



CENTRO STUDI SUL FEDERALISMO

**research paper**

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**ADJUSTMENT PROGRAMMES,  
THE EUROPEAN CENTRAL BANK  
AND CONDITIONALITY**

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## ABSTRACT

Five Eurozone states have undergone and subsequently exited economic adjustment programmes. The European Central Bank (ECB) has had a key role in the drafting and oversight on each programme through its membership of ‘the Troika’, alongside the European Commission and the International Monetary Fund. This paper examines the different categories of conditionality that were imposed on each program country, with a particular focus on how the Irish programme was implemented through examination of the quarterly programme reviews undertaken by the Troika, noting that certain conditionality remained unfulfilled on the State’s exit. The paper then considers the evolving role of the ECB in the drafting of the economic adjustment programmes and the implementation of conditionality, and considers the appropriateness of this. It discusses some of the litigation before European courts stemming from challenges to national laws mandated by conditionality on the grounds of breach of social rights. The paper concludes by holding that the central role given to the European Central Bank by the ESM Treaty shows there has been little fundamental change in its status. Further, it holds that the CJEU is failing to engage with the reality of the impacts of the programme measures on the citizens of Member State, by leaving the actions of EU institutions like the ECB de facto insulated from legal challenges

**Keywords:** adjustment programme, conditionality, European Central Bank, Eurozone, Troika.

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## **1. Introduction**

Five Eurozone states – Greece, Ireland, Portugal, Cyprus and Spain – have undergone and subsequently exited economic adjustment programmes. These programmes are funded from varying sources, reflecting the evolving approach of the European Union to the crisis, but each feature the involvement of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), generally referred to as ‘the Troika’. The details of each programme, contained in a Memorandum of Understanding (MoU) signed between the states and the lenders, include conditionality – detailed reforms that must be made within wide sectors of the domestic economy in order to ensure the ongoing provision of financial support. The negotiation and overseeing of this conditionality is undertaken by the Troika. The ECB participates in drafting and overseeing the implementation of this conditionality, even though the competence ascribed to in the Treaty of European Union is solely in the field of monetary policy.

This paper begins by describing the economic adjustment programmes applied to the five Eurozone states and explaining the legal basis for each one. It outlines the different categories of conditionality that was imposed on these countries, giving examples of specific requirements across all programme states. As a case study, looks in detail at some of the conditionality imposed on Ireland, considers that country's success in fulfilling the conditionality and highlights why some conditionality remained unfulfilled on the State's exit from the programme. It then considers the evolving role of the European Central Bank (ECB) in the drafting of the economic adjustment programmes and the implementation of the required conditionality, and analyses the criticisms of its actions. Finally, it considers some of the court challenges to measures required on foot of conditionality across a range of legal for a and in particular, the argument that some conditions breach social rights protected within European law.

## **2. Eurozone economic adjustment programmes**

### **2.1 Chronology and scale of the programmes**

Following a request for bilateral financial assistance to allow the Greek Government meet its fiscal financing needs due to an excessive interest rate being charged on government bonds, the First

Greek Programme was agreed in May 2010. It allowed for €80 billion to be provided through pooled bilateral loans from Eurozone Member States coordinated by the Commission, in conjunction with a further €30 billion multilateral assistance provided by the IMF.<sup>1</sup>

Following a similar unsustainable rise in the interest rate charged on Government bonds and the revelation of major vulnerabilities in across the national banking sector, the Irish Programme was agreed in December 2010. Financial support of €85 billion was provided, with the external elements funded through the EFSM (€22.5 billion) the EFSF (€17.7 billion), bilateral loans from the UK, Sweden and Denmark (€4.8 billion) and the IMF (€22.5 billion).<sup>2</sup> In May 2011, Portugal received a Programme valued at €78 billion, again made up from contributions from the EFSM (€26 billion), the EFSF (€26 billion) and the IMF (€26 billion).<sup>3</sup>

In light of continued economic and political uncertainty in Greece in early 2012, a second Programme was negotiated in March. The total financial support available on this occasion was €172.7 billion, with the full €144.7 billion EU contribution now coming from the EFSF along with €28 billion from the IMF.<sup>4</sup> In July 2012, financial assistance of €100 billion was made available to Spain, initially through the EFSF and subsequently through the ESM when it became operational.<sup>5</sup> The financial support was provided solely to support the banking sector, which meant that the conditionality applied to the assistance was more narrowly tailored than that for the other programmes. The IMF was not a party to the programme, but did provide advice to the parties involved.

In April 2013 an Economic Adjustment Programme was agreed for Cyprus. A total package of €10 billion was negotiated, with €9 billion coming from the ESM and €1 billion coming from the IMF.<sup>6</sup> Following the expiration of the Second Greek Programme in June 2015, the Greek Government sought continued support for a further three years, which was granted in August.<sup>7</sup> This Third Programme amounted to a package of €86 billion, disbursed solely from the ESM due to the initial refusal of the IMF to be involved.<sup>8</sup>

## 2.2 Legal basis for the programmes

Prior to the introduction of the ESM, the Irish, Portuguese and the First and Second Greek programmes followed a common legal structure. EU legal authorization for each was provided

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<sup>1</sup> The Economic Adjustment Programme for Greece, Occasional Papers 61/2010 (DG ECFIN, European Commission), p 31 (First Greek Programme).

<sup>2</sup> The Economic Adjustment Programme for Ireland, Occasional Papers 76/2011 (DG ECFIN, European Commission) p 41 (Irish Programme).

<sup>3</sup> The Economic Adjustment Programme for Portugal, Occasional Papers 79/2011 (DG ECFIN, European Commission).p 28 (Portuguese Programme).

<sup>4</sup> The Second Economic Adjustment Programme for Greece, Occasional Papers 94/2012 (DG ECFIN, European Commission) p 4 (Second Greek Programme).

<sup>5</sup> The Economic Adjustment Programme for Spain, Occasional Papers 118/2012 (DG ECFIN, European Commission) p 52 (Spanish Programme).

<sup>6</sup> The Economic Adjustment Programme for Cyprus, Occasional Papers 149/2013 (DG ECFIN, European Commission) p 55 (Cypriot Programme).

<sup>7</sup> Memorandum of Understanding between the European Commission Acting on Behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece (Third Greek Programme).

<sup>8</sup> See S. Lütz & S. Hilgers, When Overlapping Organisations Play Two-Level Games: IMF–EU Interaction in Credit Lending to Latvia and Greece, (2018) 23 *New Political Economy*, DOI: 10.1080/13563467.2018.1443063

through decisions or implementing decisions of the Council.<sup>9</sup> Implementing decisions were used in both the Irish and Portuguese cases, as both entailed a decision taken under the Regulation that had established the EFSM.<sup>10</sup> The economic analysis underpinning the particular programme is contained in a Memorandum of Understanding (MoU) signed by the EU, the Member State receiving assistance and its national central bank. Each MoU was further divided into a section on Economic and Financial Policies which set out the macro level goals for the national economy across the time-span of the programme, and a section on Specific Economic Policy Conditionality, which laid out in detail the individual fiscal, legal and policy changes that needed to be made as a condition of receiving the bailout funds, along with any requirements regarding the time period within which these changes had to be made.

The programmes devised for Cyprus and Spain and the Third Greek Programme were operated through the European Stability Mechanism (ESM). These programmes did not rely on a Union decision, but rather a Financial Assistance Facility Agreement signed between the ESM and the beneficiary Member State and its central bank.<sup>11</sup> The detail of these programmes was set out in an MoU containing both Economic and Financial Policies and Specific Economic Policy Conditionality.

### **3. Conditionality themes across the programme**

While the specific nature of the conditionality required by each Adjustment Programme was tailored to the economic situation then pertaining to the particular Member State, there are broad similarities across all seven as regards the nature and categorisation of the demands placed on national governments in exchange for the financial support.

#### **3.1. Fiscal consolidation**

Fiscal consolidation features as a key theme across the programmes. As most programme states were experiencing significant budget deficits, the need to attain deep cuts in spending and increase tax revenues is fundamental to what the adjustment programmes were seeking to achieve, and were set out as clear conditions.<sup>12</sup> Extra revenue was also generated through crisis levies on highly profitable firms, as was applied in the First Greek Programme.<sup>13</sup>

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<sup>9</sup> Council Decision of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L 145/6 (First Greek Programme); Council Implementing Decision of 7 Dec. 2010 on granting Union financial assistance to Ireland [2011] OJ L 30/34 (Irish Programme); Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal [2011] OJ L 159/88 (Portuguese Programme); Council Decision of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2011] OJ L 296/38 (Second Greek Programme).

<sup>10</sup> Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stability mechanism [2010] OJ L 118/1.

<sup>11</sup> Financial Assistance Facility Agreement between European Stability Mechanism and the Kingdom of Spain, The Bank of Spain and Fondo Reestructuración Ordenada Bancaria; Financial Assistance Facility Agreement between European Stability Mechanism and The Republic of Cyprus and Central Bank of Cyprus; Financial Assistance Facility Agreement between European Stability Mechanism and Hellenic Republic, The Bank of Greece and Hellenic Financial Stability Fund.

<sup>12</sup> First Greek Programme, p 24; Irish Programme, p 21.

<sup>13</sup> First Greek Programme, p 20.

An augmented tax take was demanded as a specific condition in all programmes bar that for Spain. VAT increases feature as a common theme<sup>14</sup>, as do increases in personal taxes, usually achieved through a reduction in tax credits.<sup>15</sup> Corporate tax increases were demanded of Cyprus, while Portugal was directed to lessen the exemptions for tax under this heading.<sup>16</sup> Increases in excise duty was another common requirement.<sup>17</sup> States were requested to introduce (Greece) and increase the rate of (Ireland) environmental levies such as carbon tax.<sup>18</sup> Property tax was also targeted for increases, and Ireland, which did not at that time have such a provision, was required to introduce it.<sup>19</sup> Special sectoral exemptions enjoyed in some countries (the shipping industry in Greece) were also targeted for removal.<sup>20</sup>

The public sector in the programme states bore a significant proportion of the reductions required in expenditure. Decreases in the size of national civil services through the non-replacement of retirees and a hiring freeze was required in some states.<sup>21</sup> Public servants were subject to wage freezes, reduction or removal of certain financial benefits in kind, and many saw substantial impacts on their pensions.<sup>22</sup>

As social protection spending made up a large proportion of budgetary spending in most EU states, it was also identified as a source of major savings. Deep across the board cuts were mandated for Ireland, while seasonal supplementary payments awarded by Greece, Cyprus and Portugal were also targeted.<sup>23</sup> Means testing for unemployment benefit and a clear concern that some states were awarding social welfare payments to higher income families is also apparent.<sup>24</sup> Other elements of state social spending, such as healthcare and housing, were also targeted across the programmes.<sup>25</sup> Portugal was required to rationalise its network of primary schools.<sup>26</sup>

### 3.2 Structural fiscal reform

As part of each of the programmes, the states were required to create an independent fiscal advisory institution, insulated from political interference.<sup>27</sup> They all also set out the need for

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<sup>14</sup> First Greek Programme, p 20; Portuguese Programme, p 19; Third Greek Programme, p 8.

<sup>15</sup> Irish Programme, p 21; Portuguese Programme, p 20;

<sup>16</sup> Cypriot Programme, p 48; Portuguese Programme, p 61.

<sup>17</sup> First Greek Programme, p 20; Portuguese Programme, p 20; Third Greek Programme, p 6.

<sup>18</sup> First Greek Programme, p 48; Irish Programme, p 69;

<sup>19</sup> Irish Programme, p 56; Portuguese Programme, p 20; Cypriot Programme, p 48; Third Greek Programme, p 8-9.

<sup>20</sup> Third Greek Programme, p 7.

<sup>21</sup> Irish Programme, p 55; Portuguese Programme, p 42.

<sup>22</sup> First Greek Programme, p 64; Portuguese Programme, p 42, 60, 74; Second Greek Programme, p 37; Cypriot Programme, p 47.

<sup>23</sup> First Greek Programme, p 64; Irish Programme, p 62; Cypriot Programme, p 100.

<sup>24</sup> Second Greek Programme, p 9.

<sup>25</sup> Cypriot Programme, p 49, 80.

<sup>26</sup> Portuguese Programme, p 60.

<sup>27</sup> The same model of independent fiscal advisory institutions would be required for all Eurozone member states under some of the legislation contained in the Six Pack: Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L 306/41 and in the Two Pack: Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 140/11; see M. Larch and T. Braendle, 'Independent Fiscal Councils: Neglected Siblings of Independent Central Banks? An EU Perspective' (2018) 56 *Journal of Common Market Studies* pp.267–283; B. Laffan & P. Schlosser 'Public finances in Europe: fortifying EU economic governance in the shadow of the crisis', (2016) 38:3 *Journal of European Integration* pp.237-249, DOI: 10.1080/07036337.2016.1140158.

medium term fiscal frameworks, with rolling expenditure caps implemented over three year periods. The need to improve the revenue collection capacity of national governments was also highlighted across a number of programmes.<sup>28</sup> In each of the Greek programmes, the requirement to improve the quality of the economic statistics provided was emphasised.<sup>29</sup>

Costs incurred outside of direct governmental spending were a key focus of this heading in the programmes. Reviews were required of the operation of public private partnerships in Portugal and Cyprus,<sup>30</sup> while the operation costs of state owned enterprises was also to be examined in those two states and Greece.<sup>31</sup> Privatisation plans with varying degrees of specificity were outlined for some states, with the Portuguese and Cypriot programmes referencing a number of state enterprises in sectors like airlines, energy generation and telecoms.<sup>32</sup> The Second Greek Programme contained a more detailed catalogue of state enterprise for sale, along with a list of concessions and pieces of state owned land that were to be sold off.<sup>33</sup>

Pensions were also targeted, with requirements to reduce accessibility to early retirement, increase contributory periods, unify the retirement ages for men and women and progressively increase the retirement age.<sup>34</sup> Greece and Cyprus were required to reform their pension structure, while an altered pension regime was to be put in place for new scheme entrants in Ireland.<sup>35</sup> In the context of social spending, both Greece and Cyprus were directed to undertake major reviews of their social security programmes, with a particular focus on whether the money being spent was targeted at those most in need.<sup>36</sup> Healthcare costs were also highlighted for reduction in both those states and in Portugal, there was a focus on bringing down the price of pharmaceuticals and prescription medicines.<sup>37</sup>

### 3.3 Financial sector reform

This heading of conditionality varied significantly according to the particular programme, as the financial institutions in difficulty in each state differed. Financial sector reform made up almost the entirety of the conditionality applied to the Spanish programme as it was primarily required to deal with banking problems and it also made up the majority of the Cypriot programme.

Most programmes contained requirements regarding the recapitalisation of specific banks and credit institutions and a need to ensure their restructuring or downsizing.<sup>38</sup> Banks were required to provide a detailed account of non-performing loans and provisions were made for the transfer of impaired assets to separate companies.<sup>39</sup> National laws were to be changed to make it easier

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<sup>28</sup> First Greek Programme, p 15; Irish Programme, p 62; Portuguese Programme, p 72. Second Greek Programme, p 34; Cypriot Programme, p 39.

<sup>29</sup> First Greek Programme, p 30; Second Greek Programme, p 103; Third Greek Programme, p 5.

<sup>30</sup> Portuguese Programme, p 44; Cypriot Programme, p 145.

<sup>31</sup> Portuguese Programme, p 45; Second Greek Programme, p 125; Cypriot Programme, p 82.

<sup>32</sup> Portuguese Programme, p 22; Cypriot Programme, p 51; Third Greek Programme, p 27.

<sup>33</sup> Second Greek Programme p 33 (Table 15: Privatisation - transactions in the pipeline).

<sup>34</sup> First Greek Programme, pp 23, 68, 69; Cypriot Programme, p 37.

<sup>35</sup> Second Greek Programme, p 37; Cypriot Programme, p 47; Irish Programme, p 35.

<sup>36</sup> Second Greek Programme, p 36; Cypriot Programme, p 47.

<sup>37</sup> Portuguese Programme, p 74; Second Greek Programme, p 36; Cypriot Programme, p 48.

<sup>38</sup> Irish Programme, p 21, 43; Second Greek Programme, p 20; Spanish Programme, p 29, 35; Cypriot Programme, p 39.

<sup>39</sup> Portuguese Programme, p 49; Spanish Programme, p 22, 30.

to seize collateral in cases where loans were not performing.<sup>40</sup> For certain institutions that were beyond saving, measures were required to provide for their resolution.<sup>41</sup> Most programmes required a revision of national rules relating to private bankruptcy and insolvency, including improving the judicial framework for dealing with these measures.<sup>42</sup> In order to ensure that going forward, banks and credit institutions would not again be exposed to wide-ranging financial risks, the ongoing stress-testing of banks being undertaken by the ECB was emphasised.<sup>43</sup>

### 3.4 Labour market and other reforms

Across the programmes, a broad range of other reform measures were outlined, broadly coinciding in a number of key themes. Wages and employment rights were targeted in all. The required measures included minimum wage rates being frozen or cut, with some mandating a lower minimum wage levels to be set for groups more likely to suffer unemployment.<sup>44</sup> Probation time periods were increased, severance pay reduced and dismissal procedures were made easier to invoke.<sup>45</sup> Social benefits for the unemployed were also the subject of scrutiny, with each programme emphasising that these ‘reforms’ were designed to incentivise exit from unemployment. The changes included enhanced conditionality on work and training availability, new sanctions for non-compliance with these, reduction of the duration of unemployment benefit, increases in the qualification period and capping of the overall amount of unemployment benefit that could be claimed.<sup>46</sup>

Supporting a positive business environment was mentioned across most programmes,<sup>47</sup> as was a requirement to improve national legislation implementing elements of the EU Services Directive.<sup>48</sup> All bar that for Spain identified sectors of national economic activity that required reform and liberalisation, with transportation<sup>49</sup> and the energy market<sup>50</sup> being referenced across each one of them. Opening up professions to wider competition was also a common theme across all programmes.<sup>51</sup> Reforms to the operation of the national judicial systems to reduce case backlogs were also required within some of the MoUs.<sup>52</sup> Nation specific structural requirements also featured, with a review of tourism provision in Cyprus, strengthening the position of

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<sup>40</sup> Cypriot Programme, p 53; Third Greek Programme, p 18.

<sup>41</sup> Irish Programme, p 27; Portuguese Programme, p 50; Second Greek Programme, p 104.

<sup>42</sup> First Greek Programme, p 65, 70; Portuguese Programme, p 51; Irish Programme, p 27; Third Greek Programme, p 19.

<sup>43</sup> Cypriot Programme, p 45; Spanish Programme, p 31.

<sup>44</sup> First Greek Programme, p 73; Irish Programme, p 36; Portuguese Programme, p 25; Second Greek Programme, p 38; Cypriot Programme, p 53.

<sup>45</sup> First Greek Programme, p 73; Portuguese Programme, p 25.

<sup>46</sup> Irish Programme, p 65; Portuguese Programme, p 20, 52.

<sup>47</sup> First Greek Programme, p 26; Portuguese Programme, p 90; Second Greek Programme, p 42.

<sup>48</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36. First Greek Programme, p 53; Portuguese Programme, p 27; Second Greek Programme, p 151; Cypriot Programme, p 53.

<sup>49</sup> First Greek Programme, p 66, 70; Portuguese Programme, p 85; Second Greek Programme, p 156; Third Greek Programme, p 27.

<sup>50</sup> First Greek Programme, p 27; Irish Programme, p 37; Portuguese Programme, p 27; Second Greek Programme, p 41; Cypriot Programme, p 53; Third Greek Programme, p 25.

<sup>51</sup> First Greek Programme, p 73; Irish Programme, p 68; Portuguese Programme, p 86; Second Greek Programme, p 41; Cypriot Programme, p 95.

<sup>52</sup> Portuguese Programme, p 28; Second Greek Programme, p 112; Third Greek Programme, p 5.

landlords in rental situations in Portugal and a requirement for Ireland to introduce a water-charging regime.<sup>53</sup>

#### **4. Examining the implementation of conditionality: Ireland as a case study**

Ireland's exit from the EU/IMF Economic Adjustment Programme in December 2013 represented the first successful completion of a programme. Following completion, it entered a period of post-programme surveillance (PPS). In its analysis of the Irish Programme, the Commission stated that it was "relevant, appropriate and effective".<sup>54</sup> Undoubtedly, the key programme objectives – regaining access to international bond markets, restructuring of the banking system, reducing unemployment and a downwards trend in respect of public debt – around which the conditionality was designed, were achieved. However, examining the quarterly reports compiled by the Troika, it is interesting to note how specific aspects of the conditionality imposed were altered or resisted due to changed political circumstances, public opposition or entrenched sectoral interests.

##### **4.1 Successful implementation of programme elements**

Considering the scope of the fiscal conditionality imposed on Ireland, significant progress was made in achieving the mandated targets. There was a significant decrease in the national deficit, from 11.1% of GDP in 2010 to 5.8% in 2013, opening the possibility that Ireland would make its 3% deficit target by 2015 as required under the Stability and Growth Pact.<sup>55</sup> This decrease in the national deficit also led to a slowing and eventual fall in the debt to GDP ratio.

In order to avoid future instances of unsustainable Government spending, the Fiscal Responsibility Act, 2012 was introduced, requiring adherence to medium term budgetary objectives, a balanced budget rule, a correction mechanism in the event of a break of the rule and a Fiscal Advisory Council.<sup>56</sup> Individual departmental overruns were to be addressed through the introduction of a multi-annual expenditure framework, including ministerial spending ceilings.<sup>57</sup> Within the financial sector, the Evaluation Report was able to point to the return to profitability of two of the three key banks, a decrease of 30% in the size of bank balance sheets and an improved capital position.<sup>58</sup> The overall oversight mechanisms for banks was improved.<sup>59</sup> The bankrupt Anglo-Irish Bank and Irish Nationwide Building Society were resolved.<sup>60</sup>

As regards the wider structural elements of the programme, labour activation policies were initiated and reforms were made to the existing agencies implementing employment services and

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<sup>53</sup> Cypriot Programme, p 53; Portuguese Programme, p 87; Irish Programme, p 70.

<sup>54</sup> Ex post Evaluation of the Economic Adjustment Programme Ireland, 2010-2013; Institutional Paper 004/July 2015, DG ECFIN, European Commission), at 11.

<sup>55</sup> Ibid, at 75.

<sup>56</sup> See R. O'Gorman, "An Analysis of the Method and Efficacy of Ireland's Incorporation of the Fiscal Compact", in Adams M., Fabbrini F. & Larouche P. (Eds) *The Constitutionalization of European Budgetary Constraints* (Hart Publishing) (2014), pp273-293..

<sup>57</sup> Ex post Evaluation of the Economic Adjustment Programme Ireland, 2010-2013; Institutional Paper 004/July 2015, DG ECFIN, European Commission), at 74.

<sup>58</sup> Ibid, at 58.

<sup>59</sup> Ibid., at 59.

<sup>60</sup> Ibid., at 15.

benefit delivery.<sup>61</sup> Beyond this, there was a major reorganisation of further education and training services. While reforms to the delivery of healthcare had not been in the original MoU, it was subsequently introduced with a focus on the financing of the system, though there was not significant progress made on this before the Programme expired.<sup>62</sup> In the field of competition law, legislation was introduced to strengthen enforcement and the Competition Authority was merged with the National Consumer Agency creating the Competition and Consumer Protection Commission.<sup>63</sup>

#### 4.2 Incomplete Elements of Programme Implementation

One condition of the Irish Programme was a €1 reduction in the hourly national minimum wage, which was contained in both the Memorandum of Understanding and the Implementing Decision.<sup>64</sup> This was justified on the basis that it would remove a barrier to job creation.<sup>65</sup> The reduction was undertaken within the timeline set out in the MoU, in January, 2011.<sup>66</sup> However, the measure was heavily criticised by some opposition parties, and when the Labour Party entered Government as part of a coalition in March 2011, it succeeded in getting a commitment to have the original hourly rate returned.<sup>67</sup>

The MoU called for the introduction of legislation to reform the legal sector and to reduce costs.<sup>68</sup> On foot of this, the Government introduced the Legal Services Regulation Bill in October 2011.<sup>69</sup> The bill was designed to regulate the provision of legal services, establish a Legal Services Regulatory Authority and a Legal Practitioners Disciplinary Tribunal, allow for new structures through which legal practitioners may provide services and to reform the law relating to costs. However, progress on the Bill was slow, with the Troika Summer 2013 report noting the negative influence of legal professional bodies on the legislative process, where the Troika stated that the amendments that had been proposed “... will determine the effectiveness of the bill in reducing legal services costs and therefore need to be considered carefully and without fear of confronting narrow vested interests”.<sup>70</sup> The final Troika report of Autumn 2013 set out the stark point that “No genuine progress towards enacting the Legal Services Regulation Bill was reported since the previous mission”.<sup>71</sup> The legislation was not finally passed until December 2015, almost two years after the programme exit.<sup>72</sup> The final version of the law was significantly narrower than the

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<sup>61</sup> Ibid, at 83.

<sup>62</sup> Ibid., at 84.

<sup>63</sup> Ibid., at 86.

<sup>64</sup> Ireland Memorandum of Understanding on Specific Economic Policy Conditionality (2010), at 20; Council Implementing Decision 2011/77 of 7 Dec 2010 on granting Union financial assistance to Ireland, 2011, OJ L 30/34. Article 3(7)(h) (the specific figure of a was not mentioned in the Decision).

<sup>65</sup> Ibid., at 36.

<sup>66</sup> The National Minimum Wage Act 2000 (Section 11) Order 2000, SI No. 13 of 2011.

<sup>67</sup> Government for National Recovery 2011-16, at 6, 51.

<sup>68</sup> The Economic Adjustment Programme for Ireland, Occasional Papers 76/2011 (DG ECFIN, European Commission) p. 68.

<sup>69</sup> No. 58 of 2011.

<sup>70</sup> The Economic Adjustment Programme for Ireland Summer 2013', *European Economy*, Occasional Papers 162 Oct 2013 (DG ECFIN, European Commission), at 32.

<sup>71</sup> The Economic Adjustment Programme for Ireland Autumn 2013', *European Economy*, Occasional Papers 167 Dec 2013 (DG ECFIN, European Commission), at 6.

<sup>72</sup> Legal Services Regulation Act, 2015 (No. 65 of 2015).

original draft and was recognised as having involved significant concessions to the legal professional bodies.<sup>73</sup>

While the Irish Programme did not list specific bodies for privatisation, it referenced a forthcoming report from the Review Group on State Assets and Liabilities which was to identify appropriate state-owned assets for possible privatisation.<sup>74</sup> However, over the course of the Irish programme, delays to the sell-offs manifested in a number of ways. The potential sale of the Government's final 25% stake in Aer Lingus to Ryanair was blocked by the European Commission on competition law grounds.<sup>75</sup> The Troika acknowledged the Government's decision to withdraw the selling of the harvesting rights to *Coillte* (State-owned forestry company) forests due to the unsuitability of market conditions, recognising a commitment to restructure it and potentially privatise it in future.<sup>76</sup> What was left unsaid here was the significant public opposition to this sale.<sup>77</sup> A further setback for the privatisation agenda was acknowledged in the final Troika report in the cancelling of the initial sale of Bord Gais (State-owned natural gas company) as the Government felt that the amounts offered did not match the value of the asset.<sup>78</sup> Over the period of the implementation of the programme, the Irish Government were able to get a significant concession from the Troika when it agreed some of the proceeds from asset disposal would be reinvested back into commercial projects which would create employment. This departed from the original MoU which had stated that all additional unplanned revenue should be used for debt reduction.

The requirement in the Programme to introduce water charges generated huge political controversy. Whereas water was being provided free of charge by local authorities to the majority of residential homes, the MoU called for a move towards full cost recovery<sup>79</sup> with the Implementing Decision referencing the transfer of water services to a single utility.<sup>80</sup> This new single public water utility would both have a better operational capacity, but would also guarantee an income stream to the State in future.<sup>81</sup> By the Autumn 2012 review, there was clear concern about the slow pace of the roll out of the metering programme, with an acknowledgement that it would take years and not be completed by the date scheduled for the

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<sup>73</sup> Legal reform: Professions to retain key powers in plan, Arthur Beesley Irish Times, 17 November 2015, <https://www.irishtimes.com/business/retail-and-services/legal-reform-professions-to-retain-key-powers-in-plan-1.2432491>

<sup>74</sup> Irish Programme, pp. 37, 40.

<sup>75</sup> The Economic Adjustment Programme for Ireland Winter 2012 Review', *European Economy*, Occasional Papers 131 April 2013 (DG ECFIN, European Commission), p.30.

<sup>76</sup> The Economic Adjustment Programme for Ireland Summer 2013', *European Economy*, Occasional Papers 162 Oct 2013 (DG ECFIN, European Commission), at p.32.

<sup>77</sup> Coillte privatisation 'unlikely' – Rabbitte, RTE, 30 April 2013 <https://www.rte.ie/news/2013/0430/389190-coillte-privatisation-unlikely-rabbitte/>

<sup>78</sup> The Economic Adjustment Programme for Ireland Autumn 2013', *European Economy*, Occasional Papers 167 Dec 2013 (DG ECFIN, European Commission), p.35. The first Post-Programme Surveillance Report for Ireland noted the eventual selling off of Bord Gais in March 2014, the conclusion of the sale of two foreign power stations owned by the ESB (State-owned electricity company) and the expected sale by ESB of its interest in two domestic power stations, Post-Programme Surveillance for Ireland Spring 2014 Report *European Economy*, Occasional Papers 195 June 2014 (DG ECFIN, European Commission), p.30.

<sup>79</sup> The Economic Adjustment Programme for Ireland, Occasional Papers 76/2011 (DG ECFIN, European Commission) p. 56.

<sup>80</sup> Article 3(7)(c).

<sup>81</sup> The Economic Adjustment Programme for Ireland Winter 2011 Review', *European Economy*, Occasional Papers 93 March 2012 (DG ECFIN, European Commission), p. 26.

introduction of water charges.<sup>82</sup> The Spring 2013 Report had to provide for a significant delay to the previously agreed end of 2014 date for the introduction of charges, partially due to the insufficient number of meters that had been installed, but also due to the proximity of the original introduction date with the initiation of the new property tax, a tacit acknowledgment of the scale of public dissatisfaction with the range of revenue raising measures being implemented.<sup>83</sup> Public resentment to the water charges persisted following their eventual introduction,<sup>84</sup> and there was a substantial campaign of non-payment.<sup>85</sup> This culminated in 2016 when, following a general election, a political agreement to suspend the collection of water charges was confirmed by legislation.<sup>86</sup>

Bearing in mind the overall success that the Irish Programme was felt by the Troika to represent<sup>87</sup> and the degree to which successive release of funds was based on the achievement of the conditionality, these instances of non or incomplete implementation are interesting. On the one hand, there is a sense of the Troika trying to make the politics of the implementation of the Programme somewhat easier. In order to soften the harsh nature of some of the measures, the new Irish Government was able to reverse the minimum wage cut and reinvest some of the profits from the privatisation programme into employment schemes – this at a time of high unemployment. These changes to the original MoU were seen as ‘wins’ for the new incoming Government that took power in March 2011, following the general election that took place immediately after the bailout agreement. The negative political implications can be seen in the resistance to the Coillte privatisation, but most particularly, in the sustained campaign against water charges which resulted in the eventual complete reversal of that particular element of conditionality. In contrast to the campaign of public protest that surrounded the water charges issue, a behind the scenes campaign of lobbying and influence allowed professional bodies in the legal sphere to significantly dilute the initial breadth and depth of the reforms mandated in the MoU.

## 5. The Role of the European Central Bank

Whereas there has been some evolution in its role across the various economic adjustment programmes according to the method of their funding, as a member of the Troika, the ECB has consistently held a central position with respect to the negotiation and the supervision of the programmes and the attached conditionality. Following the ad-hoc nature of some of its earlier interventions, its role is formalised through legislative and treaty provisions.<sup>88</sup> Within its own

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<sup>82</sup> The Economic Adjustment Programme for Ireland Autumn 2012 Review’, European Economy, Occasional Papers 127 January 2013 (DG ECFIN, European Commission), p. 41.

<sup>83</sup> Post-Programme Surveillance for Ireland Spring 2014 Report European Economy, Occasional Papers 195 June 2014 (DG ECFIN, European Commission), p.29.

<sup>84</sup> M.Quinn, T Lynn, S. Jollands, B. Nair, ‘Domestic Water Charges in Ireland – Issues and Challenges Conveyed through Social Media’, (2016) 30 *Water Resources Management* pp.3577-3591.

<sup>85</sup> Dan McGuill, ‘FackCheck: How many people boycotted water charges?’, The Journal.ie, 1 December 2016.

<sup>86</sup> M. O’Halloran, ‘Billing of Water Charges to be Suspended Next Week’, Irish Times, 24 June 2016. Water Services (Amendment) Act 2016, No. 7 of 2016.

<sup>87</sup> *Annual Growth Survey 2013*, DG ECFIN (2012, Brussels, European Commission), at 6.

<sup>88</sup> F. Costamagna ‘The Court of Justice and the Demise of the Rule of law in the EU Economic Governance: The Case of Social Rights’ Collegio Carlo Alberto Working Papers No.487 December 2016, at 3.

institutional infrastructure, its Troika related decision-making is undertaken by the Executive Board.<sup>89</sup>

### 5.1 Legal provisions on ECB involvement in bailouts

Different structures were created to finance the economic adjustment programmes, as the economic crisis progressed. The ECB's role in the negotiation of the early bailouts facilitated through the EFSM involved the creation of an assessment of financial need in conjunction with the Commission.<sup>90</sup> Agreement on whether to proceed with the financial support would then be taken by the Council in the form of a decision. The ECB was also consulted by the Commission when the latter was devising the general economic policy conditions that were central to the state's receipt of the financial assistance.<sup>91</sup> The Commission would consult with the ECB in re-examining these conditions at least every six months with a view to making any necessary changes.<sup>92</sup>

A similar approach was taken in the context of funding provided through the EFSF. The ECB liaises with the Commission and the IMF in the drafting of an MoU following a request from a Eurozone Member State and it proposes in conjunction with the Commission, the key terms of the Financial Assistance Facility Agreement to the Eurogroup Working Group.<sup>93</sup> Where the financial assistance constitutes the purchase of the Member States bonds on the secondary market, this is as the result of an ECB analysis recognising the existence of exceptional financial market circumstances and risks to financial stability.<sup>94</sup> The ECB also has a defined role, again in liaison with the Commission, in providing reports to the Eurogroup Working Group, on the states compliance with the MoU and the Decision.<sup>95</sup>

As the permanent stability mechanism for the Eurozone states, it was obvious that the ECB would maintain a significant role within the operation of the ESM. Similarly to the earlier financial stability instruments, the ECB has a role, in liaison with the Commission, in the initial assessment of a state's request for financial support (Article 13(1)) and in the actual negotiation of the MoU with that country, also with the involvement of the IMF where possible (Article 13(3)). This task is repeated in the Regulation on the strengthening of economic and budgetary surveillance of Member States in the euro area.<sup>96</sup> The three bodies are similarly given the role of monitoring the states compliance with the conditionality.<sup>97</sup>

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<sup>89</sup> D. Gros, 'Countries under Adjustment Programmes: What role for the ECB?', CEPS Special Report No. 124 / December 2015, at 2.

<sup>90</sup> Article 3 (1) Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1

<sup>91</sup> Articles 3 (3) and (4) of Regulation (EU) 407/2010]

<sup>92</sup> Article 3(6)

<sup>93</sup> EFSF Framework Agreement, Article 2(1)(a)

<sup>94</sup> Article 2(1)(b)

<sup>95</sup> Article 3(1)

<sup>96</sup> Article 7, Regulation (EU) No. 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

<sup>97</sup> Article 13(7) ESM Treaty.

Considering the degree of independence required by the Treaties in how the ECB operates under Article 130 TFEU,<sup>98</sup> there has been some discussion of the appropriateness of the degree of involvement by the ECB in the bailout programmes. It has been noted that the ECB has “interpreted broadly” the role given to it in relation to the negotiation of the adjustment programmes and has not merely focused on monetary policy – its Treaty mandated competence – but instead engages with broad issues of economic policy.<sup>99</sup> Zilioli notes that, in Advocate General Kokott’s opinion in *Pringle*, she focused on the “relatively minor” role given to the ECB in comparison with the Commission within the ESM Treaty and that it was granted merely “a qualified right to be consulted”.<sup>100</sup> Examining the CJEU decision in *Gauweiler*, Zilioli notes that in the context of the OMT programme, the Court rejected any incompatibility between the ECB’s role in an adjustment programme as a member of the Troika, while at the same time, operating OMT support.<sup>101</sup> Despite the CJEU’s assent to the current process, within the ECB itself there appears to be some acknowledgment of a need to review its role in future programmes, with President Draghi suggesting that a legislative change could be introduced to focus its involvement in the specific areas of the banking and financial sector.<sup>102</sup>

## 5.2 Reviewing the ECB’s role in bailout programmes

It has been argued that there were two main driving factors behind the ECB’s involvement in the negotiation for the initial Troika programme – the First Greek Programme. Firstly, the trust that the European Council had in the ECB as an institution and secondly, the European Council’s desire to have the Bank represented in case any of the IMF’s recommendations challenged the latter’s policies.<sup>103</sup> As outlined above, its role in the negotiation and monitoring of the implementation of programmes has been confirmed in the succeeding financial stability instruments.

Whelan has outlined concerns about the ECB’s specific role in the Irish programme as part of the Troika, as, unlike the IMF, it was not providing a direct loan to the Irish Government.<sup>104</sup> Similarly, Gros notes that language like “in liaison with”, used to describe the ECB’s involvement in all iterations of the tools designed to address Member State funding, is open to broad interpretation and the consequence was widespread participation by Bank officials in the negotiation of the various programmes.<sup>105</sup> He argues that the degree of involvement by the ECB in the detailed

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<sup>98</sup> See C. Zilioli & M. Selmayr, ‘The European Central Bank: An Independent Specialized Organization of Community Law’, (2000) 37 *Common Market Law Review* 591.

<sup>99</sup> T. Beukers, ‘The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention’, (2013) 50 *Common Market Law Review* pp.1579–1620, at 1591.

<sup>100</sup> AG Opinion, Case C-370/12 *Pringle v. Government of Ireland*, at para. 179; Chiara Zilioli ‘The ECB’s Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice’, (2016) 23(1) *Maastricht Journal of European and Comparative Law* 171, at 179.

<sup>101</sup> Case C-62/14 *Gauweiler v. Deutscher Bundestag*, at para. 60., Chiara Zilioli ‘The ECB’s Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice’, (2016) 23(1) *Maastricht Journal of European and Comparative Law* 171, at 181.

<sup>102</sup> Introductory statement to the press conference (with Q&A), Mario Draghi, President of the ECB, Vítor Constâncio, Vice-President of the ECB, Frankfurt am Main, 21 July 2016,

<https://www.ecb.europa.eu/press/pressconf/2016/html/is160721.en.html>

<sup>103</sup> S. Merler, J. Pisani-Ferry, G.B. Wolff, ‘The Role of the ECB in Financial Assistance: Some Early Observations’, June 2012, at 6.

<sup>104</sup> K. Whelan, ‘The ECB’s Role in Financial Assistance Programmes’, June 2012, at 12.

<sup>105</sup> D. Gros, ‘Countries under Adjustment Programmes: What role for the ECB?’, CEPS Special Report No. 124 / December 2015, at 5.

conditionality of programmes demonstrates “mission creep” far beyond the ECBs competence in the field of monetary policy.

Of the institutions participating in the Troika, the ECB was known as seeking more aggressive measures to more rapidly achieve the fiscal consolidation required by the Member States, when compared with the approach of the IMF and the European Commission”.<sup>106</sup>

Beyond the role set out for the ECB in the legal text of the instruments basing the financial support programmes, it is recognised that the Bank also engaged in “unconventional measures” to press member states into undertaking financial adjustment programmes.<sup>107</sup> Quasi-political pressure, in the form of letters from the ECB President to national governments, are credited as having a major role in pressuring Cyprus to initially seek and subsequently enter its financial adjustment programme,<sup>108</sup> and on the Irish Government decision to look for financial support.<sup>109</sup> A similar letter sent by the ECB President to Italy, while not resulting in a full economic adjustment programme, had major political implications within that country.<sup>110</sup> The lack of transparency in respect of actions that undoubtedly contributed to the hugely consequential decisions to seek programmes is demonstrated in that the subsequent efforts have the letters sent by the ECB to Ireland published were strenuously resisted by the institution.<sup>111</sup>

The term ‘unconventional measure’ could also apply to the manner in which, during the implementation of the Irish Programme, the ECB successfully insisted that senior bondholders would be paid back by the Government, even though this condition was not included in the Irish programme documents.<sup>112</sup> Despite the repeated efforts of the Irish Government to achieve a change on this particular measures, the ECB refused to move on this point. It has been argued that as this measure was taken to protect the overall stability of the Eurozone, there should have been some degree of compensation for the Irish Government in consideration of it shouldering the burden for the rest of the Eurozone.<sup>113</sup> In the Parliamentary Inquiry undertaken by the Irish Oireachtas, the ECB was specifically identified as having blocked the imposition of losses on senior bondholders (the IMF were found to have supported it) and as having “contributed to the inappropriate placing of significant banking debts on the Irish citizen”.<sup>114</sup> The inclusion of ‘bail-in’ provisions in subsequent EU legislation indicates some degree of re-thinking on this point,<sup>115</sup> and

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<sup>106</sup> S. Merler, J. Pisani-Ferry, G.B. Wolff, ‘The Role of the ECB in Financial Assistance: Some Early Observations’, June 2012, at 7.

<sup>107</sup> T. Beukers, ‘The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention’, (2013) 50 Common Market Law Review pp.1579-1620, at 1581.

<sup>108</sup> T. Beukers, ‘The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention’, (2013) 50 Common Market Law Review pp.1579-1620, at 1593.

<sup>109</sup> K. Whelan, ‘The ECB’s Role in Financial Assistance Programmes’, June 2012, at 8.

<sup>110</sup> S. Sacchi, ‘Conditionality by Other Means: EU Involvement in Italy’s Structural Reforms in the Sovereign Debt Crisis’, (2015) 13(1) Comparative European Politics, 2015, pp.77-92, at 82-1.

<sup>111</sup> D. Curtin, ‘Accountable Independence’ of the European Central Bank: Seeing the Logics of Transparency’, (2017) 23 European Law Journal pp. 28-44, at 30.

<sup>112</sup> K. Whelan, ‘The ECB’s Role in Financial Assistance Programmes’, June 2012, at 9.

<sup>113</sup> D. Gros, ‘Countries under Adjustment Programmes: What role for the ECB?’, CEPS Special Report No. 124 / December 2015, at 5.

<sup>114</sup> Report of the Joint Committee of Inquiry into the Banking Crisis, Chapter 11, Findings of the Joint Committee <https://inquiries.oireachtas.ie/banking/volume-1-report/chapter-11/>

<sup>115</sup> See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L 173/190;

this point was acknowledged by the Troika in the initial post-programme evaluation of Ireland, though it defended the approach ultimately adopted by stating “... a careful assessment concluded that the conditions for such a bail-in were not present in Ireland nor in the EU at the time. With no legal framework in place to manage such an exercise, the legal and economic risks were considered too great in light of the potential benefits”.<sup>116</sup>

## 6. Adjustment programmes and the European Courts

Considering the scale of the financial impacts of the necessitated cuts in income and conditions and increases in taxes and charges, as well as the losses suffered due to the restructuring of financial institutions, it is unsurprising that legal action was taken against some of the measures used to implement the programmes on the basis that they breached legality. The cases, which were heard across domestic, EU and Council of Europe legal fora, raise broad points about contrasting approaches to the protection of social rights within the EU legal framework and provide useful guidance on the position of the ECB. Those heard before the CJEU chart a development in its position regarding whether it would review the content of adjustment programmes or not.

### 6.1 Cases before the EU Courts

Initially, the CJEU took a hard line in rejecting any efforts to require it to adjudicate on the legality of measures contained in the adjustment programmes. In *ADEDY*, attempts to have the Greek national measures annulled under Article 263 TFEU was rejected by the General Court on the grounds that the applicants were unable to prove the test of ‘direct concern’ of the contested measures.<sup>117</sup> Subsequently in *Sindicato dos Bancários*, the CJEU rejected a pair of preliminary references regarding the interpretation of national measures implementing elements of the economic adjustment programme. It determined that the measures being challenged were not implementing Union law, thus preventing any examination of their compatibility with provisions of the Charter of Fundamental Rights.<sup>118</sup> This narrow interpretation of ‘implementing Union law’ has been subject to criticism, particularly in light of the CJEU’s much broader understanding of the term in *Fransson*.<sup>119</sup>

Subsequently, a set of cases arising out of the Cypriot programme has come before the EU courts - *Ledra Advertising*,<sup>120</sup> *CMBG*<sup>121</sup> and *Mallis*.<sup>122</sup> The three sets of cases all broadly share a similar fact

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Regulation (EU) No 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 [2014] OJ L 225/1.

<sup>116</sup> Ex post Evaluation of the Economic Adjustment Programme Ireland, 2010-2013; Institutional Paper 004/July 2015, DG ECFIN, European Commission), at 12-3.

<sup>117</sup> T-541/10 and T-215/11, *ADEDY and others v. Council* supported by the Commission, Orders of the General Court of 27 November 2012.

<sup>118</sup> C-128/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindicato Nacional dos Profissionais de Seguro v. Fidelidade Mundial*, Order of 26 June 2014

<sup>119</sup> Case C-617/10 *Åklagaren v Fransson*. F Costamagna ‘The Court of Justice and the Demise of the Rule of law in the EU Economic Governance: The Case of Social Rights’ Collegio Carlo Alberto Working Papers No.487 December 2016, at 17; F. Pereira Coutinho, ‘Austerity on the loose in Portugal: European judicial restraint in times of crisis’, (2016) 8(3) *Perspectives on Federalism* 106, at 118.

<sup>120</sup> Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising & Others v. Commission & ECB* (hereafter *Ledra*).

scenario – investors, the value of whose deposits in Cypriot financial institutions were significantly decreased due to a recapitalisations required under the Cypriot Economic Adjustment Programme, were suing, firstly to get elements of the MoU negotiated between Cyprus and the ESM and annulled and secondly, to gain compensation from the Commission due to the breach of its supervisory duty by failing to ensure that the portion of the MoU was compliant with Union law Union institutions.

The CJEU was quick to reject the first argument in each case whereby the applications sought to use Article 263 TFEU against elements of the Programme. In *Ledra*, it upheld the finding of the General Court noting that it had previously held in *Pringle* that the powers given to the ECB and the Commission in the ESM Treaty did not entail any power to make decisions on their own, and any actions taken by them in the context of the ESM Treaty only bound the ESM.<sup>123</sup> The fact that the Commission and the ECB had participated in the process that led to the signing of the MoU for Cyprus, “does not enable the latter to be classified as an act that can be imputed to them”.<sup>124</sup> Similarly in *CMBG*, the General Court rapidly dismissed the claim, stating that Article 263 TFEU could only be used to review the legality of acts of EU institutions, bodies, offices or agencies. The measure in question, the MoU, was signed between the ESM and Cyprus. Since it did not meet the criteria of what the Court could review under Article 263 TFEU, this element was inadmissible.<sup>125</sup>

The facts in *Mallis* were slightly different, as in that case the applicants sought annulment of a statement of the Eurogroup in which it had announced that it had reached agreement with Cyprus on a financial adjustment package and welcoming plans for the restructuring of the financial sector. In rejecting the appeal, the CJEU held that the General Court had provided sufficient reasons for its decision, noting that it had found that there was nothing to suggest that the Eurogroup was controlled by or acted as an agent of, the ECB or Commission and that its statement could not be imputed to either of these institutions.<sup>126</sup> The General Court<sup>127</sup> also found that in the event that the statement in question was attributable to the ESM rather than the Eurogroup, it still was not be imputed to either of the two Union institutions.<sup>128</sup> The CJEU noted that the role of the ECB and Commission in the Eurogroup could not be wider than that attributed to them under the ESM and that in *Pringle*, the Court had determined the role of those two institutions within the ESM did not entail the power to make decisions on their own and that the actions they undertook within the ESM committed the ESM alone.<sup>129</sup> The Court listed off the various functions of both institutions within the ESM Treaty – none of these involved the taking of decisions.<sup>130</sup> Finally, the Court noted the Opinion of the Advocate General where the latter had set

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<sup>121</sup> Case T-290/13 *CMBG Ltd. v. European Commission and European Central Bank*.

<sup>122</sup> Joined Cases C-105/15 P to C-109/15 P, *Mallis and Others v. Commission and European Central Bank*.

<sup>123</sup> *Ledra*, above note 120, at para. 53.

<sup>124</sup> *Ibid.*, at para. 52.

<sup>125</sup> *CMBG*, above note 121, at para. 56-9.

<sup>126</sup> *Mallis*, above note 122, at para. 47.

<sup>127</sup> Cases T-327-31 *Mallis and Others v. Commission and ECB*.

<sup>128</sup> *Ibid.*, at para. 48.

<sup>129</sup> *Ibid.*, at para.

<sup>130</sup> *Ibid.*, at para. 54-56.

out that the Eurogroup was not a configuration of the Council of Ministers, and as such could not be classified as a body reviewable Article 263 TFEU.<sup>131</sup>

In both *Ledra* and *CMBG* the applicants also sought compensation under Article 340 TFEU. In a departure from its approaches to all previous cases where elements of an economic adjustment programme was challenged, the CJEU demonstrated a willingness to consider this line of argument. In *Ledra*, the Court noted that the tasks conferred on both the Commission and the ECB by the ESM Treaty did not alter the nature of the powers conferred on them by the Union Treaties.<sup>132</sup> Looking at the Commission in particular, the Court noted that it had a duty as guardian of the Treaties under Article 17(1) TEU and that through Articles 13(3) and (4) ESM Treaty, it was mandated to ensure that the MoUs signed under that Treaty were consistent with Union law.<sup>133</sup> As such, the CJEU set aside that decision of the General Court that it did not have jurisdiction to consider an action based on illegality on the grounds that the actions in question could not be formally imputed to either the Commission or the ECB.<sup>134</sup>

Proceeding to examine the question in detail, the CJEU noted the previously established conditions for ascertaining non-contractual liability under Article 340 TFEU: unlawful conduct by an EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of.<sup>135</sup> The unlawful conduct must entail a sufficiently serious breach of the rule of law in order to confer a right of legal action.<sup>136</sup> Examining the rule of law in question – Article 17(1) of the Charter of Fundamental Rights regarding the ownership of private property – it was found to confer rights. Importantly, whereas the Court confirmed that that while Member States were not implementing Union law in the context of the ESM Treaty, when the Union institutions acted, even when acting the roles conferred on them outside of Union law such as by the ESM Treaty, they were nevertheless bound by the Charter.<sup>137</sup> In the adoption of a MoU, the Commission was specifically bound by its obligations under Article 17(1) TEU and under Articles 13(3) and (4) ESM to ensure that the MoU complied with Union law, including the Charter.

In considering whether in adopting the MoU the Commission had undertaken a sufficiently serious breach of the applicants property rights under Article 17(1) of the Charter, the Court recalled that the right to property was not absolute and could be limited in a proportional manner, as outlined in Article 52(1).<sup>138</sup> Considering the reasons for adopting the MoU – ensuring the stability of the banking system of the Euro-area as a whole – this was an objective of general interest.<sup>139</sup> In light of this, and the losses the applicants would have sustained in any event if the banking system as a whole had been undermined, the restrictions on their right to property were

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<sup>131</sup> *Ibid.*, at para. 61.

<sup>132</sup> *Ledra*, above note 120, at para. 56.

<sup>133</sup> Para. 57-8.

<sup>134</sup> Para. 60.

<sup>135</sup> Para. 64.

<sup>136</sup> Para. 65.

<sup>137</sup> Para. 67.

<sup>138</sup> Para. 69-70.

<sup>139</sup> Para. 71.

not unjustified.<sup>140</sup> As such, the Commission could not be found to have breached their property rights and consequently, no action for breach of non-contractual liability could be sustained.

The difficulty of the task for an applicant in successfully establishing a claim for liability in damages under Article 340 TFEU is also demonstrated in *CMBG*. The respondent institutions argued that the conduct complained about – the adoption of the relevant sections of the MoU – could not be imputed to them. The Court noted that the MoU was signed by the Commission Vice President on behalf of the Commission but that this was the Commission acting on behalf of the ESM as provided for under Article 13(4) ESM Treaty.<sup>141</sup> The Court restated that though the ECB and Commission had certain tasks under the ESM Treaty, they did not have independent decision-making power and their actions within the ESM only bound that body.<sup>142</sup> As such, the adoption of the MoU could not be attributed to either the ECB or Commission and the Court therefore had no jurisdiction to examine a claim that the MoU had caused damage.<sup>143</sup> The Court looked separately at whether the Commission had failed to fulfil its obligation under Article 17(1) TEU, to ensure that the MoU was compliant with Union law.<sup>144</sup> As such, the Court had to assess whether this omission by the Commission caused the damage claimed by the applicants and could not be attributable to any other source.<sup>145</sup> Pointing to the fact that the decrease in the value of the applicants shares occurred prior to the actual signing of the MoU, the Court determined that the loss suffered by the applicants could not be attributable with sufficient certainty, to any omission by the Commission.<sup>146</sup>

The ruling in *Ledra* is significant in that it resolves a question left unanswered by the CJEU in its *Pringle* decision – whether the Charter applies to the Union institutions when acting outside of the framework of Union law. While the key focus of this judgement is on the Commission, which has a special role in securing the implementation of Union law under Article 17(1) TEU and is specifically mentioned in Article 13(4) ESM Treaty, it is clear that the statement about the Charter applying to the Union institutions acting outside the EU framework is equally applicable to the ECB. Similarly, the requirement in Article 13(3) ESM Treaty that MoUs shall be compatible with measures of economic policy coordination provided for in the TFEU or in any act of European Union law, is similarly binding on the ECB as a named institution involved in the MoUs negotiation.

The decision has been described as a “sending a strong message to EU institutions or, at least, to the Commission”, that they do not have complete freedom of action in the context of the measures adopted under the economic adjustment programmes.<sup>147</sup> However, *Ledra* (and subsequently *CMBG*) also demonstrates the significant degree of discretion granted to the Union institutions by the Court of Justice when they take measures directed at the stability of the Eurozone as a whole, as seen in *Pringle* and *Gauweiler*. This makes it difficult to prove that a breach of fundamental rights, caused by the provisions of an MoU, was significantly disproportionate to warrant the finding of a breach of fundamental rights and has led some

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<sup>140</sup> Para. 74.

<sup>141</sup> *CMBG*, above note 121, at para. 44.

<sup>142</sup> *Ibid.*, para. 45.

<sup>143</sup> *Ibid.*, para 46-7.

<sup>144</sup> *Ibid.*, para 48-9.

<sup>145</sup> *Ibid.*, para 51, 53.

<sup>146</sup> *Ibid.*, para. 54.

<sup>147</sup> *F. Costamagna*, above note 88, at 20.

commentators to suggest that this element of the judgment means that it will be almost impossible for applicants to successfully prove a cause of action.<sup>148</sup> The cases have also failed to provide a means of challenging the content of the legal measures themselves within the context of the national legal systems, thus perpetuating a significant gap in the system of legal protection.<sup>149</sup>

## 6.2 Cases before Council of Europe bodies

In light of the Court of Justice's reluctance to engage with what Munari describes as the "indirect consequences of financial assistance measures", it is valuable to look at the approach taken to claims that national measures resulting from the economic adjustment programmes resulted in breaches of social rights, before the European Committee of Social Rights.<sup>150</sup> A body of actions, taken by Greek unions and representative bodies in response to the domestic implementation of that state's programmes, argued a breach of Article 12(3) of the European Social Charter (the right to social security).<sup>151</sup> In finding that there had been a breach of the Social Charter, the Committee noted how a number of international social rights organisations had highlighted the absence of data on the impact of the cuts on rates of poverty, and the need for Greece to undertake improved monitoring of this.<sup>152</sup> It stated that while individual cuts to pensions would not of itself represent a breach of the right to social security, the combination of successive cuts could constitute such a breach.<sup>153</sup> Due to the lack of data on the impact of the cuts, the Committee found that it could not be established that there were not alternative means of achieving the necessary savings that would have impacted on the applicants yet.<sup>154</sup> The Government had therefore not been able to establish that it had attempted to ensure sufficient protection for the most vulnerable, as states are mandated to do under Article 12(3).<sup>155</sup>

In contrast to the Committee of Social Rights, the European Court of Justice rejected arguments that elements of the economic adjustment programmes breached the Convention, ruling in a series of cases that the issues fell within the margin of appreciation granted to signatory states.<sup>156</sup> While in each case, the ECtHR considered the specific impact of the cuts in pensions and salaries experienced by the applicants, the scale of the decrease in their standard of living they

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<sup>148</sup> Costamagna, above note 88, at 21.

<sup>149</sup> See R. Repasi, 'Judicial protection against austerity measures in the euro area: Ledra and Mallis', (2017) 54 *Common Market Law Review* pp.1123–1156, at 1156.

<sup>150</sup> F Munari, 'The European Monetary Union: A Hard Test for the Rule of Law within the EU Legal System', (2017) 33 *American University International Law Review* 345, at 372

<sup>151</sup> Complaint No. 76/2012 *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* (hereafter *IKA-ETAM*); Complaint No. 77/2012 *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*; Complaint No. 78/2012 *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*; Complaint No. 79/2012 *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*; Complaint No. 80/2012 *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece* (hereafter *ATE*).

<sup>152</sup> *IKA-ETAM v. Greece*, above note 151, at para. 37.

<sup>153</sup> *Ibid.*, at paras 77-78.

<sup>154</sup> *Ibid.*, at para. 79.

<sup>155</sup> *Ibid.*, at para. 81.

<sup>156</sup> Applications nos 57665/12 and 57657/12 *Koufaki and ADEDY v. Greece* decision of 7 May 2013 (hereafter *Koufaki*) at para. 31; Applications nos 62235/12 and 57725/12 *Da Conceicao Mateus v. Portugal and Santos Januario v. Portugal* decision of 8 Oct. 2013 (hereafter *Da Conceicao Mateus*) at para. 22 ; Application no. 13341/14 *Rico v. Portugal* decision of 24 Sept. 2015 (hereafter *Rico*) at para. 37 .

not meet the threshold to warrant a finding of a breach of Article 1 of Protocol 1, which was that they were at risk of having insufficient means to live on.<sup>157</sup> As this author has previously noted, the approach to the existence of alternative financial measures demonstrated by the Committee of Social Rights was inverted by the Court, when it stated in *Koufaki* that different policy solutions were only relevant in the event that the state breached its (wide) margin of appreciation.<sup>158</sup>

### 6.3 Cases before national Courts

A number of cases came before the Portuguese Courts regarding the manner in which the implementation of the Portuguese programme impacted on the wages, pensions and conditions of works in that country.<sup>159</sup> On several occasions, the Portuguese Constitutional Court ruled that the national budgetary law, implementing the required Programme conditionality for that year, was in breach of the constitutional principle of equality. These rulings required periodic readjustments of the programme measures, with financial burdens moved to other sectors in order to ensure compliance. The Troika were clearly unhappy with the nature of some of the rulings, stating that the Court did not provide clear guidance on what sort of framework of structural reform would be compatible with the Constitution, and repeating criticism that they overly restricted the discretionary policy making powers of the Government.<sup>160</sup>

## 7. Conclusion

Despite the continued commentary on the role of the ECB in the design and implementation of the economic adjustment programmes and internal reflection within the institution, it is clear from the central role given to the Bank by the ESM Treaty in these areas that there has been little fundamental change in its status. Barring a radical in-house determination to alter how it applies its functions, it will continue to play a crucial role in future programmes, including in drafting and overseeing conditionality. The degree of compulsion behind conditionality, despite the burden they place on the population of programme states, leaves those countries in a position where they must implement or face the arguably worse option of being refused quarterly disbursement and thus being unable to make repayment on the international money markets.

However, it has been shown that even immutable conditionality may have to give way in face of conditions on the ground in a state. The example of Ireland has shown that political flexibility, public protest and entrenched interests all acted to alter the impact of the Programme. In Portugal, national courts were able to use constitutional principles to blunt certain elements,

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<sup>157</sup> *Koufaki*, above note 156, at para. 46; *Da Conceicao Mateus*, above note ??, at para. 29; *Rico*, above note ??, at para. 45.

<sup>158</sup> *Koufaki*, above note 156, at para. 48. R O’Gorman, ‘The Failure of the Troika to Measure the Impact of the Economic Adjustment Programmes on the Vulnerable’, (2017) 44(3) *Legal Issues of Economic Integration* pp.265–292, at 279.

<sup>159</sup> Tribunal Constitucional Portugal, Acordao 353/2012, 05 July 2012; Tribunal Constitucional Portugal, Acordao 17/2013, 5 Apr. 2013; Tribunal Constitucional Portugal, Acordao 413/2014, 30 May 2014; Tribunal Constitucional Portugal, Acordao 574/2014, 14 Aug. 2014. See L.D. Barroso, ‘Political Choices and Constitutional Determinations in Times of Constraint: The Case of Portugal’, (2014) *Tijdschrift voor Constitutioneel Recht* 337.

<sup>160</sup> ‘The Economic Adjustment Programme for Portugal 2011-2014’, *European Economy*, Occasional Papers 202, October 2014 (DG ECFIN, European Commission) Box 2.1, at 22.

though the avoided cuts did have to fall elsewhere. Disagreements within the Troika members themselves can also lead to changes in policy during programme implementation.

Despite this, it is clear that Union institutions are failing to engage with the reality of the impacts of the programme measures on the citizens of Member States. The CJEU has shown itself unwilling to adequately police the activities of the Commission and the ECB – the programme measures themselves remain unchallengeable at Union level and the consequences are considered too remote to warrant compensation.

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