ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

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EMU IN THE CASE LAW OF THE UNION COURTS: A GENERAL OVERVIEW AND SOME OBSERVATIONS

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ABSTRACT: The main objective of this *Article* is to map and categorize the CJEU's case law relating to EMU. Although in purely quantitative terms, this is not a huge task, there are already enough relevant court rulings, up to 31 December 2020, to enable the establishment of a taxonomy distinguishing between four different categories of EMU-related case law. The first and foremost category will comprise cases dealing with the fundamentals of EMU, including clarifying the distinction between monetary policy and economic and other policies. This category includes a number of well-known cases of great political importance, such as *Pringle* ECLI:EU:C:2012:756, *Gauweiler* ECLI:EU:C:2015:400, *Weiss* ECLI:EU:C:2018:1000, *Kotnik* ECLI:EU:C:2016:570 and *Florescu* ECLI:EU:C:2017:448. A second category relates to the nature of the EU as a system of multilevel governance and the need to determine whether the competence to act is at national or Union level or a mix of the two. Cases in point include *UK v ECB (security clearing)* ECLI:EU:T:2015:133, *Berlusconi* ECLI:EU:C:2018:1023 and *Rimšēvičs* ECLI:EU:C:2019:139. A third group of cases relates to issues of responsibility and liability, including questions of the liability of "abnormal" EU bodies or settings such as the Troika or the Euro Group. Fourth, especially the Banking Union has triggered cases relating to prudential supervision and other more technical issues. This analysis will be completed by some concluding remarks, including the question of the intensity of judicial control (standard of review), viewing the EMU case law in a broader context.

KEYWORDS: Court of Justice – case law – judicial review – EMU – euro crisis – banking union.

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I. Introduction

While the Court of Justice of the European Union (CJEU)[1] has since its beginning been an important part of the European Union institutional framework and played a crucial role in the shaping of European economic and political integration, the last 20 years or so have marked an even greater role for the two Union Courts in Luxembourg, the European Court of Justice and the General Court, in dealing with issues of considerable economic, political and constitutional significance. This development has led me to ask whether, in the context of European affairs, "all roads lead to Luxembourg" and whether the Luxembourg courts have become the final arbiter of all major problems facing the EU today.[2]

If put in these terms, the answer to the question is "no". Not all major problems are submitted to these courts, as some of these problems are dealt with by the national courts of the EU Member States (which are to be considered as forming part of the EU judicial system in the broad sense)[3] while others are solved – or regrettably often not solved – by the EU political institutions, the Commission, the Council and the European Parliament (EP), or other EU bodies such as the agencies. It should in any case be recalled that the Union are not in full control of their docket, as cases can only be brought before them by national courts, EU institutions or bodies, EU Member States or private parties.

Yet, it is undeniable that the Union Courts have become more and more involved in settling disputes which are deemed to be important, catch the public eye and, especially since the entry into force of the Lisbon Treaty in 2009, cover a broad range of issues including sensitive areas such as asylum and immigration, criminal law, respect for the rule of law, including the independence and impartiality of the judiciary, and Brexit (the UK's withdrawal from the Union).

One particular area where the role of judicial control has gained a lot of attention of late is the Economic and Monetary Union (EMU) area. The EMU regime has raised monetary and economic issues that were not previously issues of Union law nor were such issues generally perceived as judicial questions anywhere in the world. Also in the EU, the first decade of the common currency saw very few EMU related issues being brought before the courts. However, during the last ten or so years, the EMU regime has triggered tens of cases before the Union Courts, some of which may be considered vitally important for the future of EMU and even the EU itself.

One of the aims of the present *Article* is simply to map and roughly categorise the EMU-related case law of the CJEU up to the end of 2020, with a certain emphasis on ECJ case law,

[1] According to art. 19(1) TEU, the broader institutional concept of the "Court of Justice of the European Union" includes the Court of Justice, the General Court and specialised courts. The EU Civil Service Tribunal having been dissolved in 2016, there are at the time of writing no specialised tribunals.

[2] A Rosas, 'The European Court of Justice: Do All Roads Lead to Luxembourg?' (CEPS Policy Brief 3/2019).

[3] See, e.g. A Rosas, 'The National Judge as EU Judge: Some Constitutional Observations' (2014) SMU Law Review 717.

as most of the more important cases have been handled by this Court rather than the General Court.[4] The notion of EMU-related case law will be understood here in a broad sense, to include, *inter alia*, issues relating to the application of the legislation concerning the Banking Union.[5] Space does not allow a detailed analysis of individual decisions of the Union Courts. On the other hand, some concluding observations will be made on certain aspects which seem particularly relevant in an EMU context, such as the question of the intensity of judicial review and that of the interaction between Union law and national law.

The perspective will be that of a former judge of the ECJ, who is not to be considered an expert on EMU. In fact, it has to be realised that, given the broad and varied range of issues facing the Union courts, the judges of the ECJ, and to an increasing degree also the General Court, are supposed to be generalists rather than experts on particular areas of law. Trusting the judicial review of EMU rules and decisions to such a generalist court carries with it the advantages and disadvantages of any judicial review carried out by any court with a general rather than specialised mandate. In the view of the present author, the advantages outweigh the disadvantages, but this, of course, is a matter of opinion.

II. Four main categories of CJEU cases

It seems possible and instructive to distinguish between four main categories of EMU relevant case law: *i*) general questions relating to the nature and functioning of EMU in a situation of serious disturbance of the economy and financial system such as the euro and debt crisis starting in 2007,[6] including the powers of the European Central Bank (ECB) and the possibility of financial assistance to Member States in particular difficulties; *ii*) issues of division of competence and powers between Union institutions and bodies and national authorities and between Union institutions and bodies themselves (problems of multilevel governance); *iii*) questions relating to responsibility and liability, notably actions for damages brought by private parties and financial sanctions against Member States; *iv*) more technical issues related to the Banking Union in particular, including the

[4] The most important EMU-related cases have usually been initiated as requests for preliminary rulings submitted by national courts by virtue of art. 267 TFEU. All preliminary rulings are handled by the ECJ while the General Court is principally engaged with actions for annulment brought by private parties under art. 263 TFEU. Infringement actions brought by the European Commission against a Member State under art. 258 TFEU, or by a Member State against another Member State under art. 259 TFEU, are handled by the ECJ but in the EMU area, art. 126(10) TFEU excludes the right to bring infringement actions under paras 1-9 of this article (which deals with the avoidance of excessive government deficits).

[5] For an overview of EMU-related law, including the Banking Union, see, e.g. A Rosas and L Armati, *EU Constitutional Law: An Introduction* (Hart 2018) 224.

[6] On the constitutional aspects of the euro and debt crisis see, e.g. Ka Tuori and Kl Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); A Rosas and L Armati, *EU Constitutional Law* cit. 224 ff.

question of prudential supervision of banks. It should be underlined that this is a rough categorisation; there is a certain overlap between these categories.

II.1. EMU and the euro and debt crisis in general

Cases belonging to the first category include probably the most well-known EMU relevant cases decided by the ECJ, notably *Pringle*, *Gauweiler and Others* (hereinafter *Gauweiler*) and *Weiss and Others* (hereinafter *Weiss*).[7] All three cases, which were initiated as requests for preliminary rulings by national courts, *Pringle* by the Irish Supreme Court and *Gauweiler* and *Weiss* by the German Federal Constitutional Court, relate in one way or another to the euro and debt crisis or its aftermath. Some cases of general institutional interest, two of which preceded the euro and debt crisis, will be mentioned in section II.2 below.

The main legal question raised in *Pringle* was whether Union law allowed the establishment of a permanent stability mechanism, the European Stability Mechanism (ESM), to provide financial assistance to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, not by a Union legal act but by an intergovernmental treaty.[8] The answer of the ECJ was in the affirmative. It was based on an analysis of a number of TEU and TFEU provisions of relevance for EMU, such as the no-bail-out clause in art. 125 TFEU, which prohibits the Union and Member States from being liable for, or assume the commitments of, other Member States. The Court held that on certain conditions (such as strict conditionality) the granting of financial assistance is not covered by that provision, as the granting of such assistance in accordance with the ESM Treaty "in no way implies that the ESM will assume the debts of the recipient Member State".[9] The judgment, *inter alia*, also deals with the distinction between economic and monetary policy (concluding that the ESM regime belonged to the realm of economic policy, which unlike monetary policy is not an area of Union exclusive competence)[10] and the possibility of Union institutions (in this case the Commission, the ECB and the ECJ) to be involved in the functioning of the ESM, despite its intergovernmental nature.[11]

From a general constitutional point of view, it is to be noted that in *Pringle*, the ECJ affirmed that despite the general lack of jurisdiction of the Court to rule on the validity of Union primary law (such as the TEU and the TFEU), that does not prevent the Court from

[7] Case C-370/12 *Pringle* ECLI:EU:C:2012:756; case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400; case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[8] *Pringle* cit. The predecessors of the ESM were the European Financial Stabilisation Facility (EFSF), established in 2010 on an intergovernmental basis, and the European Financial Stabilisation Mechanism (EFSM), established in the same year but by a Union legislative act. On the functioning of these financial support mechanisms see European Stability Mechanism, *Safeguarding the Euro in Times of Crisis: The Inside Story of the ESM* (Publications Office of the European Union 2019).

[9] *Pringle* cit. para. 139.

[10] *Ibid*. paras 55-63, 93-98.

[11] *Ibid*. paras 153-177.

examining the validity of a European Council decision, adopted under the so-called simplified revision procedure by virtue of art. 48(6) TEU, to amend art. 136 TFEU (the provision was amended by inserting a reference to the possibility of Member States to establish a stability mechanism).[12] This was so because the Court must be able to determine whether the conditions for applying the simplified revision procedure had been complied with.

The status of the ESM and the role of the Commission and the ECB in the activities of the ESM also became relevant in cases concerning the restructuring of the Cyprus banking sector. In *Mallis and Malli v Commission and ECB* (hereinafter *Mallis*), annulment of a statement was sought from the Euro Group, which is a framework for informal meetings of ministers from euro Member States.[13] In dismissing the action, the General Court and the ECJ based their reasoning not only on the informal nature of the Euro Group but also, in line with what had already been stated in *Pringle*, observed that the Commission and the ECB did not have decision-making powers in the framework of the ESM. These two institutions could not have a wider role in the Euro Group than in the ESM, as it was the latter that had concluded a memorandum of understanding with Cyprus and the contested Euro Group statement was of a purely informative nature. Another Cyprus-related case involving an action for compensation against the Commission and the ECB relating to the ESM will be commented upon below (section II.3).

Gauweiler and *Weiss* both concerned the legality of programmes of the European System of Central Banks (ESCB) to purchase government bonds on the secondary market, that is, not directly from governments but from unspecified owners through the capital markets. In *Gauweiler* the programme, which was termed Outright Monetary Transactions (OMT), was limited to countries subject to the conditionality attached to a European Financial Stability Facility (EFSF) or ESM programme.[14] The OMT programme, while announced by the ECB in August and specified in September 2012, was never implemented to actually buy government bonds, however. This fact and some other peculiarities of the programme led many governments to invite the ECJ not to reply to the questions put by the national court. However, in line with the presumption of relevance the ECJ normally attaches to requests for preliminary rulings – and perhaps also because the requesting court was the German Federal Constitutional Court, which had never before submitted a case to the ECJ – the Court did reply (although in view of the non-implemented nature of the programme, the Court could well have declined to answer).

[12] *Ibid*. paras 30-38. See also A Rosas and L Armati, *EU Constitutional Law* cit. 239.

[13] Joined cases C-105/15 P, C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702. The status and task of the Euro Group, which are laid down in Protocol No 14 annexed to the TEU and the TFEU, have been further clarified in case C-597/18 *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028 referred to in section II.3.

[14] *Gauweiler* cit.

The Court held that the relevant provisions of the TFEU and of the Statute of the ESCB and of the ECB did permit the ESCB to adopt the OMT programme. The main issues considered in the judgment were the definition of monetary policy (the programme was held to fall under monetary policy and thus the remit of the ESCB, although it could have some secondary effects for economic policy),[15] the question whether the principle of proportionality had been respected[16] and whether the programme was in conformity with art. 123 TFEU,[17] which, *inter alia*, prohibits the ESCB from purchasing debt instruments "directly" from Member States (including governmental bodies).

The ECJ judgment in *Gauweiler* was not greeted with any enthusiasm by the German Federal Constitutional Court, which nevertheless came to the conclusion – albeit grudgingly – that the outcome could be tolerated.[18] The tension which could be seen between the approach of the ECJ and that of the German court was brought into open conflict in the context of *Weiss*.[19] This ECJ judgment concerned a more recent secondary markets public sector asset purchase programme (PSPP). As the programme was based on a legal act (an ECB decision),[20] the ECJ was asked to rule not only on the interpretation of relevant provisions of the Treaties (in this case art. 4(2) TEU relating to national constitutional identity and arts 123 and 125 TFEU referred to above) but also on the validity of the ECB Decision. Despite the strong doubts as to the legality of the programme expressed by the German Federal Constitutional Court, the ECJ ruled that consideration of most of the questions asked (a question relating to the sharing of losses of national central banks was declared inadmissible by the ECJ) disclosed no factor of such a kind as to affect the validity of the ECB Decision.

With respect to the definition of monetary policy and the distinction between it and economic policy the judgment builds on and develops what was already said in *Pringle* and *Gauweiler*. The Court observed, *inter alia*, that "the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies".[21] With regard to the aim of the ECB programme to avoid deflation and achieve annual inflation rates closer to two per cent, the Court observed that "in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought – to different ends – in the context of economic policy".[22] The part of the judgment dealing with the principle of proportionality is in line with what the Court said in *Gauweiler* and is based on the traditional approach of the Court to the intensity

[15] *Ibid*. paras 42-65.

[16] *Ibid*. paras 66-92.

[17] *Ibid*. paras 93-126.

[18] German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

[19] *Weiss* cit.

[20] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme with later amendments.

[21] *Weiss* cit. para. 60. See also paras 50-73.

[22] *Ibid*. para. 66.

of judicial review in situations where Union bodies are required to make choices of a technical nature and to undertake complex forecasts and assessments (see further below).[23] Finally, the judgment, while again building on the judgment in *Gauweiler*, discusses in some detail the interpretation of art. 123 TFEU and in particular the conditions that the asset purchasing programme is not *de facto* taking place in the primary market, by making the private investor merely an intermediary of the ESCB, or does not encourage the Member State in question to follow sound budgetary principles.[24]

As is well known, the Court's ruling that these conditions were fulfilled and the reasoning given did not convince the requesting national court, which, by referring, *inter alia*, to the principles of conferral and democratic legitimation and the need to uphold a clear distinction between monetary and economic policy, ruled that the judgment constituted an *ultra vires* act that was not binding upon the Federal Constitutional Court.[25] In its view, the ECJ judgment was not comprehensible and therefore had to be considered arbitrary. This was because the ECJ had not carried out a proper proportionality assessment, demonstrating that the effects on economic policy did not go too far. Failure of the ECB to carry out such an assessment also vitiated its decisions. While German institutions such as the Federal Government and the Central Bank had an obligation not to comply with such *ultra vires* acts, the Constitutional Court accorded these two institutions a period of three months to verify that a new ECB decision demonstrate that the programme was proportionate.

No such decision has been adopted by the ECB, which does not consider itself bound by the German Constitutional Court's judgment. The ECB has on the other hand cooperated with the German Central Bank (which, of course, is a member of the ESCB) with respect to information of relevance for a proportionality assessment.[26] In view of this information, the German Federal Government and the Central Bank have determined that the Bank may as a member of the ESCB continue to participate in the PSPP.[27] It is too early to say what, if any, will be the reaction of the Constitutional Court to these declarations and any new information being made available to it, including complaints by the litigants. If the Court were to prohibit the Central Bank from participating in the PSPP and the latter complied, the ECB could, under art. 35(6) of the Statute of the ESCB and the ECB, bring an infringement action against the Central Bank before the ECJ. The problems arising from the judgment of the German Federal Constitutional Court, as compared with the ECJ judgment, will be further commented upon below (section III).

[23] *Ibid*. paras 71-100.

[24] *Ibid*. paras 101-158.

[25] German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

[26] See, e.g. ECB, *Press release – ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate in European Central Bank* (5 May 2020) www.ecb.europa.eu. In March 2020, the ECB initiated a Covid19 pandemic emergency purchase programme (PEPP), initially amounting to 750 billion euro and in June increased by an additional 600 billion.

[27] See, e.g. D Utrilla, 'Three Months after Weiss: Was Nun?' (5 August 2020) EU Law Live eulawlive.com.

There are some other judgments which can be mentioned in the context of the first category, as they relate to special measures that the Union and Member States instigated with a view to mitigating the disturbance of the economy and financial system and the threat to the financial stability of the Union caused by the euro and debt crisis. To mention briefly a few examples, in *Kotnik and Others* (hereinafter *Kotnik*) the main issue was the conditions relating to burden-sharing and the writing off equity capital and so-called subordinated debt that could be attached to the granting of state aid to banks in the context of the financial crisis and the legal nature of a Commission Communication to that effect.[28] In *Dowling and Others* (hereinafter *Dowling*), at issue were measures to recapitalise a national bank by an increase in share capital and the issuance of new shares in a manner derogating from a Union company law directive[29] but called for by the need to overcome the Irish banking crisis and implement the programme of Union financial assistance to Ireland under the EFSM[30] and a Memorandum of Understanding (MoU) entered into between the Commission and Ireland.[31] *Florescu and Others* also related to a financial assistance programme but in this case in favour of a non-euro Member State (Romania) facing difficulties as regards the balance of payments.[32] At issue was not the legality of the programme as such but the legality of particular austerity measures imposed by national law, including in the light of fundamental rights.[33] A somewhat similar problem arose in a case concerning austerity measures affecting the salaries of Portuguese judges and whether those measures constituted a violation of the principle of independence and impartiality of judges.[34]

[28] Case C-526/14 *Kotnik and Others* ECLI:EU:C:2016:570. In its replies to questions put by the Slovenian Constitutional Court, the ECJ largely upheld the conditions formulated in the Commission Communication.

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

[30] See Regulation (EU) 407/2010 of the European Council of 11 May 2010 on establishing a European financial stabilisation mechanism.

[31] Case C-41/15 *Dowling and Others* ECLI:EU:C:2016:836. The ECJ concluded that the company law directive did not preclude the special measures, which were taken in a situation of "serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union" (*Dowling* cit. para. 55).

[32] See art. 143 TFEU and Regulation (EC) 332/2002 of the European Council of 18 February 2002 on establishing a facility providing medium-term financial assistance for Member States' balances of payments, as amended.

[33] Case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448. The ECJ held that the concrete measures undertaken under national law (implying the lowering of income of some judges) were not required by the Union programme but were measures of national law and moreover that they were not in violation of fundamental rights.

[34] Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117. The Court concluded that the austerity measures were not far-reaching enough to compromise the independence of the judges concerned.

It is evident that the case law discussed above raises fundamental issues of constitutional significance. The question that seems to be horizontally most relevant for Union law in general is the problem dealt with in *Pringle* in particular concerning the conditions for introducing, in a broader EU context, intergovernmental mechanisms such as the ESM which are formally outside Union law strictly speaking. Another aspect of general interest is the question of the intensity of judicial control when the Court is faced with complex questions of an economic nature. While the cases discussed here certainly raised novel issues relating specifically to the EMU regime it should, on the other hand, be recalled that dealing with "law and economics" was not something entirely new for the Court, as the traditional emphasis of Union law used to be on such areas as agricultural law, the four economic freedoms and competition and state aid law. Of more specific EMU relevance is the important distinction between monetary and economic policy which was at issue in *Gauweiler* and *Weiss* in particular. Problems of a constitutional nature have been also addressed in some cases more specifically dealing with institutional questions and issues of multilevel decision-making. It is to such questions I shall now turn.

II.2. Problems of multilevel decision-making

The EU should more and more be seen through the lens of multilevel constitutionalism and multilevel governance.[35] This implies, inter alia, that Union law, including Union institutions, bodies, offices and agencies, and national law, including national authorities, are increasingly intertwined.[36] EMU law, including Banking Union law,[37] offers ample illustration. The use of both Union and national bodies, and Union bodies at different levels, in the pursuit of common goals inevitably raises questions as to which level is primarily competent and bears main responsibility for the carrying out of certain tasks. Some of these questions have been put to the Union Courts as well.

At the outset, two cases should be mentioned which predate the euro and debt crisis. The institutionally more important of the two is *Commission v Council*, dealing with an initiative to instigate sanctions against France and Germany for failure to respect the deficit limits of the Stability and Growth Pact (SGP).[38] The Court annulled a Council decision to hold the excessive deficit procedure "in abeyance for the time being", ruling that while the responsibility for ensuring compliance with the SGP lied essentially with the Council, the procedures laid down in art. 126 TFEU were not at its discretion. The outcome did not change the fact that the procedure under art.126 TFEU was very much controlled by the

[35] See, e.g. A Rosas and L Armati, *EU Constitutional Law* cit. 48, 50-51, 77, 85, 98, 102, 294.

[36] A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' in D Petrlik, M Bobek and JM Passer (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux: Liber Amicorum Jiří Malenovský* (Bruylant 2020) 261.

[37] On the Banking Union see, e.g., G Bándi, P Darák, A Halustyik and PL Láncos (eds), *FIDE XXVII Congress European Banking Union, Congress Proceedings* (Wolters Kluwer, 2016).

[38] Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

Council and that the possibility of sanctions against Member States that failed to respect the deficit limits remained subject to political rather than legal considerations. Efforts to make the excessive deficit procedure and economic and fiscal surveillance more robust have been made in the context of the euro and debt crisis (e.g. the so-called Six and Two Pack legislation) but the emphasis has been on preventive measures and conditionality for financial assistance rather than sanctions.[39]

The other case preceding the euro and debt crisis worth signalling here is a case brought by the Commission against the ECB relating to the powers of the European Anti-Fraud Office (OLAF) with regard to the ECB.[40] The Court annulled an ECB decision based on the idea that a regulation concerning OLAF's investigatory powers[41] would not be applicable to the Bank. The judgment confirms the broad scope of powers of OLAF.

With respect to more recent cases, in *United Kingdom v Parliament and Council*, the former contested the powers of intervention concerning short selling and certain aspects of credit default swaps conferred on the European Securities and Markets Authority (ESMA), a Union agency.[42] The case concerned the delegated powers of ESMA both as compared with Union legislative and executive institutions and national authorities. The ECJ dismissed the action in its entirety, implying that the legality of the provision empowering ESMA to adopt certain decisions relating to short selling and credit default swaps was upheld.[43] The United Kingdom was more successful in an action against the ECB brought before the General Court, in which it sought the annulment of a policy framework published by the ECB, in so far as it set a requirement for so-called central counterparts (CCPs) involved in the clearing of securities to be located in a Member State party to the Eurosystem (in other words, the policy framework ruled out the location of such clearing-house activities in the UK).[44] Referring, inter alia, to the principle of conferral and the wording of various texts of primary and secondary law, the General Court made a distinction between payment clearing systems and securities clearing systems and held that the ECB lacked competence to regulate the activities of the latter, including a competence to lay down a location requirement for CCPs.

Some of the cases brought before the Union Courts relate to regulatory procedures involving both Union and national authorities in the course of the same procedure. In *Berlusconi and Fininvest* (hereinafter *Berlusconi*), the main issue was the legal nature of the

[39] A Rosas and L Armati, *EU Constitutional Law* cit. 231-236. But see case C-521/15 *Spain v Council* ECLI:EU:C:2017:982 referred to in section II.3.

[40] Case C-11/00 *Commission v ECB* ECLI:EU:C:2003:395.

[41] Regulation (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[42] Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18.

[43] The contested provision was Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, art. 28.

[44] Case T-496/11 *United Kingdom v ECB* ECLI:EU:T:2015:133.

involvement of a national banking authority (the Italian Central Bank) in a procedure leading to the adoption, by the ECB, of a definitive decision approving or rejecting the acquisition of a qualifying holding in a credit institution and the jurisdiction of national courts to review the legality of preparatory acts adopted by the national authority.[45] Referring above all to the fact that the preparatory acts were not binding on the ECB, the ECJ held that the Union Courts had exclusive jurisdiction to review the validity of the ECB decision and, as an incidental matter, to determine whether the preparatory national acts were vitiated by defects such as to affect the validity of the ECB decision. National courts were thus precluded from hearing an action contesting the conformity of the preparatory acts with Union or national law. The relation between the ECB and national authorities was also present in an action for annulment brought by a German bank contesting the decision of the ECB to subject the bank solely to the ECB's supervision under the system of prudential supervision of credit institutions.[46]

In *Rimšēvičs v Latvia* (hereinafter *Rimšēvičs*), the decision of the national authority at issue was not a preparatory act but the very decision the annulment of which was sought, not from a national court but from the ECJ.[47] While the Union Courts may not, as a general rule, annul national decisions (although they may determine the incompatibility of a national rule or decision with Union law), the ECJ in this case annulled the decision of the Latvian Anti-Corruption Office to temporarily prohibit the Governor of the Central Bank of Latvia from performing his duties. The outcome is explained by the particular status of national central banks as part of the ESCB and an express provision (art. 14.2.) in the Statute of the ESCB and of the ECB, which provides that a national decision to relieve a Governor from office "may be referred to the ECJ by the Governor concerned or the Governing Council" of the ECB. The Court classified such an action as an action for annulment, akin to actions under art. 263 TFEU. The Court, in its reasoning, observed that the ESCB "represents a novel legal construct in EU law" which brings together national institutions and a Union institution and constitutes a "highly integrated system" including "a dual professional role" and a "hybrid status" of the governor of a central bank.[48] This constellation (relation between the ECB and national central banks) was also at issue in an infringement case initiated by the Commission against Slovenia, which concerned the search and

[45] Case C-219/17 *Berlusconi and Fininvest* ECLI:EU:C:2018:1023.

[46] The action was first brought before the General Court, which dismissed the action (see case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337). The judgment was upheld by the ECJ on appeal in case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:C:2019:372.

[47] Joined cases C-202/18 and C-238/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139.

[48] See also A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' cit. 279; T Tridimas and L Lonardo, 'When Can a National Measure be Annulled by the ECJ?' (2020) ELR 732, 744 who refer to the judgment as forming part "of a trajectory of increasing hybridity where traditional boundaries between EU and State action break down".

seizure operations carried out by national law enforcement authorities in the premises of the national central bank, without coordination with the ECB.[49]

When looking at the cases referred to in this section, two major observations come to mind. First, some of the cases concern the powers of various Union institutions and the question who is responsible for what. While at issue have been specific powers as defined in different components of the EMU regime, it is difficult to discern any EMU-specific feature in the approach of the Court to the nature and intensity of judicial review (in other words, the Court seems generally to have dealt with these cases as any question relating to the delimitation of the powers of Union institutions). The second observation takes us beyond the powers of Union institutions and bodies in the strict sense and raises the question, dealt with in some of the cases considered (notably *Berlusconi* and *Rimšēvičs*), of the involvement of national authorities in broader EU regimes and the interplay between Union and national bodies. While these cases do relate to the specificities of the Banking Union, they at the same time bring to the fore a general tendency in EU constitutional developments, implying an increased involvement of the national level in EU decision-making.[50]

II.3. Questions of liability and responsibility

It is not surprising that the euro and debt crisis, and the measures to mitigate it and to restore the financial stability of the euro area, have triggered litigation relating to issues of liability and responsibility, in particular claims for compensation for damages alleged to have been caused by Union institutions or bodies. Under this heading account will be taken both of cases concerning liability and damages and of a case relating to financial sanctions against Member States. The consideration of relevant cases will be of a summary nature and provide examples rather than an exhaustive presentation.

Some of the cases relate to measures taken in the context of the particular difficulties facing Greece. At least two actions were brought by private investors and commercial banks respectively against the ECB in view of the measures taken by the Bank with regard to the restructuring of the Greek public debt and the related cut in the values of bond holdings.[51] These actions were dismissed by the General Court. An action against the EU Council brought by private persons whose pensions had been reduced suffered the same result.[52] The General Court, in dismissing these actions, referred, in addition to a number of arguments relating to the conditions for invoking the non-contractual liability of the Union, to the broad discretion conferred on the ECB, the exercise of which entails complex evaluations of an economic and social nature and of rapidly changing situations.[53]

[49] Case C-316/19 *Commission v Slovenia (Archives de la BCE)* ECLI:EU:C:2020:1030, referred to in section II.4.

[50] A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' cit.

[51] Case T-79/13 *Accorinti and Others v ECB* ECLI:EU:T:2015:756 and case T-749/15 *Nausicaa Anadyomène and Banque d'escompte v ECB* ECLI:EU:T:2017:21.

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

[53] See, e.g. *Accorinti and Others v ECB* cit. para. 68.

As already noted above (section II.1), the banking crisis affecting Cyprus and the measures involving a restructuring of the financial sector triggered not only actions for annulment but also compensation demands corresponding to the diminution in value of bank deposits. In *Ledra Advertising v Commission and ECB* (hereinafter *Ledra*), an action brought against the European Commission and the ECB sought both the annulment of parts of a MoU concluded between Cyprus and the ESM but signed by the Commission on behalf of the ESM, and compensation.[54] With respect to the latter, the General Court held that it lacked jurisdiction in so far as the actions for compensation were based on the illegality of the MoU, as this could not be imputed to the Commission or the ECB. On this point the ECJ disagreed, distinguishing between actions for annulment and actions for compensation. In view of the role played by the ECB and Commission in the conclusion of the MoU, including the obligation of the Commission to ensure that the MoU was not in breach of Union law, it could not be excluded that these two institutions could incur liability. On substance, however, the actions were dismissed as there was no violation of art.17 of the EU Charter of Fundamental Rights (right to property).

It should also be mentioned that there is a recent case where the applicants claimed compensation not only from Union institutions in the strict sense but also the Euro Group, which according to Protocol No. 14 on the Euro Group annexed to the TEU and the TFEU is a forum enabling ministers from euro Member States to "meet informally". While the General Court found also this aspect of the action admissible, the Advocate General of the ECJ proposed to set aside that part of the judgment and to uphold the plea of admissibility raised by the Council.[55] The judgment of the Court, in agreeing with the Advocate General that the actions directed against the Euro Group be declared inadmissible, confirmed the informal nature of this body.[56]

Finally, the possibility of imposing financial sanctions against a Member State for breach of Union legislation relating to economic and budgetary surveillance[57] has given rise to at least one case before the ECJ. On the recommendation of the Commission, the Council adopted a decision imposing a fine on Spain for the manipulation of deficit data, in accordance with a regulation relating to the effective enforcement of budgetary surveillance in the euro area.[58] Spain contested the decision before the ECJ, which dismissed the action, finding, *inter alia*, that there had been no infringement of the right to defence, the right to good

[54] Joined cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

[55] Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzzella.

[56] Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028.

[57] On the so-called Six Pack and Two Pack legislation relating to economic and budgetary surveillance see A Rosas and L Armati, *EU Constitutional Law: An Introduction* cit. 229-236.

[58] Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

administration or the applicable legislation and that the fine imposed (18,93 million euro) was not disproportionate.[59]

As already mentioned at the beginning of section II.2, the main emphasis in fiscal and budgetary surveillance has been on preventive measures and conditionality related to financial assistance to Member States in difficulties. It is the latter aspect in particular that has triggered a series of cases where private parties have claimed for damages invoking the liability of Union institutions. Such actions have generally failed and this arguably for two main reasons: first, the involvement of the Union institutions has been atypical, and the granting of assistance has been at least formally in the hands of intergovernmental mechanisms such as the ESM. Second, the threshold for obtaining compensation is probably higher in situations of severe crisis, where the authorities cannot be expected to act with exactly the same degree of diligence as in "normal" circumstances. That said, the ECJ has not been blind to the realities surrounding the granting of crisis aid and imposing conditions in that regard, refusing to free Union institutions from all liability. Finally, that only one case concerns sanctions taken against a Member State confirms the limited role played by such repressive measures in the area of economic and fiscal surveillance.

II.4. Issues relating to the banking union

There are a number of other court cases relating in one way or another to the Banking Union but which do not clearly fall under any of the three categories dealt with above. As many of them are of a primarily technical nature reference will only be made briefly to some examples.

Most of the cases at issue relate to the application of a regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and some related legal acts pertaining to the Banking Union.[60] A number of actions for annulment of various decisions of the ECB were brought by credit institutions before the General Court. To mention but a few examples, some cases concerned how the prudential supervision was to be organised in the case of a group consisting of different entities and the submission of the group to prudential supervision on a consolidated basis and the consequence of such consolidated supervision e.g. for capital requirements.[61] Some other cases concerned the discretionary powers of the ECB in refusing to accept the exclusion of certain conditions from the so-called leverage ratio.[62] In this context it could also be noted

[59] Case C-521/15 *Spain v Council* ECLI:EU:C:2017:982.

[60] Regulation (EU) 1024/2013 of the Council of the European Union of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[61] Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900 and case T-52/16 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:902. These actions were dismissed.

[62] Suffice it to mention here the case numbers of some of these cases: case T-745/16 *BPCE v ECB* ECLI:EU:T:2018:476, case T-751/16 *Confédération nationale du Crédit mutuel v ECB* ECLI:EU:T:2018:475, case T-

that in a recent judgment, Slovenia was condemned for having unilaterally seized at the premises of the Central Bank of Slovenia documents connected to the performance of the tasks of the European System of Central Banks and of the Eurosystem.[63]

From a more general Union law point of view, the most interesting case is *ECB v Trasta Komercbanka and Others* (hereinafter *Trasta Komercbanka*), which concerns the representation of a party (a bank) in its action for annulment against the ECB decision to withdraw the bank's authorisation. This took place in a situation where the bank had become insolvent and the liquidator withdrew the power of attorney of the lawyer representing the bank and where also the shareholders of the bank brought an action for annulment.[64] The ECJ, in disagreeing with the findings of the General Court, held that the bank, by virtue of its right to effective judicial protection, could still be represented by the lawyer who had brought the case, despite the liquidator having revoked his power of attorney, but, on the other hand, that the shareholders were not directly concerned by the ECB decision to withdraw the authorisation and thus did not have *locus standi*.

Finally, the Single Resolution Mechanism introduced in the framework of the Banking Union (its "second pillar") and the system of *ex ante* contributions that banks have to make to the Single Resolution Fund and to a national resolution fund in particular[65] has given rise to at least two cases, one a preliminary ruling procedure before the ECJ and the other an action for annulment before the General Court. In *Iccrea Banca*, the main issue was the calculation of the contributions to a national resolution fund.[66] In three recent actions for annulment brought by German banks, the General Court annulled the decisions of the Single Resolution Board concerning the calculation of the annual contributions to the Single Resolution Fund on several grounds, including failure to state reasons.[67]

As was the case with some of the cases considered in section II.2 above, the cases considered in the present section relate principally to the institutional aspects of the Banking Union and the respective powers of the ECB and other bodies. While these cases are not generally of constitutional significance, they demonstrate a fairly regular involvement of the General Court and/or the ECJ in the judicial control of decisions pertaining to the Banking Union and seem to suggest that judicial review in this area is fairly robust.

757/16 *Société Générale v ECB* ECLI:EU:T:2018:473, case T-758/16 *Crédit Agricole v ECB* ECLI:EU:T:2018:472 and case T-768/16 *BPN Paribas v ECB* ECLI:EU:T:2018:471. In all these cases, the decisions of the ECB were annulled.

[63] *Commission v Slovenia (Archives de la BCE)* cit.

[64] Joined cases C-663/17 P, C-665/17 P and C-669/17 P *ECB v Trasta Komercbanka and Others* ECLI:EU:C:2019:923.

[65] See, e.g. Commission Delegated Regulation (EU) 2015/63 of the European Commission of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the payments of contributions to resolution financing arrangements.

[66] Case C-414/18 *Iccrea Banca* ECLI:EU:C:2019:1036. The ECJ concluded that certain liabilities could not be excluded from the calculation of contributions.

[67] Case T-411/17 *Landesbank Baden-Württemberg v SRB* ECLI:EU:T:2020:435; case T-414/17 *Hypo Vorarlberg Bank v SRB* ECLI:EU:T:2020:437; and case T-420/17 *Portigon v SRB* ECLI:EU:T:2020:438 (appeals for the three cases are still pending).

This is so especially when it comes to the limits to the powers of the relevant institutions, where there is less room for administrative discretion.

III. Concluding observations

In considering the case law referred to above, the first observations which comes to mind is that the EMU regime, especially as it has developed as a consequence of the euro and debt crisis, has given rise to a fairly extensive case law which covers a broad range of subjects. Another general observation would be that a part of the case law, notably the cases considered in section II.1 above, has concerned issues of central importance not only for the EMU legal regime (for instance the status and powers of the ESM, the powers of the ECB and the power sharing between the ECB and national banking authorities) but also the EU constitutional order in general. The way economic and monetary policy is conducted is of crucial importance for the Union's present and future development and the cases that have been submitted to the Union Courts, the ECJ in particular, have contributed to setting the basic parameters of the EMU regime.[68]

Considering the particular role played by the Union Courts, as compared to the political institutions, it should be recalled, first of all, that courts do not determine their own agenda as the cases before them are initiated either by national courts (under the preliminary ruling procedure) or by Union institutions, Member States or private parties (in the form of infringement actions, actions for annulment or actions for compensation). Most of the cases considered above have been preliminary ruling requests made by national courts. Whatever procedure is at hand, the question of the *intensity of judicial review* becomes a central issue. In the EMU-related cases, the Union Courts have generally held that the Union institutions enjoy broad discretion with respect to economic and/or monetary choices to be made. To cite an example, in *Gauweiler* the ECJ stated that as regards judicial review of compliance with the principle of proportionality, since the ESCB is required "to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion".[69] The Court was quick to add, however, that such an approach may require a more robust review when it comes to a "review of compliance with certain procedural guarantees" and that those guarantees include the obligation of the ESCB "to examine carefully and impartially all the relevant elements of the situation and to give an adequate statement of the reasons for its decisions".[70]

That the intensity of judicial review may vary depending on the issues at hand, in particular whether it is a question of substance or procedure, is nothing exceptional but is characteristic of much of the review conducted by the Union Courts. The intensity of

[68] See further Ka Tuori and Kl Tuori, *The Eurozone Crisis: A Constitutional Analysis* cit.; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* cit.

[69] *Gauweiler* cit. para. 68.

[70] *Ibid*. para. 69.

judicial review is not a pure black-and-white distinction between broad discretion and light-touch review on the one hand, and absence of discretion and intensive, "full" review on the other.[71] It is more of a sliding scale and sometimes variations in the intensity of review in the context of one and the same case. The fact that the Union Courts grant broad discretion with respect to substantive choices especially if they are of a technical nature or involve complex assessments is nothing peculiar for EMU-related matters. It is entirely appropriate that in such situations judges – unlike what seems to be the approach of the German Federal Constitutional Court – show judicial restraint and do not, for instance, pretend that they have a better understanding of monetary policy than those who have the main responsibility for its conduct. The main task of courts in this area should not be to decide issues of ideological, economic or technical choice but to verify that the choice made is within the confines of the law. The situation is different when at issue are basic questions of competence and the powers of institutions, and respect for applicable procedures, rather than exactly how the powers are exercised when complex economic assessments are at stake.

It is true that in many of the cases considered above, the ECJ in particular has upheld the legality of decisions adopted by Union institutions. These outcomes, on the other hand, have most often than not been in line with the positions taken by all or most EU Member States. The fact that a decision is upheld does not, of course, prove that the Court's assessment is wrong. Moreover, if the law is ambiguous or in any case open to different interpretations, it is entirely legitimate, as it would seem that the ECJ has done, to give some preference to an interpretation which is in line with what the expert institutions such as the ECB have assessed to be in the interest of the effectiveness of monetary policy and perhaps even necessary with a view to saving the common currency. That said, judicial interpretation should, of course, follow established methods of interpretation. In this respect, it is simply not true that the Union Courts generally favour a teleological instead of textual interpretation. The Union Courts normally proceed in the following order of reasoning: textual interpretation, systemic or contextual interpretation and teleological interpretation.[72] If the text is clear enough, that is often the end of the story. Words matter. To take an example from the EMU area, the ECJ in *Gauweiler*[73] and *Weiss*[74] paid attention to the fact that art. 123 TFEU prohibits the ECB and national central banks from purchasing debt instruments "directly" from national governments or national public bodies. Why would this word have been inserted if the idea was to prohibit generally also "indirect" purchases (on the secondary market)?

[71] A Rosas, 'Standard of Review: Court of Justice of the European Union (CJEU)' (April 2019) Max Planck Encyclopedia of International Procedural Law www.opil-ouplaw-com.

[72] See also A Rosas and L Armati, *EU Constitutional Law* cit. 40-48.

[73] *Gauweiler* cit.

[74] *Weiss* cit.

Another feature of general interest pertaining to the relevant case law is the way it has been dealing with the interaction between Union law and national law and the recent phenomenon of national law assuming direct Union law relevance in the context of the Banking Union in particular. The cases of *Berlusconi*[75] and *Rimšēvičs*[76] are instructive in this respect. Especially in *Rimšēvičs*, the legal nature of the action brought by the ECB with respect to a national decision affecting the status of the Governor of a national central bank was not entirely clear. The ECJ characterised the action as an action for annulment, akin to the actions covered by art. 263 TFEU. With this precedent, the traditional approach, according to which Union Courts may not annul national decisions, has seen its first exception.

Another feature of institutional significance relates to the distinction between Union institutions and bodies and intergovernmental institutions which are Union-relevant, such as the ESM. In *Pringle*, the ECJ accepted that in the area of economic policy (which is a non-exclusive Union competence) such a mechanism could be created at an intergovernmental level while also drawing upon some involvement of Union institutions (such as the Commission and the ECB).[77] Such intergovernmental mechanisms on the other hand may create uncertainties as to the existence of judicial controls and liability. In *Ledra*,[78] the ECJ showed that it is sensitive to the problem of formally non-Union institutions such as the ESM performing *de facto* tasks of direct Union relevance and drawing upon the participation in its work of the Commission and the ECB. Non-contractual liability of these two institutions could not be excluded. At least in the context of civil liability, formal constructions may not completely trump what is going on in the real world.

The sensitivities and perhaps also complexities of the EMU legal and economic regime are put in stark relief by the recent judgment of the German Federal Constitutional Court, holding that both an ECB decision and a judgment of the ECJ are *ultra vires* and hence do not bind the German Court. While it is not possible to analyse further the German judgment and its implications here, suffice it to note that generalising the approach taken by the German Constitutional Court, implying that the principle of proportionality must be applied by the Union Courts, and then, arguably, by all national courts in the 27 Member States,[79] in the same peculiar and far-reaching way as it is done by the German Court, would severely jeopardise the functioning of not only the EMU regime but also the EU constitutional and legal order in general.

[75] *Berlusconi* cit.

[76] *Rimšēvičs* cit.

[77] *Pringle* cit.

[78] *Ledra* cit.

[79] On the principle of primacy and its relation with the principle of the equality of Member States see K Lenaerts, 'No Member State is More Equal than Others. The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) Verfassungsblog verfassungsblog.de.