation of the International Monetary Fund (IMF). This hybrid nature of European financial assistance raises the question of whether the actors involved in the award of the assistance are bound by EU human rights.

Against this background, this chapter first exposes the doubtful legitimacy of European financial assistance. Second, it analyses the Court of Justice (CJEU) case law on financial assistance conditionality from a human rights perspective, aiming to respond to the question of whether European actors were and could be bound by human rights when preparing financial assistance conditions. Third, it investigates the possibility of conceiving a

[1] For a holistic approach and assessment of the social reforms introduced to the social protection systems of states receiving financial aid after the 2008 economic crisis, see Becker and Poulou (eds.), *European Welfare State Constitutions After the Financial Crisis* (OUP, 2020).

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legitimate role for courts in applying the procedural and substantive dimension of human rights accountability in times of crisis.

12.2 THE (NON) DELIVERY OF ACCOUNTABILITY GOODS IN THE MAKING OF EUROPEAN FINANCIAL ASSISTANCE CONDITIONALITY

During the Eurozone crisis, the constitutional balance between the different institutions had been significantly altered in a way that the delivery of the normative goods of accountability was severely hindered. Financial assistance conditionality resulted in intrusive social governance, left at the discretion of executives, and insulated from public debate and parliamentary scrutiny. The phenomenon of executive dominance side-lining the institutions of representative democracy, observed in times of crisis, was highly repeated in the Eurozone crisis experience. Decision-making was concentrated in supranational (Commission) and national (Eurogroup) executives at the European level, accompanied by the input of expert bodies (European Central Bank (ECB) and IMF). The big shift towards executive politics was reflected by the simultaneous decrease in power of both the European Parliament (EP) and national parliaments, which traditionally serve as checks on executive power.[2]

All phases of the adjustment programme-drafting were indeed lacking in transparency and democratic oversight. From the preparatory phase of negotiations, to the development of mandates and the formulation of specific measures the European Parliament was until 2013 completely marginalised.[3] On the national level, it is doubtful whether formal documents were clearly communicated to and deliberated in due time by the respective domestic parliaments.[4] Negotiations were held behind closed doors, without the presence of social partners, a deficiency explicitly criticised by the International Labour Organization (ILO).[5] In fact, the absence of prior consultation with

[2] Dawson and De Witte, 'Constitutional Balance in the EU After the Euro-Crisis', 76 *Modern Law Review* (2013) 817, 832.

[3] This observation is reaffirmed by the EP itself. See, European Parliament resolution of 13 March 2014 on employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro-area programme countries (2014/2007(INI)), para. 2. Generally on the EP's position in the new economic governance, see Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' 20 *ELJ* (2014)164.

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

[5] See, ILO, 365th Report of the Committee on Freedom of Association, Case No. 2820 (Greece), Conclusions, para. 1002.

trade union organisations has been officially admitted by the Greek government and has been ascribed to the complexity of economic and political issues and the conditions under which the European support mechanism for Greece has been formulated.[6] The adoption of Regulation 472/2013 did not bring adequate change in this regard, since the rights to information and discussion awarded to the EP and the domestic parliaments do not amount to rights to participation in the decision-making process. As a result during the adjustment programme-drafting, both the EP and national parliaments were neither able to serve the good of openness, through transparent and contestable public actions, nor the good of publicness, which would encompass the consideration of different societal interests and perspectives.

The loss of democratic oversight was not only depicted in the rudimentary role of the EP and national parliaments but also in the increasing tendency towards informal governance.[7] The outcome of staff-level meetings was often decided beforehand in bilateral meetings of the most important players. Even more strikingly, national authorities seem to have received the implementation guidelines on conditions included in the Memoranda of Understanding (MoU) through simple email exchange with the Troika. Such opaqueness and informality levels exclude the transparency and consultation necessary for the genuine involvement of citizens and social partners in EU decision-making to take place. Therefore, the EP has repeatedly called for transparency in the MoU negotiations.[8] Overall, this rise of informal governance seriously affected the ability of democratic institutions to ensure the delivery of the accountability goods of openness and non-arbitrariness, since they could not apply due process guarantees in the making of financial assistance conditionality.

In sum, the institutional framework for awarding financial assistance shows profound structural shortcomings in terms of both procedural and substantive accountability. By the expansion of democratically questionable supranational decision-making, social interests were extremely marginalised and certain views, such as those of social partners, profoundly underrepresented.

[6] See, ILO, 365th Report of the Committee on Freedom of Association, Case No. 2820 (Greece), Conclusions, para. 967.

[7] On general patterns, see Christiansen and Neuhold, 'Informal Politics in the EU', 51 *Journal of Common Market Studies* (2013) 1196.

[8] See European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), paras. 36, 72; European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission, and IMF) with regard to the euro-area programme countries (2013/2277(INI)), paras. 37, 48, 66, 94, 107.

12.3 HUMAN RIGHTS ACCOUNTABILITY AS INSTITUTIONALISED THROUGH COURTS

Respect of human rights by decision-makers is an important factor for the delivery of accountability goods. More precisely, the accountability good of non-arbitrariness can be procedurally delivered through the adoption of procedures to 'mainstream' rights-based limitations in policy-making, that is, through impact assessments, by which officials may demonstrate that human rights have been taken into account. Substantively, human rights serve the good of non-arbitrariness, by ensuring that an adopted policy does not discriminate against a given group in society or does not infringe on the rights of individuals. Moreover, human rights endorse the delivery of the accountability good of publicness, by orientating the conduct of decision-makers towards the pursuit of a common, legitimate aim.

One of the main accountability forums able to examine decision-makers' conduct in line with the accountability goods of non-arbitrariness and publicness are courts through human rights review. First, courts are able to verify whether a rights-based impact assessment was conducted. Furthermore, through human rights review courts can make sure that a policy adopted does not result in the violation of rights of individuals. Lastly, through their proportionality review, courts ask decision-makers to demonstrate that their policies restrict rights only in pursuit of a legitimate aim and in absence of less restrictive measures.

Against this background, how did courts act as 'accountability-rendering actors' in the context of the Economic and Monetary Union (EMU)? In fact, the far-reaching reforms in fields such as social security and healthcare were in many cases experienced as violations of human rights by the respective right-holders, who sought for legal protection before national and international courts. As a result, many national constitutional courts but also the Court of Justice of the EU issued a series of rulings on the conformity of the reforms initiated during the Eurozone crisis with human rights. Hence, which was the CJEU's actual response though to the alleged human rights violations?

The Medium-Term Financial Assistance (MTFA) Facility and the European Financial Stabilisation Mechanism (EFSM) are clearly EU financial assistance mechanisms: they were established through EU Regulations on the basis of the EU Treaties and have an institutional underpinning, which entrusts major tasks to EU institutions.[9] Financial assistance conditionality is laid down in two types

[9] In detail on the institutional setting of those mechanisms, see Poulou, 'Human Rights Obligations of European Financial Assistance Mechanisms', in Becker and Poulou (eds.), *European Welfare State Constitutions after the Financial Crisis* (OUP, 2020), at p. 25.

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of legal documents: on the one hand, in an MoU, and on the other hand, in Decisions of the Council of the EU. The MoU is signed by the recipient state and the European Commission. As EU institutions acting under EU law, the Commission, the ECB, and the Council of the EU should be undisputedly bound by EU fundamental rights when negotiating, drafting, and monitoring financial assistance conditionality. The question of the application of EU fundamental rights is only partly complicated when it comes to MoUs containing financial assistance conditions. This is because the character of the MoUs as binding legal agreements is disputed. If the MoUs are not binding legal documents, how could they be measured against human rights standards?

The legal status and effects of MoUs in the context of the MTFA (article 143 TFEU) were addressed by the CJEU in *Florescu*,[10] a case that originated in the context of the first financial assistance programme to Romania, following Council Decision 2009/458/EC.[11] The core terms of the Romanian bailout were laid out in Council Decision 2009/459/EC[12] and subsequently elaborated in the MoU concluded between the European Union, represented by the Commission, and Romania.[13] The applicants in the main proceedings were judges who also held teaching positions at the university, as the law permitted at that time. The contested measure at issue in the main proceedings prohibited the combining of the net pension with income from activities carried out in public institutions if the amount of the pension exceeded a certain threshold, fixed at the amount of the national gross average salary. The persons affected sought to argue that article 17 of the Charter (right to property) should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibited the combining of a net public-sector retirement pension with income from activities carried out in public institutions if the amount of the pension exceeded a certain threshold.

In *Florescu* the CJEU ruled that the MoU 'gives concrete form to an agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance

[10] For a detailed analysis of the case, see Markakis and Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu', *Common Market Law Review* (2018) 643.

[11] Council Decision 2009/458/EC of 6 May 2009 granting mutual assistance to Romania [2009] OJ L150/6.

[12] Council Decision 2009/459/EC.

[13] Memorandum of Understanding between the European Community and Romania. https://ec.europa.eu/economy_finance/publications/pages/publication15409_en.pdf, last accessed on 15.08.2021.

from the EU'.[14] The Court held that the legal bases of the MoU lay in article 143 of the TFEU and Regulation 332/3002 and that it was concluded, in particular, by the European Union, represented by the Commission. Hence, the CJEU reached the conclusion that the MoU 'constitutes an act of an EU institution within the meaning of 267(b) TFEU' and may thus 'be subject to interpretation by the Court' through a preliminary ruling.[15] Furthermore, the Court added that the objectives set out in article 3(5) of Decision 2009/459, as well as those set out in the MoU, were sufficiently detailed and precise to permit the inference that the purpose of the prohibition on combining a public-sector retirement pension with income from activities carried out in public institutions, stemming from Law No 329/2009, was to implement both the MoU and that Decision and, thus, EU law, within the meaning of article 51(1) of the Charter; therefore, the Charter was applicable to the dispute in the main proceedings.[16]

Building on the outcome of *Florescu*, one can reach the conclusion that the MoUs concluded within the EU legal order, meaning in the MTFA and EFSM framework, are to be qualified as Union acts within the meaning of article 267(1)(b) of the TFEU and, thus, are amenable to a request for interpretation under article 267.[17] Moreover, the EU institutions involved in the making and conclusion of those MoUs are unavoidably bound to respect human rights, since the Charter definitely applies to EU institutions undertaking Union acts.

More difficult though is the question of whether the Charter applies in the EFSF and ESM framework. How did the CJEU respond to the question of whether the Charter is applicable in the context of European financial assistance or whether the EU institutions involved are freed from the obligation to respect the fundamental rights of the Union? The respective case law of the CJEU has to be presented separately, since it relates to different EU institutions and bodies involved in the complicated framework of European financial assistance.

12.3.1 *The Applicability of the Charter to the Eurogroup*

In the context of European assistance, the Eurogroup is usually entrusted with general guidelines with regard to economic policy and not with the formulation of detailed financial assistance conditions. During the eurozone crisis, it

[14] Case C-258/14 *Eugenia Florescu and Others v Casa Judeţeana de Pensii Sibiu and Others* [2017] EU:C:2017:448, para 34.

[15] Ibid., para 35.

[16] Ibid., para 48.

[17] For an updated analysis of article 267 TFEU, see Wahl and Prete 'The Gatekeepers of 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings', *Common Market Law Review* 511 (2018).

determined the strategic choices of the economic adjustment programmes, such as the voluntary debt haircut in the case of Greece.[18] With regard to specific conditionalities though, it relied on the recommendations of the Troika. A notable exception to this rule was the case of Cyprus, in which the restructuring of the Cypriot banking sector was first decided by the Eurogroup before the Troika reached an agreement with domestic authorities.[19] The Cypriot rescue package is of particular interest, since it marks the first time that bank depositors were targeted as part of a European bailout deal. In exchange for the loans received by the ESM and the IMF, Cyprus had inter alia to wind up its second-largest bank, the Cyprus Popular Bank (also known as Laiki Bank), and to recapitalise its biggest bank, the Bank of Cyprus, at the expense of shareholders, bondholders, and depositors. In the winding up of the Cyprus Popular Bank, uninsured deposits exceeding the amount of €100,000 were completely liquidated. In the recapitalisation of the Bank of Cyprus, the depositors lost 47.5 per cent of their uninsured deposits.[20]

Given their substantial financial losses – the result of the extensive write-off of their bank deposits – uninsured depositors sought judicial protection before the courts of the EU, challenging the validity of the Eurogroup statement outlining the conditions of the bailout. Nevertheless, all their actions for annulment have been unsuccessful.[21] In fact, in the CJEU case *Mallis and Others v Commission and ECB*, the Court confirmed the orders of the General Court holding that the Eurogroup, which is an informal forum for discussion between ministers of the Member States whose currency is the euro, cannot be classified as a body, office, or agency of the EU within the meaning of article 263 of the TFEU.[22] Thus, a statement by it cannot be regarded as a measure intended

[18] Eurogroup Statement on the European Stability Mechanism with respect to Greece, Doc No 128075, 21 February 2012 <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/128075.pdf>, last accessed on 15.08.2021.

[19] See Eurogroup Statement on Cyprus, Doc No 136487, 25 March 2013 <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/136487.pdf>, last accessed on 15.08.2021.

[20] Poulou, 'The Liability of the EU in the ESM framework' Case note on Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v Commission and ECB*, *Maastricht Journal of European & Comparative Law* 127 (2017), at p. 129.

[21] See Case T-327/13 *Mallis and Malli v Commission and ECB* [2014] EU:T:2014:909; Case T-328/13 *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB* [2014] EU:T:2014:906; Case T-329/13 *Chatzithoma v Commission and ECB* [2014] EU:T:2014:908; Case T-330/13 *Chatziioannou v Commission and ECB* [2014] EU:T:2014:904; Case T-331/13 *Nikolaou v Commission and ECB* [2014] EU:T:2014:905. For an analysis of these cases, see Karatzia, 'Cypriot Depositors Before the Court of Justice of the European Union: Knocking on the Wrong Door?', *King's Law Journal* 175 (2015).

[22] Joined Cases C-105–109/15 P *Mallis*, para 61. See also Opinion of AG Wathelet in Joined Cases C-105–109/15 P *Mallis* [2016] EU:C:2016:294, para 65.

to produce legal effects with respect to third parties, and can, therefore, not be annulled on the basis of article 263 of the TFEU.[23] Moreover, in *Mallis* the CJEU rejected the argument that the Eurogroup is under the factual control of the Commission and the ECB, when it comes to meetings related to the ESM, and thus held that Eurogroup statements containing financial assistance conditions cannot be imputed to the EU institutions.[24]

In *Council v K. Chrysostomides & Co. and Others*, the CJEU went even further, stating that the Eurogroup is not an institution within the meaning of article 340 par. 2 TFEU, such that its actions cannot trigger the non-contractual liability of the Union.[25] This is because, according to the Court, the Eurogroup was created as an intergovernmental body, outside the institutional framework of the EU, a fact that was not slightly altered by the formalisation of the existence of the Eurogroup and the participation of the Commission and the ECB at its meetings through article 137 TFEU and Protocol No 14.[26]

Nevertheless, in view of the serious interference with the fundamental rights of individuals, which might remain without legal remedy as is illustrated by the Cypriot case, the question arises whether the Court could have decided differently, stating the Eurogroup is bound by the Charter when formulating financial assistance conditionality. The scope of the Charter is determined by article 51(1) of the EUCFR, which reads: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity.' Not being one of the seven EU institutions listed in article 13(1) of the TEU, the Eurogroup may be bound by the Charter only if it could be regarded as a body, office, or agency of the or as a configuration of the Council of the EU. As pointed out in the explanation accompanying article 51 of the EUCFR, the expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation.[27] The Eurogroup is explicitly mentioned in article 137 of the TFEU, which, with respect to its composition and the Union arrangements for its meetings, refers to Protocol No 14 annexed to the TFEU. This Protocol provides that the Eurogroup consists of the finance ministers of the euro area Member States, who 'shall meet informally … to discuss questions related to the specific responsibilities they share with regard to the single currency'. As the Court has held, this provision presents the Eurogroup as 'a forum

[23] Ibid., para 49.
[24] Ibid., para 47.
[25] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Council v K. Chrysostomides & Co. and Others* [2020] EU:C:2020:1028, para 90, 97.
[26] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Chrysostomides*, para 84, 87.
[27] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 32.

for discussion, at ministerial level, between representatives the Member States whose currency is the euro', and not as a 'decision-making body'.[28]

Furthermore, the Eurogroup is not among the different configurations of the Council of the EU provided by article 16(6) of the TEU and enumerated in Annex I to the Rules of Procedure of the Council.[29] Besides not being classified as such by the TFEU, the classification of the Eurogroup as a configuration of the Council would not be in line with the different functions that each of them performs. As Advocate General Wathelet observed in his Opinion on *Mallis*, while the Eurogroup is an informal forum for discussion between euro area Member States on questions specifically related to the single currency, the Council's functions pursuant to article 16(1) of the TEU are far broader and include the exercise, in conjunction with the Parliament, of legislative power within the EU and the other decision-making powers conferred on the Council alone by the TFEU.[30]

Since it can neither be equated with a configuration of the Council nor classified as a formal decision-making body, office, or agency of the EU,[31] the Eurogroup does not fall under the scope of the Charter as defined in article 51(1) of the EUCFR. In view of the fact that, despite its informal nature, the Eurogroup very often predetermines and shapes crucial decisions in the framework of financial assistance, the conclusion that its acts cannot be assessed against the Charter is very problematic for the delivery of accountability goods. First and foremost, decisions taken under such an informal setting undermine the accountability good of openness, by depriving citizens of official information and transparent decision-making procedures. Furthermore, being left outside the scope of judicial review decisions of the Eurogroup can neither be assessed as to their non-arbitrariness nor as to their pursuit of common goals. As a result, the lack of human rights review with regard to decisions taken by the Eurogroup puts also the accountability goods of non-arbitrariness and publicness into peril.

12.3.2 *The Applicability of the Charter to the Commission and the ECB*

The next question relates to the case law of the CJEU with regard to the applicability of the Charter to the Commission and ECB, which as members of the Troika, had an important say in formulating and monitoring financial

[28] Joined Cases C-105–109/15 P *Mallis*, para 47.
[29] See Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure [2009] OJ L325/35.
[30] See Opinion of AG Wathelet in Joined Cases C-105–109/15 P, *Mallis*, para 61.
[31] Joined Cases C-105–109/15 P *Mallis*, para 61.

assistance conditionality.[32] Since Troika is a cooperation body and hence a subject that cannot be as such held accountable under international or EU law,[33] its actions have to be regarded as joint measures of EU institutions and subjects of international law (Commission, ECB, and IMF), whose commitment to human rights must be assessed separately.

The CJEU was confronted with the applicability of the Charter to the Commission and the ECB (when they negotiate and conclude the MoU) in 2016, in the seminal case *Ledra Advertising*.[34] On appeals against decisions of the General Court, which had dismissed as inadmissible actions for annulment and compensation raised after the restructuring of Cypriot banks, the CJEU clearly spelt out the obligation of EU institutions to respect human rights when formulating financial assistance conditionality. Filling the gap left on this issue in *Pringle*, the CJEU followed the Opinion of Advocate General Kokott,[35] explicitly stating that the Charter binds EU institutions in all circumstances, even when they act outside the EU legal framework.[36] In this vein, the Court clearly underlined that, in the context of the adoption of an MoU, the Commission is bound under both article 17(1) of the TEU – which confers upon it the general task of overseeing the application of EU law – and article 12(3) and (4) of the ESM Treaty – which requires it to ensure that the MoUs by the ESM are consistent with EU law – to ensure that such an MoU is consistent with the fundamental rights guaranteed by the Charter.[37]

Although article 51(1) of the EUCFR should have been mentioned, together with article 17(1) of the TEU and article 13(3) of the ESM Treaty, among the provisions that oblige the EU institutions to ensure that the MoUs are consistent with EU fundamental rights, the clear reference to the pertinence of the Charter to actions of EU institutions in the making of financial assistance conditionality constitutes a milestone for the protection of human rights in the context of post-crisis European financial assistance. *Ledra Advertising* leaves no doubt that – even if in the EFSF and ESM framework the Commission

[32] Recital 3 of the Preamble and arts 2(1)(a) and 3(1) of the EFSF Framework Agreement; article 13(3) and (7) of the ESM Treaty; article 7(1)(1) and (4)(1) of Regulation 472/2013.

[33] See also Fischer-Lescano, 'Troika in der Austerität: Rechtsbindungen der Unionsorgane beim Abschluss von Memoranda of Understanding', *Kritische Justiz* 7 (2014).

[34] For a detailed analysis of the judgement, see Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al v European Commission and European Central Bank', *European Constitutional Law Review* 369 (2017); Poulou, note 21 above.

[35] See Opinion of AG Kokott in Case C-370/12 *Pringle* [2012] EU:C:2012:675, para 176.

[36] Joined Cases C-8–10/15 P *Ledra*, para 67.

[37] Ibid.

and the ECB act under powers conferred on them by intergovernmental agreements – their commitment to the Charter does not cease to exist.

Nevertheless, when deciding on the substance of the case, the CJEU ruled against the plaintiffs. More precisely, the Court concluded that the bail-in implemented in the Cypriot banking sector did not constitute a disproportionate and intolerable interference with the substance of the appellants' right to property, given the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed, if the latter had failed. Having found no unlawful conduct on behalf of the Commission, when permitting the adoption of the bail-in, the Court dismissed the appellants' claims for compensation (articles 268 and 340 TFEU) as lacking any foundation in law.

12.3.3 *The Applicability of the Charter to the Council of the EU*

The Council of the EU approves financial assistance conditionality in the form of Council Decisions.[38] The CJEU was confronted early on with the assessment of Decisions of the Council containing financial assistance conditionality after actions for annulment launched under article 263 of the TFEU. More precisely, the legality of Decision 2010/320/EU was questioned, on the one hand, due to the reduction of Easter, holiday and Christmas bonuses[39] and, on the other hand, due to the increase in the retirement age and the reduction of the pensions of civil servants.[40] Council Decision 2011/57/EU was challenged on the basis of its provision improving the management of public assets,[41] introducing means-testing of family allowances[42] and limiting recruitment in the whole general government to a ratio of a maximum of one recruitment every five retirements or dismissals, without sectoral exceptions.[43]

In order for the actions for annulment to be admissible, the applicants had to prove that the regulatory acts were of direct and individual concern to them pursuant to article 263(4) of the TFEU. The Court held that the challenged provisions were indeterminate and left a margin to the Greek State as to the way they were implemented, and thus could not directly affect the applicants.[44]

[38] Article 7(2) Regulation (EU) 472/2013.
[39] Article 2 para 1 lit. f of Council Decision 2010/320/EU.
[40] Article 2 para 2 lit. b of Council Decision 2010/320/EU.
[41] Article 1 para 4 lit. k of Council Decision 2011/57/EU.
[42] Article 1 para 8 lit. s of Council Decision 2011/57/EU.
[43] Article 1 para 8 lit. gg of Council Decision 2011/57/EU.
[44] Case T-541/10 *ADEDY and Others v Council*, paras 70 and 72–73; Case T-215/11 *ADEDY and Others v Council*, paras 81, 84, and 90.

It is only the content of the national implementing measures, which determine to what extent the applicants will suffer reductions, that might directly affect their legal situation. As a result, both actions were rejected as inadmissible.

As far as some of the contested measures are concerned, the arguments of the General Court are persuasive. Indeed, some of the provisions, such as the provision that provided for 'better management of public assets, with the aim of raising at least EUR 7 billion during the period 2011–2013'[45] and the provision on means-testing of family allowances, which stipulated 'means-testing of family allowances from January 2011 on yielding savings of at least EUR 150 million (net of the respective administrative costs)',[46] were vague and left it to the discretion of national authorities to specify the details of their implementation. As a result, the General Court convincingly held that those provisions were not of direct concern to the applicants within the meaning of article 263 para 4 TFEU.

In contrast, less convincing is the outcome in relation to other contested measures. The 'reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1,500 million for a full year (EUR 1,100 million in 2010)'[47] and the provision on 'an act that limits recruitment in the whole general government to a ratio of not more than one recruitment for five retirements or dismissals, without sectoral exceptions, and including staff transferred from public enterprises under restructuring to government entities'[48] are detailed provisions, which specified the way in which they were to be implemented by the Member State concerned. Hence, in this case, the requirement of direct and individual concern of the applicants within the meaning of article 263 para 4 TFEU should have been regarded as met.

In view of the above, it is obvious that CJEU denied the applicants' legal standing, approaching the cases on cuts in wages, pensions, and social benefits only in a procedural manner without proceeding to the assessment of their compatibility to human rights. Nevertheless and regardless of the procedural question of whether the Decisions are of direct and individual concern to individuals, pursuant to article 263(4) of the TFEU, the Council of the EU is undoubtedly included among the EU institutions which are bound by the Charter according to article 51(1) of the EUCFR read together with article 13 of the TEU. In addition, the Decisions of the Council fall under the types of

[45] Article 1 para 4 lit. k of Council Decision 2011/57/EU.
[46] Article 1 para 8 lit. s of Council Decision 2011/57/EU.
[47] Article 2 para1 lit. f of Council Decision 2010/320/EU.
[48] Article 1 para 8 lit. gg of Council Decision 2011/57/EU.

secondary legislation listed in article 288(4) of the TFEU. Thus, the Decisions of the Council adopted under the framework of European financial assistance are unilateral, legally binding acts of an EU institution and as such fall under the scope of the Charter. The fact that their content arguably reflects a negotiated agreement between different actors does not impact on their legal nature as acts of secondary EU law within the meaning of article 288 of the TFEU.[49] Against this background, it is very unfortunate to realise that individuals concerned may experience procedural hurdles when launching an action for annulment against a decision entailing lending conditions, when at the same time these decisions must be in conformity with the Charter.

Nevertheless, when, later on, the CJEU decided on the substance of financial conditions laid down in Council decisions, it held that restrictions on human rights were justified. Indeed, in case *Sotiropoulou and Others v Council*[50] the General Court dealt with an action for compensation under article 268 TFEU in respect of the loss and harm, which the applicants had allegedly sustained, as a result of the reduction of their main pensions due to the adoption of a series of Council decisions under articles 126 (9) and 136 TFEU on pension reform in Greece.[51] In support of their action, the applicants relied on two pleas in law. First, the applicants claimed that, in adopting the contested decisions, which concern inter alia the laying down of detailed measures in the social security and pension system, the Council exceeded the powers conferred by the Treaty and infringed the principles of conferral and subsidiarity as laid down in articles 4 and 5 TEU in conjunction with articles 2

[49] This point can be compared with Council Decisions concluding external EU agreements. The fact that the Council Decisions do not add anything to the agreements is no obstacle against the legal challenge of these Decisions before the Court.

[50] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297.

[51] The Decisions of the Council concerned are the following: Council Decision 2010/320/EU of 10 May 2010 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] L145/6; Council Decision 2010/486/EU of 7 September 2010 amending Decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] L241/12; Council Decision 2011/57/EU of 20 December 2010 amending Decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2011] L26/15; Council Decision 2011/257/EU of 7 March 2011 amending Decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening the fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2011] L110/26; Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction

to 6 TFEU. Second, the applicants contended that the contested decisions of the Council required the introduction of drastic pension cuts that fundamentally disturbed the applicants' financial situation and resulted in the reversal of situations which they had sought in good faith. As a result, the applicants claimed that the enactment and implementation of the reductions at issue resulted in direct infringement of their right to human dignity, their right as elderly persons to lead a life of dignity and independence, and their right to social security benefits and social services providing protection in cases such as old age, laid down in articles 1, 25 and 34 CFREU, respectively.

As to the first plea in law, the General Court held that the principles of conferral and subsidiarity concern the division of responsibilities between Member States and the EU and cannot be regarded as conferred rights on individuals. Consequently, any breach of these principles is not in itself sufficient to establish the non-contractual liability of the Union.[52] In any case, the contested decisions do not infringe the principles of conferral and subsidiarity, as they were issued with a view to reinforcing and deepening the fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit. As a result, the General Court held that the contested decisions were adopted in the context of the exercise of powers expressly conferred on the Council by article 126 (9) and article 136 TFEU.[53]

By their second plea in law, the applicants claimed that the sum of the pension cuts appears excessive and disproportionate and does not strike a fair balance between the requirements of the general interest and the protection of their fundamental rights enshrined in articles 1, 25, and 34 CFREU, namely the right to human dignity, the rights of the elderly and the entitlements to social security benefits and social services respectively. As to this complaint, the General Court held that, to the extent that the allegedly violated provisions

judged necessary to remedy the situation of excessive deficit [2011] L296/38; Council Decision 2011/791/EU of 8 November 2011 amending Decision 2011/734/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2011] L320/28;Council Decision 2012/211/EU of 13 March 2012 amending Decision 2011/734/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2012] L113/8 and Council Decision 2013/6/EU of 4 December 2012 amending Decision 2011/734/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2013] L4/40.

[52] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 72.

[53] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 73.

of the Charter constitute rules of law intended to confer rights on individuals, it must be considered whether any breach of them could substantiate the Union's liability in this case.[54] Furthermore, the Court stated that, according to settled case law, when assessing the non-contractual liability of the Union, the Court has to take into account, inter alia, the complexity of the situations to be regulated, the difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question[55] More precisely, the decisive criterion for establishing a sufficiently serious breach of a rule of law intended to confer rights on individuals is whether there has been a manifest and grave disregard by the institution concerned of the limits of its discretion.[56] In the case at stake, the contested decisions constitute an exercise of the powers conferred on the Council by articles 126 (9) and 136 TFEU in the context of the excessive deficit procedure of an Eurozone Member State. This competence mainly involves economic policy choices for which it is justified to provide a wide margin of discretion. Hence, those provisions specify only the type of measures to be taken, which may be included in the recommendations from the Council to a Member State for the attainment of a specific objective.[57] Against this background, the General Court stated that it was necessary to assess whether the Council adopted the decisions at stake in a manifest and serious breach of the limits of its discretion.[58] As reminded by the Court, the contested decisions were issued following the conclusion of the Council that an excessive deficit exists in Greece[59] and the budgetary measures included had been extensively discussed with the Greek government and commonly agreed by the European Commission, the ECB and the IMF.[60] In light of the above, the General Court held that it was not manifestly unreasonable to envisage various cost-saving measures, including pension cuts. Therefore, in adopting the contested decisions, the Council did not exceed the limits of its wide discretion.[61]

Moreover, the Court underlined that even if the contested decisions were in fact capable of causing the alleged damage to the applicants, the rights to access social security benefits and social services are not absolute, since their exercise may be subject to restrictions justified by objectives of general interest

[54] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 76.
[55] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 77.
[56] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 78.
[57] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 81.
[58] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 82.
[59] Council Decision 2009/415/EC of 27 April 2009 on the existence of an excessive deficit in Greece [2009] L135/21.
[60] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, paras 83–85.
[61] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, paras 86–87.

pursued by the Union, as provided for in article 52 (1) CFREU.[62] In this vein, measures to reduce the size of pensions meet objectives of general interest, namely the ensuring of fiscal consolidation, the reduction of public expenditure, and the support of the pension system of the Member State concerned.[63] Consequently, the General Court held that these measures also met objectives of general interest pursued by the Union, namely the ensuring of budgetary discipline of Member States whose currency is the euro and the ensuring of the financial stability of the euro area.[64] In view of those objectives and the imminent risk of insolvency of the Member State concerned, the General Court came to the conclusion that the contested measures, which were specified in Greek national laws,[65] cannot be regarded as unjustified restrictions of the rights claimed by the applicants, since they do not constitute a disproportionate and intolerable interference impairing the very substance of these rights.[66] In light of the above considerations, the General Court held that the applicants did not establish that the Council had committed a serious breach of a rule of law which confers rights on individuals. Hence, in absence of one of the cumulative conditions for establishing the non-contractual liability of the Union provided for in article 340 para 2 TFEU, the action was dismissed in its entirety.[67]

12.3.4 *The CJEU as an 'Accountability-Rendering Actor'?*

The overview of the supranational jurisprudence shows that the CJEU held a hesitant stance towards the protection of human rights during the Eurozone crisis. First, the CJEU declined to take up the merits of cases that questioned the compatibility of crisis-driven measures with Charter-guaranteed human rights, thus shying away from the task of delivering accountability goods. More precisely, leaving conditionality measures outside the scope of human rights review, came to a detriment of the accountability good of non-arbitrariness, since decision-makers were left free to not take into account right-based

[62] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 88.
[63] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 89.
[64] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 89.
[65] See article 3 of law 3845/2010, article 11 of law 3863/2010, articles 12 and 44 of law 3986/2011, article 2 of law 4024/2011, article 2 of law 4024/2011, article 6 of law 4051/2012 and law 4093/2012.
[66] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, para 90. At this point, the General Court referenced the similar outcome of the case *Ledra Advertising v Commission and ECB*, in which the CJEU held that the restructuring of the Cypriot banks did not constitute an unjustified restriction of the depositors' right to property guaranteed by article 17 para 1 CFREU.
[67] Case T-531/14 *Sotiropoulou and Others v Council* [2017] EU:T:2017:297, paras 92–93.

limitations in their policy-making. Furthermore, the accountability good of publicness was left without protection, since the court did not review whether consultation existed in the making of the measures or if the policies were in line with the principle of proportionality.

Second, even during the second phase of crisis-driven case law when the CJEU finally addressed the substantive questions put to it, it did not rule in favour of the plaintiffs. The CJEU weighed their claims against the perceived need for budgetary discipline by Eurozone Member States, the precarious financial stability of the euro area and the imminent risk of insolvency of the Member State concerned, concluding that the contested measures did not comprise unjustified restrictions on human rights. As a result, the CJEU guaranteed a very low level of protection of the accountability goods of non-arbitrariness and publicness, since the protection of human rights was put under a very weak judicial review. Altogether, these decisions mean that the CJEU will not be remembered for its defence of accountability goods during the European financial crisis but rather for the judicial self-restraint that it exercised in the field.

12.4 THE CALL FOR A COMBINATION OF A PROCEDURAL AND SUBSTANTIVE UNDERSTANDING OF HUMAN RIGHTS ACCOUNTABILITY

The stance of the Court during the crisis reflects the general concerns about courts competing with other decision-making institutions for the ultimate say on polycentric political issues. Judges, the argument goes, are ill-suited to make decisions in matters with complex budgetary and political[68] Furthermore, courts are warned against interfering with collective policy decisions made by political fora such as parliaments, whose democratic accountability makes them better equipped to aggregate, mediate, and balance the affected interests.

The general rule of task-distribution between constitutional institutions, courts, and parliaments, applies, however, in times of proper functioning of democracy. During the current Eurozone crisis though, the constitutional balance between the different institutions had been significantly altered. As noted above, financial assistance conditionality resulted in intrusive social governance, left at the discretion of executives, and insulated from public debate and parliamentary scrutiny. Traditional *fora* of deliberation, such as parliaments, where

[68] Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', *South African Journal on Human Rights* (2017) 383, at p. 393.

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social policies could be defended, were substantially weakened. In this context, the basic premise of democratic legitimacy, that binding collective decisions should result from procedures that allow for the effective and equal participation of the largest possible number of the actors affected, is frustrated.[69]

Under these circumstances, applying the general rule that courts should not interfere with complex choices of political bodies regarding financial assistance, would mean that the exclusion of subjects affected and the eventual violation of their human rights, would be left without any effective remedy. In a situation where the conduits of democratic participation are blocked or ineffective, courts should thus actively undertake the task to institutionalise both procedural and substantive accountability of the decision-makers.

In order to serve accountability and more precisely the good of publicness in a procedural manner, courts should review the procedural conditions under which decisions were taken, that originate from financial assistance conditionality and drastically interfere with human rights. That is, whether these decisions emerged from deliberative and inclusive procedures, which included the views of those affected.[70] Courts should particularly ask decision-makers to elaborate on how decisions were made, which social actors were consulted, and to what extent affected individuals could be heard. This role of courts should not be understood as simply a scrutiny of procedural conditions of bare majoritarianism. Through this scrutiny, courts ensure that rights of minorities and politically marginalised groups, such as the young generation, are not violated by majoritarian decision-making.

The relevance for the legal assessment of the participation or not of the affected actors is reflected in Regulation 472/2013,[71] which explicitly requires the involvement of social partners and relevant civil society organisations in the preparation of the adjustment programmes, with a view to contributing to building consensus over its content.[72] Moreover, in its decisions concerning

[69] On the understanding of legitimacy as a democratic process for the genesis of law, see Dahl, *Democracy and Its Critics* (Yale University Press, 1989) p. 106; Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1997), at p. 321.

[70] On the democratic legitimacy of judicial review, see Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); Dahl, *Democracy and Its critics*, ibid., at p. 188; Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007), at p. 236.

[71] 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 (Two-Pack Regulation), O.J. 2013, L 140/1.

[72] Article 8 of Regulation 472/2013.

pension schemes in Greece mentioned, the European Committee of Social Rights (ECSR) included the democratically questionable procedures to a factor that contributed to the violation of the Social Charter, noting that the Greek government has not discussed the pension reforms with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue. Thus, the ECSR ruled that, even though the controversial restrictions would under certain conditions not breach the Charter, 'due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place', they do amount to a violation of the right to social security (article 12 para. 3 ESC).[73]

With regard to the institutionalisation of accountability in a substantive manner, courts should proceed to an ad hoc basis assessment of the conformity of a specific measure with the human rights affected. Nevertheless, some prominent examples illustrate the substantive red lines that could be drawn by the judiciary. For example, in Greece, a series of financial assistance conditions were especially addressed to the labour rights of the young generation, introducing differentiated treatment on the ground of age. In both the first and the second economic adjustment programmes, the Greek government assumed the responsibility to introduce sub-minima wages for groups at risk such as young people.[74] Minimum wages established by the national general collective agreement had to be reduced by 22 per cent, for youth though – namely for ages below twenty-five – wages had to be reduced by 32 per cent.[75] This differentiated treatment of young workers obviously touches upon the right to fair and just working conditions (article 31 CFREU) on the protection

[73] 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.

[74] See European Commission, Directorate-General for Economic and Financial Affairs, The Economic Adjustment Programme for Greece, May 2010, Occasional Papers 61, p. 68. Same clause was also included in Article 2 para. 3 lit. d. Council Decision 2010/320/EU.

[75] See European Commission, Directorate-General for Economic and Financial Affairs, The Second Economic Adjustment Programme for Greece, March 2012, Occasional Papers 94, p. 147. This further 10 per cent reduction of the minimum wage of young Greek people was presented as a means to reduce the gap in the level of the minimum wage relative to peers (Portugal, Central and Southeast Europe), to help address high youth unemployment, as well as employment of individuals on the margins of the labour market, and to encourage a shift from the informal to the formal labour sector.

of young people at work (article 32 CFREU) and the rule of non-discrimination (article 21 CFREU).[76] Indicative is also the fact that the European Committee of Social Rights (ESCR) ruled in its decision 66/2011 that the differentiated reduction of the minimum wage of people under 25 constitutes a violation of article 4§1 (right to a fair remuneration) of the European Social Charter (ESC) read together with the non-discrimination clause of the Preamble to the ESC, which corresponds to articles 31 and 21 CFR. In that case, the ESCR found disproportionate discrimination against young employees, whose minimum wage was reduced below the poverty level.[77]

Moreover, drawing on the understanding of legitimacy and democracy in EU law, this chapter suggests that a democratically legitimate role of courts can be conceived, if a link between the procedural and the substantive dimension of human rights accountability is established. The basic principle is that, in order for courts' judgement in disputed financial assistance cases to be legitimised, judges should assess the observance of the procedural dimension of human rights and, depending on the outcome, calibrate the standard of review on the basis of the substantive dimension of the respective rights accordingly. More precisely, starting from the premise that the political process is, in principle, better suited for the formulation of social policies, courts should first focus on the decision-making process rather than on the content of a contested policy choice. In this vein, judges should review whether the contested measure, which allegedly represents a majority decision, has indeed been the result of a participatory and deliberative decision-making process or whether the affected individuals were excluded from the relevant procedure.

12.5 CONCLUSION

The overview of the supranational jurisprudence shows that the general pattern during the Eurozone crisis was that the CJEU shied away from the difficult task to overrule conditionality-driven decisions over complex social policy issues and, thus, to ensure accountability goods. In the majority of cases, the courts deferred to the legislator leaving the final say on choices regarding social policy and resource allocation to them. The application of this general rule of task-distribution between courts and parliaments relies on the assumption that

[76] The differentiated treatment of the younger generation is also incompatible with secondary EU law, like the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

[77] ECSR, Decision on the Merits, 23.05.2012, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece, Complaint No. 66/2011, para. 65, 68–69.

the non-neutral choices of political bodies were made after the consultation and participation of all affected individuals and vulnerable groups.

Nevertheless, it is only through taking both process and substance seriously that human rights accountability can effectively be applied and at the same time ensure a democratic role for courts. Courts should review the observance of substantive guarantees of human rights in connection with compliance with the procedural conditions inherent in a democratic legislative process. In this way, decisions on substantive political and social issues would in principle remain at the disposal of the respective political institution, which would bear the weight of defending them before the judiciary. The court would be reviewing complex policy choices, with the aim to protect human rights and ensure the delivery of accountability goods.