ARTICLES

The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?

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ABSTRACT: This *Article* analyses the judicial and political accountability of the European Stability Mechanism (ESM) in light of the seminal *Mallis* and *Ledra* cases (respectively, Court of Justice: judgment of 20 September 2016, case C-105/15 P, *Mallis and Malli v Commission and ECB* [GC]; judgment of 20 September 2016, case C-8/15 P, *Ledra Advertising v. Commission and ECB* [GC]). It seeks to determine to what extent the intergovernmental nature of the ESM has shielded its activity from the accountability mechanisms established within EU law. It then assesses whether the Proposal, recently issued by the Commission, to transform the ESM into an EU body, the European Monetary Fund (EMF), would improve the accountability of this body. It is argued that embedding conditionality policies in the European constitutional legal order constitutes a necessary, but not a sufficient step. To achieve this objective, it is necessary to couple a close judicial scrutiny by the Court of Justice with an equally substantial democratic oversight by the European Parliament.

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KEYWORDS: European Stability Mechanism – European Monetary Fund – financial assistance – conditionality – Eurogroup – accountability.

I. INTRODUCTION

The financial and economic turmoil which stormed Europe during the last decade has painfully demonstrated the necessity to provide stability support to EU Member States when they experience a financial crisis. Unsurprisingly, when States forge between themselves a currency union such as the Eurozone, they also lose the ability to see one member of the currency club going bankrupt without experiencing tremendous knock-on effects. A certain degree of fiscal solidarity is necessary, and not even a legal prohibition of constitutional nature such as the no bail-out clause can prevent Member States from assisting each other in order to prevent a systemic crisis.[1]

The European Stability Mechanism (ESM) is the last and main crisis-management tool created by Member States whose currency is the euro for this scope.[2] Its purpose is to raise funds and provide support "to the benefit of ESM Members which are experiencing or are threatened by severe financing problems if indispensable to safeguard the financial stability of the euro area as a whole or of its Member States".[3] The ESM represents, in line with other legal instruments adopted to counteract the effects of the present crisis and possibly prevent the next one, an intergovernmental experiment.[4] It was created through an international law agreement, namely the Treaty establishing the European Stability Mechanism (TESM), on the basis of the Member States' treaty

[1] V. BORGER, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, in *European Constitutional Law Review*, 2013, p. 7 *et seq.* See Art. 125 TFEU. As well known, Art. 125 TFEU established that a Member State "shall not be liable for or assume the commitments" of other central governments. However, such clause was the object of a teleological interpretation by the Court of Justice that made Art. 125 TFEU compatible with national measures of financial assistance, as long as they are provided under strict conditionality. See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*. For a definition of systemic risk, see S. SCHWARCZ, *Systemic Risk*, in *Georgetown Law Journal*, 2008, p. 204.

[2] The ESM is the third mechanism created by the EU to provide financial assistance within the Eurozone. Before the ESM, the EU had established two financial mechanisms, namely the European Financial Stabilisation Mechanism (EFSM) and then the European Financial Stability Facility (EFSF). Whilst the first was established through EU law, based on Art. 122 TFEU, the latter was a limited company under Luxembourg law. See Regulation (EU) 407/2010 of the Council of 11 May 2010 establishing a European financial stabilization mechanism and the Decision of the representatives of the governments of the euro area Member States meeting within the Council of the European Union of 10 May 2010.

[3] Art. 3 of the Treaty establishing the European Stability Mechanism (TESM).

[4] For a comprehensive literature review on the position of EU legal scholarship concerning legal reforms during the euro-crisis see T. BEUKERS, *Legal Writing(s) on the Eurozone Crisis*, in *EUI Working Papers*, no. 11, 2015, and G. MARTINICO, *EU Crisis and Constitutional Mutations: A Review Article*, in *Revista de estudios politicos*, 2014, p. 247 *et seq.*

making power, without the formal participation of the Union.[5] From a legal point of view, the ESM is an international organization, and does not belong to the EU legal order. However, it is not completely detached from the European Union, as the ESM enjoys a strong institutional and teleological proximity with EU law.

Institutionally, the ESM employs three EU Institutions – the EU Commission, the European Central Bank (ECB) and the CJEU – entrusting them with important tasks. From a teleological point of view, the ESM also shares with EU law a clear integrationist objective, namely the financial stability of the euro area.[6] This is now explicitly mentioned in EU primary law, as Member States amended the TFEU. The latter now authorises Member States whose currency is the euro to "establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole".[7]

However, this is only part of the story, as the main connection between the TESM and EU law is provided by "conditionality", given that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality".[8] Financial assistance, henceforth, cannot be provided unless the beneficiary state accepts to comply with the conditions imposed by the ESM and outlined in a Memorandum of Understanding (MoU). In the recent *Florescu* case, the MoU was defined by the Court of Justice as the document giving concrete form to an "agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU".[9] The case concerned the Romanian bail-out, which was provided by the EU through a financial facility based on Art. 143 TFEU.[10] However, as long as we substitute the EU with the ESM, the definition can also be applied to MoUs concluded by the ESM. In other words, the MoU is a legal *agreement* between the beneficiary Member State and the ESM, whose purpose is to establish the conditions ("economic objec-

[5] Treaty establishing the European Stability Mechanism, Brussels, 2 February 2012.

[6] *Pringle*, cit., para. 164. For the teleological proximity between the ESM and EU law, as well as a review of the legal scholarship concerning European integration through intergovernmental treaties, see A. Petti, *EMU Inter-se Agreements: A Laboratory for Thinking about Associative Institutionalism*, Firenze: European University Institute, 2015, p. 10.

[7] Art. 136, para. 3, TFEU. European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. Despite the decision coming after the establishment of the ESM, the validity of the Mechanism was still ratified by the Court of Justice. See *Pringle*, cit., para. 73.

[8] Art. 136, para. 3, TFEU.

[9] Court of Justice, judgment of 13 June 2017, case C-258/14, *Florescu and others*, para. 34.

[10] Art. 143 TFEU provides the EU with a legal basis to assist Member States whose currency is not the euro in case of a crisis of the balance of payment that could endanger the internal market or the common commercial policy. See also the Regulation establishing the facility enacting this provision: Regulation (EC) 332/2002 of the Council of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments.

tives") upon which the former can receive financial assistance from the latter. Once the MoU is stipulated, the conditions thereby enshrined must be implemented by the beneficiary Member State through national measures, according to national legislative procedures. Since there is almost no policy area left untouched by conditionality policies, ranging from labour and health policy to pension costs and judiciary systems, national measures implementing the MoU can encroach upon fundamental rights guaranteed at the national level and international level. Furthermore, ESM conditionality can interfere with many areas pre-empted by EU law, as well as many rights protected by the Charter of Fundamental Rights of the European Union (the Charter).[11]

Although its activity is institutionally and teleologically close to, as well as potentially intertwining with the EU legal order, the ESM does not satisfy EU standards in terms of accountability. In particular, the Mechanism does not have the same "relatively democratic and transparent mode of decision-making" and a "relatively efficient judicial enforcement system" capable of reviewing political decisions and protecting individual rights.[12] When an EU Member State can no longer service its debt, the assistance provided by the mechanism must be directed at restoring fiscal and financial autonomy.[13] However, the question of *how* to achieve this result is a political question masked by the supposed technocratic nature of the ESM itself. As the conditions attached to stability programmes impose deep socio-economic transformations to the recipient Member State, the ESM is called to exercise an extensive political competence. One must bear in mind that with great political powers (should) come great accountability. In particular, the ESM should explain and justify its conduct to an elected, democratic body (political accountability), and its activity should be susceptible to judicial review (legal accountability).[14] Citizens affected by conditionality measures will hardly find legitimate an executive power whose activity is beyond judiciary and parliamentary control. Besides the disenfranchisement of citizens, the lack of legal and political accountability can lead to

[11] For the extensive reach of conditionality over fundamental and social rights, see M. Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*, and M. Dawson, *The Governance of EU Fundamental Rights*, Cambridge: Cambridge University Press, 2017, p. 189.

[12] B. De Witte, *Treaty Games. Law as Instrument and as Constraint in the Euro Crisis Policy*, in F. Allen, E. Carletti, S. Simonelli (eds), *Governance for the Eurozone. Integration or disintegration?*, Philadelphia: FIC Press, 2012, pp. 154-155.

[13] *Pringle*, cit., para. 137. See also European Court of Auditors, Special Report 18/2015, Financial assistance provided to countries in difficulties, p. 11.

[14] P. Craig, *Accountability*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 431 *et seq.*; M. Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 447 *et seq.*; M. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, in *West European Politics*, 2010, p. 946 *et seq.*; M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013; M. Markakis, *Political and Legal Accountability in Economic and Monetary Union*, 2017, unpublished PhD thesis.

power concentration, abuse of executive discretion as well as underperformance in terms of effectiveness and efficiency.[15]

The problem is that the international nature of the ESM has partially shielded the Mechanism and its implementing acts from those two forms of accountability. The TESM confers jurisdiction to the CJEU, but only for disputes arising between ESM Member States, or between the latter and the ESM[16] The TESM does not provide any remedy to individuals who have been substantially affected by the activity of the Mechanism. The acts of the ESM and their implementation at national level, despite having substantial effects on EU citizens, are not reviewable by the CJEU since they are not EU law acts.[17] Citizens can neither start a direct action against the activity of ESM bodies under Art. 263 TFEU, nor request a preliminary reference concerning the legality of ESM acts, as both ESM bodies and acts are extraneous to the EU legal order. At the present stage, the only option for EU citizens to challenge ESM-based conditionality measures before the CJEU is to initiate an action for damages against EU Institutions – the EU Commission and the ECB – for their activity within the ESM framework. However, the requirements imposed by the Court to obtain compensation on this judicial path are extremely difficult to satisfy, and until now the Court has always ruled against the applicants seeking to redress the damages experienced because of austerity measures.[18] Henceforth, the activity of the ESM remains largely outside the scope of the Court's scrutiny.

If the judicial accountability of the ESM is very problematic, the political oversight is even more lacking. The ESM is subject only to a weak democratic control from the European Parliament. The TESM does not even mention the latter, despite the fact that the Mechanism relies on the activity of other EU Institutions. The European Parliament is therefore not only excluded from the ESM decision-making governance, but also lacks any instrument to render the ESM directly accountable. The only route available to keep track of the ESM activity is Regulation 472/2013, which established that the MoU signed by the Commission should be consistent with an EU-based program, precisely the Macroeconomic Adjustment Program (MAP).[19] For accountability purposes, the Regulation imposes to the Commission and the ECB only reporting obligations towards the Euro-

[15] M. BOVENS, *Analysing and Assessing Accountability*, cit., pp. 465-466.

[16] Art. 37 TESM. Art. 273 TFEU expressly permits the conferral by Member States of new jurisdictional competences to the Court of Justice. The CJEU's new competences within ESM law were deemed compatible with EU law in *Pringle*, cit., paras 170-177.

[17] C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, in *European Constitutional Law Review*, 2014, p. 393 *et seq.*

[18] Court of Justice, judgment of 20 September 2016, case C-8/15 P, *Ledra Advertising v. Commission and ECB* [GC]. See also General Court, judgment of 3 May 2017, case T-531/14, *Sotiropoulou et al. v. Council of the European Union*.

[19] Art. 7 of 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.

pean Parliament. Overall, the latter has no power to influence the drafting of the MoU/MAP, whose conditions are decided outside the scope of its democratic control.

The present *Article* intends to analyse the legal and political accountability of the ESM, also in light of its possible transformation in the European Monetary Fund (EMF). The first part (I) will assess how the extreme institutional proximity between the Eurogroup (an assembly established by EU law) and the Board of Governors (a body established by the TESM) creates a gap in the judicial and political accountability of ESM-based conditionality programmes. The focus will then shift to the accountability of the Commission (II), which after the *Ledra* case can be subjected to a damages action when it exercises its tasks on behalf of the Mechanism. Although welcomed as a positive step towards accountability *for* conditionality measures, this *Article* will claim that this judgment goes in the opposite direction, as it leads the Commission to be held accountable for conditionality policies that it does not control. Finally, the *Article* will analyse the Proposal to establish a European Monetary Fund (III), assessing whether the transformation of the ESM into an EU-law based body would improve its accountability.

An important disclaimer is necessary. The present *Article* will merely focus on legal and political accountability at the European level. It will therefore not take into consideration the compatibility of ESM activity with domestic constitutions and their fundamental rights' guarantees.[20] In a similar vein, it will not analyse the accountability mechanisms provided by national parliaments.[21] Instead, it will focus on the accountability ensured by the CJEU and the European Parliament. Although domestic constitutional courts and national parliaments certainly have a role to play in overseeing national measures implementing the MoU, only supranational institutions can effectively hold the ESM accountable for its activity. If accountability is the process through which a judicial or elected body monitors, evaluates and eventually sanctions an executive power for its activity, then the former and the latter must operate on the same level, without any mismatch in terms of power, competence and scope of activity.[22] Since the ESM is clearly a supranational actor, it is not realistic to expect national courts and parliaments to engage with the ESM on an equal footing. Furthermore, establishing a common, effective and legitimate mechanism of accountability at the European level constitutes the

[20] See C. KILPATRICK, B. DE WITTE (eds), *Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, in *EUI Working Papers*, no. 5, 2014. See also C. KILPATRICK, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in *EUI Working Papers*, no. 34, 2015.

[21] See C. FASONE, *National Parliaments Under "External" Fiscal Constraints. The Case of Italy, Portugal and Spain Facing Eurozone Crisis*, in *LUISS Guido Carli School of Government Working Papers*, no. 19, 2014.

[22] For the definition of accountability, see M. BOVENS, *Analysing and Assessing Accountability*, cit., p. 450: "Accountability is a relationship between and actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".

only manner to preserve the equality of EU citizens *vis-à-vis* conditionality policies.[23] Only supranational institutions such as the CJEU and the European Parliament can hold the ESM accountable for *every* citizen of the European Union. On the other hand, domestic courts and parliaments lack the mandate, the vision as well as the legitimacy to operate on behalf of all the European citizenry. The principle of equality is openly disregarded when the degree of protection granted to EU citizens against illegitimate conditionality measures depend upon the activism, dimension and importance of their domestic constitutional court or parliament.[24]

II. We are one, but we are not the same. The *Mallis* case and the accountability of the Eurogroup and the Board of Governors

II.1. The Cypriot bail-out

At the beginning of 2012, the Cypriot economy was in severe distress, with markets doubting the stability of its banking system and the creditworthiness of the country. The two major Cypriot banks were in desperate need of recapitalisation, and the government had no choice but to request financial assistance from the ESM. As already stated above, assistance by the Mechanism is based on "strict conditionality", which means that the loan cannot be disbursed unless the beneficiary state agrees to comply with the conditions imposed by the ESM.

On 27 June 2012, the Eurogroup indicated that the Republic of Cyprus, in order to obtain financial assistance from the ESM, was to negotiate a MoU with the *troika*, composed by the Commission, the ECB and the International Monetary Fund (IMF). In the case of Cyprus, the most notable condition required during the negotiations was the bail-in of the two main banks of the country. There is a bail-in every time the resolution of financial firms is partially covered by the resources of creditors and depositors. Therefore, the restructuring of the Cypriot banking system would have required equity shareholders, bondholders, and uninsured depositors to pay for the merger and recapitalisation of the two credit institutions. In March 2013, the Republic of Cyprus decided

[23] See F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, in *German Law Journal*, 2015, p. 1003 *et seq.*

[24] The EU legal scholarship has highlighted the "constitutional unbalances" created by the euro-crisis and the reform of the European Monetary and Economic Union (EMU) within the Eurozone. Whereas domestic parliaments and constitutional courts have seen their powers diminished during and after the financial crisis, the effects have not been equally distributed within the Eurozone, creating a strong divide between creditor and debtor countries, as well as between big and small ones. Some courts and parliaments have maintained (if not increased) their competences, whereas others have seen theirs substantially reduced. See M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-crisis*, in *Modern Law Review*, 2013, p. 817 *et seq.* and C. Joerges, *Brother, Can You Paradigm?*, in *International Journal of Constitutional Law*, 2014, p. 769 *et seq.*

to accept this condition, reaching a political agreement with the other members of the Eurozone and crystallising this consensus in a "draft" memorandum of understanding.

On 16 March 2013, the Eurogroup welcomed the acceptance of the Cypriot authorities to bail-in the national banking system.[25] On 25 March 2013, the Eurogroup issued a statement indicating that it had reached an agreement related to the key elements of the stability support, including the plan to bail-in the two main banks.[26] The same day, the Governor of the Central Bank of Cyprus put them into resolution.[27] Over the course of two months, precisely between March and April 2013, most of the account holders of the two credit institutions with more than 100,000 euro in their deposits lost substantial parts of their belongings.[28]

II.2. The *Mallis* case

A group of depositors identified the Eurogroup as the main culprit behind the decision to bail-in the Cypriot banking system. The Eurogroup was the only EU actor to endorse the bail-in before its implementation at national level, and its statement on 25 March 2013 was issued the same day of the resolution. They claimed that this act was the legal source imposing upon national Cypriot authorities the bail-in procedure. Henceforth, they initiated an action for annulment against the statement of the Eurogroup issued on 25 March 2013.[29] Since they were uncertain whether the Eurogroup, an informal body without legal personality, could be a defending party in the proceeding, the plaintiffs decided to bring the action not only against the latter, but also against the Commission and the ECB, claiming that they were the *de facto* authors of the statement. Ultimately, they brought before the CJEU every EU actor involved in the management of conditionality measures, hoping that the Court could hold at least one of them judicially accountable for the conditions attached to the financial aid.

Both the General Court in the first instance and the Court of Justice in appeal dismissed the claim on similar grounds.[30] The Court of Justice analysed the role of the Eurogroup in the management of conditionality policies relying on a textual interpretation of

[25] Eurogroup statement on Cyprus of 16 March 2013, cited in P. Demetriades, *A Diary of the Euro Crisis in Cyprus. Lessons for Bank Recovery and Resolution*, Cham: Palgrave Macmillan, 2017, p. 102.

[26] Eurogroup statement on Cyprus of 25 March 2013, cited in P. Demetriades, *A Diary of the Euro Crisis in Cyprus*, cit., p. 103. See also the journalistic sources reported by T. Beukers, *The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, in *Common Market Law Review*, 2013, p. 1579 *et seq*.

[27] Court of Justice, judgment of 20 September 2016, case C-105/15 P, *Mallis and Malli v Commission and ECB* [GC], para. 19.

[28] C. Duve, P. Wimalasena, *Who Decides Whether Bail-in is Legal? What Comes after Cyprus and Greece?*, in *Law and Financial Markets Review*, 2015, p. 180 *et seq.*

[29] *Mallis and Malli v Commission and ECB* [GC], cit.

[30] The focus of this section will not be on the General Court's judgment, but merely on the Court of Justice's ruling in appeal.

the provisions of EU law dedicated to this assembly. The latter is a body composed by the finance ministers of the Member States whose currency is the euro.[31] A protocol of the Treaties further establishes that "the ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the common currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings".[32] Based on those provisions, the Court of Justice found that the Commission and the ECB participate in the Eurogroup meetings as mere observers, without any decision-making power. Henceforth, they cannot be considered the authors of the contested statement.[33] They certainly perform relevant tasks in the management of conditionality policy, such as negotiating the MoU, however those duties are entrusted to the Commission and the ECB by the Board of Governors, a body of the ESM, and on the basis of the TESM.[34] In other words, those two institutions act within the ESM framework as agents of an international body (the Board of Governors) on the basis of international law (the TESM).[35] Henceforth, their activity within the ESM framework cannot be linked to the Eurogroup, which belongs to the EU legal order.

Concerning the Eurogroup, the Court analysed whether the latter and its statements could be subjected to an action of annulment on the basis of Art. 263 TFEU. It dismissed the action because of the legal nature of the Eurogroup, which is considered an informal body without decision-making powers. Firstly, an action for annulment is only possible against EU institutions, listed by Art. 13, para. 1, TEU, as well as bodies, offices and agencies of the Union. The Court found that the Eurogroup does not belong to either of those two groups, being a mere "forum of discussion" where finance ministers of the euro area meet "informally".[36] It cannot be considered an EU Institution, as it is not listed in Art. 13, para. 1, TEU. Similarly, it does not constitute a configuration of the Council of the European Union, as those configurations are established in a Council Decision that does not mention the Eurogroup.[37] Finally, it cannot be regarded as an office, body or agency of the EU within the meaning of Art. 263, para. 1, TFEU, given its informality and lack of legal personality.[38] Concerning the statement, the Court of Justice

[31] Art. 137 TFEU.

[32] Protocol no. 14 on the Eurogroup.

[33] *Mallis and Malli v Commission and ECB* [GC], cit., para. 57.

[34] *Ibid.*, para. 54-56. The duties of EU Institutions within the ESM framework will be analysed in section III.1.

[35] *Mallis and Malli v Commission and ECB* [GC], cit., para. 52.

[36] Protocol no. 14 on the Eurogroup.

[37] Decision 2009/937/EU of the Council of 1 December 2009 adopting the Council's Rules of Procedure.

[38] Opinion of AG Wathelet delivered on 21 April 2016, joined cases C-105/15 P to C-109/15 P, *Mallis and Malli v. Commission and ECB*, para. 64, according to which "whenever the TFEU Treaty has sought to make art. 263 TFEU applicable without requiring the possession of legal personality, it has expressly named the institutions, offices, agencies and bodies in question, be that the European Council or the

found that it was an act "of a purely informative nature", which intended to inform the general public of the existence of a political agreement between the Eurogroup and the Cypriot authorities regarding the necessity to grant financial assistance.[39] Given its declaratory scope, the announcement never had the objective of producing legal effects *vis-à-vis* third parties, which constitutes a requirement for judicial review at the European level. In conclusion, the statements of the Eurogroup cannot produce legal effects; therefore, they are not reviewable by the Court of Justice.[40]

II.3. The political and legal accountability of the Eurogroup

If the Eurogroup is only an informal forum of discussion, then who is responsible for conditionality? More precisely, who decided to allocate the rescuing cost of the Cypriot banking system to the creditors and clients of the two banks? The implicit message of the Advocate General and the Court seems to be that, since the EU did not grant stability support to Cyprus, then EU law cannot provide an answer. Instead, as the assistance was granted by the ESM, we should look into the source of international law regulating its activity, notably the TESM. This intergovernmental Treaty gives extensive decision-making powers in the field of conditionality to a particular body, the Board of Governors, which has the exact same composition of the Eurogroup, it being formed by the finance ministers of the Eurozone.[41] The Board takes the decision "to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding, and to establish the choice of instruments and the financial terms and conditions".[42]

The procedure for granting financial assistance established in the TESM clearly confirms that the Board is the main decision-making body behind conditionality measures. A Member State seeking financial assistance must forward a request to the Board of Governors, which will take a final decision after the Commission, in liaison with the ECB and possibly the IMF, has assessed the existence of a threat to the financial stability of the Eurozone.[43] The details of the conditionality attached to the financial assistance are

Committee of Regions". The analysis of the AG on the legal nature of the Eurogroup was endorsed by the Court of Justice at para. 61.

[39] *Mallis and Malli v Commission and ECB* [GC], cit., para. 59.

[40] See Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 54. See also P. Craig, *The Eurogroup, Power and Accountability*, in *European Law Journal*, 2017, pp. 234-249; S. Shaelou, A. Karatzia, *Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Ledra and Mallis*, in *European Law Review*, 2018, p. 248 *et seq.*; P. Craig, M. Markakis, *The Euro Area, Its Regulation and Impact on Non-Euro Member States*, in P. Koutrakos, J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham: Edward Elgar, 2017; R. Smits, *ESM Conditionality in Court: Two Advocate Generals on 14 Cypriot Appeal Cases Pending in Luxembourg*, in *Acelg Blog*, 22 April 2016, acelg.blogactiv.eu.

[41] Art. 5 TESM.

[42] Art. 5, para. 6, TESM.

[43] Art. 13, para. 1, TESM.

included in the MoU, a document drafted by the state concerned and the Commission, once again in liaison with the ECB and wherever possible together with the IMF. However, these EU institutions act only because they are *entrusted* by the Board of Governors and are under its direct supervision.[44] For example, the Commission can sign the MoU only with the approval of the Governors.[45] Hence, overall, the Board of Governors constitutes the main decision-making body of the ESM. It is responsible for making the most important decisions, including capital calls, the disbursement of stability support, and the availability of financial instruments.[46] While other institutions such as the Commission and the ECB carry out the tasks conferred by the TESM, they do not do it autonomously but as *agents* of the *Mechanism*, acting on behalf *of the Board* and under its direct control.[47] The relationship of principal-agents between the Board and the EU Commission was confirmed in the seminal *Pringle* case, where the Court established that the duties conferred to the latter, "important as they are, do not entail any power to make decisions of their own".[48]

This means that while the Eurogroup is not responsible for the conditionality attached to the ESM activity, the real "culprit" is a body with the *exact same* composition as the Eurogroup, which is also chaired by the same president.[49] Although the Eurogroup cannot be equated with the Board of Governors, as the former is established by EU law and the latter by an international treaty, the TESM, this is an extreme case of institutional proximity, with two institutional actors composed by the same persons operating in two different, yet substantially linked, spheres of the law. The interpretation offered by the General Court and the Court of Justice is perfectly in line with the text of the Treaties, in particular the Protocol on the Eurogroup. However, there is a clear mismatch between this formalistic reading and two factual evolutions which have occurred during the euro-crisis. The first is the "institutional evolution" experienced by this assembly, which has acquired a prominent role in the management of conditionality policies.[50] As the assembly where finance ministers are seated, the Eurogroup disposes

[44] Art. 13, para. 3, TESM.

[45] Art. 13, para. 4, TESM.

[46] Art. 5 TESM.

[47] See Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 108.

[48] *Pringle*, cit., para. 161.

[49] Art. 5 establishes the possibility for the finance ministers to confirm the President of the Eurogroup also as President of the Board of Governors or to nominate a third person. So far the first choice has been preferred, in the person of Jeroen René Victor Anton Dijsselbloem first and Mario Centeno later. See Opinion of AG Whatelet, *Mallis and Malli v. Commission and ECB*, cit., para. 71. The decrees which established the resolution were published on 29 March 2013. See Central Bank of Cyprus, decrees 103 and 104 of 29 March 2013.

[50] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 237, according to which the Eurogroup would be a classic instance of institutional evolution, "whereby a body originally conceived to have a more limited role came to occupy a far more prominent position, outstripping in the process the constitutional vestments with which it was garbed, as judged by the Treaty provisions to deal with it".

"the power of the purse", and has acquired the competence to make emergency decisions concerning the disbursement of financial assistance.[51] The case of Cyprus constitutes a telling example of this *de facto* power, which is not sanctioned by any legal basis within EU law. The bail-in was a – again, *de facto* – ultimatum handed by the Eurogroup to the Cypriot Government and Parliament. Since it was necessary to decide within two days how to recapitalise the banking system, national ministers acting within the Eurogroup decided to preserve their budgetary resources and allocate part of the burden of the operation to the creditors of the bank. The authorship of the decision to proceed with the bail-in rests with the Eurogroup, whose announcement occurred just two days before the national law establishing the procedure.[52] The words of the Cypriot finance ministry may be more enlightening than every other analysis: "Programme partners had formulated their own comprehensive macroeconomic adjustment programme. Subsequently, the new government had only very little time and scope to further negotiate aspects of the MoU. The most controversial aspect of the final MoU was the application of the bail-in instrument on bank deposit. The Government was forced to accept this measure under duress".[53]

The second factual evolution is the establishment of the Board of Governors. This body gives the President and the members of the Eurogroup the possibility to dismiss the clothes of EU law and wear the ones provided by the TESM, thus taking conditionality decisions that are binding for Member States whose currency is the euro and produce substantial effects on EU citizens.

As the resources of the ESM come from the fiscal capacity of the Member States, it is normal that national finance ministers want to have the final say on when and how to disburse financial assistance.[54] What is less justifiable, however, is that they can make

[51] L. Van Middelaar, *Taking Decisions or Setting Norms? EU Presidencies between Executive and Legislative Power in a Crisis-driven Union*, in B. Steunenberg, W. Voermans, S. Van den Bogaert (eds), *Fit for the Future. Reflections from Leiden on the Functioning of the EU*, Den Haag: Eleven International Publishing, 2016, p. 7 *et seq*.

[52] Cf. factual backgrounds of the *Mallis* and *Ledra* cases: *Mallis and Malli v Commission and ECB* [GC], cit., paras 13-22 and *Ledra Advertising v. Commission and ECB*, cit., paras 14-24.

[53] Answer given by the Cypriot finance minister to the questionnaire forwarded by the European Parliament. European Parliament, *Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the 'troika' (Commission, ECB and the IMF) actions in euro area programme countries*, 24 April 2014, www.europarl.europa.eu. See also M. Dawson, *The Governance of EU Fundamental Rights*, cit.

[54] Only the initial, paid-in capital of the ESM budget comes directly from national budgets (Art. 41 TESM). The rest comes from market operations, as the ESM can raise funds by issuing capital market instruments and engage in money market transactions. However, its creditworthiness and ability to raise funds is only as strong as the one of the Member States belonging to the organisation. For a legal analysis of the ESM financial toolkit, see V. Borger, *The European Stability Mechanism, a Crisis Tool Operating at Two Junctures*, in B. Wessels, M. Haentjens (eds), *Research Handbook on Crisis Management in the Banking Sector*, Cheltenham: Edward Elgar Publishing, 2015, p. 150 *et seq*.

such decisions completely outside the judicial control of the CJEU. When the finance ministers act under the ESM framework, taking the guise of the Board of Governors, they enjoy impunity *vis-à-vis* private persons given the international nature of this body, which is fully extraneous to the European legal order.[55] On the other hand, the actions of the Eurogroup fall outside the scope of judicial scrutiny, it being considered an "informal forum" whose decisions are not acts producing legal effects.[56]

It is noteworthy that the absence of judicial control is not compensated by a more sophisticated system of democratic oversight. In the EU institutional landscape, the only institutions capable of influencing the Eurogroup decision-making would be the European Council and the Eurosummit, being them the EU highest executive bodies.[57] However, it is difficult to see how those institutions, also representing the interests of national governments, could improve the accountability of the Eurogroup. The European Parliament has democratic oversight, although weak and indirect, only over the activity of the Commission and the ECB, whose representatives have reporting obligations to the competent Parliament committee.[58] The only direct link between the Eurogroup and the Parliament is provided by self-imposed reporting obligations, such as the commitment of the Eurogroup President to inform the European Parliament about the Eurogroup priorities.[59] In 2013, the European Parliament reported that "the ultimate political responsibility for the design and approval of the macroeconomic adjustment programmes lies with the EU finance ministers and their governments", deploring "the absence of EU-level democratic legitimacy and accountability of the Eurogroup when it assumes EU-level executive powers".[60]

When Protocol n. 14 was drafted, the Eurogroup was supposed to be a mere political forum to discuss, at the ministerial level, potential economic reforms. A few years later, the euro-crisis substantially changed the nature of the powers that the finance ministers could exercise within the European economic governance. This assembly is no longer an informal body to discuss political projects, but it is now a decision-making executive with management, oversight and implementation competences in the field of conditionality.[61] The problem lies in the fact that such evolution did not occur under EU law, but was sanctioned by an international treaty which established another body mirroring the Eurogroup. Although the decision to not recognise this transformation re-

[55] *Pringle*, cit., paras 178-182.

[56] *Mallis and Malli v Commission and ECB* [GC], cit., para. 59.

[57] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 240.

[58] The accountability powers of the European Parliament towards the activity of the ECB and the Commission within the ESM network will be assessed in section IV.

[59] See European Council, *Role of the Eurogroup President*, www.consilium.europa.eu.

[60] European Parliament Report 2013/2277/(INI) of 28 February 2014 on the enquiry into the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, para. 50.

[61] P. Craig, *The Eurogroup, Power and Accountability*, cit., p. 237.

spects the formal veil which separates EU from international law, it has severe consequences for the mechanisms of judicial and political accountability provided by the European legal order.[62]

III. The man the authorities came to blame? The institutional liability of the Commission in the *Ledra* case

III.1. The legality of European institutions acting outside the Treaties

Despite its international law nature, the ESM framework heavily involves European institutions, especially the EU Commission and the ECB, entrusting them with executive and monitoring tasks.[63] In particular, the Commission is called to assess requests for financial support, evaluate their urgency, negotiate the MoU with the recipient Member State, monitor compliance with the conditionality attached to the financial assistance[64] and finally participate in the meetings of the Board of Governors and the Board of Directors as an observer.[65] Given the relevance of those tasks, the activity of the Commission within the ESM framework was judicially challenged in 2012, altogether with the validity of the ESM itself, well before the *Ledra* and *Mallis* cases.

In the seminal *Pringle* judgment, the Court of Justice stressed the role of the Commission as agent of the ESM, whose activity within the TESM "solely commits the ESM".[66] Furthermore, it endorsed the commixture of international law and EU Institutions, subject to two constitutional caveats. Firstly, Member States are entitled to borrow EU Institutions only in areas that do not fall under an exclusive competence of the European Union.[67] The Court clearly stated that this condition, in the case of the TESM, was fully satisfied, as the Mechanism was neither affecting the field of monetary policy (an exclusive competence of the Union) nor the Treaty articles related to economic policy (a coordinating competence). This caveat was expressly directed at Member States, limiting their powers to borrow EU Institutions.

The second requirement was more difficult to assess, as it required that the new tasks created through international law must never alter "the essential character of the

[62] *Ibidem*.

[63] The TESM also relies on the Court of Justice: Art. 37 TESM. This section will merely deal with the role of the Commission within the ESM framework. The independent and technocratic nature of the ECB would require a separate treatment of this institution, which, for space limitation, it is not possible to carry out here. For an academic work dealing also with the role of the ECB, see A. Karatzia, M. Markakis, *What Role for the Commission and the ECB in the European Stability Mechanism?*, in *Cambridge International Law Journal*, 2017, p. 232 *et seq.*

[64] See Art. 13, para 1, Art. 4, para. 4, and Art. 13, paras 3 and 7, TESM respectively.

[65] Art. 5, para. 2, and Art. 6, para. 2, TESM.

[66] *Pringle*, cit., para. 161.

[67] *Ibid.*, para. 158.

powers conferred on those institutions" by the Treaties.[68] The Court did not further elaborate on this condition, without clarifying how to draw the line between the essential and non-essential character of EU Institutions' tasks. This lacuna left scholars pondering the extent of the obligation of the Commission and the ECB to respect EU law when they were acting outside the EU constitutional framework.[69] Can the Commission still be considered the "guardian of the treaties" even when it is acting outside them?

In an obiter dictum in *Pringle*, the Court briefly touched upon the responsibility of the Commission *vis-à-vis* EU law in the ESM framework, ruling that it has the duty to "ensure that the Memoranda of understanding concluded by the ESM are consistent with European Union law".[70] It is important to also notice that the TESM provides a similar requirement, although smaller in scope. Art. 13, para. 4, of the TESM establishes the obligation of the Commission to sign the MoU on behalf of the ESM, but only insofar as the document is drafted in full compliance with a particular area of EU law, namely the measures of economic policy coordination. Hence, both EU law and the TESM converged in obliging the Commission to ensure the consistency and coherency between the MoU and EU law.

III.2. The action for damages: the right path to ensure the liability of the ESM?

The *Ledra* case has provided further insight concerning the applicability of EU law to the activity of EU Institutions acting outside the Treaties.[71] The ruling involved the same factual background as the *Mallis* judgment, namely the attempt of account holders of the restructured Cypriot banks to partially redress the losses they incurred during the bail-in procedure. The Court reiterated the distinction between the international nature of the ESM and the European legal order, stating that the TESM-based activity pursued by the ECB and the Commission commits the ESM alone.[72] Furthermore, it confirmed that their acts within the ESM framework, including the signature of the MoU, cannot be imputed to them, but only to the ESM.[73]

The surprising part of the judgment came when the Court of Justice addressed the role of the European Commission in bail-out procedures. The Court reaffirmed that en-

[68] *Ibid.*, para. 162.

[69] A. Karatzia, M. Markakis, *What Role for the Commission and the ECB in the European Stability Mechanism*, cit.; S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, in *European Union Constitutional Law Review*, 2013, p. 37 *et seq.*; P. Craig, Pringle *and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 2013, p. 263 *et seq.*

[70] *Pringle*, cit., para. 104.

[71] *Ledra Advertising v. Commission and ECB* [GC], cit. The case was decided by the Court of Justice reunited in the Grand Chamber. This section is analysing only the appeal before the Court of Justice, and not the case before the General Court.

[72] *Ibid.*, para. 51.

[73] *Ibid.*, para. 52.

trusting new tasks to EU institutions cannot alter the essential nature of their powers, which in the case of the Commission includes its role as guardian of the Treaties.[74] Acting under the ESM framework does not change the Commission's obligation to promote the general interest of the Union and to oversee the correct application of EU law. Furthermore, the TESM also provides for the Commission's duty to secure the consistency between ESM and EU law.[75] These responsibilities entail a specific consequence, namely the duty of the Commission to "refrain from signing a memorandum of understanding whose consistency with EU law it doubts".[76] The Court considered that the essential role of the Commission ("guardian of the Treaties") also entails the obligation to ensure the consistency between EU and ESM law.[77] This new reading of the Commission's tasks under the ESM framework is not only relevant from an institutional viewpoint, but also has practical effects on EU citizens who are affected by conditionality measures potentially inconsistent with EU law. They are now able to bring an action for damages for non-contractual liability against the Commission.[78] The admission of this action constitutes a novelty in this area of the law, as it allows individuals to hold ESM agents responsible for their activity when the latter is incompatible with EU law, including the Charter.

Hereafter, the Court analysed whether the ECB and the Commission had incurred in non-contractual liability for their action, having included the bail-in as a condition in the MoU, or their inaction, having not prevented that such a condition was included in the MoU.[79] In particular, the Court analysed whether the decision to impose a bail-in procedure as a condition for assistance constituted a "serious breach of a rule of law intended to confer rights on individuals", being it the main requirement for a successful action for damages.[80] Such a rule of law was identified with the right to property of the plaintiffs, whose economic resources were used to restructure the Cypriot banking system without their consent.[81] The Court started its analysis by pointing out that such a right is not absolute, and it can be restricted by public authorities when such restrictions meet objectives of general interests and comply with the principle of proportionality.[82] In the case at hand, the restrictions imposed by the Commission did not constitute a disproportionate and intolerable interference with the plaintiffs' right to property, as they were pursuing a legitimate objective, namely the financial stability of

[74] *Ibid.*, para. 57.

[75] Art. 13, paras 3 and 4, TESM.

[76] *Ledra Advertising v. Commission and ECB* [GC], para. 59.

[77] See A. Poulou, *The Liability of the EU in the ESM Framework*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 131.

[78] Art. 268 and Art. 340, paras 2 and 3, TFEU.

[79] *Ledra Advertising v. Commission and ECB* [GC], para. 63.

[80] Court of Justice, judgment of 4 June 2000, case C-352/98 P, *Bergaderm and Goupil v. Commission*, para. 42.

[81] Cf. Art. 17, para. 1, of the Charter. *Ledra Advertising v. Commission and ECB* [GC], cit., para. 68.

[82] *Ibid.*, para. 70.

the Eurozone.[83] Given the level of financial integration within the Eurozone, international banks are incredibly interconnected, so much so that the failure of one or more of them can have knock-on effects not only on other financial firms, but also on other sectors of the economy.[84] Here the Court seems to take into consideration the concept of systemic financial crisis, which materialises when the failure of a financial institution can compromise the globalised financial system in which it operates and spread risks to other non-financial sectors of the economy.[85] In light of the systemic risks posed by the collapse of the Cypriot banking system to the financial stability of the Eurozone, the Commission and the ECB had the right to substantially restrict the right of property of the plaintiffs, using part of their deposits and bonds for the resolution of the two credit institutions. Henceforth, the Court ruled that the Commission and the ECB had not adopted an unlawful conduct, as their activity was legally justified.[86]

III.3. Does the *Ledra* case (indirectly) improve the judicial accountability of ESM conditionality?

It is important to understand whether the *Ledra* case, which allows an action for damages against the Commission, can render the ESM-based activity of this Institution more accountable.[87] Furthermore, since we are dealing with the activity of the Commission *within* the ESM framework, it is necessary to assess whether the new judicial avenue offered by the Court of Justice could *indirectly* improve the judicial accountability of the ESM itself. In other words, does *Ledra* constitute a step in the right direction towards a more accountable management of conditionality measures?[88]

The action for damages cannot hinder the ability of EU Institutions to make political decisions within the boundaries of EU law. Restricting the room for manoeuvre of the EU when political powers are exercised would finally lead the Court of Justice to substitute the political judgment of EU Institutions with its own. Henceforth, the requirements to have a successful action for damages are very difficult to satisfy. Plaintiffs must demonstrate "a sufficiently serious breach of a rule of law conferring rights to an indi-

[83] *Ibid.*, para. 71.

[84] *Ibid.*, para. 72.

[85] See S. Schwarcz, *Systemic Risk*, cit.

[86] *Ledra Advertising v. Commission and ECB* [GC], cit., para. 75.

[87] This analysis is also relevant for the effectiveness of this action *vis-à-vis* the activity of EU Institutions not only when they operate within the ESM framework, but more generally in the European Economic Governance. See General Court: judgment of 24 January 2017, case T-749/15, *Nausicaa Anadyomène SAS and Banque d'escompte v. ECB*, and judgment of 3 May 2017, case T-531/14, *Sotiropoulou and others v. Council*.

[88] For a positive, but conditioned answer, see A. Hinarejos, *Bailouts, Borrowed Institutions and Judicial Review: Ledra Advertising*, in *EU Law Analysis*, 26 September 2016, eulawanalysis.blogspot.co.uk and R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, in *Common Market Law Review*, 2017, p. 1154.

vidual", a proof of damage and a causal link between the two elements.[89] The first requirement is particularly burdensome, given that only when the EU Institution or body has substantially reduced or no discretion, the burden of proof that needs to be provided by the plaintiff would scale down to a "mere infringement of EU law".[90] However, as stated in the introduction, the nature of conditionality policies is inherently political, as they involve political decisions concerning how to restore the financial and fiscal stability of the beneficiary Member State. Furthermore, the ESM only operates in emergency situations, as it can intervene only when the stability of the Eurozone is at risk. This put the plaintiff in an impossible position, as they will obtain compensation only when they demonstrate that EU Institutions have seriously breached EU law taking complex decisions during an emergency situation.

The very high burden of proof required by plaintiffs, however, is only one of the problematic issues of *Ledra*. The second one lies in its institutional implausibility, as the judgment requires the Commission to be liable for an activity which lies outside its own decision-making powers. The Court's case law regarding the Commission's role in the ESM framework appears to be contradictory. On the one hand, the Commission was continuously deemed to be a mere agent of the ESM, with no "power to make decisions of its own" (*Pringle* case).[91] On the other, in *Ledra,* it was requested to ensure the consistency between the ESM and EU law. One of the two points must concede to the other. Either the Commission is devoid of decision-making power within the ESM, and it cannot be responsible for unlawful conditionality measures, or it has such power, and then the findings in *Ledra* are well grounded. Although the lack of transparency in the management of conditionality renders it difficult to determine which Institution is responsible for a decision, the Commission plays an ancillary and implementing role within the ESM.[92] It is responsible for the negotiation, drafting and signing of the MoU, but it carries out those activities as an agent of the real decision-maker, namely the finance ministers of the Eurozone. This is the reason why its activity on the basis of the TESM "solely commits the ESM".[93]

The Cypriot case provides a revealing illustration of the principal-agent relationship between the ministers and the Commission. The plaintiffs in both the *Ledra* and *Mallis* cases requested judicial protection against a very specific condition imposed by the

[89] *Bergaderm and Goupil v. Commission*, cit., para. 42.

[90] Court of Justice, judgment of 10 December 2002, case C-312/00 P, *Commission v. Camar and Tico*, para. 54, and General Court, judgment of 2 March 2010, case T-16/04, *Arcelor v. Parliament and Council*, para. 53.

[91] *Pringle*, cit., para. 161. Cf. Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 108.

[92] For the lack of transparency, see A. KARATZIA, M. MARKAKIS, *What Role for the Commission and the ECB in the European Stability Mechanism*, cit., p. 240.

[93] *Pringle*, cit., para. 161.

ESM on the Republic of Cyprus, the bail-in of the two main Cypriot banks.[94] This condition was explicitly requested by the finance ministers of the Eurozone, who announced this solution acting as the Eurogroup in March 2013, and formally approved the disbursement of financial aid – which was conditioned to the bail-in – acting as the Board of Governors.[95] The Commission does not even vote in those two bodies, as it participates in both of them as an observer without voting rights.[96]

Finally, since the ESM is an international organisation extraneous to the EU legal order, EU law does not provide any legal basis to impose a financial penalty on the ESM. Therefore, a successful damages action directed against the Commission for its activity within the ESM framework could only be compensated by the EU budget. This would certainly be paradoxical, as the EU would be requested to pay for unlawful activity carried out by an international body, although with the participation of the Commission. Given the paucity of the EU budget, the success of such action is even less plausible.[97] Overall, the very high burden of proof required to succeed, the institutional implausibility and the financial risks for the EU budget prevent the action for compensation inaugurated in *Ledra* from improving the judicial accountability of ESM-based conditionality policies.

[94] See Commission, *The Economic Adjustment Programme for Cyprus*, Occasional Paper no. 143/2013, p. 107.

[95] Jeroen Dijsselbloem, President of the Eurogroup and the Board of Governors at the time of the Cypriot crisis, proudly acknowledged that the decision to bail-in the Cypriot Banking system was taken by the Eurogroup: "We found out that Cyprus not only had a massive banking sector, far oversized for the size of this island's economy, it was fully loaded with foreign deposit holders, many from Russia of whom we were not sure where the money was actually coming from. But as a politician I know one thing that we were not going to save with European and Cypriot taxpayers' money: Russian deposits. [...] it was a very difficult decision [...] but the outcome was the right decision [...] We did a bail-in on the investors, capital-holders and even the large deposit holders in Cyprus". See J. DIJSSELBLOEM, *Europa Lecture*, 17 January 2017, available at www.universiteitleiden.nl.

[96] Art. 5, para. 3, TESM, and Protocol no.14 on the Eurogroup.

[97] See General Court, order of 10 November 2014, case T-292/13, *Evangelou v. Commission and ECB*, a case concerning the legal expenses to be paid by the bailed-in plaintiffs who unsuccessfully participated in an action against the Commission and the ECB: "The ECB, for its part, merely stated that the case was of fundamental economic and political importance. However, it must be noted that if the Court had granted the applicants the compensation that they claimed they were entitled to, other holders of deposits in Cypriot banks which suffered a reduction in value at the material time could, in theory, have sought similar compensation. This could potentially have resulted in the European Union and the ECB being ordered to pay very large sums by way of compensation. It is therefore appropriate to conclude that the dispute represented a major economic interest for the Commission and the ECB".

IV. Are the times really a-changing? The possible transformation of the ESM into the European Monetary Fund

IV.1. The Commission's Proposal

The decision to set up the ESM was taken by Member States at the height of the euro crisis in 2012.[98] The urgency to react as quickly as possible to market speculations on the survival of the Eurozone led Member States to resort to international law. Legal scholars criticised this solution, as EU law did not prevent the establishment of a permanent stability mechanism within the European legal order, especially after the amendment of Art. 136 TFEU.[99] The Commission acknowledges that the decision to set-up the ESM as an international law-based institution created a "complex landscape where judicial protection, respect of fundamental rights and democratic accountability are fragmented and unevenly implemented".[100]

In December 2017, the Commission delivered a package of new legislative proposals aimed at completing the Economic and Monetary Union by 2025, including the project to transform the ESM into the European Monetary Fund (EMF).[101] This Proposal, based on the flexibility clause, Art. 352 TFEU, would turn the ESM into a "unique legal entity under EU law", with the ambitious objective to link its decision-making governance to the "robust accountability framework of the Union together with a fully-fledged judicial control".[102] The flexibility clause can be used as a legal basis to adopt appropriate measures, including establishing a new EU body, only when the requirements are satisfied. The EU must have the necessity to take action within the framework of EU policies. The aim of this action must be the achievement of an EU law objective, and finally the Treaties must not provide any other legal basis. In its Proposal, the Commission

[98] See Commission Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final of 6 December 2017.

[99] *Ibid.*, p. 5. See also Communication COM(2012) 777 final/2 of 28 November 2012 from the Commission, *Blueprint for a Deep and Genuine Economic and Monetary Union*, and see M. Schwarz, *A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation*, in *Common Market Law Review*, 2014, p. 389 *et seq.*, who claims that the Mechanism could have been established within the EU legal order through the enhanced cooperation procedure, and M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-crisis*, cit., according to whom the recent legal reforms within the EU economic governance, and in particular the intergovernmental establishment of the ESM, would have deprived the EU from the ability to successfully mediate political conflicts.

[100] Proposal for a Regulation COM(2017) 827, p. 3.

[101] See Communication COM(2017) 821 final of 6 December 2017 from the Commission, *Further Steps Towards Completing Europe's Economic And Monetary Union: A Roadmap*. Also C. Gortsos, *The Proposed Legal Framework for Establishing a European Monetary Fund (EMF): A Systematic Presentation and a Preliminary Assessment*, in *SSRN*, 17 December 2017, ssrn.com; M. Ioannidis, *Towards a European Monetary Fund, Comments on the Commission Proposal*, in *EU Law Analysis*, 31 January 2018, eulawanalysis.blogspot.com.

[102] Proposal for a Regulation COM(2017) 827, p. 3.

claims that those criteria are fully satisfied, as the establishment of the EMF is necessary to preserve the financial stability of the euro area and the Treaties have not provided any other provision to achieve this objective.[103] In *Pringle*, the Court of Justice did not rule whether the EU could lawfully establish the ESM within the EU legal order through Art. 352 TFEU, but clarified that EU primary law lacks an appropriate provision to establish a stabilisation mechanism.[104] Furthermore, the revised version of Art. 136 TFEU allows only Member States to establish a stability mechanism, and not the EU. Henceforth, the Commission is certainly right when it asserts that the first two requirements are complied with. However, it has been questioned whether the establishment of the EMF can be truly considered necessary, given that a stability mechanism is already in place – the ESM – for the same purpose.[105] In other words, it appears decisive to evaluate whether the last requirement, the "necessity test", is satisfied. First of all, it is difficult to imagine the Court of Justice preventing the realisation of a clear integrationist objective such as the transfer of the ESM into the EU legal order, transforming the management of ESM conditionality from an international law-based activity into an EU procedure under its judicial scrutiny. Besides, after Brexit, the European Union will be identified more and more with the Eurozone. The latter will represent 85 percent of the EU economy.[106] With the exceptions of Denmark and Sweden, all the remaining non-euro Member States are under the legal obligation to adopt the common currency.[107] If a stability mechanism is indeed necessary to preserve the financial stability of the Eurozone, and the latter is more and more central in the project of European integration, then it is very hard to claim that such a mechanism should not be integrated within the EU legal order. Finally, the Commission could claim that the establishment of the EMF is necessary to ensure that the objective of financial stability is achieved in a manner that is consistent with EU law, and in particular with the principle of effective judicial review.[108] Since bringing the ESM under the umbrella of EU law is the only way to put its activity under the judicial scrutiny of the CJEU, this line of reasoning could constitute another way to satisfy the "necessity test" required by Art. 352 TFEU. The main obstacle

[103] *Ibid.*, p. 5.

[104] *Pringle*, cit., paras 64 and 67.

[105] M. Ioannidis, *Towards a European Monetary Fund, Comments on the Commission Proposal*, cit.

[106] E. Maurice, *EU Mulls Post-Brexit Balance of Euro and Non Euro-Zone States*, in *EUobserver*,15 December 2017, euobserver.com.

[107] This is not to say that after Brexit the EMU will not be characterised by asymmetric integration, which constitutes an inherent element of the Economic and Monetary Union. See S. Van den Bogaert, V. Borger, *Differentiated Integration in EMU*, in B. De Witte, A. Ott, E. Vos (eds), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Cheltenham: Edward Elgar, 2017, p. 209 *et seq.*

[108] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, where the Court ruled, in a case also related to the compatibility of conditionality policies with EU law, that "the very existence of effective judicial review designed to ensure compliance with EU law is of the very essence of the rule of law", para. 36.

to the success of the Commission's Proposal does not seem to lie in the legality of the chosen legal basis, but rather on the political will of EU Member States. The flexibility clause can be used only if the Proposal of the Commission obtains the unanimous consent of the Council, besides the one of the European Parliament. Furthermore, EU Member States should conclude an intergovernmental agreement to transfer the ESM's funds into the newly established EMF, which also requires unanimity.[109] Certain national governments have already expressed their opposition to the EMF, since the latter, as we are going to see, may start a process characterised by the strengthening of the decision-making authority of the Commission at the expenses of their prerogatives.[110]

Despite the declarations of the Commission, the establishment of the EMF could hardly be considered an institutional revolution, as the Fund would succeed the ESM "with its current financial and institutional structures essentially preserved".[111] Indeed, the Statute of the EMF, annexed to the Proposal, is broadly similar to the TESM, with the exception of a few "targeted adjustments".[112] As the EMF would become an EU body, it would be subjected to the *Meroni* and *Romano* doctrines, which constitutionally delimitate the extent and degree of powers that the EU can delegate to EU agencies and bodies.[113] In those two cases, the Court established that the latter could only exercise "clearly defined executive powers", and should not acquire "discretionary powers, implying a wide margin of discretion, which may, according to the use which is made of it, make possible the exercise of actual economic policy".[114] In addition, EU agencies or bodies could not take "acts having the force of law".[115] Without any legal adjustment, the EMF would not satisfy those requirements, as conditionality policies would allow the latter to exercise discretionary powers, which in certain cases may even amount to exercising economic and budgetary policies in lieu of the beneficiary Member State. In addition, the acts of the EMF could become indistinguishable from "acts having the force of law" every time the MoU would establish conditions that are so detailed that do not leave any margin of discretion to national authorities called to implement them.

[109] Proposal for a Regulation COM(2017) 827, p. 5.

[110] For example, German Chancellor Angela Merkel is opposing the idea of turning the ESM into an EU body. See G. CHAZAN, *Angela Merkel Snubs Emmanuel Macron on Plan for EU Monetary Fund*, in *Financial Times*, 17 April 2018, www.ft.com. She expressed the preoccupation that such transformation may put the mechanism under the control of the Commission, at the expense of the tight control so far exercised by Eurozone Governments. However, the establishment of the EMF as an EU body constitutes one of the objectives of the coalition agreement of the current Government in Germany, see L. GUTTEMBURG, N. KOENIG, L. RASCHE, *Merkel on EU Reforms, a Decryption*, in *Jacques Delors Institute*, 6 June 2018, www.delorsinstitut.de.

[111] Proposal for a Regulation COM(2017) 827, p. 5.

[112] *Ibid.*, p. 6.

[113] Court of Justice: judgment of 13 June 1958, case 9-56, *Meroni v. High Authority*; judgment of 14 May 1981, case 98/80, *Romano*.

[114] *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, cit.

[115] *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, cit.

Although the Court has recently reiterated the constitutional importance of those two cases, it has also *de facto* enlarged the degree of powers that can be delegated by the EU. In a recent landmark case the Court has allowed the European Securities and Markets Authority (ESMA) to acquire the power to prohibit or restrict certain financial activities in case they threaten the orderly functioning and integrity of EU financial markets.[116] Such power entails a wide margin of discretion, since it requires ESMA to evaluate whether a financial market risk materialises, and implies the adoption of legal acts of general application, as prohibiting certain financial products have a general effect upon investors. Nevertheless, the Court found such competence in line with the *Meroni* doctrine. In addition, it held that "the institutional framework established in the TFEU, in particular art. 263 and 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application".[117] A comparison could be made between the power of ESMA to prohibit certain financial activities and the one of the EMF to provide financial assistance. Both competences pursue the same objective, namely the financial stability of the European Union. They both involve "certain decision-making powers in an area which requires the deployment of specific technical and professional expertise".[118] Nevertheless, these similarities cannot overcome the differences. The management of financial assistance involves a much broader margin of discretion than the one granted to ESMA, as the content of the MoU can potentially encroach on every area of macroeconomic policy. There would be no clear parameter or criteria to restrict the discretion of the EMF when it establishes the conditions attached to financial assistance. Art. 13 of the Statute only provides that "the content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen", also providing a general duty of consistency with "the measures of economic policy coordination provided for in the TFEU".[119] On the other hand, the discretion of ESMA is substantially restrained by the ESMA Regulation and by various conditions and criteria established by EU secondary law.[120]

Since the powers exercised by the EMF as an EU body would be too wide and discretionary to comply with the *Meroni* and *Romano* doctrines, the latter must be closely controlled by another EU Institution, called to take the political and legal responsibility for its activity. To this end, the Commission's Proposal establishes that the Council must endorse the decisions taken by the Board of Governors.[121] This is indeed a very effective solution, as the Board of Governors takes all the most important and discretionary decisions. An

[116] Court of Justice, judgment of 22 January 2014, case C-270/12, *United Kingdom v. European Parliament and Council of the European Union*, so-called *Short Selling* case.

[117] *Ibid.*, para. 65.

[118] *Ibid.*, para. 82.

[119] Statute of the EMF, Art. 13, para. 2.

[120] *Ibid.*, paras 46 and 51.

[121] Art. 3 of the Proposal for a Regulation COM(2017) 827.

endorsing act by the Council can solve the problem of delegation, providing at the same time a direct link between the activity of the EMF and the one of the Council. The endorsement can be granted in two different ways. Normally, the Board must transmit its acts to the Council immediately after their adoption, and they enter into force only once the latter approve them. However, in specific cases, the emergency procedure can be activated, according to which the act of the Board has legal effects unless the Council forwards an objection. The endorsement procedure is not a new institutional device in EMU. For example, the Commission is called to endorse the draft regulatory and implementing technical standards issued by the European Supervisory Agencies (ESAs), and the ECB Governing Council to endorse the draft decisions of the ECB supervisory board within the context of the Single Supervisory Mechanism (SSM).[122] Although the EMF cannot be strictly compared to the ESAs and the ECB supervisory board, it seems that the EU increasingly relies on this endorsement procedure, through which an expert body drafts decisions and an EU Institution endorses them to give them the force of law, in order to ensure accountability and institutional balance within the EMU.[123]

Other important "targeted adjustments" can be found in the management of stability operations. Although Arts 12 and 13 of the Statute of the EMF broadly reproduce the same articles of the TESM, few but relevant differences can be found. In particular, the ESM can provide financial assistance only "if indispensable to safeguard the financial stability of the euro area as a whole *and* of its Member States", whereas the EMF could do the same when the risks concern the financial stability "of the euro area *or* of its Member States".[124] This means that the EMF could provide assistance not only when a financial crisis has systemic effects for the Eurozone, but also when the latter endangers only the stability of the Member State affected. This would hardly revolutionise the activity of the EMF, as the disbursement of financial assistance would still ultimately depend upon a decision of the Board of Governors.[125] This means that deciding when a crisis can or cannot have systemic consequences for the EU largely remains a political decision to be taken by the Board of Governors. Given the level of financial integration reached within the Eurozone, it is also important to wonder whether it is still possible to

[122] For the endorsement procedure of the Commission *vis-à-vis* the ESAS: Arts 10 and 15 of Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. For the endorsement procedure of the ECB Governing Council *vis-à-vis* the Supervisory board, see Art. 26, para. 8, of Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. See also M. LAMANDINI, R. MUÑOZ, *EU Financial Law. An Introduction*, Padova: CEDAM, 2016, pp. 154 and 189.

[123] Thanks to Nathan de Arriba-Sellier for raising this point.

[124] Art. 12 TESM. See M. IOANNIDIS, *Towards a European Monetary Fund, Comments on the Commission Proposal*, cit.

[125] Art. 13, para. 4, Statute of the EMF.

have a financial crisis threatening the financial stability of a Member State without endangering the Eurozone as a whole.[126]

Concerning the procedure to disburse financial assistance, the Statute of the EMF contains some remarkable innovations. Firstly, the IMF is no longer mentioned among the actors involved in the procedure. In the TESM, the IMF had the task, "wherever possible", to negotiate the MoU along with the Commission and the ECB.[127] It was also entrusted, again "wherever possible", with the task of monitoring the compliance of the beneficiary Member State with conditionality.[128] This is no longer the case in the Proposal, as the IMF is partially substituted by the EMF, whose role in the procedure is greatly enlarged. In particular, the EMF is called to negotiate the MoU together with the Commission and the ECB and to sign it along with the Commission.[129] It is worth reflecting on those modifications. The IMF has been a relevant actor in the sovereign debt crisis, both as lender and as active participant of the *troika*, being responsible for the management and implementation of conditionality together with the EU Commission and the ECB. However, since the third Greek stability programme in 2015, the IMF is not participating in the bail-out with its own resources, due to disagreements with the Commission concerning the sustainability of the Greek public debt.[130] However, it is still part of the *troika*, monitoring the compliance of Greek authorities with the Commission and the ECB.[131] At the moment, it is not clear whether the IMF would again be involved in future programmes, also in light of the fact that the EU has acquired the necessary expertise to manage supranational loans without the IMF. However, since the IMF is an international organisation extraneous to the EU legal order, it is debatable whether it would need a legal source of European origins to operate within the *troika.* Its involvement within EMF-based conditionality will not depend upon the Statute of the EMF, and cancelling any mention of the IMF will not prevent its involvement in case the Board of Governors and the beneficiary Member State would decide to rely on the IMF again.

In the Proposal, the EMF would have a more active role in the troika than the ESM, being called to negotiate the MoU and sign it together with the Commission. Whereas the signing of the MoU, as we have seen in analysing the *Ledra* case, implies important legal consequence for the EMF, its formal participation in the negotiations would allow

[126] For a complete report of the current state of financial integration in the European Union, see D. VALIANTE, *Europe's Untapped Capital Markets, Rethinking Integration after the Great Financial Crisis*, CEPS Paperback, London: Rowman & Littlefield, www.ceps.eu.

[127] Art. 13, para. 3, TESM.

[128] Art. 13, para. 7, TESM.

[129] Art. 13, paras 3 and 4, of the Statute of the EMF.

[130] C. BAN, L. SEABROOKE, *From Crisis to Stability, How to Make the European Stability Mechanism Transparent and Accountable*, Transparency International EU, 2017, transparency.eu, p. 27.

[131] The IMF is participating in the third Greek stability programme through an "agreement in principle" that does not entail any disbursement. IMF, *IMF Managing Director Christine Lagarde to Propose Approval in Principle of New Stand-by Arrangement for Greece*, IMF Press Release no. 17/225, 15 June 2017, www.imf.org.

the EU to rely on the expertise developed by the ESM during the sovereign debt crisis. Curiously, the Proposal does not give any role to the EMF in monitoring the compliance with conditionality. This is in stark contrast with the current role played in this area by the ESM, which is now involved in monitoring the compliance of Greece with its third programme.[132] The ESM has successfully increased its involvement on the Greek bail-out on the basis of its large exposure to the country's debt.[133] Henceforth, it is peculiar to note that the Commission Proposal does not give to the EMF a competence that the ESM is already exercising *de facto*.

Those adjustments to the procedure to provide financial assistance should not be over-evaluated. Overall, they provide a shift of competences *within* the *troika*, but not *between* the *troika* and the finance ministers of the Eurozone. As we have seen, the procedure established in Art. 13 TESM is based on a clear division of powers between the Board of Governors, whose task is to take the most important decisions related to conditionality, and the *troika*, formed by the Commission, the ECB and the IMF, called to implement them. Under the EMF, this hierarchical relationship between the Board and the *troika* would remain untouched. The only change would be *within* the *troika*, where the Commission and the EMF would take over what was previously done by the IMF. In other words, the Proposal of the Commission would transform the ESM into an EU body, but it would not change the inherently intergovernmental manner in which it provides financial assistance. Exactly like the ESM, the Eurozone national governments would sit at the apex of the EMF governance.[134] This does not mean that inserting the ESM in the EU legal order would have no consequences on the governance and activity of the Mechanism. In fact, we must also take into consideration the hidden institutional transformations that the establishment of the EMF may bring in the long term. The EU has a long history of such transformations, with institutions shaping their form and activity *vis-à-vis* others through formal and informal interinstitutional arrangements, as well as legal and political principles.[135] Henceforth, it is important to take into consideration not only the text of the Commission Proposal, but also the effect that would have on the EMF the fact that its activity would be carried out within a constitutional ecosystem which is shaped by the mutual interaction of different constitutional actors. For example, being part of the EU constitutional framework, the EMF would be required to

[132] C. Ban, L. Seabrooke, *From Crisis to Stability*, cit., p. 19. The ESM is currently participating in the monthly missions to Greece in order to attend, together with the Commission, the ECB and the IMF, technical discussions related to the implementation by Greek authorities of conditionality policies.

[133] *Ibid.*, pp. 19-20.

[134] Art. 3 of the Statute of the EMF.

[135] For a seminal article concerning the concept of transformation within the EU legal order, see J. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*, for an application of this concept within the EMU, see M. Ioannidis, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, cit.

comply with the principle of institutional balance and the duty of sincere cooperation among institutions.[136] In a similar vein, a stricter judicial oversight from the Court of Justice may in the long term substantially modify the system of checks and balances characterising the EMF governance. Over time such constraints may render the instrument more accountable, and even radically change the way conditionality is implemented in Europe and perceived by European citizens.[137]

IV.2. The legal accountability of the EMF

From the point of view of legal accountability, namely the availability of judicial review at the European level, the transformation of the ESM into the EMF would constitute a major improvement. In order to understand the importance of this change, it is useful to review the difficulties faced by EU citizens to bring ESM-based conditionality measures before the CJEU.[138]

Individuals cannot challenge the acts of the ESM, as the latter is an international organisation based on the TESM, which does not provide any standing for non-privileged applicants. The ESM Institutions such as the Board of Governors and the Board of Directors enjoy a similar impunity. Individuals cannot initiate an action for damages against those bodies nor an action for annulment against their acts. Therefore, the intergovernmental nature of the ESM put this organisation outside the reach of individual complaints. On the other hand, challenging national measures implementing ESM-based conditionality seems equally arduous. The Court of Justice can hear a preliminary referral only when a national court refers a question related to the interpretation of EU law or the interpretation and validity of an act of EU institutions, bodies, offices and agencies. The question is whether the MoU, the document drafted by the Commission containing the conditions implemented by national authorities, should be considered an act of EU law according to Art. 267, para. 1, TFEU. The case law of the Court of Justice clearly shows that not all MoUs have the same legal nature. Instead, the dividing line between the EU or International Law nature of the MoU seems to be the legal basis according to which the Commission signs the agreement. When financial assistance is provided by the ESM, the Commission does not act according to EU law, but on the basis of Art. 13, para. 3, TESM. Therefore, the Commission signs the MoU *on behalf* of the

[136] Art. 13, para. 2, TFEU.

[137] Other important adjustments include the competence of the EMF to provide a common backstop to the Single Resolution Fund, the possibility for faster decision-making in specific urgent situations, and the possibility to develop new financial instruments. Due to space constraints, this section will merely focus on those adjustments that are the most relevant for the accountability of the EMF, in order to understand whether the latter would be more accountable than the ESM.

[138] For a more complete overview, see C. Kilpatrick, *The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality*, in *EUI Working Papers*, no. 14, 2017, and A. Karatzia, *An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States*, cit.

ESM producing an act of international law (TESM) which is not reviewable by the Court of Justice.[139] However, the situation is different when financial assistance is based on EU law. In the recent *Florescu* case, the Court analysed the legal nature of the MoU signed between the Commission and Romania.[140] The Romanian programme was provided by a facility mechanism based on Art. 143 TFEU and was entirely regulated by a Council Regulation.[141] The Court noted that, within the Romanian assistance programme, the Commission was signing the MoU on the basis of Art. 3 of the Regulation 332/2002.[142] Hence, the agreement was "an act whose legal basis lies in the provisions of EU law", which "constitutes an act of an EU Institution within the meaning of Art. 267(b) TFEU".[143]

The *Florescu* case clearly shows that, at least in terms of access to the Court of Justice, the legal basis according to which financial assistance is provided *does* make a substantial difference for individuals seeking justice. At the same time, it also reiterates that the only avenue available to individuals affected by the ESM activity is the action for damages inaugurated in *Ledra*. A solution that, as we have seen above, is far from ideal. Given this difficult situation, AG Wathelet decided to use his opinion on the *Mallis* case to provide advice to future plaintiffs aspiring to challenge the national implementation of ESM-based conditionality.[144] He noted that the content of the MoU – establishing the conditionality attached to ESM financial assistance – is reproduced, "in varying degrees of detail", also in a EU law-based program, the Macroeconomic Adjustment Program (MAP). The MAP is proposed by the Commission and approved by a Council decision.[145] Therefore, plaintiffs may ask national courts to refer the Council decision to the Court of Justice, thereby challenging the compatibility between the MAP and EU law.

This theory has not been tested so far. If the MAP were to be found illegal, the Commission and the Council would be obliged to modify it. It is not clear whether the ESM would also be under the obligation to change the MoU in order to adapt it to the amended MAP. In theory, the MAP and the MoU are two different conditionality agreements belonging to two different legal orders, the former to the EU and the latter to the

[139] *Ledra Advertising v. Commission and ECB* [GC], cit., para. 52.

[140] *Florescu and others*, cit. See M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter:* Florescu, in *Common Market Law Review*, 2018, p. 643 *et seq*.

[141] See *supra*, footnote 10.

[142] *Florescu and others*, cit., para. 33.

[143] *Ibid.*, para. 35. Although only implicitly, the Court of Justice also reached a similar conclusion in a case concerning the Portuguese bail-out. As the Portuguese programme was partially based on EU law (the EFSM), the Court admitted a referral concerning the compatibility between an MoU-based austerity measure and EU law. Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*.

[144] Opinion of AG Wathelet, *Mallis and Malli v. Commission and ECB*, cit., para. 85. In the legal scholarship, the first to detect the relationship between the MoU and the MAP was C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, cit.

[145] Art. 7 of Regulation 472/2013.

TESM.[146] So far, every time the stability programmes needed to be modified, the Commission first modified the MoU, and only later were those changes incorporated in the MAP; not the other way around.[147] The Greek programme represents an important exception, as the MAP was never amended, notwithstanding the numerous changes made to the MoU.[148] Only the Court of Justice, if given the opportunity, could clarify whether there is a duty of consistency between the MAP and the MoU, and which Institutions are obliged to uphold it.[149]

The overview provided above shows the low degree of judicial accountability enjoyed by the ESM vis-a-vis individual plaintiffs. Only ESM Member States could bring an action before the CJEU, leaving citizens and legal persons with the only possibility of resorting to strategic litigation to find a way into the Court of Justice. Transforming the ESM into the EMF would improve the situation in many aspects, although the degree of judicial accountability of the new body would still not match the importance of its activity. The acts adopted by the EMF and its bodies would always be reviewable by the CJEU, as the latter has the competence to "review the legality of acts of bodies, offices or agencies of the Union intended to produce effects vis-a-vis third parties". As clarified in *Florescu*, MoUs signed by the EMF and the Commission would also fall under the scrutiny of the Court of Justice, as they would become EU law acts.[150] However, the persisting problem would still be how to bring such acts before the Court, given the relatively stringent admissibility criteria. Individual plaintiffs could not bring an action for annulment, neither against EMF acts nor against national acts implementing the MoU. As those measures are not addressed to specific individuals, plaintiffs could never overcome the *Plaumann* standing test, as it would be impossible to find a legal act adopted within the framework of conditionality programmes being of "direct and individual concern" to them.[151] The action for compensation, which is currently available only against the Commission and the ECB, could also be triggered against the Board of Governors and the Board of Directors, as un-

[146] See R. REPASI, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., p. 1138, according to whom the MAP "co-exist with the MoU and partly overlap in content. They are, however, legally not synchronized with each other. Modifications of the one have to be reproduced with regard to the other in accordance with the respective procedures".

[147] The numerous reviews at the Cypriot MAP can be found at the EU Commission's website, ec.europa.eu. C. KILPATRICK, *The EU and Its Sovereign Debt Programmes*, cit., p. 16.

[148] C. KILPATRICK, *The EU and Its Sovereign Debt Programmes*, cit., p. 16.

[149] For a negative answer, see R. REPASI, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., p. 1138. For a positive one, see M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter:* Florescu, cit., according to whom the Commission would have a "dynamic" obligation to adjust the MAP with the MoU "throughout the duration of the programme".

[150] *Florescu and others*, cit.

[151] See two early attempts to initiate an action of annulment against austerity measures: General Court: order of 27 November 2012, case T-541/10, *ADEDY and others v. Council* and order of 27 November 2012, case T-215/11, *ADEDY and others v. Council*.

der the EMF they would be transformed into EU law-based bodies. However, the difficulties facing the plaintiffs in *Ledra* to demonstrate a manifest and grave damage suffered by conditionality policies would still be present under the EMF. Henceforth, the main avenue for EU citizens to see EMF-based conditionality policies adjudicated by the Court of Justice would still be the preliminary referrence.[152]

The most welcome change for the judicial accountability of the EMF would be the introduction of an approval mechanism by the Council for decisions taken by the Board of Governors.[153] As we have seen before, currently the most important conditionality decisions, such as the one to proceed with the bail-in in Cyprus, are taken either informally by the Eurogroup or outside the EU legal order by the ESM Board of Governors. The finance ministers of the Eurozone can therefore easily escape judicial control. The establishment of the EMF would finally provide individuals with an avenue to challenge those decisions, as they could always send a preliminary reference on the interpretation or validity of the approval decision by the Council.[154] Individuals would still need to convince a national judge to refer a question to the Court of Justice, demonstrating that the national law under scrutiny derives from EU law and is relevant for the judgment before the national court, but at least there would be a clear act from an EU Institution – the Council – enshrining the conditionality attached to financial assistance.[155] The informal nature of the Eurogroup would no longer constitute an obstacle to judicial review, as its decisions would always be backed up by a formal act of an EU Institution challengeable according to Art. 263 TFEU.

Transforming the ESM into an EU body would be important not only to provide better access to judicial review, but also because it would oblige the EMF to fully uphold the Charter. Even if the Statute of the EMF only establishes that the EMF should fully observe Art. 28 of the Charter, the entire Charter always applies to "institutions, bodies, offices and agencies of the Union".[156] This would mean that conditionality policies would always have to be fully consistent with EU primary law, including the Charter. The Court of Justice has stressed the need for full consistency between EU law and the MoU in both the *Pringle* and *Ledra* cases.[157] However, such duty has so far only fallen on the

[152] This is the main conclusion reached by R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit., in the field of ESM conditionality, and it would also apply to the activity of the EMF.

[153] Art. 3 of the Proposal for a Regulation COM(2017) 827.

[154] Art. 1 of the Proposal for a Regulation COM(2017) 827.

[155] National judges have to set out the precise reasons why a ruling from the Court of Justice is necessary to enable them to give a judgment. Court of Justice, judgment of 4 May 2016, case C-547/14, *Philip Morris Brands and others.* The Court of Justice can refuse to rule in case the interpretation of EU law requested is unrelated to the case before the national court or it is merely hypothetical. Court of Justice, judgment of 21 December 2016, case C-444/15, *Associazione Italia Nostra Onlus.*

[156] Art. 51 of the Charter.

[157] *Pringle*, cit., para. 164; *Ledra Advertising v. Commission and ECB* [GC], cit., para. 58.

shoulders of the Commission. As it was claimed in the section II, this constitutes an excessive task, as the latter has no control over the real decision-making power of the ESM framework (the Eurogroup/Board of Governors). The situation would change with the establishment of the EMF. As the latter would sign the MoU together with the Commission, they would jointly be responsible for the full compliance of conditionality measures with EU law. This would be a favourable change, relieving the Commission from the unfair responsibility scheme created by the *Ledra* case.

Finally, the EMF would have an autonomous self-financed budget, which would not be part of the EU budget.[158] This would disentangle the paradoxical situation described above, according to which damages caused by an international organization could potentially pose risks to the financial balance of the EU budget. The CJEU would finally have the competence to see that losses and damages caused to individuals are made good by the EMF with its own budget, which is much larger than that of the EU.[159]

IV.3. The political accountability of the EMF

Arts 5 and 6 of the Proposal are specifically dedicated to the accountability of the EMF, establishing that the EMF "shall be accountable to the European Parliament and to the Council for the execution of its tasks". In particular, the EMF shall submit an annual report to the Commission, the Council and the European Parliament (Art. 5, para. 2). Furthermore, the European Parliament may ask the Managing Director of the EMF to report the activity of the Fund to the competent committees, as well as to ask questions to the EMF, who would be under the obligation to answer orally or in writing (Art. 5, para. 3, and Art. 5, para. 4). Finally, the chair and vice-chairs of the competent committees of the European Parliament would have the right to hold confidential oral discussions behind closed doors with the Managing Director (Art. 5, para. 5).

These *ex post* accountability mechanisms are already used by the European Parliament.[160] Regulation 472/2013 establishes the duty of the Commission to keep the European Parliament informed about its activity within the European Economic Governance. In particular, the Commission shall inform the European Parliament every time a Member State is subjected to an enhanced surveillance, MAP and a post-programme surveillance.[161] In addition, the Commission has the duty to draft a comprehensive re-

[158] Art. 29 of the Proposal for a Regulation COM(2017) 827.

[159] Although it would probably be necessary to adopt further secondary legislation in order to detail how to retrieve such losses and to give the CJEU a strong legal basis to scrutinise and condemn the EMF to repay individuals with the EMF budget.

[160] For the mechanisms of accountability that can be used by the European Parliament within the European economic governance, see C. Fasone, *European Economic Governance and Parliamentary Representation. What place for the European Parliament?*, in *European Law Journal*, 2014, p. 164 *et seq.*

[161] Arts 3 and 7 of Regulation 472/2013.

port every five years to be submitted to the European Parliament.[162] Although the Regulation does not specifically target the ESM, the activity of the Commission under the Regulation and under the TESM substantially overlaps. For example, when the European Parliament is acquiring information concerning the MAP, it is also indirectly overseeing the content of the MoU, given that those two documents have a similar content and they are both drafted by the Commission.

The European Parliament is aware of the fact that conditionality policies are decided outside its democratic control and decision-making. The Parliament denounced "the lack of transparency in the MoU negotiations" and lamented the effects of such opacity "on the trust of citizens in democracy and the European project".[163] In order to ameliorate this situation, the ECON Committee has established a specific working group, the Financial Assistance Working Group (FAWG), whose objective is to follow more closely the implementation of ESM-supported programmes.[164] The FAWG organises meetings and prepares hearings with the actors involved in the management of conditionality policies (ECB, Commission, IMF and ESM) and national authorities.[165] The FAWG plainly recognises and accepts the exclusion of the European Parliament in the decision-making process of conditionality management, but still attempts to enhance the democratic oversight of the ESM through public and private meetings and hearings.[166] The main problem of the FAWG is that it mostly works on a voluntary basis, meaning that the institutions invited can not only refuse to attend the meeting or the hearing, but are also free to decide the amount of information to be released.[167] Naturally, turning down an invitation by the FAWG would be politically controversial, rendering the possibility of such an event rather remote. Nevertheless, refusing to disclose sensible information or disclosing it on a confidential basis are already common working elements of the FAWG.

The Proposal of the Commission would certainly improve the legal framework upon which the European Parliament obtains information from the Mechanism and EU Institutions. The EMF would be obliged to answer the questions of the competent parlia-

[162] Art. 19 of Regulation 472/2013.

[163] European Parliament Report 2013/2277/(INI), para. 30.

[164] The Financial Assistance Working Group was established by the Conference of Presidents of the European Parliament, ordinary meeting of 21 January 2016.

[165] A description of the activities of the FAWG, which is part of the Economic and Monetary Affairs Committee, can be found at the European Parliament website, www.europarl.europa.eu.

[166] See for example the exchange of views between the FAWG and the EU Commission Vice President Valdis Dombrovskis on Greece at ec.europa.eu. See also the words of Roberto Gualtieri, Chair of the FAWG, during the mission in Greece: "The European Parliament cannot decide how the programme is implemented on a day-to-day basis, but we will continue to ensure the full transparency of the programme and to provide a proper democratic debate on these issues that are central to the stability and prosperity of the euro area", www.europarl.europa.eu.

[167] The reporting obligations established by Regulation 472/2013 and by the Treaties are mandatory for the Institutions involved.

mentary committee.[168] The European Ombudsman would acquire the competence to watch its activity.[169] EU citizens may start petitions concerning the EMF's activity at the European Parliament.[170] In extreme circumstances, the European Parliament may even establish a committee of inquiry to investigate the EMF's violations of EU law.[171] This would definitely improve the quality and quantity of information at the European Parliament's disposal. However, this would only partially improve the democratic oversight of the Fund, as the Parliament would still not be able to participate in the EMF's decision-making. It would not be requested to give its consent to the disbursement of financial assistance. It would also lack any ratification power over the appointment of the Board of Governors or Directors. The Proposal only establishes the right of the Parliament to be consulted during the appointment of the Managing Director.[172] This is in stark contrast with the accountability powers of the European Parliament in the Banking Union, where its approval is required for the appointment of both the Chair and Vice-Chair of the Single Supervisory Mechanism and the Single Resolution Board.[173] Overall, the fact that the European Parliament would lack *ex ante* powers of control over the activity of the EMF would constitute an obstacle to its democratic oversight. Collecting information through reporting obligations and transparency instruments has little value if one cannot act on it.

V. Final remarks

This *Article* has attempted to draw an introductory analysis of the recent Proposal of the European Commission to transform the ESM into an EU law-based body, the EMF. Previous EU legal scholarship has successfully demonstrated that the intergovernmental nature of the ESM has shielded this body from proper judicial accountability.[174] On

[168] See Art. 230 TFEU, and Art. 5 of the Proposal for a Regulation COM(2017) 827.

[169] Art. 228 TFEU.

[170] Art. 227 TFEU.

[171] Art. 226 TFEU.

[172] Art. 7 of the Statute of the European Monetary Fund.

[173] Art. 26, para. 3, of Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and Art. 56, para. 6, of Regulation (EU) 806/2014 of the of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010. See M. Markakis, *Political and Legal Accountability in the European Banking Union: A First Assessment*, in *Hungarian Yearbook of European Union Law*, 2016, p. 535 *et seq.*

[174] See R. Repasi, *Judicial Protection Against Austerity Measures in the Euro Area:* Ledra *and* Mallis, cit.; C. Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, cit.; see also P. Dermine, *The End of Impunity? The Legal Duties of "Borrowed EU Institutions" Under the European Stability Mechanism Framework*, in *European Constitutional Law Review*, 2017, p. 369 *et seq.*; and A. Poulou, *Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?*, in *Common Market Law Review*, 2017, p. 991 *et seq.*

the same line, this *Article* has highlighted two major problems, namely the judicial impunity of the Eurogroup/Board of Governors and the mismatch between the actual powers of the Commission under the TESM and its responsibility under the *Ledra* judgment. The main problem of the ESM lies in the low level of accountability enjoyed at the European level by the Eurozone finance ministers. In particular, the institutional transformation of this assembly, converted from a forum of discussion into a decision-making power in the field of conditionality, has occurred largely outside the judicial scrutiny of the Court of Justice. By the same token, making the Commission responsible for damages caused by conditionality does not represent an effective and fair solution, as it risks holding the Commission responsible for decisions taken by the Board of Governors. In the final section, it is claimed that the EMF, fully integrated into the EU constitutional framework, would indeed have a larger degree of judicial accountability. The duty of the Council to endorse the main decisions of the Board of Governors would improve the accountability of the Eurozone finance ministers, whereas the Commission would share its responsibility for signing the MoU with the EMF itself. Those changes would fix the accountability unbalances that we have highlighted analysing the *Mallis* and *Ledra* cases. Nevertheless, it is important to understand whether the CJEU can actually improve the overall legitimacy of the Mechanism.

Providing financial assistance entails a redistribution of fiscal resources. How to manage fiscal solidarity constitutes the political question *par excellence*, and the conflicts it creates cannot be solved by a judicial body. Regardless of the EU or international law nature of the financial assistance provided, the Court has never found a conditionality policy unlawful, granting always the widest possible margin of discretion to EU Institutions pursuing the objective of financial stability, often at the expense of fundamental rights protected by the Charter or the principle of legal certainty.[175] In doing so, the Court has not only showed a great degree of judicial restraint, but has also successfully steered away from political conflicts. When the problem is so inherently political, the solution must come from politics. Analysing the Proposal of the Commission, this *Article* concludes that the ESM substantially lacks democratic accountability. Although the EMF would bring some meaningful improvements, the European Parliament would still be excluded from the direct management of conditionality measures, lacking at the same time effective *ex post* accountability mechanisms.

Therefore, the establishment of the EMF would be a welcoming step towards a more legitimate exercise of conditionality policies, as it would put the activity of the Mechanism under the full scrutiny of the Court of Justice, but not towards its democra-

[175] For the violation of the principle of legal certainty by conditionality during the euro-crisis, see P.M. RODRIGUEZ, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, in *European Constitutional Law Review*, 2016, p. 265 *et seq.* See also *Florescu and others*, cit., para. 1, and General Court, judgment of 7 October 2015, case T-79/13, *Accorinti and others v. ECB*.

tisation. The democratic accountability of the EMF would be in line with the low level of democratisation of the EMU, where the European Parliament struggles to have its voice heard.[176] Rather than a revolution, the EMF would therefore constitute a necessary base upon which further improving the legitimacy and democracy of conditionality. Future stability programmes should occur within the remits of the constitutional safeguards provided by the EU architecture. As it is often the case with European integration, establishing the EMF should be considered an incremental step towards other reforms, rather than an end point. Once the Mechanism becomes an EU body, then it will always be possible to further increase its accountability, whereas further, incremental improvements would be impossible as long as it is an international organisation. Conditionality provided by the EMF in the EU constitutional legal order would be far from perfect, but still much better than the one provided outside of it.

[176] For an overview of the democratic shortcomings of the EMU, see L. Daniele, P. Simone, R. Cisotta (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Cham: Springer, 2017.