



ARTICLES

THE HOUSE ALWAYS WINS. A SYSTEMATIC ANALYSIS OF CJEU CASE LAW RELATING TO THE ECONOMIC AND MONETARY UNION (2010-2020)

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ABSTRACT: During the past ten years or so there has been an ongoing debate about the constitutional limits of EMU development and its external assessment by courts. This *Article* conducts a systematic investigation of the CJEU's cases relating to the EMU (including Banking Union) in 2010-2020. A clear pattern emerges from this dataset: the only successful annulment actions derive from the area of the Banking Union. All actions of annulment considering financial assistance programs and the ECB's crisis measures have been dismissed or rejected, and all actions seeking compensation or recognition of a failure to act were dismissed. We examine the argumentation of the Court and conclude that its function in the EU legal order remains administrative rather than genuinely constitutional. In legal "grey zones" or politically contested cases, the Court's approach remains that of marked loyalty to the executive decisions taken by executive players at Union level, based on argumentation that is not always legally solid or supported by facts. This not only endorses the liberties taken during the crises, but has the effect of increasing the future room for manoeuvre of the EU's executive institutions, especially in cases where judicial review would be needed to maintain the credibility of the EU as a union based on the rule of law.

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This research was supported by the Norface Governance Programme under research grant no 462-19-101 and the Jenny and Antti Wihuri Foundation. The funders had no role in study design, data collection and analysis, decision to publish, or preparation of the manuscript. We acknowledge the research assistance of Camilla Pedersen, Izel Karahan, and Sarah Kaddar, Vivi Säiläkivi and Pielpa Ollikainen. Earlier versions of the manuscript have been presented at the Universities of Helsinki and Amiens. We thank all participants, as well as the two anonymous peer reviewers, for their comments.



KEYWORDS: European Court of Justice – Economic and Monetary Union – Banking Union – separation of powers – rule of law – judicial review.

I. INTRODUCTION

During the past ten years or so there has been an ongoing debate about the constitutional limits of the Economic and Monetary Union's (EMU) development and its external assessment by courts. It would be difficult to deny that the EU institutions have occasionally operated in a legal grey zone. Treaty competences have been repeatedly expanded, often through creative interpretations, or circumvented in order to combat crisis.¹ While subject to challenge before both national and EU courts, these measures have rarely been quashed.² The crisis legacy has also been visible in academic analyses, which have often acknowledged the pragmatic assertion that irrespective of the existence of legal grounds, annulment would in practice be impossible without the collapse of the euro area or the escalation of the crisis.³

Crisis measures, while usually explained as exceptional and temporary, have also changed the EU as a constitutional order in a more permanent manner. Executive powers in the EU have been expanding through crisis measures and informalisation of decision making that challenge the possibilities of democratic scrutiny and deliberation.⁴ The role of the Court of Justice of the EU (CJEU)⁵ in these developments is debated. Dermine, analysing the governance of the Eurozone, argues that “the Court seems to have progressively fallen out of sync with the Union's evolving normative landscape and regulatory practice and no longer accounts for what is actually unfolding on the ground”, giving rise to a “disconnect [that] is profoundly disturbing and raises a number of serious constitu-

¹ P Leino and T Saarenheimo, 'Sovereignty and Subordination: On the Limits of EU Economic Policy Co-ordination' (2017) ELR 166; P Leino-Sandberg and M Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) CMLRev 433.

² For a discussion of national constitutional courts, see C Fasone, 'Constitutional Courts as Part of Separated Powers in the Member States: From the Euro Crisis to the NGEU' in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *Dynamics of Powers in the EU* (Hart 2024) 185-204.

³ Cf A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) *International Organization* 41, 45 f. More recently, see e.g. in relation to the European Stability Mechanism, V Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) *German Law Journal* 113. Similarly see B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) CMLRev 805. In relation to NextGenerationEU, see B de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CML Rev 635.

⁴ On this, see C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Powers in the EU* cit.

⁵ We use the CJEU acronym to denote the Court as an institution, comprising the General Court (GC) and the Court of Justice (CoJ).

tional issues".⁶ For others, the Court's actions make sense. Goldmann finds that it is rather the German Federal Constitutional Court (FCC) that appears as "the harbinger of a dystopian future for the EU".⁷ As Hinarejos observes, the dialogue between the CJEU and its national counterparts is likely to continue since "[n]ew challenges will no doubt continue to be brought every time the boundaries are pushed forward in this area", illuminating "the complexity and depth of disagreements in the area of EMU".⁸

One such illumination took place on 6 December 2022, when the FCC issued a ruling addressing the constitutional complaints relating to the EU's Own Resources Decision.⁹ While the FCC has now overcome its long-standing reluctance towards the preliminary reference procedure and referred two cases, both concerning the EMU, to Luxembourg, this time it felt a reference was not necessary. The grounds provoked an academic debate, as the FCC argued that there is "no reason to assume that the Court of Justice of the European Union would interpret the competences in Art. 122 and Art. 311(2) TFEU more narrowly than the Federal Constitutional Court. Against this background, the constitutional complaints would remain unsuccessful even after a referral".¹⁰

It is difficult to disagree with the FCC in this assessment. In EU legal scholarship, the track record of the CJEU and particularly the Court of Justice (CoJ) as an "activist" court in the service of EU integration, is well-documented.¹¹ It has structurally given much weight to the "unity, primacy, and effectiveness of EU law".¹² Indeed, the CJEU's President Koen Lenaerts has acknowledged its deferential attitude towards the other EU institutions, arguing that the intensity of judicial review needs to accommodate the quality of decisions to be reviewed:

"in areas entailing choices of a political or complex nature, the legality of a measure adopted by the EU political institutions can be affected only if the measure is manifestly inappropriate having regard to the objective pursued. That cannot be regarded as undue deference vis-à-vis the political institutions of the Union. It is, on the contrary, standard

⁶ P Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) 221-222.

⁷ M Goldmann, 'The European Economic Constitution after the *PSPP* Judgment: Towards Integrative Liberalism?' (2020) *German Law Journal* 1058.

⁸ A Hinarejos, 'The Legality of Responses to the Crisis' in Amtenbrink, Hermann and Repasi (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 1398-1399.

⁹ Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21.

¹⁰ Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21, para. 236.

¹¹ H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986); JHH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) *Comparative Political Studies* 510; M Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press 2013).

¹² See e.g. case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para. 29; case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107 para. 60; case C-42/17 *Criminal Proceedings against MSA and MB* ECLI:EU:C:2017:936 para. 47; joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal Proceedings against PM and others* ECLI:EU:C:2021:1034 paras 221-212.

restraint by a court in a democratic society to avoid crossing the line between law and politics. In other words, the Court of Justice cannot be expected to encroach upon the core prerogative of the EU legislature to decide politically which measures are the most appropriate response to a given issue".¹³

This is not an accident but follows from the Court's rather explicit choice of reigning in Member States, which seems to turn it largely oblivious vis-à-vis the judicial role of counterbalancing and controlling the political branches in the Union layer.¹⁴ Historically, the Court has often been treated as a solution to problems that are extraneous to it: it settles issues that the politicians have been unable to tackle efficiently.¹⁵ This places the Court in the role of making policy choices rather than reviewing them. The CJEU's structurally integrationist stance is problematic from a separation of powers perspective. Judicial control of the acts of the EU executive and legislative branch and of the boundaries of the competences of the European Union is often considered weak or deferential.¹⁶ Indeed on the contrary, the boundaries of the competences of the European Union have at times been expanded through the Court's case law, giving rise to accusations of judicial overreach.¹⁷ Even, or perhaps especially, in crisis situations, the control functions exercised by the Court remain lax.¹⁸ Its deferential approach gains new significance in times when EU powers are no longer expanded through Treaty change but by adopting a new interpretation of the old Treaties.¹⁹ While Treaty amendments have been one of the key avenues for Member States to ensure that they remain Masters of the Treaties, the process of new interpretation places the EU institutions in the driving seat and allows them to expand their own powers in ways that are difficult to control by national parliaments.

¹³ K Lenaerts, 'The Broadening of EU Competences through the Case Law of the Court of Justice: Myth or Reality' (2023) ERA Forum 589.

¹⁴ Noteworthy is the contrast between the general title and the content's focus on Member States in K Lenaerts, 'On Checks and Balances: The Rule of Law Within the EU' (2023) ColumJeurL 2, 25.

¹⁵ JHH Weiler, 'Europe in Crisis—On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) Singapore Journal of Legal Studies 248, 263.

¹⁶ Goldner Lang has termed this phenomenon judicial passivism, defined as a subcategory of judicial activism where the Court instead of overstepping its powers is "consciously (actively) not using its powers where it could", see I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in T Capeta, I Goldner Lang and T Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart 2022) 175–192.

¹⁷ M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice* (Edgar Elgar Publishing 2013).

¹⁸ See M Gulati and G Vanberg, 'Paper Tigers (or How Much Will Courts Protect Rights in a Financial Crisis?)' in F Allen, E Carletti and M Gulati (eds), *Institutions and the Crisis* (European University Institute 2018) 111; and in another field AW Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) ELO 284.

¹⁹ N Scicluna and S Auer, 'From the Rule of Law to the Rule of Rules: Technocracy and the Crisis of EU Governance' (2019) West European Politics 1420.

Although the EU has never followed a classic conception of separation of powers,²⁰ the need to ensure the independence of judicial scrutiny of political and administrative exercise of power can hardly be questioned. A functioning separation of powers structure exists to ensure democratic scrutiny. It presumes the existence of at least a potential conflict between the branches.²¹ Our data demonstrates how such conflict seems to be lacking; instead of challenging each other the EU institutions are driven by consensus, which may be even stronger in case of unorthodox solutions.

Existing legal commentary in the EMU field has been focused on specific subfields within EMU, in which the judicial functions fulfilled by the CoJ and the GC vary. In particular, the debate has been dominated by individual cases, including the prominent preliminary references – *Pringle*,²² *Gauweiler*,²³ and *Weiss*.²⁴ Many have taken a pragmatically positive position, praising or at least defending the Court for doing, to borrow the famous words of Draghi,²⁵ “whatever it takes”.²⁶ Others have been more critical. In these rulings, the ECB has in the words of one commentator been treated as a “runaway institution’ that can de facto define the limits of its own mandate”.²⁷ Especially *Gauweiler* has been portrayed as “a judgment of institutional empowerment” with the ECB emerging as the “big winner of the judgment” and the “tensions and instability arising from the separation of competences in monetary and economic policy gravitat[ing] to the advantage of the Union”.²⁸ By allowing the ECB to continue taking actions that lack clear Treaty support, the Court has been said to “perpetuate zombie rules and the power imbalances that they enshrine, at the expense of leaving the determination of such rules

²⁰ For a further discussion of this see, C Eckes, P Leino-Sandberg and AW Ghavanini, ‘Introduction’ in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Powers in the European Union* cit. 3-18.

²¹ On this, see P Leino-Sandberg and P Minkkinen, ‘From Separated Powers to Consensual Executive Government in the EU’ in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Powers in the European Union* cit. 19-36.

²² Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

²³ Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400.

²⁴ Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

²⁵ Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, www.ecb.europa.eu.

²⁶ See e.g. S Adam and FJ Mena Parras, ‘The European Stability Mechanism through the Legal Meanings of the Union’s Constitutionalism: Comment on *Pringle*’ (2013) ELR 848; P-A van Mallegheem, ‘*Pringle*: A Paradigm Shift in the European Union’s Monetary Constitution’ (2013) German Law Journal 141; P Craig and M Markakis, ‘*Gauweiler* and the Legality of Outright Monetary Transactions’ (2016) ELR 4; AAM Mooij, ‘The *Weiss* Judgment: The Court’s further Clarification of the ECB’s Legal Framework: Case C-493/17 *Weiss* and Others’ (2019) Maastricht Journal of European and Comparative Law 449.

²⁷ J Mendes, ‘Constitutive Powers and Justification. The Duty to Give Reasons in EU Monetary Policy’ in Mark Dawson (ed.), *Substantive Accountability in Europe’s New Economic Governance* (Cambridge University Press 2023) 313.

²⁸ T Tridimas and N Xanthoulis, ‘A Legal Analysis of the *Gauweiler* Case. Between Monetary Policy and Constitutional Conflict’ (2016) Maastricht Journal of European and Comparative Law 17, 38.

to processes consonant with democratic constitutionalism".²⁹ This also has implications for its accountability. Previous research has demonstrated that the CJEU keeps the ECB "within its mandate only in a procedural way", preferring to discuss the process through which a provision was adopted rather than its substantive content.³⁰ The commentary on the case law on the crisis measures in cases such as *Ledra*³¹ and *Chrysostomides*³² has focused on the shadow existence of the Eurogroup as a power hub that avoids judicial accountability,³³ as the "remaining avenues for judicial review are insufficient to ensure that litigants are accorded effective judicial protection in this area".³⁴ At the same time, the opposition mounted by the FCC has been met in legal academia primarily by bashing the FCC as "Germany's failing court"³⁵ and led, among other reactions, to a "Joint Statement in Defense of the EU Legal Order"³⁶ criticising the FCC for challenging EU integration and questioning the authority of the CJEU.³⁷

The Court's overall pattern of deference and its systemic effects on Union development have been far less discussed. They, too, have implications for how the other EU institutions evaluate their room for manoeuvre and for the EU as a Union based on the rule of law. We believe that a functioning constitutional democracy requires a constitutional court with authority and credibility in the eyes of its constituencies. This requires balancing between "activism" and deference, and we wonder if the CJEU has always set the balance right. A Court that intervenes in the will-formation of political or executive branches too often is perhaps an activist court. A "passivist" Court that never intervenes may also be a problem, since it increases the confidence of the political branches that there are no legal limits to their actions.³⁸ This is in particular a problem in the EU con-

²⁹ J Mendes, 'Constitutive Powers and Justification' cit. 314.

³⁰ M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) *ELJ* 75, 76, 92.

³¹ Case C-8/15 *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

³² Case T-680/13 *Chrysostomides, K. and Co. and Others v Council and others* ECLI:EU:T:2018:486.

³³ See e.g. P Craig, 'The Eurogroup, Power and Accountability' (2017) *ELJ* 234; P Nicolaidis, 'The Euro Group and Judicial Protection: Has the Court of Justice Created a Loophole?' (2021) *Maastricht Journal of European and Comparative Law* 919; I Staudinger, 'The Court of Justice's Self-restraint of Reviewing Financial Assistance Conditionality in the Chrysostomides Case' (28 May 2021) *European Papers* www.europeanpapers.eu.

³⁴ M Markakis, 'The Political and Legal Accountability of the Eurogroup' in Mark Dawson (ed.), *Substantive Accountability in Europe's New Economic Governance* (Cambridge University Press 2023) 153.

³⁵ P Eleftheriadis, 'Germany's Failing Court' (18 May 2020) *Verfassungsblog* verfassungsblog.de.

³⁶ RD Keleman, P Eeckhout, F Fabbrini and L Pech, 'National Courts Cannot Override CJEU Judgments' (26 May 2020) *Verfassungsblog* verfassungsblog.de.

³⁷ See e.g. M Kumm, 'Rebel without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do about It' (2014) *GLJ* 203; J Bast, 'Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review' (2014) *GLJ* 167; J Basedow, J Dietze, S Griller and M Kellerbauer, 'European Integration: Quo Vadis? A Critical Commentary on the ECB Judgment of the German Federal Constitutional Court of 5 May 2020' (2021) *ICON* 188.

³⁸ P Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge University Press 2022) chapter 8.

text, as the EU is not a state, is largely run by non-elected executives, and suffers from low degrees of political integration.

We take this as a starting point for our analysis and see the active and critical stance of the FCC as partly provoked by the passive stance by the CJEU. Instead of focusing on individual cases or some cases that are closely related to a particular issue, we conduct a systematic analysis of all relevant CJEU case law in the area of EMU (including the Banking Union) in 2010-2020. By subdividing this body of case law into three subcategories, our analysis still takes into account the specific features of each field while maintaining a systematic bird's-eye perspective. To our knowledge, no such analysis previously exists. Only this kind of an analysis can bring out systematic issues and patterns that reach beyond findings in an individual case and thus have specific weight in making visible how judicial decision-making may affect and is affected by other branches of government.

This research design was expected to capture the extent of and ways in which the CJEU empowers, checks, or restrains the legislative and executive branches both vertically and horizontally, and how it communicates with the EU's institutions and Member States through adjudication. We find a remarkable level of institutional alignment. No cases have been brought by institutional actors. Challenges brought by individuals or, more rarely, Member States against the Commission, the Council, the ECB or other EU actors have, save in the area of the Banking Union, consistently failed. Most often, they have failed on formal grounds, demonstrating the CJEU's reluctance to engage in any meaningful review of how and by whom European executive power is exercised in the area of EMU, which has constituted one of the EU's main constitutional battlegrounds during and after the Euro area sovereign debt crisis. On this basis, we argue that the Court fulfils an administrative function, concerned mainly with enforcement. The role of a constitutional court, ensuring a respect for the Treaties going beyond mere lip service, remains largely vacant.

The *Article* is structured as follows. Section II describes the data set on which the analysis is based (section II.1) and presents the overall findings (section II.2). Sections III–V provide a detailed discussion of the findings as regards the financial assistance programmes (section III), the ECB's monetary crisis measures (section IV), and the Banking Union (section V). Section VI concludes.

II. DATA SET AND GENERAL ANALYSIS OF CJEU CASE LAW

II.1. THE DATA SET

The data selection took its point of departure in the *SepaRope Judiciary Dataset*,³⁹ prepared within the NORFACE funded project Separation of Powers for 21st Century Europe.⁴⁰ The search initially covered all judgments and orders delivered by either the CoJ or the GC that had been categorized in the Curia⁴¹ database as belonging to the subject area "Economic and Monetary Policy" (all subcategories).⁴² Temporally, the dataset was limited to cases decided between 1 January 2010 and 31 December 2020. This time period was chosen to ensure, on the one hand, a sample of large enough size to permit the identification of patterns in the cases and cover the period of European sovereign debt crisis, and on the other hand to avoid the dataset going too far back in time, which could endanger its relevance.

Certain cases yielded from the searches were excluded from the dataset due to one of four reasons: *i*) the judgment did in fact not concern the EMU, although this had initially been indicated by the keyword search, but something else, such as the internal market *ii*) it concerned the regulation of euro coins; *iii*) it had been removed from the CJEU's register and was therefore unavailable, or *iv*) the case concerned purely procedural matters (signified by suffixes DEP or OST to the case number). While the supervision of credit institutions is largely defined as an internal market act rather than an EMU measure, the Banking Union was included in the data set as one of the central political responses to the Euro crisis and because its legal basis is partly found in art. 127(6) TFEU. However, the cases involving banking supervision that predate the Banking Union were excluded. Access to documents cases within the EMU were not included in the dataset, as they concern the application of transparency legislation rather than of the Treaty provisions of the EMU and are typically classified accordingly in the Curia database.

³⁹ AW Ghavanini, A Östlund, C Pedersen, S Kaddar and I Karahan, 'An Empirical Approach to Separation of Powers Research in the EU: Introducing the SepaRope Judiciary Dataset' (CERGU Working Paper 1-2022).

⁴⁰ The project has investigated the CJEU's legal decision-making and reasoning, specifically regarding its participation in will-formation and exercise of control of other actors at Union and Member State level in the policy fields of the EMU, migration and EU international trade. These three fields were selected as they are exceptionally controversial, engaging public debate and arousing criticism against the foundations of the exercise of political and legal power in the EU. The project examines how, within the EU, the different branches of government at different governance levels co-determine each other's powers, how they contribute to or hinder democratic will-formation, and how they serve or fail to serve as each other's checks and balances.

⁴¹ InfoCuria, available at the CJEU's website curia.europa.eu.

⁴² The dataset was initially collected by the consortium's Gothenburg team and is further explained in AW Ghavanini, A Östlund, C Pedersen, S Kaddar and I Karahan, 'An Empirical Approach to Separation of Powers Research in the EU: Introducing the SepaRope Judiciary Dataset' cit.

As it is well known that the CJEU's subject matter indications are sometimes incomplete or erroneous, the automated case selection was complemented qualitatively in order to ensure, as far as possible, the completeness of the dataset. This was done using two complementary approaches: a review of relevant literature as well as following up the citations in the judgments yielded by the database search. Based on these approaches, the dataset was supplemented with cases related to the euro crisis and falling within the selected time period but not found during the database search.⁴³ The full case list has been provided as an online supplementary document. Most documents included in the dataset were available in English, but some only existed in German, French or Greek. The latter were translated with DeepL and Google Translate tools.

The overall dataset includes 71 cases in total, divided into three subcategories: the financial assistance programs given to the crisis countries (26 cases), the ECB's monetary crisis measures (7 cases), and the Banking Union (38 cases). Some of the cases are more technical in nature, while others are more constitutional in nature and involve the limits of EU action or fundamental rights. The 71 cases in turn gave rise to 107 distinct actions; these were identified relying on the Court's own specification of the case in the judgment.⁴⁴

The 107 actions include 60 actions for judicial review against EU legislative and executive acts brought by individuals, trade unions or financial institutions under art. 263 TFEU. There are no interinstitutional cases where one EU institution would have challenged the action of another EU institution. The dataset also includes 18 claims for compensation (art. 268 and 340 TFEU), 3 claims of failure to act (art. 265 TFEU) and 17 appeals directed against earlier GC rulings (art. 256 TFEU). Among these, there is only one appeal case brought by an EU institution (the Council) before the CoJ, which also shows that EU institutions rarely appeal rulings. As will be demonstrated below, this is easily explained by the fact that the General Court rulings largely reflect their views. The data also contains 7 cases referred to the CoJ by national courts for the preliminary reference procedure (art. 267 TFEU), which often give rise indirectly to both validity issues concerning EU legal acts and infringements of EU law by the Member States.

II.2. OVERALL FINDINGS

Already an analysis of the party composition in the analysed cases demonstrates a striking institutional alignment, including not only the political and executive institutions but also the CJEU. The cases are all brought against the EU's executive actors, in particular

⁴³ For example, GC case *Chrysostomides, K. and Co. and Others v Council and others* cit., which has been labelled as concerning "Provisions governing the institutions" in the Curia database, was found from the Council's appeal of that ruling to the CoJ (C-597/18), and case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 was found through the literature review.

⁴⁴ As given immediately after the identification of the parties and before the description of the composition of the Court.

the Commission, the Council, the ECB, and the Eurogroup. Only one case, alleging failure to act and dismissed by the Court, involves the European Parliament as a co-defendant (alongside the European Council, Eurogroup, the Council, Commission and the ECB).⁴⁵ To the extent the cases concern several EU institutions (either as parties or through interventions), the institutions have always appeared on the same side of the dispute. The EU institutions and Member States have intervened actively in the CoJ's preliminary rulings. Among the EU institutions, the Commission intervened in various cases dealing with the financial assistance programmes and the Banking Union.

As for the outcomes, the general pattern is that the EU Courts side with the institutions. An overview of the CJEU's decisions is provided in Table 1. Regarding the financial assistance programs or the ECB crisis measures, all actions seeking annulment, compensation, or recognition of a failure to act were dismissed as either inadmissible or unfounded both in the GC and, where applicable, on appeal by the CoJ. Where a case has been partially dismissed as inadmissible and partially rejected in substance, this is indicated in both columns; thus, the numbers indicated in the fourth and fifth column from the left are sometimes larger than the number of actions indicated in the third column.⁴⁶ Of course, even where the outcome of the case goes against an applicant, this does not necessarily mean that the action was a failure from a broader perspective; the claimant may lose the individual case, but still have their point recognised as part of the Court's reasoning. This way, the case may still contribute to shaping the law and imposing limitations on the actions of the EU institutions.

The only cases where the Court upheld actions of annulment concerned the Banking Union. However, even here all actions seeking compensation or recognition of a failure to act as well as appeals were also dismissed regarding banking supervision and crisis resolution.⁴⁷ In accordance with their rules of procedure,⁴⁸ both Courts consistently ordered the losing party to bear the costs of other party, although the interveners had to pay their own costs. This means that as far as the applicants are concerned, they not only risk lengthy proceedings and most likely a lost case but also the unavoidable prospect of significant litigation costs.

The dataset also includes a small number of preliminary references where challenges have been channelled through national courts, but in effect functioning as an alternative

⁴⁵ Case T-38/14 *Kafetzakis and Others v Parliament and Others* ECLI:EU:T:2015:785.

⁴⁶ These classifications have been made following the Court's own legal analysis of the case as available in the Curia database.

⁴⁷ There is one successful appeal related to our case selection, in which the appealed GC decision (case T-466/16 *NRW. Bank v SRB* ECLI:EU:T:2019:445) involved a declaration of inadmissibility, later overturned by the CoJ, which referred the case back to the GC for a decision on the merits. The judgment was delivered only in October 2021 and thus falls outside the temporal scope of this analysis (case C-662/19 P *NRW. Bank v SRB* ECLI:EU:C:2021:846).

⁴⁸ Art. 134 of the Rules of Procedure of the General Court and art. 138 of the Rules of Procedure of the Court of Justice.

annulment procedure.⁴⁹ Also in these cases, the CoJ generally sided with the institutions against the individual applicants, thus effectively upholding the contested measures; in Table 1, these have been coded as actions dismissed on substantive grounds.

	Contested decisions	Actions	Dismissed as inadmissible	Dismissed on substantive grounds	Application granted
Financial assistance programs (26 cases)	bailout conditions, bail-in, debt restructurings	17 annulment	17	6	0
		11 compensation	9	4	0
		4 appeal	1	4	0
		3 prel ruling	0	3	0
		1 failure to act	1	0	0
ECB's crisis measures (7 cases)	bond purchases, liquidity provision	5 annulment	5	0	0
		1 compensation	1	0	0
		4 appeal	2	2	0
		2 prel ruling	0	2	0
Banking Union (38 cases)	Supervision (I pillar)	14 annulment	2	3	9
		2 compensation	1	1	0
		5 appeal	5	2	0
		1 prel ruling	0	1	0
		2 failure to act	1	1	0
		2 interim measure	0	2	0
	Resolution (II pillar)	24 annulment	16	0	8
		4 compensation	4	0	0
		4 appeal	2	2	0
		1 prel ruling	0	1	0
71		107	67	34	17

TABLE 1. Empirical analysis of the CJEU's case law on EMU 2010-2020

In the following sections, we will examine each of these areas in turn. The analysis demonstrates that not only does the Court typically side with the institutions, but that it

⁴⁹ Cf B de Witte, 'The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts' (2016) in B de Witte, JA Mayoral, U Jaremba, M Wind and K Podstawa (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar 2016) 15.

appears to do so not as the result of independent analysis of the merits of the case but as a matter of deference to the executive decision-maker. We have studied this in more detail by requesting public access to the pleadings of the ECB and the Commission in the preliminary reference cases that involve the Bank, with a view of examining whose legal argumentation the Court follows.⁵⁰ A systematic content analysis of a subset of cases where the Court ruled on the action on the merits indicated that it typically conducts only a light review of the legality of the contested action.⁵¹ The preferred standard of judicial review can be described as a limited substantive review, meaning that the Court satisfies itself that the reasons underpinning the EU act under review are in principle adequate and not tainted with manifest errors. Alternatively, the Court opts for a lower standard, satisfying itself only that the act had been adopted following the adequate decision-making procedures.

Inevitably, some cases fall outside the temporal scope of the analysis. Before the Euro crisis, only a few politically important cases were brought before the CJEU. Two, however, bear mentioning – not least because both were brought by the Commission against another institution; as the analysis will demonstrate, inter-institutional cases are exceedingly rare in the EMU field. In the *OLAF* case, the CJEU clarified the ECB's constitutional status as an EU institution, granting the Bank a high level of operational independence to conduct monetary policy.⁵² In *Commission v Council*, which concerned the manoeuvring of Germany and France to block the Commission's recommendations on the excessive deficit procedure in the Council, the Court hesitated to clarify the procedure and division of powers between these institutions in the enforcement of national budgetary discipline.⁵³ Falling outside the temporal scope of our analysis, the cases will not be further discussed here;⁵⁴ however, it might be observed that, similarly to the subsequent cases included in our analysis, the Court in both rulings refrained from taking a more detailed constitutional position on the EMU. It is indicative of the Court's in-

⁵⁰ See A Ronkainen, 'Litigating Monetary Policy: The Limits are Ours' in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Powers in the European Union* cit. 161-184.

⁵¹ See AW Ghavanini, A Östlund, C Pedersen, S Kaddar and I Karahan, 'An Empirical Approach to Separation of Powers Research in the EU: Introducing the SepaRope Judiciary Dataset' cit.

⁵² Case C-11/00 *Commission v ECB* ECLI:EU:C:2003:395.

⁵³ Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

⁵⁴ For further discussion, see e.g. B Dutzler, 'OLAF or the Question of Applicability of Secondary Community Law to the ECB' (2001) *European Integration online Papers*; R Goebel, 'Court of Justice Oversight over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the OLAF Judgment' (2005) *FordhamIntLJ* 610; I Maher, 'Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion' (2004) *ELR* 831; D Doukas, 'The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado about Nothing?' (2005) *LIEI* 293; M van der Sluis, 'The Role of Constitutional Law for the ECB: Past, Present, and Future' in T Beukers, D Fromage and G Monti (eds), *The New European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press 2022) 392.

stitution-pleasing stance that one commentator observed that the judgment in *Commission v Council* was “hailed with satisfaction by all parties involved”.⁵⁵

At the other side of the spectrum, some more recent judgments have also been left out of the systematic analysis. Where appropriate, such later developments – especially where they consist of subsequent appeals of GC rulings delivered within the temporal scope of this analysis – have been discussed throughout the analysis, and have on no occasion been found to change the tenor of our findings.⁵⁶ One important new development should however be noted here. In *Dexia v SRB*, the GC ruled that the SRB had infringed EU law by collecting *ex ante* contributions exceeding the threshold laid down in the Single Resolution Mechanism Regulation.⁵⁷ Doing so, the Court not only rejected the institutional position (the SRB was supported by the EP and the Council of the EU), but paved the way for similar challenges by other banks amounting in the cumulative to billions of euros. The gravity of the matter is underscored by the Court’s press release, in which it observes that immediate repayment in accordance with the judgment would “risk depriving the SRF of the financial means that may prove necessary to ensure the stability of the euro area and the financial stability of the Union”;⁵⁸ for this reason, the GC ruled that the annulled decision can be maintained temporarily. The case is currently under appeal to the CoJ.⁵⁹

III. FINANCIAL ASSISTANCE PROGRAMMES

The Euro Member States’ response to the euro crisis was to provide financial assistance programmes to crisis countries in the form of bailout packages.⁶⁰ The first Greek bailout package was an ad hoc measure arranged between the Greek government and the so-called “Troika”, consisting of the Commission, the ECB, and the International Monetary Fund (IMF). This was followed by the establishment of the temporary European Financial Stability Facility (EFSF), which granted bailouts to Greece, Portugal, and Ireland in 2010-2011. In 2012 the EFSF was replaced by the permanent European Stability Mechanism (ESM), which has provided financial aid to Spain’s financial sector, Cyprus, and

⁵⁵ D Doukas, ‘The Frailty of the Stability and Growth Pact and the European Court of Justice’ cit. 308.

⁵⁶ See in particular footnotes 114 and 116.

⁵⁷ Case T-411/22 *Dexia v SRB* ECLI:EU:T:2024:216. For an early comment, see V Blazsek, ‘Financial Stability over the Prompt Repayment of Unlawfully Collected ex-ante Contributions: The CJEU’s 10 April 2024 Judgment in *Dexia v. SRB* (Case T 411/22)’ (2024) SSRN ssrn.com.

⁵⁸ CJEU, *The Calculation of the 2022 ex ante Contributions to the Single Resolution Fund (SRF) is Unlawful* (10 April 2024) curia.europa.eu.

⁵⁹ Case C-454/24 P *SRB v Dexia*.

⁶⁰ The histories of euro crisis, see C Bastasin, *Saving Europe: Anatomy of a Dream* (Brookings 2015 second edn); W Mitchell, *Eurozone Dystopia: Groupthink and Denial on a Grand Scale* (Edward Elgar 2015); M Brunnermeier, J Harold and J-P Landau, *The Euro and the Battle of Ideas* (2016 Princeton University Press); A Mody, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018).

Greece. The Troika enjoyed an active role in preparing and monitoring bailout programmes, although it is obviously not an EU institution.

Financial assistance was conditioned on severe austerity measures as well as structural reforms in the public and financial sectors. The second Greek bailout also involved a haircut (a reduction in the stated value of assets) to privately owned Greek bonds known as Private Sector Involvement (PSI). The Cypriot assistance programme included the conversion of depositors' uninsured savings for recapitalizing Cyprus' two biggest banks (a so-called bail-in). Individuals and trade unions requested the GC to annul austerity, haircut and bail-in measures and sought compensation for the losses caused and a recognition of a failure to act. The challenges concerned mostly the Greek and Cypriot bailouts as well as the legality of the establishment of the ESM. The Irish, Portuguese, and Spanish bailouts were subject to much fewer legal challenges. The central questions in these cases have been the Council's and the Eurogroup's role in enforcing the decisions taken by the Troika, the identification of the institution (EU or national) responsible for the challenged measure and the scope of discretion that the national authorities have had when implementing Troika decisions. All of these are relevant legal questions given the highly unorthodox legal construction in which the decisions took place.

The GC dismissed three challenges to the first Greek bailout as inadmissible. The first two were brought against the Council and involved decisions it had taken for the purpose of strengthening of the surveillance of budgetary positions under Regulation (EC) 1466/97 and for speeding up the implementation of the excessive deficit procedure under Regulation (EC) 1467/97. Civil servants (assisted by their trade union) suffering a deterioration of their employment conditions challenged Council Decision 2010/320/EU of 10 May 2010 that required Greece to reduce its deficit as a precondition of the bailout and Council Decision 2011/57/EU of 20 December 2010 that added new measures to the bailout programme.⁶¹ The first decision includes a detailed list of legislative and administrative measures, such as reducing bonuses, increasing the retirement age and limiting pension expenditures, that "Greece shall adopt [...] before the end of September 2010". The second contested decision adds new saving measures including the privatisation of public assets, social spending cuts and recruitment limitations. The cases were framed as competence cases, with the applicants arguing that the Commission and Council had exceeded their powers under arts 126(9) and 136 TFEU. Given the detailed description of measures that are expected from Greece, this does seem like a relevant question. However, the cases were declared inadmissible because of the lack of direct concern on the part of the applicants.⁶² Although the bailout en-

⁶¹ Council Decision of 20 December 2010 amending Decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit.

⁶² Case T-541/10 *ADEDY and Others v Council* ECLI:EU:T:2012:626 and case T-215/11 *ADEDY & Others v Council* ECLI:EU:T:2012:627.

tailed specific pension expenditure targets related to the GDP, the GC held that Greek authorities had a wide discretion in the implementation of required measures and hence it was not the Council decision but the subsequent national measures that could potentially affect the applicant's legal situation. The GC also held that direct concern was excluded since reductions in remuneration affected the civil servants' factual, rather than legal, situation. Judicial review was instead to be guaranteed by national courts, with recourse to the preliminary reference procedure where necessary.

In the third case, the applicants challenged eight subsequent Council decisions⁶³ addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit. These decisions also reach deep into the Greek legislative and executive agenda in various areas of national law where the EU has no substantive competence. In the view of the applicants, this constituted an infringement of the principles of conferral and subsidiarity. The Court, however, remained unconvinced by the argument and refused to accept that the contested decision had undermined the applicants' rights to human dignity and access to social security and social services. According to the Court, the decisions corresponded to the exercise of the powers conferred on the Council, as they were taken with a view of reducing Greece's deficit deemed necessary to remedy the situation of the excessive deficit procedure and to address Greek deficits, which constituted a threat to the financial stability of the euro area. This finding could be challenged, given the role of the EU in Member States' economic and fiscal policies under the Treaty. The GC also rejected the application for compensation for damages that the applicants claimed to have suffered as a consequence of the pension and social insurance reforms.⁶⁴

Regarding the second Greek bailout, three cases were brought against the haircut of privately owned Greek bonds; two against the ECB and one against the full range of institutional actors including the Parliament, the Council, the Council of the EU, the European Commission, the ECB and the Eurogroup. First, one case sought to annul the actions that excluded the ECB from the haircut. Following the line of argumentation introduced in earlier rulings, the GC found that the applicants were not directly concerned on account of the discretion left to national implementing authorities.⁶⁵ Therefore, the requirement of direct concern was not fulfilled. The Court also held that the ECB's measures linked with the restructuring of debts could not be classified as the legal basis for the haircut. A subsequent action for damages brought by (partially) the same applicants was rejected on the merits by the GC, which set a high threshold for the appli-

⁶³ Council decisions 2010/320/EU of 10 May 2010, 2010/486/EU of 7 September 2010, 2011/57/EU of 20 December 2010, 2011/257/EU of 7 March 2011, 2011/734/EU of 12 July 2011, 2011/791/EU of 8 November 2011, 2012/211/EU of 13 March 2012 and 2013/6/EU of 4 December 2012.

⁶⁴ Case T-531/14 *Sotiropoulou & Others v Council* ECLI:EU:T:2017:297.

⁶⁵ Case T-224/12 *Accorinti & Others v ECB* ECLI:EU:T:2014:611.

cants by observing that a sufficiently serious breach must include a “manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB”.⁶⁶ It then found that the ECB had neither misused its powers nor infringed the principles of legitimate expectations, equal treatment, or proportionality. Finally, a complaint against the PSI, brought as an action for failure to act, was dismissed as the applicants had not previously called upon the relevant EU institutions to act, which is a precondition for bringing an action of this kind (art. 265(2) TFEU).⁶⁷ The corresponding claim for compensation was rejected because of flaws in the application.

The scene for further judgments was set in *Pringle*, a preliminary ruling concerning the legality of amending art. 136 TFEU to reflect the establishment of the ESM and the ESM Treaty’s compliance with the economic and monetary provisions of the EU Treaties, especially the so called “no bailout” clause (art. 125 TFEU).⁶⁸ The ruling has been extensively analysed elsewhere,⁶⁹ and some brief remarks will suffice here. Dealing with the case in the accelerated procedure and dismissing all Thomas Pringle’s arguments, the CoJ did “what had been expected” by safeguarding the possibility of bailing out failing Member States.⁷⁰ Carrying out this ostensibly necessary task to save the euro, the Court was forced to downplay the role of the Union institutions. In particular, it accepted that amending art. 136 TFEU did not increase the competences conferred to the EU in the Treaties, which was a necessary conclusion for the Court to be able to endorse the use of the simplified Treaty revision procedure. It furthermore held that although the ESM Treaty allocates various tasks to the Commission and the ECB, these tasks do not provide any independent decision-making power or amend the essential character of the powers conferred on those institutions by the Treaties. The activities pursued by those institutions within the ESM Treaty solely commit the ESM and thus fall outside the remit of EU law. Therefore, institutional balance was not affected. As regards the no bailout clause, the CoJ argued the aim of the clause is not to prevent all financial assistance but ensure that the EU Member States follow sound budgetary policies and that they remain subject to the logic of market when they get into debt. The strict conditionality as-

⁶⁶ Case T-79/13 *Accorinti & Others v ECB* ECLI:EU:T:2015:756 para. 68.

⁶⁷ *Kafetzakis & Others v Parliament & Others* cit.

⁶⁸ *Pringle* cit.

⁶⁹ E.g. B de Witte and T Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order’ cit. 805; P Craig, ‘*Pringle* and the Nature of Legal Reasoning’ (2014) *Maastricht Journal of European and Comparative Law* 205; G Beck, ‘The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court’s Cumulative Approach and the *Pringle* Case’ (2013) *Maastricht Journal of European and Comparative Law* 635; S Adam and FJ Mena Parras, ‘The European Stability Mechanism through the Legal Meanderings of the Union’s Constitutionalism’ cit.; C Herrmann, ‘*Pringle v. Ireland*’ (2013) *AJIL* 410.

⁷⁰ V Borger, ‘The ESM and the European Court’s Predicament in *Pringle*’ cit.; Similarly see B de Witte and T Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order’ cit. 806.

sociated with the ESM's financial assistance ensures that the ESM operates consistently with EU measures for coordinating economic policies and that the Member State receiving financial assistance pursues sound budgetary policies. At the time, the clause was thus understood to set some (even if minor) limits to EU action.⁷¹

The CoJ has maintained this position in subsequent cases brought against the EU institutions involving activities within the framework of the ESM Treaty. In this regard, its position is carefully calibrated to offer the institutions maximum leeway while at the same time making sure that disputes arising from the ESM Treaty are treated as "related to the subject-matter of the Treaties" in the meaning of art. 273 TFEU, which ensures its own jurisdiction to settle such disputes. This has left the Court with limited review powers related to the political decision-making within the ESM.

The bail-in included in the Cypriot financial assistance programme generated the most challenges, 17 in total. Most of them concerned the status and reviewability of the Eurogroup and its acts, given that under the Protocol on the Eurogroup, the Euro area ministers "shall meet informally [...] to discuss questions related to the specific responsibilities they share with regard to the single currency".⁷² The actions were directed against the Commission, the ECB, the Council, the Eurogroup and the EU as a whole concerning either the Eurogroup statements or the Memorandum of Understanding (MoU) concluded between the ESM and Cyprus and sought the annulment of the bail-in measures as well as compensation for losses suffered.

In the *Mallis case*, six challenges were directed against the Commission and the ECB for the annulment of the bail-in measures stated in the Eurogroup statement of 25 March 2013.⁷³ The applicants argued that the statement represented a joint decision on the bail-in by the Commission and the ECB; thus the cases were brought against them jointly. This line of argument was presumably adopted in view of the CJEU's competence to review acts of the EU institutions, as an action directly against the Eurogroup would have risked facing a declaration of inadmissibility.⁷⁴ The GC, however, was not convinced. Although the Commission and the ECB take part in Eurogroup meetings and the Commission may assist with their preparation, the Court argued that the Eurogroup's statements could not be imputed to either institution as they did not have any power of review with regard to the Eurogroup; nor could they issue recommendations or give

⁷¹ P Leino-Sandberg and M Ruffert, 'Next Generation EU and its Constitutional Ramifications' cit. 433, who however observe that Next Generation EU marks a change in this regard, effectively dissolving any constitutional limitations relating to conditionality.

⁷² Protocol (No 14) on the Euro Group.

⁷³ Cases T-327/13 *Mallis and Others v Commission and ECB* ECLI:EU:T:2014:909 to T-332/13 *Chrysanthi Christodoulou and Maria Stavrinou v European Commission and ECB* ECLI:EU:T:2014:910.

⁷⁴ Cf. to this effect para. 61 of the subsequent judgment of the ECJ in case C-105/15 P *Mallis & Malli v Commission and ECB* ECLI:EU:C:2016:702.

binding instructions to it. On these grounds, the GC declared the action inadmissible as it addressed the wrong defendants.

Interestingly, however, the Court did not stop there, but continued “for the sake of completeness” (which, as the reader will be aware, is not a typical concern for a court) to observe at some length that as an informal meeting, the Eurogroup could not be regarded as a decision-making body, nor were its statements to be treated as legally binding measures.⁷⁵ In other words: whereas the GC could have dismissed the action merely on the basis that the Eurogroup is something else than another decision-making forum for the Commission and the ECB, it appears to have gone out of its way to further declare that acts of the Eurogroup are not subject to review before the Union Courts. On appeal, the CoJ – agreeing in substance with the GC but blurring its distinction between the author and the nature of the act – held that the statement could not be considered an “expression of a decision-making power of those two EU institutions” and therefore dismissed the appeals as unfounded.⁷⁶

The *Ledra* case involved six challenges brought against the Commission and the ECB, requesting the annulment of certain paragraphs of the MoU concerning the bail-in as well as compensation for the losses caused by the bail-in.⁷⁷ Like in *Mallis*, the GC observed that the MoU had been concluded between the ESM and Cyprus and repeated that the duties conferred on the ECB and the Commission under the ESM Treaty do not entail any power to make decisions of their own. The activities solely commit the ESM. As non-contractual damages can be awarded only for actions taken by the institutions, a damage claim was rejected as inadmissible on this basis. As for the claim that the Commission had neglected its duty to guarantee the MoU’s compliance with EU law, specifically the right to property, the GC found that the applicants had failed to establish a causal link between the damage and the Commission’s inaction; thus the action was manifestly lacking any foundation in law, without the GC having to decide whether there had been any actual wrongdoing on the part of the Commission.

On appeal, however, the CoJ accepted, relying on *Pringle*, that the ESM Treaty does in fact oblige the Commission to ensure that the MoU is consistent with EU law. In its view, as a “guardian of the Treaty”, the Commission could not sign a MoU whose compatibility with EU law it doubted, irrespective of whether the signing committed the Commission as an institution or somebody else. This finding makes *Ledra* a rare case in which the Court demanded some degree of accountability for institutional action. However, on substance the CoJ recalled that the right to property may be subject to restrictions justified by the objectives of EU’s general interests. As the Cypriot financial assistance program aimed at

⁷⁵ *Mallis and Others v Commission and ECB* cit. paras 51–62.

⁷⁶ *Mallis & Malli v Commission and ECB* cit. para. 57.

⁷⁷ Cases T-289/13 *Ledra Advertising v Commission & ECB* ECLI:EU:T:2014:981 to T-294/13 *Fialtor Ltd v European Commission and European Central Bank* ECLI:EU:T:2014:980.

ensuring the stability of the banking system of the euro area as a whole, the bail-in did not constitute a disproportionate or intolerable interference impairing the appellants' right to property. Consequently, no compensation was awarded.⁷⁸

Lastly, two challenges for non-contractual damages relating to losses caused by the Cypriot bail-in were brought by applicants against the Council, the Commission, the ECB, the Eurogroup, and the EU as a whole.⁷⁹ The actions ultimately failed, as the GC remained unconvinced that the contested Union measures were unlawful in light of any of the justifications presented by the applicants (notably, the right to property, the protection of legitimate expectations, and the principle of equal treatment). Nevertheless, the GC did follow the reasoning of the applicants on a few matters of principle. First, the GC held that the Eurogroup is, for the purposes of non-contractual liability under art. 340 TFEU, to be considered a body of the Union, capable of incurring liability for the EU.⁸⁰ Second, it accepted that, while the direct harm had been caused by actions taken by the national authorities, the maintenance or continued implementation of at least some of these acts could be attributed to the Union, thereby establishing jurisdiction for the CJEU to examine the question of liability.⁸¹

On appeal by the Council, however, the CoJ reversed the GC's ruling on both accounts.⁸² As regards the status of the Eurogroup, the CoJ held that although the establishment and functioning of this group is governed by the TFEU, this does not alter the informal character of its meetings, nor endow it with decision-making powers within Union law. Contrary to the GC, the CoJ considered the resulting lack of accountability for the Eurogroup to be compatible with the rule of law, citing the reviewability of any act implementing a political agreement reached by the Group. This conclusion has been criticised in literature.⁸³ The CoJ also further narrowed the action by rejecting one of the claims that the GC had allowed, on the grounds that – contrary to what the GC had found – a Council decision allowed so wide discretion to the implementing authorities that any harm was to be attributed only to the actions of the latter.

Finally, the rulings on this topic include two less significant – for the purposes of the EMU, at any rate – preliminary rulings regarding the Irish and Portuguese bailouts, respectively. First, the Irish High Court asked whether the Second Directive prevents the

⁷⁸ *Ledra Advertising v Commission and ECB* cit.

⁷⁹ *Chrysostomides, K. and Co. and Others v Council and others* cit. and case T-786/14 *Bourdouvali and Others v Council and Others* ECLI:EU:T:2018:487.

⁸⁰ *Chrysostomides, K. and Co. and Others v Council and others* cit. para. 113; *Bourdouvali and Others v Council and Others* cit. para. 109.

⁸¹ *Chrysostomides, K. and Co. and Others v Council and others* cit. para. 181; *Bourdouvali and Others v Council and Others* cit. para. 180.

⁸² Case C-597/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028. See also P Nicolaidis, 'The Euro Group and Judicial Protection' cit.; I Staudinger, 'The Court of Justice's Self-restraint of Reviewing Financial Assistance Conditionality in the Chrysostomides Case' cit.

⁸³ M Markakis, 'The Political and Legal Accountability of the Eurogroup' cit. 153.

High Court from ordering a company to recapitalise a credit institution owned by the former as a part of the restructuring of the Irish financial sector requested by the Irish bailout,⁸⁴ in light of the EU Treaty, the obligations of Ireland under the EU/IMF Programme of Support and the terms of the Council Implementing Decision 2011/77 adopted under Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism – a highly complicated legal framework. The measure includes allotting new shares without offering them on a pre-emptive basis to existing shareholders, lowering the nominal value of the company's shares and altering the company's memorandum and articles of association without the consent of company's general meeting. The CoJ found that the Second Directive provides protection for shareholders and creditors of public limited liability companies during normal times. However, it does not preclude an exceptional measure for ensuring the financial stability of the Union. Second, as regards the Portuguese bailout, its Supreme Administrative Court referred a question for a preliminary ruling considering whether the principle of judicial independence enshrined in EU law precludes the measures to reduce remuneration of the judiciary as a part of a measure to reduce Portugal's excessive public deficits.⁸⁵ For the CoJ, this presented an opportunity to establish various core principles relating to the rule of law. However, on the actual substance the Court found that the principle of judicial independence did not preclude general salary-reduction measures. These measures required by Portugal's bailout program were temporary in nature and applied to all member of public administration, including the representatives of the legislature, the executive and the judiciary.

The case law in this section demonstrates that cases will be equally unsuccessful irrespective of whether they are directed against Council decisions that have a clear (even if perhaps constitutionally contested) legal basis, against the Eurogroup as the well-known "run-away" (non-)institution exercising broad factual powers, or against all possible institutions that have had any role in the decision-making or implementation process. While actions for damages are more likely to pass the admissibility threshold, these are more onerous to pursue in substance. Unlike annulment actions, an action for damages requires the claimant not only to demonstrate the unlawfulness of the institutional actions, but also that they have suffered actual harm and that there is a direct causal link between the institution's unlawful conduct and any losses suffered.⁸⁶ Especially the latter hurdle has often proved difficult to overcome. Such actions thus are less well-suited to the judiciary's constitutional control function vis-à-vis the other branches, since the review of legality is but one of several cumulative criteria to be assessed.

⁸⁴ Case C-41/15 *Dowling & Others* ECLI:EU:C:2016:836.

⁸⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.

⁸⁶ See e.g. *Chrysostomides, K. and Co. and Others v Council and others* cit. para. 245.

IV. THE ECB'S MONETARY CRISIS MEASURES

In addition to its involvement in the preparation and monitoring of the bailout packages through membership in the Troika, the ECB responded to the crisis with extraordinary monetary measures, involving emergency liquidity provisions, the reduction of eligibility criteria, and, most importantly, large-scale bond purchase programmes that practically ended the acute phase of the Euro area sovereign debt crisis.⁸⁷

As we have seen, the bailouts were mostly challenged in courts by citizens of the crisis countries, while the ECB's monetary measures were mainly questioned by German actors, involving parliamentarians, lawyers, academics, and ordinary citizens. The latter cases were brought before the EU Courts and national courts sometimes with class actions of thousands of signatories. The fact that the ECB's extraordinary actions met such broad resistance in Germany is interesting, given that – unlike in the crisis states – the measures did not affect the applicants directly, beyond their effect on all EU citizens. Instead, these actors were opposed as a matter of principle, based on a strong German conviction of the appropriate role of an independent central bank. The Court dismissed all direct actions. It also dismissed one action brought against the ECB's refusal to increase the ceiling on the provision of Emergency Liquidity Assistance (ELA) for financial institutions. Finally, the FCC requested two preliminary rulings regarding the legality of the Outright Monetary Transactions (OMT) and the Public Sector Purchase Programme (PSPP); the CoJ found both programmes to be legal.

One of the cases was brought by Stefan Städter, a German lawyer, and concerned the annulment of the introduction of the Securities and Markets Programme (SMP) as well as the decisions regarding the eligibility criteria of Greek, Irish, and Portuguese bonds. The GC rejected the request as manifestly inadmissible, as the applicant had failed to comply with the two-month time limit laid down in art. 263 TFEU.⁸⁸ On appeal, the CoJ upheld the GC's decision of inadmissibility, and consequently found no need to address the applicant's allegation of violations of arts 123 TFEU to 125 TFEU.⁸⁹

Other cases of German origin have given rise to decisions on the somewhat more controversial questions of what can be subject to review and who has standing before the Court. The substantive arguments of the *Städter* case were later taken up when Sven von Storch, joined by 5216 other applicants, filed a new challenge seeking the annulment of introducing the OMT (that replaced the SMP) and suspending the minimum credit ratings threshold of collateral requirements.⁹⁰ The GC dismissed the action on

⁸⁷ Section I: The ECB's response to the Financial and Sovereign Debt Crisis: Unconventional Monetary Policy and the Lender of Last Resort Function in T Beukers, D Fromage and G Monti (eds), *The New European Central Bank: Taking Stocks & Looking Forward* (Oxford University Press 2022).

⁸⁸ Case T-532/11 *Städter v ECB* ECLI:EU:T:2011:768.

⁸⁹ Case C-102/12 P *Städter v ECB* ECLI:EU:C:2012:723.

⁹⁰ Case T-492/12 *von Storch and Others v ECB* ECLI:EU:T:2013:702.

the basis that the applicants did not fulfil the criterion of direct concern. Echoing its above-mentioned *ADEDY* rulings, the Court stated that as both decisions required further implementing measures, they did not have immediate effects on the applicants' legal position; any effects on the applicants would concern only the value of their assets and thus affect their factual position, not their legal position. The GC also rejected two arguments based on fundamental rights. Regarding the applicants' claim of interference with their right to peaceful enjoyment of property, the Court observed that including effects on the value of assets in the criterion of direct concern would render it so inclusive as to become devoid of substance. Finally, the Court referred to its well-established case law on the "complete system of legal remedies" established by the preliminary reference procedure and the possibility of direct action under art. 263 TFEU. On appeal, the ECJ unsurprisingly stated that the GC had not erred in law and dismissed the appeal in its entirety as manifestly unfounded.⁹¹

When the leftist Syriza government decided to hold a referendum in Greece on the bailout conditions in the beginning of 2015, the ECB halted its ELA to Greek banks. This led to claims for compensation for the losses incurred as a result of a bank holiday and capital controls imposed. In *Alcimos Consulting*, the GC confirmed that the Greek authorities had exercised more than "hypothetical discretion" when choosing to introduce a bank holiday and the relevant capital controls following the ECB decision, and that the applicant – a private entity based in Athens – therefore was not directly concerned by the ECB decision.⁹² Regarding the demand for compensation, the applicant's choice to request only the symbolic sum of 1 euro proved a tactical error, as the GC held that the compensation sought was inconsistent with the alleged "serious" losses and that consequently the application had failed to clearly and precisely identify the alleged losses caused by contested decisions had been provided. Hence, the case was dismissed in its entirety.

However, the most important judgments were the two preliminary rulings regarding the legality of the ECB's government bond purchase programmes regarding the OMT and the PSPP. Especially the OMT was controversial as more than 11 000 German complainants questioned in several constitutional complaints its legality,⁹³ leading the FCC to request its first preliminary ruling from the CJEU. As is well known, the CoJ clarified in the *Gauweiler* and *Weiss* rulings the relationship between economic and monetary policies as well as interpreted the purpose of art. 123 TFEU. We describe the rulings only briefly. The CoJ dismissed all of the FCC's legal doubts towards the programmes. Based on our analysis of the Court pleadings, it is evident that the CoJ carefully followed the line of argumen-

⁹¹ Case C-64/14 *P von Storch and Others v ECB* ECLI:EU:C:2016:846.

⁹² Case T-368/15 *Alcimos Consulting v ECB* ECLI:EU:T:2016:438.

⁹³ Due to the "subjectivisation" of the principle of democracy since the FCC's Maastricht decision (BVerfGE 89, 155 [171-172]), it has been possible for individuals to claim that their subjective rights have been violated as part of the admissibility process, with the constitutional procedural law de facto approaching a mass procedure. We thank Ruth Weber for explaining this point to us.

tation provided by the Commission and the ECB,⁹⁴ accepting that the Treaties and the ECB Statute give the ECB a wide discretion resulting in a correspondingly low standard of review.⁹⁵ The Court described this standard as ascertaining the absence of “manifest” errors and compliance with “certain procedural guarantees”.⁹⁶

Building on *Pringle*, the Court argued that since the Treaties do not give an exact definition of monetary policy but only define its objectives and available instruments, the latter determine whether a measure falls within the area of monetary or economic policy. Thus, it should be assessed whether government bond purchase programmes contribute to the ECB’s monetary objective and comply with the principle of proportionality. In the Court’s view, both programmes fall within the sphere of monetary policy, since the OMT’s stated objective of safeguarding monetary policy transmission and the PSPP’s objective to support transmission mechanism both help the ECB to achieve its primary objective, namely price stability. The CoJ also confirmed in both cases that the ECB had respected the principle of proportionality. The fact that the ECB’s reasoned analysis had been subject to challenge did not suffice to call that reasoning into question since, as the Court pointed out, questions of monetary policy are usually of “a controversial nature”.⁹⁷ In view of the ECB’s broad discretion, the Bank is only required to use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.⁹⁸

Regarding the ECB’s monetary financing prohibition, the CoJ followed carefully the legal argumentation concerning the legality of government bond purchases provided by the Commission. First, the Court accepted that as art. 123 TFEU does not include the precise definition of monetary financing but prohibits purchases from the primary markets, the ECB can make secondary market purchases as long as they do not have the same economic effect as primary market purchases. Second, again based on *Pringle*, it confirmed that the objective of art. 123 TFEU is to ensure sound budgetary discipline. Therefore, the ECB can purchase government bonds as long as these do not lessen the impetus to follow sound budgetary policies. The CoJ found that the ECB had offered sufficient safeguards to ensure that the OMT and the PSPP do not infringe these requirements. In addition to buttressing the ECB’s expert powers, the judgments have also transformed the monetary financing prohibition from a concrete constraint into a more general policy objective. We have argued elsewhere that the economic reasoning used

⁹⁴ See A Ronkainen, ‘Litigating Monetary Policy’ cit.

⁹⁵ *Gauweiler and Others* cit. See also e.g. A Hinarejos and D Rakic, ‘Independence, Discretion and Accountability in the Evolving Monetary Policy Framework of the European Central Bank’ (2024) *Maastricht Journal of European and Comparative Law* 473; J Mendes, ‘Law and Discretion in Monetary Policy and in the Banking Union: Complexity Between High Politics and Administration’ (2023) *CMLRev* 1579.

⁹⁶ *Gauweiler and Others* cit. paras 68–69. Cf also *Weiss and Others* cit. paras 24, 30.

⁹⁷ *Gauweiler and Others* cit. para. 75; *Weiss and Others* cit. para. 91.

⁹⁸ *Gauweiler and Others* cit. para. 75; *Weiss and Others* cit. para. 91.

in *Gauweiler* and *Weiss* rulings is based on a very limited and incorrect understanding of monetary financing, the functioning of government bond markets, and market discipline.⁹⁹ This may have led the FCC to find, in its final PSCP ruling, that both the ECB and the CJEU had acted *ultra vires* and to require the German *Bundestag* to ensure that the ECB conducts a significant proportionality assessment.¹⁰⁰

The ECB crisis measures gave rise to the least litigation in the three areas examined here. The cases demonstrate that the individuals of the crisis countries challenged the ECB's actions in the Troika while the resistance of the ECB's monetary measures was widespread especially in Germany, which was at the other end of the spectrum both economically and geographically. It is hardly surprising that none of the latter actors were able to demonstrate direct concern, considering the well-known restrictiveness of that criterion. Nor is it perhaps surprising, considering the political and economic stakes, that the CoJ deferred to the Commission's argumentation, as set out in its observations submitted to the Court, in the *Weiss* and *Gauweiler* rulings, even though the Commission's standpoint was certainly geared towards securing a particular outcome and could easily have been countered with other, perhaps more convincing arguments that the Court was not prepared to hear. It bears observing, however, that several of these actions failed on account of errors on the part of the applicants; this bears witness to the difficulties connected with decentralised enforcement actions. Finally, the CoJ left many open questions that have been further developed by the ECB in its new purchase programmes, which clearly deviate from the safeguards accepted in *Gauweiler and Weiss*. As a result, the new purchase programmes are hardly beyond further referrals for preliminary rulings or requirements at the *Bundestag* to perform proportionality analyses.¹⁰¹

V. BANKING UNION

The central response to the fragility of the banking sector during the eurozone sovereign debt crisis was the establishment of the Banking Union. It consists of two pillars that are the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The first pillar, the SSM, transfers the responsibility for banking supervision from the national to the EU level and grants the ECB a leading supervisory role over financial institutions, including the right to conduct stress tests and require certain capital and risk limits.¹⁰² The

⁹⁹ A Ronkainen, 'Litigating Monetary Policy' cit.

¹⁰⁰ Bundesverfassungsgericht, *ECB decisions on the Public Sector Purchase Programme exceed EU competences*, press release No. 32/2020 of 05 May 2020 www.bundesverfassungsgericht.de; B Jennen, *German Parliament Backs ECB Bond-Buying After Court Standoff* (2 July 2020) www.bloomberg.com.

¹⁰¹ K Matussek, 'ECB's Covid Rescue Program Attacked in Suit at Top German Court' (11 March 2021) www.bloomberg.com; F Sibelt, 'ECB Nemesis Kerber Weighs Action Against the New Debt Shield' (29 July 2022) www.reuters.com.

¹⁰² Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

second pillar, the SRM, sets the general principles for the resolution of failing banks. The SRM consists of the Single Resolution Board (SRB) and national resolution authorities. Instead of using taxpayers' money (bail-out), the resolution includes the write-down of a bank's credit to its creditors and the conversion of credit and deposits into equity (bail-in).¹⁰³ After these tools have been exhausted, the Single Resolution Fund (SRF) can be used for resolving failing banks. Its funding is collected from all banks located in the Banking Union countries in the form of annual contributions. A planned third pillar, the deposit guarantee scheme of deposits up to 100 000 euros, remains to be completed.¹⁰⁴

In the area of Banking Union, there were 38 cases decided by the EU Courts. This is the one area where we find some successful cases for the applicants, but also a considerable number of fundamental procedural mistakes made by them.

As regards the ECB's supervisory measures under the supervisory pillar, the GC decided in the favour of the applicants nine times. Six of these nine cases were brought by financial institutions seeking to annul the ECB's decision to impose on banks a duty to deduct an equivalent amount of money subscribed to national resolutions funds from their own capital.¹⁰⁵ The applicants claimed that the ECB had exceeded its powers and failed to carry out an individual and detailed assessment of the specific risks associated with its decision. The ECB justified the decision with reference to the need to guarantee solid coverage of the risks that contributions to resolution funds exposed credit institutions. The GC found that while the ECB's approach fell appropriately within the framework of its supervisory powers, it had not taken into account the specific circumstances of the applicants, thus infringing the responsibility to carry out individual prudential examination. It therefore annulled the ECB's decisions concerning the applicants.

The remaining three successful cases represented only a partial success for the applicants, who sought to annul the ECB's decisions to impose an administrative pecuniary penalty on the three banks as a result of continuing break of capital requirement. The GC found the contested decisions to be within the ECB's powers and lawful insofar as they established a breach of certain capital requirements on the part of the applicants, and therefore upheld the decisions in principle. However, it also established that

¹⁰³ Regulation (EU) 806/2014 of the European Parliament and of 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) No 1093/2010.

¹⁰⁴ Communication COM(2017) 592 final from the Commission of 11 October 2017 on completing the Banking Union.

¹⁰⁵ Case T-143/18 *Société générale v ECB* ECLI:EU:T:2020:389; case T-144/18 *Crédit agricole and Others v ECB* ECLI:EU:T:2020:390; case T-145/18 *Confédération nationale du Crédit mutuel and Others v ECB* ECLI:EU:T:2020:391; case T-146/18 *BPCE and Others v ECB* ECLI:EU:T:2020:392; case T-149/18 *Arkéa Direct Bank and Others v ECB* ECLI:EU:T:2020:393 and cases T-150/18 and T-345/18 *BNP Paribas v ECB* ECLI:EU:T:2020:394.

the ECB had neglected its obligation to state adequate reasons for the calculation of a penalty imposed on the applicants and annulled pecuniary penalties.¹⁰⁶

Even in this field of the ECB's supervisory powers, however, the majority of the claims brought before the GC were rejected, often on procedural grounds. One action against the ECB for failure to act against a Portuguese bank to prevent money laundering was dismissed, as the applicants had failed to call upon the ECB to act beforehand as required by art. 265 TFEU. Consequently, the GC also dismissed the applicants' request for compensation for the losses allegedly suffered as a result of this inaction as manifestly lacking foundation in law.¹⁰⁷ The GC also dismissed a later complaint from the same applicants as partially inadmissible due to various irregularities in the application; *inter alia* and most remarkably, the applicants had requested both the annulment of decisions taken by a national authority and a preliminary ruling directly from the GC. The applicants also brought a renewed action for a declaration of failure to act, which the Court found manifestly unfounded as the actions the applicants sought were both time-barred and outside of the ECB's competence.¹⁰⁸ The CoJ unsurprisingly dismissed the subsequent appeal as manifestly inadmissible, observing *inter alia* that only one of the pleas raised in the appeal was comprehensible, and that that one plea was manifestly inadmissible.¹⁰⁹ Furthermore, the GC rejected two requests for interim measures regarding the ECB's decision to withdraw the authorisation to function as credit institution on the grounds that, in the first case, the condition or urgency was not met and, in the second, that there were no new facts proving that the contested decision caused serious and irreparable damage after the rejection of the first application of interim measures.¹¹⁰ Both rulings were subsequently upheld on appeal by the CoJ.¹¹¹

Finally, the only preliminary ruling in this area involved Italy's former prime minister Silvio Berlusconi. After the ECB opposed his acquisition of a financial institution due to Berlusconi's tax fraud conviction, Berlusconi and his company Fininvest challenged the actions taken by the Bank of Italy, which had preceded the ECB's decision, before na-

¹⁰⁶ Case T-576/18 *Crédit agricole v ECB* ECLI:EU:T:2020:304; case T-577/18 *Crédit agricole Corporate and Investment Bank v ECB* ECLI:EU:T:2020:305, and case T-578/18 *CA Consumer Finance v ECB* ECLI:EU:T:2020:306. The CoJ dismissed the appeal both as inadmissible and based on substantive grounds, but the judgment was given after the temporal scope of our analysis (case C-456/20 P *Crédit Agricole v ECB* ECLI:EU:C:2021:502).

¹⁰⁷ Case T-22/16 *Comprojecto - Projectos e Construções and Others v ECB* ECLI:EU:T:2017:172.

¹⁰⁸ Case T-768/17 *Comprojecto - Projectos e Construções and Others v ECB* ECLI:EU:T:2019:104.

¹⁰⁹ Case C-251/19 P *Comprojecto - Projectos e Construções and Others v ECB* ECLI:EU:C:2020:366.

¹¹⁰ Case T-797/19 R *Anglo Austrian AAB & Belegging-Maatschappij "Far-East" v ECB* ECLI:EU:T:2020:37 and case T-797/19 RII *Anglo Austrian AAB & Belegging-Maatschappij "Far-East" v ECB* ECLI:EU:T:2020:151.

¹¹¹ Case C-114/20 P(R) - *Anglo Austrian AAB & Belegging-Maatschappij "Far-East" v ECB* ECLI:EU:C:2020:1059 and C-207/20 P(R) *Anglo Austrian AAB & Belegging-Maatschappij "Far-East" v ECB* ECLI:EU:C:2020:1057. After these decisions the GC dismissed the actual application of annulment and the CoJ upheld the ECB's decision by dismissing the appeal, but both judgments were given outside the temporal scope of our analysis.

tional courts.¹¹² The national court referred questions for a preliminary ruling in which it sought clarifications as to the exact division of tasks between the ECB and national supervision authorities in the SSM, and its effects for the allocation of judicial review powers. The CoJ established that its exclusive jurisdiction covers not only the final EU acts but also national preparatory acts adopted by Italian central bank.¹¹³

As regards the resolution pillar, one third of the annulment cases (eight out of 24) was decided in favour of the applicant. Several complaints were directed against precautionary and practical resolution measures. In the six successful applications, a total of ten banks challenged the volume of *ex ante* contributions to the SRF, claiming that the SRB had calculated contributions incorrectly and infringed procedural guarantees, such as the right to be heard and the obligation to state reasons. The GC agreed that the SRB had failed to authenticate the contested decisions and failed to respect procedural rights. It consequently annulled the SRB's decisions concerning the applicants.¹¹⁴ Similar circumstances were brought before the GC in other actions, which however failed on account of the two-month time limit laid down in art. 263 TFEU.¹¹⁵ One appeal was brought but dismissed by the CoJ as both inadmissible and unfounded.¹¹⁶

The GC also dismissed one application seeking the annulment of the SRB's *ex ante* contributions and compensations as well as the annulment of other decisions (including hypothetical ones) by the SRB, chiefly because the action had been lodged after the ex-

¹¹² They also brought action against the ECB's decision directly before the CJEU, where it was dismissed by the GC based on substantive grounds. This judgment was however given outside the temporal scope of our analysis (T-913/16 *Fininvest & Berlusconi v ECB* ECLI:EU:T:2022:279).

¹¹³ Case C-219/17 *Berlusconi & Fininvest* ECLI:EU:C:2018:1023. P Dermine and M Eliantonio, 'Case note on CJEU (Grand Chamber), judgement of 19 December 2018, C-219/17, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*' (2019)). *Review of European Administrative Law* 237.

¹¹⁴ Case T-323/16 *Banco Cooperativo Español v SRB* ECLI:EU:T:2019:822; case T-365/16 *Portigon v SRB* ECLI:EU:T:2019:824; case T-377/16 *Hypo Vorarlberg Bank v SRB* ECLI:EU:T:2019:823; case T-411/17 *Landesbank Baden-Württemberg v SRB* ECLI:EU:T:2020:435; case T-414/17 *Hypo Vorarlberg Bank v SRB* and case T-420/17 *Portigon v SRB* ECLI:EU:T:2020:437. Following appeals from the Commission and the SRB, the GC's judgement in *Landesbank Baden-Württemberg v SRB* was set aside by the CoJ on the basis that the GC had erred in law holding that the SRB had failed to fulfil its duty to state reasons (joined cases C-584/20 P and C-621/20 P *Commission v Landesbank Baden-Württemberg and SRB* ECLI:EU:C:2021:601). Bizarrely, however, the CoJ itself reached the same outcome in substance, premissing its ruling on *another* violation of the same obligation.

¹¹⁵ Case T-466/16 *NRW. Bank v SRB* ECLI:EU:T:2019:445; case T-661/16 *Credito Fondiario v SRB* ECLI:EU:T:2018:806; case T-14/17 *Landesbank Baden-Württemberg v SRB* ECLI:EU:T:2018:812; case T-42/17 *VR-Bank Rhein-Sieg v SRB* ECLI:EU:T:2018:813.

¹¹⁶ Case C-69/19 P *Credito Fondiario v SRB* ECLI:EU:C:2020:178. A successful appeal was brought in case C-662/19 P *NRW. Bank v SRB* ECLI:EU:C:2021:846, and the matter referred back to the GC for examination in substance. Both the appeal and the subsequent GC judgement were given outside the temporal scope of our analysis; however, it bears mentioning that the latter was entirely in favour of the SRB (case T-466/16 RENV *NRW. Bank v SRB* ECLI:EU:2024:111).

piry of the time limit.¹¹⁷ The same applicant subsequently instituted national proceedings against the Italian central bank, later to be referred to the CoJ for a preliminary ruling. Discussing the division of powers between national courts and the EU judiciary at length, the CoJ held that the calculation of *ex ante* contributions by the SRB as well as national acts preparatory to that calculation falls exclusively within the jurisdiction of the CJEU. Doing so, it explicitly disagreed with the referring national court, which had argued that the Bank of Italy had taken an “active and decisive role” that was subject to judicial review before national courts.¹¹⁸ Where a ruling on such matters is necessary in a case pending before a national court, the CoJ observed that the national court may make use of the preliminary reference procedure. In the case at hand, however, the CoJ recalled that a preliminary reference is inadmissible when the question is raised by a party who doubtlessly would have had standing to challenge the act directly before the GC under art. 263(4) TFEU, which the applicant would (and indeed had, albeit out of time). Consequently, only one part of the questions referred was examined in substance. On this question, the CoJ found against the applicant that certain liabilities arising from transactions between banks could not be excluded from the calculation of *ex ante* contributions regardless of possible double counting of some liabilities.

Lastly, a number of unsuccessful complaints were directed against the resolution scheme of Banco Popular, which involved losses on the bank’s shareholders and junior bondholders and the bank’s sale via competitive tender. The applicants sought primarily the total or partial annulment of the SRB’s decisions regarding the resolution, and in some cases also compensation. The GC dismissed all these cases as inadmissible. While in some cases the dismissal followed from rather straight-forward procedural errors on the part of the applicants,¹¹⁹ in others it involved more qualitative legal assessments. Two cases were rejected for lack of direct concern to the applicant; first, because the legal position of the applicant had been established only after the adoption of the contested decision¹²⁰ and second, because the contested decision – in this case, the SRB’s decision not to carry out *ex post* valuation of Banco Popular – did not contain any legal provisions likely to affect the applicant’s legal situation.¹²¹ Another challenge against the same decision was brought as an action for annulment of a letter from the SRB informing the applicant of its decision not to carry out *ex post* valuation. According to the

¹¹⁷ Case T-494/17 *Iccrea Banca v Commission and SRB* ECLI:EU:T:2018:804.

¹¹⁸ Case C-414/18 *Iccrea Banca* ECLI:EU:C:2019:1036 para. 24.

¹¹⁹ Incomplete applications under art. 76(d) of the Rules of Procedure for the GC (case T-473/17 *Jarabo Sancho and Jarsan Centro de Gestion v SRB* ECLI:EU:T:2017:778; case T-257/20 *González Calvet v ECB* ECLI:EU:T:2020:541); inadequate representation under art. 19(3)–(4) of the Statute of the CJEU (case T-522/17 *Nap Innova Hoteles v SRB* ECLI:EU:T:2017:881). The last-mentioned ruling was appealed to the CoJ, who rejected the appeal as partly unfounded and partly inadmissible (case C-731/17 P *Nap Innova Hoteles v SRB* ECLI:EU:C:2018:546).

¹²⁰ Case T-618/17 *Activa Minoristas del Popular v ECB and SRB* ECLI:EU:T:2018:608.

¹²¹ Case T-2/19 *Algebris (UK) and Anchorage Capital Group v SRB* ECLI:EU:T:2019:741.

Court, the SRB's inaction did not produce any legal effects that would affect the applicant's legal position, meaning that the letter was not a challengeable act within the meaning of art. 263 TFEU.¹²² The GC also dismissed the request to annul the SRB's decision to conversion of warrants, as this would entail partial annulment of a decision and the Court did not consider the challenged part of the decision to be severable from the remainder of the act.¹²³ Although falling outside of the temporal scope of this examination, it bears mentioning that the three last-mentioned GC decisions were all upheld on appeal to the ECJ.¹²⁴

In sum, while the Banking Union gave rise to more successful applications than any other sector we studied, all of the irregularities established by the Court were relatively minor in character, affecting only individual claimants. None of the applicants ultimately managed to convince the Court that the ECB had acted beyond its mandate. Furthermore, while annulment was sometimes successful, damages were never paid. Among the unsuccessful complaints, on the other hand, it is clear that at least some failures are attributable more to the (lack of) quality of the applications than to the outlook of the CJEU.

Individual access to the CJEU appears somewhat more open in this sector. The cases on calculation of *ex ante* contributions to the SRF demonstrate how the CoJ retains judicial review powers centrally at the Union layer (*i.e.*, to the CJEU itself), minimalizing the role for national courts. This is a noticeable difference from the case law on the financial assistance programmes, where the Court instead downplayed the importance of Union decisions and referred applicants to national courts. At the same time, the GC has proven itself willing to engage in meaningful review of that calculation, when complaints are filed in a timely manner by applicants passing the *locus standi* threshold. In other words, the judicial review of discretion in this area may have matured somewhat from a "soft to a hard(er) look".¹²⁵

VI. CONCLUSIONS

Our analysis covers the time period ranging from the global financial crisis to the Covid-19 pandemic. Both have placed the EU and national institutions alike under extreme pressure and at times necessitated urgent and unconventional responses aiming at complementing the structures of the EMU and ensuring the survival and sustainability of the Eurozone. Earlier research has taken different views on the EU Courts' case law in

¹²² Case T-599/18 *Aeris Invest v SRB* ECLI:EU:T:2019:740.

¹²³ Case T-557/17 *Liaño Reig v SRB* ECLI:EU:T:2019:771.

¹²⁴ Case C-874/19 P *Aeris Invest v SRB* ECLI:EU:C:2021:1040; case C-934/19 P *Algebris (UK) and Ancho- rage Capital Group v SRB* ECLI:EU:C:2021:1042; case C-947/19 P *Liaño Reig v SRB* ECLI:EU:C:2021:172.

¹²⁵ See M Ioannidis, 'The Judicial Review of Discretion in the Banking Union: from "Soft" to "Hard(er)" Look?' in C Zilioli and K-P Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar 2021) 130–145.

the area of EMU, especially in crisis contexts. Some of the cases included in our analysis have been subject to previous analysis and indeed criticism against the CJEU's deferential stance vis-à-vis the ECB and the Eurogroup in particular. Largely, however, legal scholars have been willing to accept the mainstream institutional and highly pragmatic argument of there being "no other way" – that annulment of political and executive emergency measures would be impossible without the Euro area collapsing.

Today the financial crisis is already more than ten years away, and broader conclusions can be drawn. The analysis conducted in this *Article* allows a fuller picture to emerge. Many of the cases discussed here relate to novel solutions and creative readings of the law, and would have enabled the Court to embark upon lines of legal argumentation leading to much more critical findings. While in each individual case the conclusion may have been justifiable, the aggregate reveals a clear pattern. Yet, the Court systematically opted for readings that green-light institutional measures.

While in classic accounts of the evolution of EU law the CJEU has been widely seen as disproportionately powerful, today it seems reluctant to exercise effective control the other EU branches in particular as regards matters that can be characterised as constitutional or going beyond mere technicalities.¹²⁶ A reason for this reticence may be that, by the time a case reaches the Court, it is often too late to take abortive action without drastic consequences, leading the Court to adopt a legal line of argumentation that accommodates the factual realities.¹²⁷ While such conduct would be understandable and perhaps even politically desirable, the Court's position still has effects for the functioning of the constitutional architecture of the Union.¹²⁸ The EU has always been executive-driven.¹²⁹ During the ten years of crisis, its executive branch has been further strengthened, to the extent that legislature's and the judiciary's ability to effectively exercise the control functions that fall to them under a system of separated powers must be seriously questioned.¹³⁰ This risks deepening the Union's much-lamented "democratic deficit" and poses a challenge to its continued commitment to the rule of law. While many of these difficulties can be traced back to the EU's constitutional design, they are further strengthened by institutional practice. Our study finds that in a period when highly consequential decisions were being made in newly and often hastily invented executive setups, the EU Courts nearly systematically, with a limited number of exceptions, found in

¹²⁶ Se B de Witte, 'Judicialization of the Euro Crisis? A Critical Evaluation' in F Allen, E Carletti and M Gulati (eds), *Institutions and the Crisis* cit.103.

¹²⁷ Cf A Steinbach, 'Effect-based Analysis on the Court's Jurisprudence on the Euro Crisis' (2017) ELR 254.

¹²⁸ Cf M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) ModLRev 817.

¹²⁹ D Curtin, 'Challenging Executive Dominance in European Democracy' (2014) ModLRev 1.

¹³⁰ See C Eckes, P Leino-Sandberg, and AW Ghavanini, 'Conclusions' in *The Dynamics of Power in the European Union* (Hart Publishing 2024) 311-326.

favour of the other EU institutions.¹³¹ Indeed, the analysis demonstrates a pattern of strong institutional alignment around what is perceived as an EU interest, where virtually all institutions side with each other. As this *Article* has demonstrated, the cases that came before the Court were typically brought by individual claimants (private individuals, public figures such as parliamentarians, or financial institutions), whose arguments were either dismissed as inadmissible or rejected in substance.

The clear responsiveness of the CJEU to institutional justifications has multiple implications for the EU as a constitutional order. In a functioning structure of democratic governance, there would need to be a realistic prospect of court scrutiny “biting in”. Instead, the Courts’ judgments increase the room for manoeuvre of the executive institutions. This is especially so in cases that involved highly innovative and legally contested interpretations stretching the limits of EU Treaties – such as, for instance, the establishment of the ESM formally outside of the EU legal order, the role of the Council in approving adjustment measures or the position of the Eurogroup in general, or the crisis measures of the ECB. In these cases, judicial review would be particularly important to maintain the credibility of the EU as a union based on the rule of law, especially since many of the measures have been specifically designed with a view to avoid judicial control.¹³²

The lack of successful cases, especially in relation to financial assistance programmes, is in large part due to the Court’s consistent refusal to hear these cases in substance. While (most of) these rulings can be justified *in casu*, the effect of viewing them as a pattern is striking and gives the impression that the Court is rather keen on seizing upon any reason to not review challenges towards the institutions in substance. Indeed, the Court in this regard follows what appears to be a litigation strategy on the part of the institutions, which have almost consistently raised objections of inadmissibility, often on multiple grounds, against the claims brought by individual complainants. Combined with the fact that the institutions never themselves brought action to ensure the compatibility of new forms of economic governance with the Treaties or even to protect their own prerogatives, this entails that institutional alignment prevents challenges not only from succeeding, but from being heard at all.

In particular, two grounds for inadmissibility have had the effect of insulating Union-level executive decisions from judicial review: the identification of the author of the contested measure, and the art. 263(4) TFEU requirement of direct concern. In the first regard, the EU Courts have consistently refused to recognise the Eurogroup as an institution

¹³¹ Cf similarly M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024), which “forcefully” demonstrates a “shifting relationship between the Court and the political institutions, with a general trend being a more cooperative relationship” (cf similarly M Dawson, B de Witte and E Muir, ‘Introduction: Locating Judicial Politics’ in M Dawson, B de Witte and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 1–16, 12, which “forcefully” demonstrates [...]).

¹³² Cf J Tomkin, ‘Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy’ (2013) GLJ 169.

or even as an actor to be reckoned with. While the General Court in *Chrysostomides* and *Bourdouvali* held that it must be possible to hold the Eurogroup accountable in an action for damages against the Union and indeed that “any contrary solution would clash with the principle of the Union based on the rule of law”,¹³³ the CoJ reverted to the formalistic position under which the decisions of the Eurogroup carry no legal force and consequently cannot be challenged before the CJEU but before national courts. Any challenge before national courts, however, will make it difficult to assess the *de facto* powers exercise by the executive coordination facilitated through the Eurogroup.

Similarly, the Court has mostly accepted that actions taken under the ESM Treaty are not subject to its review, despite the ECB’s and the Commission’s prominent actual involvement in the decision-making process. It is of course true that the Court’s formal competence under the ESM Treaty is limited to questions of its interpretation and application in specific cases. Nevertheless, the prominent involvement of the EU institutions in the decision-making as well as the personal overlap between the bodies would also have enabled an alternative, functional interpretation of the reviewability of their actions going beyond *Ledra* and *Chrysostomides*. Taken together, these cases demonstrate how gaps and overlaps in the competences and indeed composition of formal and informal bodies raise important accountability considerations and presents stumbling blocks to the effective oversight of courts.¹³⁴

As for direct concern, the Court has often found that the measures taken at Union level did not themselves produce the effects complained over and that the relevant executive choices were instead made in national implementing acts. This can be considered an active distortion of historical facts by the Court. Crisis countries would have defaulted on their debts without bailouts, which in turn were conditioned on severe austerity, haircut and bail-in measures and structural reforms by other (most importantly Germany) Member States and the EU institutions. In the case of Cyprus, after the Cypriot parliament rejected the offered financial assistance program requiring the bail-in of depositors, the ECB even threatened to cut its ELA which would have in practice collapsed the Cypriot banking sector.

The shortcomings of the Court’s restrictive interpretation of standing for non-privileged applicants have been discussed extensively in previous literature, and will not be reiterated here.¹³⁵ Suffice it to remark that while this does not entirely prevent the judicial review of Union acts, it again shifts the primary accountability to the national

¹³³ *Chrysostomides, K. and Co. and Others v Council and others* cit. para. 114; *Bourdouvali and Others v Council and Others* cit. para. 110.

¹³⁴ Cf the introduction to a special issue edited by D Fromage, M Eliantonio and K Wright, ‘Soft Law and Multilevel Cooperation as Sources of (New) Constitutional Challenges in EU Economic and Monetary Integration: Introduction to the Special Issue’ (2022) *Journal of Banking Regulation* 1.

¹³⁵ For a recent analysis, see G Winter, ‘Plaumann Withering: Standing before the EU General Court Underway from Distinctive to Substantial Concern’ (2023) *European Journal of Legal Studies* 85.

level and opens Union actors up for being held accountable against individual complainants only through the more arduous route of preliminary references, which furthermore depends on the discretion of national courts to refer.¹³⁶ The rarity of preliminary references encountered in this study is testament to the inherent limitations of this avenue, and when matters have been referred, from the applicant's perspective the results have been equally disappointing. Either way, an applicant may be forgiven for concluding the institutions will win.

Another observation that is remarkable in the light of the institutions' and especially the Commission's – being the “watchdog of the Treaties” – reluctance to bring proceedings before the Courts is that a considerable number of cases have been held inadmissible on account of procedural errors on the part of the applicants, such as incomplete applications, actions filed out of time, failure to request actions before filing a complaint on failure to act, and lack of adequate representation. These rulings are *prima facie* uncontroversial, and hardly attributable to any particular outlook of the Court. However, they do highlight the shortcomings of private enforcement, demonstrating that individual applicants often do not possess the requisite legal skills to successfully pursue litigation before the CJEU. Notably, this applies even when applicants are well-resourced and in possession of legal expertise. In this context it also bears observing that the applicants carry a significant financial risk in the event of a partial or full rejection of the claim. Considering the lack of public enforcement in the field, these factors not only impede individual access to justice, but severely limits the scope of judicial review overall.

Overall, our analysis suggests that the CJEU's function remains administrative rather than genuinely constitutional. The Court appears to perceive of its function as one of supporting and supplementing the other institutions, rather than challenging and controlling them. The control it does exercise often stops at the procedural issues pertaining to the decision-making process and does not engage with the actual implications of the reviewed actions.¹³⁷ In doing so, the Court not only authorises the choices made by its fellow institutions but effectively provides legal justification for continued executive competence creeps. In a Union whose *acquis* is continuously expanding and that exercises state-like public powers with far-reaching consequences for citizens and private entities, this is not good enough. If the EU is to live up to its commitments to democracy and the rule of law, it is in dire need of a constitutional jurisdiction that can ensure that

¹³⁶ Cf in another legal field I Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' (2021) CMLRev 777.

¹³⁷ Cf M Dawson and A Maricut-Akbik, 'Accountability in the EU's Para-Regulatory State: The Case of the Economic and Monetary Union' (2023) Regulation & Governance 142, who makes a similar point relying on a distinction between procedural and substantive accountability. Cf also L Kinski, D Fromage and M Blauberger, 'Responsible Judges or Judging Responsibilities? EU Court of Justice, *Bundesverfassungsgericht* and EU Economic Governance' (2024) JEPP 251, who characterises the CoJ's responsibility claims *vis-à-vis* the other institutions during the Euro crisis as “cautious”.

executive powers are exercised within the boundaries of the Treaties.¹³⁸ As EU executive powers expand through new practices, citizens need to be assured that there is an effective remedy capable of keeping that expansion in check and of upholding core constitutional division of powers. While our analysis does not exclude that the CJEU possess the prerequisite courage, the pattern revealed does not inspire trust.

With a ten years' hindsight from the Euroarea sovereign debt crisis, our analysis demonstrates that the separation of powers in the EMU field is unsatisfactory. As was recently observed in an editorial in the *Common Market Law Review*, the Court's relative distance to a crisis in both time and action places it under "a special responsibility to reflect, with a cool and critical mind, on the deeper legal significance" of crisis measures.¹³⁹ This responsibility remains largely unfulfilled. Instead of exploring the deeper legal implications and economic realities of acts taken – in fact if not, technically speaking, in law – by the Commission, the ECB, and the Eurogroup, the Court has unquestioningly accepted the superficially legal set-ups designed specifically to escape Treaty-based decision-making procedures and accountability measures. Although the Commission and the ECB had a significant role in the preparation and monitoring of assistance programs as a part of the Troika and the Eurogroup and the ESM Board of Governors consisted of the very same financial ministers, the GC and the CoJ practically cleared all the EU institutions of any responsibility related to the financial assistance programmes. It is difficult to avoid the overall impression that whatever the circumstances the CJEU will opt for the line of argumentation that enables it to find institutional measures compatible with the Treaties.¹⁴⁰ This holds nearly equally true in crisis times and in normal times, raising questions about the maturity of the EU as a constitutional system and how seriously its main institutions have assumed their responsibilities under the rule of law.

¹³⁸ Cf T Horsley, *Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018) 263–265.

¹³⁹ 'Editorial Comments' (2024) *CMLRev* 581, 58. Similarly, see M van der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in *Weiss* (C-493/17)' (2019) *Legal Issues of Economic Integration* 263, 284; and T Tridimas, 'The ECB and the Court of Justice: Old Toolbox, New Problems' in T Beukers, D Fromage and G Monti (eds), *The New European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press 2022) 292–317, 317.

¹⁴⁰ For a similar assessment in the narrower context of the *Pringle* ruling, see G Beck, 'The Court of Justice, Legal Reasoning, and the *Pringle* Case-Law as the Continuation of Politics by Other Means' (2014) *ELR* 234.