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The Legal Classification of ESM – MoUs in the

***Ledra* Decision:**

At Odds with the Union Principle of the Rule of Law?

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Abstract

The Ledra decision has received much critical acclaim in academic circles for finally breaking up the rigid legal dichotomy between international law-based euro crisis management tools on the one hand and EU law on the other. What is more, in holding that Union institutions are not absolved from their EU legal duties but remain subject to the entire body of Union law when executing tasks under the auspices of the European Stability Mechanism, the Court has delivered a message whose symbolic value may radiate far beyond academic debates and legal commentary. Yet, there is another dimension to this ruling - the CJEU's fateful conclusion that Memoranda of Understanding adopted pursuant to the ESM do not constitute Union measures. The upshot of this seems to be that, for the foreseeable future, individual litigants are deprived of any meaningful option for effective EU legality review of ESM conditionality. It is against the backdrop of this dilemma that the complex and unprecedented procedural issues raised by the legal make-up of ESM-MoUs beg the question as to what extent the classification of ESM-MoUs adopted in Ledra may be deemed compatible with the EU's well-established body of procedural (case-)law in the first place. Inquiring into this matter it is maintained that the Ledra categorisation of ESM-MoUs contradicts one of the fundamental constitutional norms and, indeed, procedural safeguards of the EU – the Union principle of the rule of law.

Key-Words: Ledra Decision – European Stability Mechanism – ESM Conditionality – ESM-MoUs – Legality Review – EU Procedural Law – Union Principle of the Rule of Law

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1. Introduction

The *Ledra* decision¹ has received much critical acclaim in academic circles for finally breaking up the rigid and seemingly insurmountable legal dichotomy between international law-based euro crisis management tools on the one hand and EU law on the other.² Whereas prior to this ruling barriers of a procedural nature have bestowed upon conditionality instruments emanating from the crisis response architecture an aura of quasi-immunity from EU legal challenges³, *Ledra* has made it plain that Union legal constraints are alive and kicking also in a context external to the EU legal framework such as that constituted by the European Stability Mechanism ('ESM'). What is more, in holding that Union institutions are not absolved from their EU legal duties but remain subject to the entire body of EU law⁴ when executing tasks under the auspices of the ESM, the Court of Justice ('Court') has delivered a message whose symbolic value may radiate far beyond academic debates and legal commentary: EU institutions, when devising, adopting and managing one of the most intrusive and controversial instruments of the euro area's crisis management toolkit – financial assistance conditionality – cannot hide behind international treaty-based structures but remain legally accountable to the European citizenry.

Yet, while the symbolic significance of the *Ledra* decision can hardly be overstated, there is another dimension to this ruling which casts a rather less favourable light on its passages – the CJEU's finding that Memoranda of Understanding adopted under the auspices of the ESM Treaty ('ESM-MoUs') do not constitute Union acts.⁵ In fact, this finding appears to forestall any option to challenge ESM-MoUs under either of the two main Union avenues for legality review, i.e. actions for annulments under Art. 263 TFEU and preliminary references on the validity of Union

¹ Joined Cases C-8/15 P, C-9/15 P, C-10/15 P, *Ledra Advertising Ltd et al. v. Commission and European Central Bank* ('*Ledra Advertising*'), EU:C:2016:701.

² See, for example, Paul Dermine, 'The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework'. *European Constitutional Law Review* 13, 2017, pp. 369 and 381-382; Anastasia Poulou, 'The Liability of the EU in the ESM Framework'. *Maastricht Journal of European and Comparative Law* 24(1), 2017, pp.127-128 and 138-139.

³ See Case T-541/10, *ADEDY and Others v. Council* ('*ADEDY*'), EU:T:2012:626; Case T-215/11, *ADEDY and Others v. Council* ('*ADEDY*'), EU:T:2012:626; Case C-127/12, *Sindicato dos Bancários do Norte et al. v. BPN*, EU:C:2014:2130; Case C-264/12, *Sindicato Nacional dos Profissionais de Segur e Afins v. Fidelidade Mundial*, EU:C:2014:2036.

⁴ *Supra* n. 1., paras. 56-59 and 67.

⁵ *Supra* n. 1, paras. 52-55.

acts provided for in Art. 267 TFEU. Although it is true that the Court's statements regarding the legal nature of ESM-MoUs were made in the context of annulment proceedings, the relevance thereof clearly also seems to extend to validity references. Indirect legality challenges under Art. 267(b) TFEU, after all, just like direct legality challenges, are expressly reserved for acts originating with EU institutions, bodies, offices or agencies.⁶ Yet, the implications of the *Ledra* dictum on the legal character of ESM-MoUs appear to be even more far-reaching than that: not only does the classification of ESM-MoUs as non-EU acts remove them from legality review under Art. 263 and Art. 267 TFEU, but it seems tantamount, at the same time, to the foreclosure of the only meaningful options for *effective* legality review of ESM conditionality *as such*. There are two principal reasons for this:

First, the nature of the legal remedy unlocked in *Ledra* – the action for damages procedure – is such that litigants will hardly be ever able to successfully contest the legality of ESM conditionality thereunder. Indeed, as the Union judicature has itself established, compensatory actions do not pertain to the Union's system of legality review in the first place.⁷ Their primary purpose lies above all in securing an award in damages⁸ whereas safeguarding the integrity of EU law is merely an ancillary concern. Hence, only *sufficiently serious* breaches of EU rules conferring *rights on individuals* are caught thereunder.⁹ And even if such a manifest EU rights interference can be determined, there must still be actual damage which is *causally* linked to said interference.¹⁰ It is perfectly conceivable, hence, that many – possibly even quite grave – EU law infringements go wholly unpunished when challenged via this route. Beyond doubt, therefore, relying on the non-contractual liability of the Union as cure-all remedy in the face of unlawful ESM policy conditions appears to risk obfuscating much of the legal controversy surrounding ESM conditionality under the pretext of the questionable guarantee of effective judicial protection.

⁶ This conclusion is not affected by the recent finding in *Florescu*, in the context of a preliminary reference on the interpretation of an MoU addressed to Romania, that MoUs adopted pursuant to the Medium-Term Financial Assistance Facility ('MTFAF') constitute Union acts. Suffice it to say, that the arguments adduced to underpin this finding in *Florescu*, namely that MTFAF-MoUs are *explicitly* based in EU law and *concluded by the EU*, do not apply in the context of ESM-MoUs; see Case C-258/14, *Florescu and Others v. Casa Județeană de Pensii Sibiu and Others* ('*Florescu*'), EU:C:2017:448, para 35.

⁷ Case C-131/03 P, *R.J. Reynolds Tobacco Holdings, Inc. et al. v. Commission*, EU:C:2006:541, paras. 82-83.

⁸ Case C-234/02 P, *European Ombudsman v. Lamberts*, EU:C:2004:174, para. 59.

⁹ Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA v. European Commission*, EU:C:2000:361, para. 42.

¹⁰ *Ibid.*

Second, challenging the legality of ESM conditionality through Council Implementing Decisions ('CIDs') – i.e. fully conventional EU law acts adopted under Regulation 472/2013 which replicate the gist of ESM-MoUs¹¹ – is not likely to work either. The pronouncedly broad and discretionary nature of CIDs relative to ESM-MoUs¹² makes it almost impossible to imagine that private applicants, the most likely challengers of ESM policy conditions, could ever succeed in meeting the direct concern criterion and, hence, acquire standing in an annulment action under Art. 263 TFEU.¹³ Similarly, the generic and unspecified character of CIDs substantially dims the prospects for them to be successfully subjected to indirect legality review under Art. 267 TFEU. Both litigation practice and research alike suggest that, in practice, the discretionary nature of CIDs combined with 'marked accessibility problems' greatly suppresses the making of preliminary references on their validity by national adjudicators.¹⁴

Apparently aware of this predicament¹⁵ the Commission has issued a proposal for a Council Regulation on the establishment of a European Monetary Fund¹⁶ ('EMF') quite recently which aims at incorporating the ESM and, by extension, ESM-MoUs¹⁷, into the EU legal framework. Yet, promising as the Commission proposal might sound, the prospects of it becoming a reality rather sooner than later are not the brightest to say the least – for at least two reasons: First, with Art. 352 TFEU as envisaged legal basis¹⁸ the current Commission initiative seems to rest on highly shaky legal foundations. Whilst it is true that Art. 352 TFEU grants the Union legislature notable leeway, its scope is not unlimited. In particular, it does not permit any expansion of Union competences and/or amendments to the Treaties without following the

¹¹ Regulation of the European Parliament and of the Council No. 472/2013/EU (2013) OJ L 140/1, Art. 7.

¹² Take, for example, the provisions of the ESM-MoU and the associated Council Decision dealing with the restructuring and recapitalization of the Cypriot banking sector; *compare* Memorandum of Understanding of 26 April 2013 on Specific Economic Policy concluded between the Republic of Cyprus and the European Stability Mechanism (2013), pp. 7-8 and Council Decision No. 2013/236/EU (2013) OJ L 141/32, Art. 2(6)(d).

¹³ See Case T-541/10, *ADEDY*, paras. 60-88; See Case T-215/11, *ADEDY*, paras. 71-100.

¹⁴ See Claire Kilpatrick; 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?'. *European Constitutional Law Review* 10, 2014, pp. 413-414 and 418. Also, to the knowledge of the author, not a single preliminary reference on the validity of CIDs, or – prior to the adoption of Regulation 472/2013 – of any other EU law conditionality measure, has been made by national courts to date.

¹⁵ *Infra* n. 16, pp. 3 and 5.

¹⁶ Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 Final (2017).

¹⁷ Annex to the Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 Final (2017), Art. 13.

¹⁸ *Supra* n. 16, pp. 5 and 11.

procedures prescribed for that purpose.¹⁹ Yet, integrating the ESM into EU law would seem to entail precisely that: After all, as follows from the seminal *Pringle* judgement, the Treaties do not currently provide *any* Union power for the creation of a mechanism like the ESM.²⁰ Moreover, Art. 136(3) TFEU expressly notes that the power to adopt a stability mechanism like the ESM is reserved for the *Member States* and not the Union. Against this backdrop, the Commission's choice of Art. 352 TFEU as legal basis is predestined for lengthy legal debates – debates which might quite possibly culminate in the ultimate realisation that recourse to the significantly more burdensome ordinary revision procedure cannot be avoided. Second, even if Art. 352 TFEU were deemed a suitable legal basis, the difficulty for an initiative of this scale to be adopted under this provision should not be underestimated, given the requirement for unanimous approval in the Council and the need to obtain the consent of both the European Parliament ('EP')²¹ and some national parliaments which have secured discrete co-determination rights in the Art. 352 TFEU procedure.²² By anyone's standards, thus, quite a long and winding road still lies ahead of the realization of the Commission's plans to integrate the ESM into EU law. Viewed realistically, therefore, the above-highlighted predicament, i.e. the absence of options for *effective* legality review of ESM conditionality, does not appear to be resolved anytime soon through EU legislative action.

This makes it seem all the more appropriate to challenge the current status quo, i.e. the legitimacy of the jurisprudence which has catered for this predicament in the first place, namely the *Ledra* decision and the classification of ESM-MoUs articulated therein. And indeed, given the novel, complex and highly controversial procedural debates which the legal make-up of ESM-MoUs trigger under Union law, the CJEU's characterisation of ESM-MoUs does not at all come forth as a self-evident truth: hardly ever had the Union judiciary been confronted with legal instruments combining institutional and regulatory elements of both EU and international law origin in such a curious and pervasive manner. Yet, the procedural issues raised by ESM-MoUs – intricate and unprecedented as they well may be – do not evolve in an EU legal vacuum.

¹⁹ See, for instance, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, paras. 29-30.

²⁰ Case C-370/12, *Pringle v. Government of Ireland et al. ('Pringle')*, EU:C:2012:756, paras. 64, 105 and 167-168.

²¹ Art. 352(1) TFEU.

²² In Germany, for example, recourse to the Art. 352 procedure, is subject to prior bicameral ratification; see BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 – para. 328.

On the contrary, there is quite a dense and sophisticated body of EU jurisprudence on all imaginable kinds of *sui generis* acts; the EU judiciary has established classificatory criteria and definitions for these purposes and – most importantly – it has postulated overarching procedural guarantees in light of which said criteria and definitions are to be construed.²³

It is in the context of this encounter or clash, if you will, between the Union's fairly well-established procedural rules and principles on the one hand and the highly ambiguous, complex and, indeed, unparalleled procedural issues raised by ESM-MoUs on the other, that the research question which this thesis seeks to address arises. It reads as follows: How does the CJEU's fateful finding in *Ledra* that ESM-MoUs cannot be classified as Union measures resonate with EU procedural law? Inquiring into this issue it will be argued throughout this study that the CJEU's characterisation of ESM-MoUs in *Ledra* is at odds with one of the fundamental constitutional norms and, indeed, procedural guarantees of the EU, namely the Union principle of the rule of law. This argument is predicated on the view that *Ledra*, inasmuch as it entails the removal of a *de facto* Union act from legality review under both Art. 263 and Art. 267 TFEU, has unduly restricted the scope of the procedural *rule of law* guarantee of a complete system of legal remedies for legality review in respect of *all* Union measures.

To develop this standpoint, it will be proceeded as follows: First, the passages of the *Ledra* ruling dealing with the legal nature of ESM-MoUs are reviewed. Thereby emphasis will be placed on the reasoning and classificatory methodology resorted to by the CJEU. Second, the analytical framework by recourse to which the *Ledra* categorisation of ESM-MoUs will be assessed in light of the Union principle of the rule of law is elaborated upon. To this effect, the status and meaning of the Union principle of the rule of law and the definition of Union acts associated with this principle will be illuminated. Further, to demonstrate how this definition of Union acts is typically operationalized, the CJEU's case-law on atypical acts will be surveyed and the dominant classificatory criteria governing the ascertainment of the legal character of non-standard-measures will be identified. Third, having regard to the thus established analytical framework, the *Ledra* dictum on the legal nature of ESM-MoUs is duly scrutinized pursuant to the Union principle of the rule of law review. This is done via

²³ See section 3 entitled 'Analytical Framework: The Union Rule of Law as Fundamental Procedural Guarantee of the EU', pp. 8-11.

two steps: In a first step, the legal nature of ESM-MoUs will be re-evaluated in light of the CJEU's dominant classificatory criteria, namely substance and context. Based on this reassessment – in a second step – the main argument of this thesis will be adduced and the rule of law incompatibility of the *Ledra* classification of ESM-MoUs will be established. Fourth, the practical added-value of the central proposition of this study for prospective legality challenges to ESM conditionality is laid out in brief. Sixth, and finally, the main argument of this thesis and the key-steps underlying its formulation are reiterated.

2. The *Ledra* Decision: Legal Formalism as Vehicle for the Denial of the EU Law Nature of ESM-MoUs

This section aims at revisiting the sweeping conclusion reached in *Ledra* that ESM-MoUs do not constitute Union measures. Indeed, inasmuch as this conclusion is the object of the rule of law critique underlying the main argument of this thesis, close scrutiny of the CJEU's underlying reasoning and classificatory approach is warranted.

Two, in fact, interrelated observations drawn from *Pringle* centrally²⁴ inspired the CJEU's conclusion that ESM-MoUs are not EU-authored: First, the observation that the duties conferred on the Commission as well as on the ECB within the ESM Treaty, irrespective of their importance, do not entail any power to make decisions of *their own*. And second, the observation that all of the activities engaged in by EU institutions within the ESM framework *commit the ESM alone*.²⁵ The common thread which seems to run through these observations is the presumption that, given the agency role ascribed to EU institutions by the ESM Treaty, EU institutions lack discretion vis-à-vis the ESM and hence, are precluded – categorically – from taking autonomous decisions or entering into legal commitments at their own behest. Now it is true, that on the face of it, it looks like the Court did not take this presumption completely at face value when observing, in its authorship analysis, that the EU institutions did not exceed the limits of the powers conferred on them by the ESM

²⁴ They are mentioned, directly or indirectly, three times in the authorship analysis, see *supra* n. 1, paras. 51, 53, 54.

²⁵ *Supra* n. 1, paras. 51 and 53, 54.

Treaty by virtue of their participation in the negotiations of the Cypriot ESM-MoU and their provision of technical expertise, advice and guidance.²⁶ Yet, upon closer examination, this observation does not amount to much more than a mere restatement of the formal powers conferred on the EU institutions by Art. 13 of the ESM Treaty²⁷ and, as such, simply reproduces the presumption that EU institutions lack discretion vis-à-vis the ESM rather than to genuinely scrutinize its accuracy in light of all the facts at hand.

It must be concluded, hence, that the *Pringle*-derived presumption that EU institutions lack discretion vis-à-vis the ESM – absent any credible scrutiny as to its validity – makes up the very essence of the CJEU’s classification of ESM-MoUs in *Ledra*. By implication, given that this presumption is based, above all, on one single formal indicator – the principal-agent link between the ESM and the EU institutions, as enshrined in the ESM Treaty – the Court’s legal characterisation of ESM-MoUs in *Ledra* may be justifiably considered narrow and formalistic in nature. In what follows, the analytical framework is set up by recourse to which this classification of ESM-MoUs will be assessed in virtue of the Union principle of the rule of law.

3. Analytical Framework: The Union Rule of Law as Fundamental Procedural Guarantee of the EU

To create a robust analytical framework for the ensuing rule of law analysis of the CJEU’s classification of ESM-MoUs, this section will first seek to shed light on the status and meaning of the Union principle of the rule of law as well as the broad definition of Union measures inherent to it. Second, to demonstrate how the encompassing definition of Union acts is typically put into practice, the CJEU’s case-law on the classification of atypical acts will be surveyed.

²⁶ *Supra* n. 1, para. 52.

²⁷ See Treaty Establishing the European Stability Mechanism (2012), Art. 13(2), (3).

3.1 The Union Rule of Law and the Comprehensive Definition of Union Measures

The Union principle of the rule of law is referred to in Art. 2 of the Treaty on the European Union (“TEU”) as a foundational value of the Union and represents one of the defining principles underpinning and legitimizing the EU’s constitutional system.²⁸ In this role, the Union rule of law does not function as a justiciable *ground* for legality review but assumes a more general and fundamental role: It constitutes the normative *foundation* of the Union’s system of legality review and, as such, entails the fundamental procedural guarantee of a ‘complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions’. This was explicitly articulated, for the first time, in the momentous *Les Verts* ruling²⁹ and has been reiterated time and again thereafter in the CJEU’s rich jurisprudence concerning legal actions under both Art. 263 and Art. 267 TFEU³⁰.

It is very worth noting, in this context, that the definition of the term ‘*measures adopted by the institutions*’, i.e. the concept of Union measures underlying the guarantee of a complete system of legal remedies, has ever since been construed very broadly. This follows from the CJEU’s case-law on atypical acts under both Art. 263 and Art. 267 TFEU. As for Art. 263 TFEU, it is the seminal *ERTA* decision – and a consistent line of case-law concerning *sui generis* acts that has emerged therefrom – which has made it plain that the concept of Union acts is not confined to the limited class of fully conventional EU law measures referred to in Article 288-292 TFEU. On the contrary, Union measures are ‘*all measures adopted by the institutions, whatever their nature or form which are intended to have legal effects*’.³¹ Similarly, in the context of Art. 267 TFEU, ever since the *Grimaldi* decision the Court has insistently

²⁸ Laurent Pech, ‘A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’. *European Constitutional Law Review* 6, 2010, p. 362.

²⁹ See, Case C-294/83, *Parti écologiste ‘Les Verts’ v. Parliament*, EU:C:1986:166, para. 23.

³⁰ See, amongst others, Case C-314/85, *Foto-Frost and Hauptzollamt Lübeck-Ost*, EU:C:1987:452, para. 16;

Case C-314/91, *Weber v. Parliament*, EU:C:1993:109, para. 8; Case C-15/00, *Commission v. EIB*, EU:C:2003:396, para. 75; Case C-461/03, *Gaston Schul Douane-expediteur BV v. Minister van Landbouw*, EU:C:2005:742, para. 22; Case C-232/05, *Commission v. France*, EU:C:2006:651, para. 57; Case T-345/05, *Mote v. European Parliament*, EU:T:2008:440, para. 21.

³¹ See, for example, Case C-22/70, *Commission v. Council (‘ERTA’)*, EU:C:1971:32, para. 42; Case C-303/90, *France v. Commission*, EU:C:1991:424, para. 8; Case C-147/96, *Netherlands v. Commission*, EU:C:2000:335, para. 25; Case C-27/04, *Commission v. Council*, EU:C:2004:436, para. 44; Case C-362/08 P, *Internationaler Hilfsfonds eV v. Commission*, EU:C:2010:40, para. 50

emphasized that Union measures include ‘all acts of the EU institutions *without exception*’.³²

To recapitulate the foregoing observations: The Union principle of the rule of law constitutes a foundational value of the Union, operates as normative basis of the Union’s system of legality review and, as such, comes with the procedural guarantee of a complete system of legal remedies to review the legality of all Union measures. Moreover, as follows from the broad *ERTA* and *Grimaldi* definition of Union acts, the range of measures which may come under the scope of this guarantee is potentially enormous and not at all confined to those ordinary Union instruments referred to in the Treaties.

3.2. The Dominant Classificatory Paradigm of ‘Substance over Form’

Taking the comprehensive definition of Union acts under both the *ERTA* and *Grimaldi* lines of cases as a point of departure, this section is devoted to illustrating how the Court typically operationalizes this definition when it comes to classifying non-standard measures for the purposes of legal review. To this effect, a case-law survey will be carried out whereby the prevailing judicial practice as to the ascertainment of both the (1) *law quality* (taken here to refer to the *binding* and *public law* qualities of an act) as well as the (2) *authorship* of atypical acts is examined.

First, as far as the *law quality* of atypical acts is concerned, it is worth pointing out that – in line with the broad definition of Union acts established above – the Court does not ordinarily pay much attention at all to formalities such as the formal label or legal basis³³ of an act when ascertaining its law quality. What matters, above all is whether the act in question is aimed at having *legal effects*.³⁴ This, in turn, is an issue to be resolved, as the Court has consistently held, by looking to the *substance* of the

³² Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles* (‘*Grimaldi*’), EU:C:1989:646, para. 8; Case C-11/05, *Friesland Coberco Dairy Foods v. Inspecteur van de Belastingdienst* (‘*Friesland Coberco*’), EU:C:2006:312, para. 36; Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, EU:C:2010:659, para. 38; *supra* n. 6, para. 30.

³³ See Case C-521/06 P, *Athinaïki Techniki AE v. Commission* (‘*AT v. Commission*’), EU:C:2008:422, para. 45.

³⁴ *Supra* n. 31.

measure under review.³⁵ Thereby ‘imperative wording’ may serve as weighty evidence in favour of the view that a measure is vested with *binding* legal effects.³⁶ As of recently, this dictum also seems to have informed the CJEU’s jurisprudence on *sui generis* acts of particular relevance for present purposes – namely its jurisprudence on *MoUs* (albeit on *MoUs* adopted under the EU-based Medium-Term Financial Assistance Facility (‘MTFAF’)). Hence, in the recent *Florescu* decision, it was by reference to the compelling language of the *MoU* at issue, i.e. the requirement set out therein, amongst others, that ‘disbursement of each [...] instalment shall be made on the basis of a satisfactory implementation of the economic programme’, that the CJEU established its mandatory nature.³⁷ It is true, admittedly, that it did so by way of *obiter dictum*, that is, in a context primarily concerned with the question of whether the *MoU* under review required the implementation of the specific domestic legislation challenged in the main action (rather than with the mandatory character of the *MoU per se*).³⁸ Yet, this does not appear to reduce the relevance of the Court’s conclusion and its underlying reasoning in any way. After all, the inquiry as to whether an act requires the implementation of certain domestic legislation necessarily depends, inter alia, on the question of whether said act is capable of imposing obligations in the first place, i.e. whether it is *mandatory*. In exploring these interrelated issues, the Court, upon having considered the substance of the *MoU* at issue, confirmed the mandatory character of *MoUs* while denying, however, that *in casu* that there was a specific provision in the *MoU* which required the adoption of the national legislation challenged in the main action.³⁹ As such *Florescu* seems to verify the pertinence – also in respect of *MoUs* – of the well-established judicial practice of looking to the substance and the ‘imperative wording’ of atypical acts for the purposes of validating their *binding* qualities. On another note, the Court – in reliance on the generous *ERTA* definition of Union acts – also accepted the possibility that *private* contractual arrangements may be considered *public* Union acts for the purposes of judicial review, if they are aimed at producing legal effects stemming from ‘the exercise of the prerogatives of a *public authority*

³⁵ See, amongst others, Case C-303/90, *France v. Commission*, para. 10; Case C-147/96, *Netherlands v. Commission*, para. 27; Case C-27/04, *Commission v. Council*, paras. 44-46; Case C-521/06 P, *AT v. Commission*, para. 42; Case C-362/08 P, *Internationaler Hilfsfonds eV v. Commission*, para. 52.

³⁶ Case C-57/95, *France v. Commission*, EU:C:1997:164, para. 18; Case C-11/05, *Friesland Coberco*, paras. 25-27.

³⁷ *Supra* n. 6, paras. 39-41.

³⁸ *Supra* n. 6, para. 37.

³⁹ *Supra* n. 6, para. 41.

conferred on the contracting institution'.⁴⁰ Guidance to this effect may be obtained, amongst others, from 'ambiguous formulations which might be understood by the parties to the contract as constituting unilateral decision-making powers'.⁴¹ As concerns MoUs in particular, the CJEU has indicated in *Florescu* that such acts, irrespective of their contractual form, may nonetheless be treated like unilateral public law measures for the purposes of judicial review if the legal context and the identity of their contracting parties are public in nature.⁴²

Second, as for the *authorship* of atypical acts, it should be noted from the outset that there have been comparatively few cases to date where the origin of non-standard measures was at stake. However, this does not mean that no lessons can be learned from those few judicial pronouncements there are on this matter. Quite the contrary: Very clear signs can be identified in the Court's authorship jurisprudence that the approach governing the ascertainment of the origin of atypical acts cannot be substantially different, in essence, from the open-ended, substance-oriented practice pursued when it comes to checking on the law quality of non-standard measures. This follows, above all, from the broad *ERTA* and *Grimaldi* definition of Union measures. Indeed, it would be more than counterintuitive, if this comprehensive understanding of Union acts were matched by narrow formal classificatory criteria in the authorship analysis. In this vein – expressly relying on the broad *ERTA* and *Grimaldi* definition of Union acts – the Union judicature has consistently refused to draw conclusive guidance from rigid formal indicators in its authorship jurisprudence: Authorship as laid out in the formal designation of an act was rejected on several occasions as definite indicator for the purposes of ascertaining the legal origin of a measure.⁴³ Further, the Court has repeatedly refused to accord conclusive weight to the formal principal-agent dualism in its authorship appraisal: In *Lomé*, the fact that the Council adopted a measure on behalf of an international organization⁴⁴, i.e. as an agent, was not considered

⁴⁰ Case C-506/13 P, *Lito Maieftiko v. Commission ('Lito Maieftiko')*, EU:C:2015:562, para. 20; see, similarly, Joined Cases T-314/03 and T-378/03, *Musée Grévin SV v. Commission*, EU:T:2004:139, paras. 81 and 84; Case T-85/01, *IAMA Consulting Srl v. Commission*, EU:T:2007:29, para. 51.

⁴¹ Case C-506/13 P, *Lito Maieftiko*, para. 21.

⁴² Hence, in *Florescu* the fact that the MoU at issue was based in public law (EU law) and concluded by a public law actor (the Union) led the Court to conclude that it is to be regarded as 'an act of an EU institution within the meaning of Article 267(b) TFEU', see *supra* n. 6, para. 35.

⁴³ Joined Cases C-181/91 and C-248/91, *Parliament v. Council ('Bangladesh')*, EU:C:1993:271, paras.13-14; Case C-114/12, *Commission and Parliament v. Council ('Broadcasting Rights Convention')*, EU:C:2014:2151, paras. 38-41; Case T-192/16, *NF v. European Council ('EU-Turkey')*, EU:T:2017:128, paras. 42 and 45.

⁴⁴ The seventh European Development Fund (1990); see Internal Agreement 91/401/EEC on the financing and administration of Community aid under the Fourth ACP-EEC Convention (16.07.1990), Art. 1.

decisive.⁴⁵ Likewise in *Florescu* the fact that the MoU under review was concluded by the Commission merely on behalf of the Union did not keep the Court from ruling that it ‘constitutes an *act of an EU institution*, within the meaning of Art. 267 TFEU’.⁴⁶ Yet, besides overtly rejecting the conclusiveness of formal criteria, the Court has also forcefully embraced (again taking the comprehensive definition of a Union act as a point of departure), open-ended, substance-oriented criteria reminiscent of those underlying its ‘law quality’ jurisprudence. Hence, in *Bangladesh* and *EU-Turkey* the Court elevated the *substance* of the act together with the *context* in which it was adopted to central yardsticks of the authorship analysis.⁴⁷ Likewise, while not articulating an express formula of the kind developed in *Bangladesh*, the Court reasserted the centrality of substance and context for the authorship appraisal more implicitly in a number of other instances.⁴⁸

In sum, considering the preceding paragraphs, it can be clearly observed that – predicated on the encompassing definition of Union acts – the judicial assessment of atypical acts as for their (1) *law quality* and their (2) *Union authorship* is typically structured around broad and open-ended criteria such as substance and context rather than isolated formal parameters like formal label, legal basis or a principal-agent link. Indeed, this trend seems so pronounced that one may well speak of a dominant classificatory paradigm in the CJEU’s case-law on non-standard measures, namely the classificatory paradigm of ‘substance over form’.⁴⁹

Having elaborated upon status and meaning of the Union rule of law, the broad conception of Union acts inherent to it, and, ultimately, the operationalization of this definition in the CJEU’s jurisprudence on the classification of non-standard acts, the analytical framework is now set for the ensuing rule of law review of the Court’s legal categorisation of ESM-MoUs in *Ledra*.

⁴⁵ Case C-316/91, *Parliament v. Council* (*Lomé*), ECLI:EU:C:1994:76, paras. 2-3, 7-9.

⁴⁶ Remarkably, in contrast to the acts under review in *Bangladesh* and *Lomé*, the MoU at issue in *Florescu* was adopted in the absence of a marked hybrid legal context, i.e. in a legal environment firmly embedded in EU law; see *supra* n. 6, paras. 31-33.

⁴⁷ Joined Cases C-181/91 and C-248/91, *Bangladesh*, para. 14.

⁴⁸ See Case C-316/91, *Lomé*, paras. 3, 8-9; *supra* n. 6, paras. 31-36; C-114/12, *Broadcasting Rights Convention*, paras. 40-41.

⁴⁹ The catchphrase ‘substance over form’ will be used in this thesis as a shorthand for the CJEU’s classificatory approach on atypical acts (i.e. its tendency to resort to generous and open-ended criteria such as substance *and* context when classifying atypical measures) and should not be understood, hence, as merely referring to the criterion of ‘substance’ *strictu sensu*.

4. A Rule of Law Review of The *Ledra* Decision

The rule of law review of the *Ledra* judgement will be conducted in two steps: First, the legal nature of ESM-MoUs will be reassessed in light of the dominant classificatory paradigm of ‘substance over form’. Second, based on the outcome of this reassessment, conclusions will be drawn as to compatibility of *Ledra* decision with the Union principle of the rule of law and the procedural guarantee of a complete system of legal remedies associated with this principle.

4.1. ESM-MoUs in Light of the Dominant Classificatory Paradigm of ‘Substance over Form’

4.1.1. The Law Quality of ESM-MoUs

In *Ledra* the Court abstained from addressing the law quality of ESM-MoUs. It might be reasonably assumed that this inaction was partly path-dependent on the finding that ESM-MoUs are not EU-authored. Exercising judicial economy, the Court did apparently not find it necessary to further engage with this issue. This is certainly regrettable given the controversies the law quality of (ESM-)MoUs has spurred, to date, both across jurisdictions and in legal commentary.⁵⁰ Against the backdrop of this omission, this section attempts to cast light on the law quality of ESM-MoUs – both as to their legally binding character and their public law nature – by having recourse to the relevant judicial pronouncements drawn from both the *ERTA* and *Grimaldi* lines of cases.

As for the ascertainment of the binding quality of ESM-MoUs, the established judicial practice of looking to the substance and, by extension, the language of atypical acts is quite revealing in their regard: Indeed, express ‘imperative wording’ pervades all ESM-MoUs. Each of them makes it plain that, as a matter of principle, financial

⁵⁰ For discussions of the law quality of MoUs in the academic literature see, amongst others, Andreas Fischer Lescano, ‘Competencies of the Troika. Legal Limitations of the Institutions of the European Union’, in: Niklas Bruun et al., (Eds.); *The Economic and Financial Crisis and Collective Labour Law in Europe*: Oxford and Portland: Hart Publishing, 2014, pp. 68-71; *supra* n. 14, pp. 406-415; Anastasia Poulou, ‘The Liability of the EU in the ESM Framework’, pp. 135-136. For jurisprudence on the law quality of MoUs, see Tribunal Constitucional, Acórdão No. 187/2013, Lei do Orçamento do Estado, (5.4.2013), paras. 2 and 29; Συμβούλιο της Επικρατείας (Greek Council of State) Decision 668/2012 (20.02.2012); *supra* n. 6, paras. 37-41.

assistance is dependent upon ‘*compliance*’ by the beneficiary Member State with all the undertakings set out in the MoU. Further, they unmistakably stipulate that disbursement of any tranche of financial assistance (after the first instalment) will be dependent on a decision by the ESM Board of Directors (‘BoD’) that the recipient Member State has ‘*complied*’ with the conditions set out in the MoU. What is more, as to possible amendments to their substance, ESM-MoUs typically refer to their ‘becom[ing] *effective* upon signature’.⁵¹ Clearly, notions such as ‘compliance’ or ‘effectiveness’ do not pertain to the standard vocabulary deployed in connection with mere political agreements and/or understandings. On the contrary, they seem to signal a clear intention on the part of the contracting parties to be legally bound by their agreement. Having said this, it is worth recalling, moreover, that in the recent *Florescu* case the Court has accepted the mandatory nature of an MoU by reference to significantly less compelling catchwords than those just alluded to: stipulations in the MTFAF-MoU, such as that ‘disbursement of every instalment is to be made on the basis of the satisfactory implementation of the economic programme’ were deemed sufficient by the CJEU to accept the binding nature of the MoU at issue.⁵² Whilst it is true that *Florescu* concerned an MoU adopted pursuant to a different regime, namely the EU law-based MTFAF, there appears to be no *prima facie* weighty reason why the *Florescu* dictum should not be extended to ESM-MoUs given the obvious parallels in terms of legal structure between these acts. In sum, therefore, having regard to the Court’s case-law on atypical acts – in particular the recent *Florescu* ruling on MTFAF-MoUs – a very strong case can be made for arguing that ESM-MoUs must in view of their ‘imperative wording’ be deemed legally binding instruments.

A *prima facie* problem remains, however, that ESM-MoUs do not constitute conventional unilateral public law acts. They take the form of *agreements* concluded between two different legal persons – the Commission (acting on behalf of the ESM) and a debtor Member State. This has fed suspicions in the academic debate that ESM-MoUs could on account of their contractual nature fall outside the scope of Union law.⁵³

⁵¹ See, for example, Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 19 August 2015 (2015), p. 2; Supplemental Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 5 July 2017 (2017), pp. 2-3.

⁵² *Supra* n. 6, paras. 39- 41.

⁵³ See, for example, Kenneth A. Armstrong; ‘Differentiated Economic Governance and the Reshaping of Dominium Law’, in: Maurice Adams et al., (Eds.); *The Constitutionalization of European Budgetary Constraints*. Oxford; Portland: Hart Publishing, 2014, pp. 77-78; Anastasia Poulou, ‘The Liability of the EU in the ESM Framework’, pp. 135-136.

Yet, while ESM-MoUs' contractual form can be hardly denied, EU judicial wisdom has it, as was highlighted above, that their contractual form does not automatically remove them from the ambit of reviewable Union measures. Indeed, it still needs to be ascertained whether ESM-MoUs are capable of producing binding legal effects stemming from 'the exercise of the prerogatives of a public authority conferred on the contracting institution'. Against this backdrop, it is very worth pointing out that the Commission negotiates and signs ESM-MoUs pursuant to the prerogatives conferred on it as an agent of a public international institution, namely the ESM.⁵⁴ Furthermore, as the Court acknowledged in *Ledra*, the Commission retains its fundamental prerogative as public authority of the Union (i.e. as Guardian of the Treaties) in the procedure leading up to the adoption of ESM-MoUs.⁵⁵ What is more, ESM-MoUs are imbued, with 'ambiguous formulations' that could be understood as 'constituting unilateral decision-making powers': After all, as was already indicated, it is incumbent on the aid-receiving ESM Member State alone to *comply* with the substantive provisions of ESM-MoUs. Hence, rather than laying out *mutual* obligations and rights – as one would expect from an ordinary contract – ESM-MoUs primarily string together *one-directional* policy prescriptions. Importantly, moreover, many ESM-MoUs provisions bear the distinctive mark of unilateral decision-making powers conferred on the Commission by the EU Treaties. For example ESM-MoU policy prescriptions on bank recapitalizations as a rule come with the associated requirement to submit restructuring plans to the Commission for prior approval under EU state-aid rules.⁵⁶ In light of this extensive reliance on the unilateral public authority of the Commission in particular, there can be hardly any denying that, notwithstanding their contractual form, ESM-MoUs must be considered as producing binding legal effects stemming from the exercise of the prerogatives of a public authority and are bound, therefore, to be considered unilateral public law acts for the purposes of EU judicial review. This view is forcefully sustained, once again, by the recent *Florescu* decision. Here, the fact that the MTFAF-MoU at issue assumed the form of an 'agreement' between the EU and Romania had no bearing whatsoever on the Court's finding that this measure was to be regarded as a *public* Union act, given the public legal context governing its

⁵⁴ *Supra* n. 27, Art. 1(1).

⁵⁵ *See supra* n. 1, para. 56-57 and 59.

⁵⁶ *See infra* n. 77.

conclusion and the public law nature of its contracting parties.⁵⁷ Translating this logic to ESM-MoUs, one may immediately come to note that these instruments, too, are concluded in a distinctly public legal context between two archetypical public law actors.⁵⁸ Hence, no matter whether one applies the criteria established in the CJEU's well-established *ERTA* lines of cases or those resorted to in the recent *Florescu* decision, the conclusion that ESM-MoUs are to be considered unilateral public law acts for the purposes of EU legal review seems irresistible.

The preceding paragraphs on the law quality of ESM-MoUs clearly illustrate that, having regard to the *ERTA* and *Grimaldi* lines of cases persuasive evidence can be adduced to the effect that ESM-MoUs must be deemed legally binding public law acts: Whereas the mandatory character of ESM-MoUs can be derived from their 'imperative wording', their public law nature can be inferred from the exercise of unilateral public authority in their regard, the public legal context governing their adoption and, ultimately, the public law identity of their contracting parties.

4.1.2. The Authorship of ESM-MoUs

As was shown above, the authorship issue – in contrast to the law quality aspect – has received the full attention of the CJEU in *Ledra*. The Union judiciary, guided by the formal principal-agent dualism as enshrined in the ESM Treaty, presumed that EU institutions lack autonomy vis-à-vis the ESM when it comes to ESM-MoUs and, hence, concluded that these acts cannot be deemed to originate with the Union.

Yet, recalling the classificatory methodology dominating the Court's authorship case-law, formal indicators such as the principal-agent link can never be considered as conclusive in their own right; they can serve, at most, as one amongst many other aspects to be taken account of in a thorough review of *all* pertinent *contextual* and *substantive* factors. Conducting such an authorship (re-)review with respect to ESM-MoUs is precisely what the forthcoming section aspires to achieve. For the sake of

⁵⁷ *Supra* n. 6, para. 35.

⁵⁸ As to the public legal context governing ESM-MoUs it is worth pointing out that the procedure governing ESM-MoUs is laid out in Art. 13 of the ESM Treaty – an agreement under public international law. Moreover, ESM-MoUs are deeply embedded in the EU's public regulatory framework; see subsection 4.1.2 entitled 'The Authorship of ESM-MoUs', heading (ii) 'Regulatory Dimension: Where Do ESM-MoUs Originate?', pp. 20-24. As to the public law identity of the contracting parties to ESM-MoUs: Suffice to say that it is the Commission on the one hand and the (public) authorities of the bailout country on the other which conclude ESM-MoUs.

clarity and argumentative coherence, the analysis of all relevant contextual and substantive parameters will be conducted along two dimensions – an institutional and a regulatory dimension.

i) Institutional Dimension: Who Originates ESM-MoUs?

On the institutional plane a two-step approach will be pursued: First, going beyond the formal principal-agent dualism enshrined in the ESM treaty, the Court's formalistic presumption that EU institutions lack discretionary powers vis-à-vis the ESM in the ESM-MoU procedure will be re-examined. Based thereon, the substantive influence (if any) EU institutions may bring to bear on ESM-MoUs will be analysed and inferences as to their ESM-MoU authorship will be made therefrom. Second, the role of the Eurogroup in the ESM-MoU procedure will be dealt with. In doing so, particular attention will be devoted to the nature and extent of the Eurogroup's substantive decision-making powers in regard of ESM-MoUs as well as the legal status of this Union body. Building on this analysis, the Eurogroup's potential authorship role in regard of these acts will be accounted for.

a) EU Institutions

The question to what extent EU institutions may actually exercise discretion vis-à-vis the ESM is a decisive one. It settles the threshold issue, after all, whether 'borrowed' EU institutions may – in principle – become ESM-MoU authors in their own right (rather than merely on behalf of the ESM). As was pointed out, in *Ledra* the formal principal-agent link between the ESM and EU institutions as enshrined in the ESM Treaty, led the Court to presume that EU institutions lack discretion vis-à-vis the ESM and, hence, are categorically precluded from becoming autonomous ESM-MoUs authors. Ironically enough, however, the Union judicature appears to have rebutted this presumption itself later in the very same *Ledra* decision when called upon to rule on the second prong of the applicants' plea, namely the action for damages claim: Faced with the issue whether the Union institutions remain bound by their EU law duties in the ESM-MoU procedure, the CJEU left no doubt that the Commission, by virtue of its role as Guardian of the Treaties (as codified in Art. 17(1) TEU) and in light of Art. 13(3) and

(4) of the ESM Treaty, *must* ensure that ESM-MoUs are compatible with EU law.⁵⁹ Importantly, the Court did not interpret this duty as a best-endeavour obligation, as suggested by Advocate General Wahl ('AG Wahl')⁶⁰, but as a genuine *obligation as to the result*⁶¹. Further – and also in contrast to AG Wahl's Opinion⁶² – the Union judicature made it plain that compliance with ESM-MoUs must be ensured not merely as concerns Union measures of economic policy coordination but in regard of *EU law as a whole*.⁶³ Now, whilst certainly laudable, this interpretation seems to defy any firm textual backing in the ESM Treaty. After all, as AG Wahl correctly observed in his Opinion, the term 'consistency' in Art. 13(3) does not give rise to a requirement of full conformity or compliance but rather appears to refer to a standard of mere compatibility and non-contradiction. Moreover, the explicit reference in Art. 13(3) to 'measures of economic policy coordination' (rather than EU law in its totality) appears to signal a clear lack of intention on the part of the ESM Members to insert a requirement of compliance with all aspects of EU law in the ESM Treaty.⁶⁴ Yet, notwithstanding these two distinct textual limitations, the Court – premised on a generous interpretation of Art. 17(1) TEU – read a fully-fledged *obligation* on the part of the Commission to ensure ESM-MoUs' compatibility with *EU law as whole* into Art. 13(3) and (4) of the ESM Treaty. Inasmuch as this comprehensive EU law performance obligation goes far beyond any of the ESM duties formally conferred on the Commission, the CJEU appears to have accepted (albeit unintentionally) that the Commission's role within the ESM-MoU procedure is significantly broader than its ESM Treaty mandate actually allows for. It has accepted, in other words, that the Commission, thanks to its EU constitutional mission as Guardian of the Treaties, is equipped with significant discretion vis-à-vis the ESM.⁶⁵

⁵⁹ *Supra* n. 1, paras. 56-59.

⁶⁰ Opinion of Advocate General Wahl (21.04.2016), Joined Cases C-8/15 P, C-9/15 P, C-10/15 P, *Ledra Advertising Ltd et al. v. Commission and European Central Bank*, paras. 70-80.

⁶¹ *Supra* n. 1, para. 59.

⁶² *Supra* n. 60, para. 74.

⁶³ *Supra* n. 1, para. 58-59 and 67.

⁶⁴ *Supra* n. 60, paras. 71-74.

⁶⁵ While there can be no doubt that the ECB, too, must observe EU law in the ESM-MoU procedure, it is, unlike the Commission, not equipped with a general EU law enforcement mission. Its duty to observe EU law, hence, comes across as what has been coined a best-effort obligation by AG Wahl. Yet, as such, it does not seem to give the ECB autonomous powers over and above those conferred on it by the ESM Treaty (in particular Art. 13(3) thereof).

Yet, while discretion vis-à-vis the ESM is a *necessary* prerequisite, it is not yet a *sufficient* condition to advance a robust authorship claim. A decisive issue still remains to be settled, namely the extent to which the Commission is both able and willing to deploy its discretion to affect the very *substance* of ESM-MoUs. In this context, it should be recalled that Commission discretion vis-à-vis the ESM was said to lie in a duty, namely the duty to ensure the compatibility of ESM-MoUs with EU law. Now, upon closer scrutiny, this duty also appears to vest in the Commission a notable power of decision concerning ESM-MoUs' substance. How else, after all, if not by recourse to substantive decision-making powers were the Commission to honour its duty to ensure the ESM-MoUs' EU law compliance? Indeed, had the Commission no substantive decision-making capacity concerning ESM-MoUs, the existence of a fully-fledged duty on its part to uphold their conformity with EU law would hardly make any sense: It would entail the non-sensical scenario that the Commission could be blamed for EU law inconsistencies it could not have prevented in the first place. The only possible conclusion to be drawn from the Court's recognition of a genuine obligation on the part of the Commission to ensure the EU law compatibility of ESM-MoUs must hence be that the Commission possesses substantive decision-making powers by virtue of which it may comply with this obligation.⁶⁶

However, the mere existence, *in theory*, of EU-law related substantive powers of decision does not yet amount to *actual* substantive influence. It is warranted, therefore, to examine to what extent and in which manner the Commission actually resorts to its substantive decision-making powers *in practice*. As is well known, the active determination of the substance of ESM-MoUs is a matter chiefly delegated to the Troika under Art. 13(3) (and to a lesser extent under Art. 13(7) of the ESM Treaty).⁶⁷ Ascertaining the Commission's actual substantive influence on ESM-MoUs, hence, requires a closer look into the inter-institutional power and decision-making dynamics unfolding in this tripartite arrangement.

Research suggests, surprisingly perhaps, that cooperation on the ground between each of the Troika's constituent institutions is typically quite non-

⁶⁶ See, similarly, Anastasia Poulou, 'The Liability of the EU in the ESM Framework', p. 135.

⁶⁷ This is not to omit, of course, that ever since the inception of the third Greek bailout, the ESM itself has become involved in both ESM-MoU negotiations and compliance monitoring, see subheading (b) 'The Eurogroup', pp. 17-20.

confrontational and collegial.⁶⁸ In terms of policy input, moreover, insiders from all participating institutions overwhelmingly tend to describe the Troika as a co-equal partnership.⁶⁹ Yet, collegial and equitable inter-institutional cooperation can obviously not be equated with the forfeiture of the Troika partners' respective substantive autonomy. Each constituent actor, after all, continues to operate pursuant to the logic and rules prescribed by its own mandate(s)⁷⁰ and –while there is mutual learning – each actor retains its own respective areas of core expertise.⁷¹ In other words, although the Troika institutions collaborate very closely and on an equal footing, each of them nonetheless maintains some more or less extensive room for independent substantive manoeuvre. Accordingly, IMF staff reports have revealed that, in fact, there is a fairly clear division of labour between the IMF on the one hand and the Commission (with the ECB in a supporting role⁷²) on the other. Whereas the IMF is typically entrusted with 'short-term macro-critical policies', the Commission, due to its in-depth expertise of the Union's regulatory landscape, is primarily responsible for devising 'comprehensive medium-term structural reforms'⁷³ in areas as diverse as financial services, transport or energy.⁷⁴ The Commission, moreover, is purported to streamline each and every policy condition – also those which do not *per se* fall within its own sphere of expertise – with existing EU law requirements: In this vein, the Commission's tireless insistence on, for example, the continued application of EU state aid rules to bank recapitalizations has often led to fierce conflicts with the IMF.⁷⁵

The unremitting enforcement of Union law on the part of the Commission paired with its EU-law bound approach to structural reforms visibly illustrates that the Commission is not only able, *theoretically*, but also willing, *in practice*, to bring to bear its EU law-related substantive decision-making powers in the context of its Troika

⁶⁸ See Jean Pisani-Ferry et. al, 'EU-IMF assistance to euro-area countries: an early assessment'. *Bruegel Blueprint Series, Vol. XIX*, 2013, pp. 22 and 114-115; G. Russel Kincaid, 'The IMF's Role in the Euro Area Crisis: What are the Lessons from the IMF's Participation in the Troika?'. *IEO Background Paper 2*, 2016, pp. 24-25

⁶⁹ See G. Russel Kincaid, 'The IMF's Role in the Euro Area Crisis: What are the Lessons from the IMF's Participation in the Troika?' pp. 38-39.

⁷⁰ See Jean Pisani-Ferry et. al, 'EU-IMF assistance to euro-area countries: an early assessment', pp. 3 and 106-107, 113, 119.

⁷¹ See *supra* n. 70, pp. 25, 110, 114-115.

⁷² See *supra* n. 70, p. 111, 114.

⁷³ See *supra* n. 69, p. 28. For the Cypriot ESM-MoU specifically, see IMF, 'Collaboration between Regional Financing Arrangements and the IMF'. *Policy Paper*, 2017, p. 27.

⁷⁴ See *supra* n. 70, p. 114.

⁷⁵ See *supra* n. 70, pp. 24, 110.

interactions. ESM-MoU provisions themselves quite bluntly attest to this when stipulating, for example, that financial institutions seeking recapitalization from public funds must submit restructuring plans to the Commission for prior approval under EU state-aid rules⁷⁶ or that the Third Energy Package is to be implemented fully and immediately with the Commission being notified thereof⁷⁷. It seems very difficult, if not impossible, to credibly deny that these and, indeed, many other ESM-MoU policy conditions⁷⁸ directly emanate from the Commission acting pursuant to its EU-law related substantive decision-making capacity in the ESM-MoU procedure.

In sum, therefore, the Commission, besides being the only EU institution within the ESM framework which possesses EU-law mandated discretion vis-à-vis the ESM, also appears to be both able and willing to actively use this discretion to decide on the content of ESM-MoUs. The Commission, in other words, not only perpetuates its independent role as EU institution in the ESM-MoU procedure but, in doing so, proactively inserts, changes and/or withdraws ESM-MoU policy conditions. There can be hardly any doubt, in view of this, that ESM-MoUs must be attributed – if only in part – to the Commission.

b) The Eurogroup

Apart from the Commission and its Troika partners, there is another actor which is centrally, and ever more intensively, involved in the ESM-MoU procedure: the ESM. The ESM possesses both important formal and expanding informal channels of substantive influence in the ESM-MoU procedure. The main formal channel of substantive influence consists in the veto-power over ESM-MoUs retained by ESM Board of Governors ('BoG').⁷⁹ Informal channels for substantive input, in turn, are constituted by the ESM's recently obtained capacity (without there being an enabling provision in the ESM Treaty) to operate as a stand-alone partner alongside the Troika in both the ESM-MoU negotiations⁸⁰ and the monthly review missions to programme

⁷⁶ See Memorandum of Understanding of 26 April 2013 on Specific Economic Policy concluded between the Republic of Cyprus and the European Stability Mechanism (2013), p. 9.

⁷⁷ See *supra* n. 76, p. 29.

⁷⁸ See *supra* n. 76, p. 17 (as concerns the Patients' Rights Directive) p. 21 (as concerns the Council Directive on administrative cooperation in the field of taxation), p. 27 (as concerns the Services Directive).

⁷⁹ *supra* n. 27, Art. 13 (4).

⁸⁰ *infra* n. 111.

countries⁸¹. Yet, while the ESM may well be a significant player – possibly even on the verge of becoming *the* player – in the ESM-MoU procedure, it should not go unnoticed, however, how extremely limited the institutional independence of the ESM is in practice.⁸² Indeed, its main executive body – the BoG – seems to be fully captured, in fact, by a body external to the formal ESM framework, namely the Eurogroup:

It is striking to observe from the outset that membership both in the BoG and the Eurogroup is wholly identical in practice. Each body gathers the finance ministers of the euro area Member States⁸³ and, given that the BoG has always chosen, to date, to be chaired by the President of the Eurogroup⁸⁴, both fora typically assemble the exact same group of people. It hardly needs to be pointed out that such a constellation comes with quite a heightened risk of seizure and intermingling responsibilities. And indeed, if practical evidence is considered, not too much seems left of the BoG's independent powers and competences in the ESM-MoU procedure. Interviews with ESM staff have revealed that the BoG, as a rule, is not itself engaging in any actual substantive decision-making activities, but merely *formalizes* decisions (incl. decisions on ESM-MoUs) effectively taken in the Eurogroup. Thus, in the words of one of the interviewees 'discussions [in the BoG] are not very long, because it is an implementation of the decision of the Eurogroup, this is how it works in practice'.⁸⁵ Former President of the Eurogroup and Chairman of the BoG, Jeroen Dijsselbloem, forcefully attests to this statement when acknowledging – in a letter to the European Ombudsman – that arrangements exist under which national procedures are to be concluded and programme documents published right *after* the Eurogroup has reached its 'political understandings' and *ahead* of the respective BoG meetings.⁸⁶ Indeed, was the substance of ESM decisions still subject to actual debate in the BoG and not already settled in the Eurogroup, it would hardly make any sense to initiate

⁸¹ See, for example, Commission, 'Compliance Report ESM Stability Support Programme for Greece – Third Review'. *Report*, 2018, p. 2.

⁸² Cornel Ban, Leonard Sealbrooke (Transparency International EU), 'From Crisis to Stability – How to make the European Stability Mechanism Transparent and Accountable'. *Report*, 2017, pp. 19-23.

⁸³ *Compare*, Protocol (No 14) on the Euro Group (2012) OJ C 326/283, *supra* n. 27, Art. 5(1).

⁸⁴ For the power to do so, see *supra* n. 57 Art. 5(2). Most recently, the BoG appointed the President-Elect of the Eurogroup, Mário Centeno as its chairman, see ESM Press Release of 21 December 2017, 'ESM Board of Governors appoints Mário Centeno as its Chairman', 2017.

⁸⁵ See *supra* n. 82, p. 22.

⁸⁶ Eurogroup Press Release 703/16 of 01 December 2016, 'Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency', 2016.

these steps prior to the BoG meeting. Ultimately, concerning ESM-MoUs in particular, another important indication as to the absence of real substantive decision-making powers on the part of the BoG derives from the so-called ‘foreshadowing effect’ created by Eurogroup statements. This ‘foreshadowing effect’ refers to the anticipation in Eurogroup statements of the key aspects and parameters of the forthcoming ESM-MoUs.⁸⁷ Indeed, core policy prescriptions laid down in final Eurogroup statements are ordinarily replicated – fully and exactly – in the subsequently adopted ESM-MoUs.⁸⁸

It appears exceedingly difficult, in light of the foregoing, to maintain that the ESM BoG actually operates as an autonomous institution in the ESM-MoU procedure and, by extension, independently determines the actual shape of ESM-MoUs: Not only does the Eurogroup draw on the BoG’s component members and president, but, more critically, it seems to have fully seized its powers and responsibilities in the ESM-MoU procedure – including its substantive decision-making powers on ESM-MoUs. Yet, if the BoG’s role and substantive powers of decision on ESM-MoUs are actually and effectively exercised by the Eurogroup, the conclusion seems inescapable that the Eurogroup, too, is to be regarded as (one of) the author(s) of ESM-MoUs.

Yet, while there are cogent reasons to believe that ESM-MoUs should in actual fact be imputed to the Eurogroup, the *prima facie* caveat remains, however, that the Eurogroup can neither be considered an EU institution nor a body, office or agency of the Union, as was held in *Mallis*.⁸⁹ Importantly, in that context the CJEU also ruled out that the Eurogroup may qualify as an emanation of an EU institution, namely a Council configuration.⁹⁰ As for this latter finding the Court fully deferred to the main argument advanced by AG Wathelet, namely that it is due to, above all, the fundamental *functional* difference existing between the Council and the Eurogroup that the latter cannot be considered a Council configuration: Whereas the Eurogroup operates merely as an informal forum for discussion unable to take decisions producing binding legal effects, the functions of the Council ‘are far broader and include in particular [...]

⁸⁷ This term has been borrowed from René Repasi, see René Repasi, ‘Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*’. *Common Market Law Review* 54, 2017, p. 1145.

⁸⁸ Compare, for example, Eurogroup Statement on Cyprus of 25 March 2013 (2013) and *supra* n. 76, pp. 7-8 (on the bail-in operation), Eurogroup Statement on Greece of 14 August 2015 (2015) and Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 19 August 2015 (2015), e.g., p. 5 (on the Hellenic Financial Stability Fund) or p. 6 (on primary surplus targets).

⁸⁹ Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis et al. v. Commission and European Central Bank*, EU:C:2016:702.

⁹⁰ *Supra* n. 89, para. 61.

decision-making powers conferred on the Council'.⁹¹ In other words, for AG Wathelet the main dividing line seemed to lie in the alleged absence of *binding decision-making powers* on the part of the Eurogroup. Yet, in light of the preceding paragraphs, this functional distinction does not seem particularly persuasive – at least as far as the Eurogroup's ESM-related activities are concerned. After all, as was illustrated, the Eurogroup has fully captured the BoG's substantive decision-making capacity as concerns, inter alia, ESM-MoUs. Although its decisions are mere *de facto* decisions, pending formalization by the BoG, they nonetheless appear to entail both direct and indirect binding legal effects. Direct binding legal effects ensue, since, as was shown, arrangements exist pursuant to which national parliamentary and executive decision-making procedures are triggered and concluded right after the Eurogroup reaches its dreaded 'political understandings'. Indirect binding legal effects, in turn, appear to result from the fact that Eurogroup decisions 'foreshadow' the main substantive tenets of ESM-MoUs (acts which were shown to be legally binding earlier in this study). Against this background, the Court's view in *Mallis* that Eurogroup statements merely 'reflect[] a common intention to pursue the negotiations in accordance with the statement's terms'⁹² appears quite naïve at best and largely hypocritical at worst: Eurogroup understandings, inasmuch as they have both direct and indirect legal effects, are certainly much more than mere negotiation roadmaps.

The functional difference between the Eurogroup and Council configurations which was alluded to by AG Wathelet, namely the absence of binding decision-making powers on the part of the Eurogroup, thus clearly seems to disappear when the Eurogroup operates in an ESM context. By implication, the main reason by reference to which AG Wathelet and, thereafter, the Court concluded that the Eurogroup does not amount to a Council configuration must be deemed invalid. If this realization is combined with the observation, moreover, that – when it comes to ESM conditionality – the Eurogroup, besides emulating the decision-making function of the Council, relies on the very same persons for the execution of this function⁹³, and, ultimately, also deals with the same substantive issues, quite a strong case can be made for the the

⁹¹ Opinion of Advocate General Wathelet (21.04.2016), Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis et al. v. Commission and European Central Bank*, EU:C:2016:290, paras. 61-62.

⁹² *Supra* n. 89, para. 59.

⁹³ Indeed, as concerns the adoption of macro economic adjustment programmes attached to ESM stability support under Art. 7(2) of Regulation 472/2013, only the *euro area finance ministers* in the Council may participate in the decision-making process, see Art. 136(2) TFEU.

Eurogroup/Council dichotomy to be reconsidered altogether and the Eurogroup to be accorded the role it legally deserves in the ESM context, namely that of a *de facto* Council configuration.

Having regard to all the points raised in the preceding paragraphs, it was shown that there is substantial room for arguing that the Eurogroup, on account of its tight control over the BoG – including its substantive decision-making powers on ESM-MoUs – is to be considered an ESM-MoU (co-)author. Moreover, it was reasoned that although the Eurogroup is no formal Council format, its binding decision-making powers and overall close resemblance to the Council (when operating in an ESM context), make quite a strong case for it to be treated like a *de facto* Council configuration for the purposes of EU legal review.

ii) Regulatory Dimension: Where Do ESM-MoUs Originate?

The regulatory dimension is something the Court did not at all pay much attention to in its authorship analysis in *Ledra*. On the contrary, as was demonstrated, it distilled the origin of ESM-MoUs almost entirely by virtue of formal institutional considerations. Yet, if the tenor of the Court's authorship case-law is taken as a yardstick, the scope of the authorship appraisal cannot be limited to institutional issues alone. It is not for nothing, after all, that the Union judicature held that *all* relevant substantive and contextual parameters must be taken account of (not merely those pertaining to *institutional* matters). That being said, there are in fact regulatory considerations which could have *prima facie* supported the Court's conclusion that ESM-MoUs do not descend from the Union. There is the *Pringle* decision, for instance, where the Court ruled out that the Union has the competence to establish a mechanism like the ESM and, hence, to adopt 'strict conditionality' in the form of ESM-MoUs.⁹⁴ There is the fact, moreover, that the procedure leading up to the adoption of ESM-MoUs is set out in an international agreement external to the EU legal order, namely the ESM Treaty.⁹⁵ Yet, these indications, important as they might well seem, are far from conclusive. After all, the framework governing ESM conditionality has remained anything but static ever since the *Pringle* decision was rendered and the ESM Treaty entered into force. It has evolved in record tempo and, importantly, it has done so within – not beyond – the

⁹⁴ *Supra* n. 20.

⁹⁵ *Supra* n. 27, Art. 13.

confines of EU law. Hence, in May 2013 – less than one year after the entry into effect of the ESM Treaty – Regulation 472/2013 was adopted as one of the component parts of the so-called ‘Two-Pack’ reforms.⁹⁶ Art. 7 thereof provides for the negotiation and adoption of macroeconomic adjustment programmes (‘MAPs’) in the form of CIDs whenever a euro area Member State requests financial assistance from the ESM. This regulatory evolution – as one might sense – is not without consequences for ESM-MoUs. On the contrary, it bears the potential to fully overturn conventional wisdom as concerns the regulatory anchoring of these measures. The forthcoming paragraphs will seek to illustrate this by taking an in-depth look at the substance, nature and procedure of MAPs.

As concerns substance, it is worth pointing out from the start that both Regulation 472/2013⁹⁷ and the ESM Treaty itself⁹⁸ require full substantive consistency between ESM-MoUs and MAPs respectively. It is hardly surprising, hence, that MAPs and associated ESM-MoUs typically display a considerable degree of substantive overlap. By dint of the enactment of MAPs, therefore, regularly quite a significant fraction of ESM-MoUs is fully brought within the sphere of Union law. Yet, notable as this may well be, the fact remains, however, that ESM-MoUs *as such* – and, hence, the large segments contained therein which are not fully replicated in MAPs – are still bound to remain outside the remit of EU law. It is settled case-law, after all, that the fact that a Union act may have the object or effect of incorporating into EU law certain provisions that are set out in a measure which the EU has not itself adopted, is not sufficient for that measure to be brought within the purview of the rules of the Union. What it takes, instead, for such an act to be considered part and parcel of Union law, is that the EU itself has assumed and, hence, transferred to it the powers to adopt that measure.⁹⁹

Now can the creation of Regulation 472/2013 and, relatedly, the establishment of a Union capacity to adopt MAPs attached to ESM stability support be interpreted as amounting to such a transfer to the Union of the Member States’ capacity to impose strict ESM conditionality and, ultimately, of the very power to enact ESM-MoUs as such?

⁹⁶ *Supra* n. 11.

⁹⁷ *Supra* n. 11, Art. 7(2).

⁹⁸ *Supra* n. 27, Art. 13(3).

⁹⁹ See Case C-308/6, *International Association of Independent Tanker Owners v. Secretary of State for Transport*, EU:C:2008:312, paras. 49-50; Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, EU:C:2011:864, para. 63.

To assess this a closer look at both the very nature and the procedure underlying MAPs is warranted:

As for the *nature* of MAPs, Regulation 472/2013, to be fair, nowhere explicitly refers to them as ‘conditionality’ instruments¹⁰⁰; and neither do the provisions of these acts themselves make any such reference¹⁰¹. Quite possibly this was motivated by the fact that doing otherwise might raise (justifiable) concerns as to existence of a competence appropriation by the Union as far as ESM conditionality is concerned. Yet, if this is the underlying rationale, it is not a very convincing one to say the least. The ESM Treaty for its part leaves no doubt in Art. 12(1) and Art. 16 that MAPs are to be understood as a form of ESM conditionality. Further, even Regulation 472/2013 itself, although short of an express reference to the term ‘conditionality’, seems to implicitly acknowledge the conditionality-like structure of the MAPs: In Art. 7(1), it defines them as measures which – by contrast with ordinary Union instruments of economic policy coordination – aim at ‘*broadening, strengthening and deepening*’ any Union instrument of economic policy coordination. In doing so, Regulation 472/2013 seems to openly acknowledge that MAPs pertain to one and the same form of Union governance as ESM-MoUs – *governance by conditionality*; a form of governance whose distinctive hallmark lies in its unprecedented regulatory interference, both in terms of breadth and depth, with the public policy of bailout countries.¹⁰² Yet, this is not the only clear indication in support of the view that MAPs constitute ESM conditionality instruments. Indeed, further evidence to this effect can be derived from the fact that MAPs closely emulate ESM-MoUs’ guarantee function in the ESM bailout-bargain: Accordingly, MAPs, in the same way as ESM-MoUs, operate as unilateral pledge (in lieu of collateral) upon which ESM stability support is rendered contingent.¹⁰³ Ultimately, the intimate substantive ties of MAPs with ESM-MoUs should be recalled: It does seem very difficult indeed to plausibly deny MAPs their conditionality nature when in reality they set out the very same policy imperatives and key parameters in selected areas for legislative and administrative reform as ESM-MoUs.

¹⁰⁰ *Supra* n. 11.

¹⁰¹ See, for example, Council Implementing Decision No. 2013/463/EU (2013) OJ L 250/40.

¹⁰² See Anastasia Poulou, ‘Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?’. *Common Market Review* 54, 2017, pp. 996-997.

¹⁰³ See *supra* n. 102, p. 996.

In sum, hence, there seems to be no cogent argument against and, indeed, many in favour of the view that MAPs in the form of CIDs attached to ESM stability support must be deemed ESM conditionality instruments. Quite tellingly, even one of the Troika actors, namely the ECB, seems to share this view. In its Opinion of 7 March 2012 the ECB openly acknowledged that CIDs, ‘*de facto* reflect the economic policy conditions agreed between all parties in the context of granting access to [ESM] financial assistance’.¹⁰⁴ Yet, if there now is a Union competence to adopt fully-fledged ESM conditionality measures and if, as a result, the *Pringle* dictum that ‘strict conditionality’ reflects a power firmly retained by the Member States is *de facto* suspended, then ESM-MoUs, too, may be ultimately conceived of as springing from this newly appropriated Union capacity.

Yet, one may respond to this by arguing that, since economic policy is a non-exclusive competence of the Union, the mere fact that the Union has now carved out a power for itself to adopt ESM conditionality instruments does not automatically deprive the Member States of their concurrent power to adopt ESM conditionality in the form of ESM-MoUs.¹⁰⁵ Obviously, however, this argument would only work for as long as as ESM-MoUs may indeed be said to result from this concurrent Member State power, i.e. for as long as ESM-MoU emanate from the procedure established in Art. 13 of the ESM Treaty.

Against this background, it is very worth mentioning that Regulation 472/2013 not only provides for a novel Union instrument in the sphere of ESM conditionality but, for these purposes, has also set up an elaborate *procedure*. Without thereby making any premature insinuations, it is certainly quite striking to observe how rigorously Art. 7 of Regulation 472/2013 emulates the procedural requirements underlying the ESM-MoU procedure: it draws on an exactly identical cascade of procedural steps (1) negotiations, 2) decision-making, 3) compliance monitoring) and, within each stage respectively, on (almost) the same cluster of institutional actors¹⁰⁶. But it does not stop there. In practice, large proportions of the ESM-MoU procedure *as such* (rather than

¹⁰⁴ Opinion of the European Central Bank CON/2012/18 (2012) OJ C 141/7, point II.10.

¹⁰⁵ See Bruno de Witte and Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*’. *Common Market Law Review* 50, 2013, p. 837.

¹⁰⁶ Under both Art. 7 of Regulation 472/2013 and Art. 13 of the ESM Treaty, the Troika institutions are centrally involved in the negotiation and review stage respectively as regards ESM conditionality. Likewise, no matter whether we deal with the ESM Treaty or Regulation 472/2013, it is the euro area finance ministers which by virtue of their power of approval hold veto powers as concerns the negotiated ESM conditionality.

merely its rules) appear to be fully integrated into the procedure governing MAPs under Art. 7 of Regulation 472/2013. Three important indications to this effect can be derived from the preamble to the MAPs which were adopted in the context of the most recent ESM bailout package for Greece¹⁰⁷: First, in this preamble the ESM BoG is regularly referred to as provider of a mandate for the MAP negotiations under Art. 7(1) of Regulation 472/2013¹⁰⁸; although Regulation 472/2013 – in contrast to the ESM Treaty – does not make any provision for such an involvement of the BoG¹⁰⁹. This seems to suggest that the BoG’s role as initiator of ESM-MoU procedure (as detailed in Art. 13(3) in conjunction with Art. 5(6)(g) of the ESM Treaty) is, in practice, fully translated to the context of the MAP procedure set out in Regulation 472/2013. Second, the preamble of each MAP points at the fact that the Greek ESM-MoU was adopted, *following agreement on the MAP under Art. 7(1)* – i.e. following the conclusion of the MAP negotiations. At the same time, any reference to discrete negotiations as concerns the ESM-MoU itself are fully omitted.¹¹⁰ This appears to indicate that, in practice, ESM-MoUs, rather than being based on an autonomous negotiation processes conducted in accordance with Art. 13(3) of the ESM Treaty, fully rely on the negotiation outcome arrived at in the context of the MAP procedure. In other words, actual ESM-MoU deliberations seem to wholly unfold under the remit of Regulation 472/2013 and not, as formally envisaged, pursuant to the ESM Treaty. This might also explain, in part at least, the recent involvement of the ESM as stand-alone negotiation partner alongside the Troika in the MAP deliberations:¹¹¹ With ESM-MoU negotiations being *de facto* outsourced to the MAP procedure under Regulation 472/2013, this might be construed as an attempt of the ESM Member States to safeguard their intergovernmental interests and to counterbalance the intensifying supranational drift of ESM conditionality governance. Third, and finally, the sequencing resorted to as concerns the adoption of MAPs and ESM-MoUs pertaining to the same ESM aid package merits close attention. ESM-MoUs are typically adopted (i.e. signed) by the Commission only *after* the associated MAPs have been approved by the eurozone finance ministers in

¹⁰⁷ Council Implementing Decision No. 2015/1411/EU (2015) OJ L 219/12; Council Implementing Decision No. 2016/544/EU (2016) OJ L 91/27; Council Implementing Decision No. 2017/1226/EU (2017) OJ L 174/22.

¹⁰⁸ Council Decision No. 2015/1411/EU, recital (7); Council Decision No. 2016/544/EU, recital (7); Council Decision No. 2017/1226/EU, recital (1).

¹⁰⁹ *Supra* n. 11.

¹¹⁰ Council Implementing Decision No. 2015/1411/EU, recital (7) (8) and (9); Council Implementing Decision No. 2016/544/EU, recital (7) (8) (9); Council Implementing Decision No. 2017/1226/EU, recital (1)(2) and (3).

¹¹¹ *Supra* n. 108.

the Council.¹¹² While isolated cases of such a sequencing pattern could probably be dismissed as mere coincidences, the sheer consistency and regularity thereof connotes that ESM-MoUs' adoption is, in fact, strongly dependent upon the preceding approval of the associated MAPs by the Council. Put differently, it very much looks like that it is only once the Council has given its blessing on an MAP that the Commission feels authorized to sign the associated ESM-MoU. The power of prior approval conferred on the BoG under Art. 13(4) of the ESM Treaty, hence, seems to be effectively usurped by or – at the very least – shared with the Council acting under Art. 7(2) of Regulation 472/2013. This, in turn, suggests that another crucial element of the ESM-MoU procedure, the decision-making stage, is in actual fact outsourced, partially at least, to the MAP procedure.

In sum, the establishment of Regulation 472/2013 does clearly not 'only' cater for the translation of ESM-MoUs' substantive backbone into EU law or the creation of a concurrent Union power to adopt 'strict conditionality' but – with ESM-MoUs now being designed and decided on in a firm EU procedural context – seems tantamount to an outright transferral to the Union of the Member States' power to enact ESM-MoUs *as such*. From a regulatory perspective there appears to be no getting around the conclusion, hence, that it is above all in EU law where ESM-MoUs' origins should be sought.

Overall, having regard to all preceding paragraphs pertaining to the re-appraisal of the authorship of ESM-MoUs, it was shown that – venturing beyond the narrow formal indicator relied on in *Ledra* (the principal-agent dualism) and drawing on *all* relevant contextual and substantive parameters along both *institutional* and *regulatory* lines – there appears to be a preponderance of evidence in favour of the view that ESM-MoUs must be taken for emanations of the Union. On the *institutional* plane, it was demonstrated that the Commission must be deemed, in light of its Art. 17(1) TEU role as Guardian of the Treaties, to possess discretion vis-à-vis the ESM

¹¹² The Cypriot MAP was adopted on 25 April 2013 (see Council Decision No. 2013/236/EU) and the associated MoU followed suit on 26 April 2013 (see *supra* n. 79). The second Greek MAP was adopted on 15 February (see Council Decision No. 2016/544/EU) and the associated MoU, with some delay, was enacted on 16 June 2016 (see Supplemental Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 16 June 2016 (2017)). The third Greek MAP was adopted on 30 June 2017 (Council Decision No. 2017/1226/EU) and the MoU followed shortly thereafter on 05 July 2017 (see Supplemental Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 5 July 2017 (2017)). Conversely, the first Greek MAP and the associated MoU both were adopted on 19 August 2015 (see Council Decision No. 2015/1411/EU and Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 19 August 2015 (2015)).

and, in addition, was shown to be both able and willing to resort to said discretion for the purposes of taking substantive decisions regarding ESM-MoUs. It was inferred therefrom, that there can be hardly any doubt that ESM-MoUs must – if only in part – be imputed to the Commission. Further, it was illustrated that the Eurogroup, on account of its tight control over the BoG (including its substantive powers of decisions concerning ESM-MoUs), too, must be accounted for as an ESM-MoU (co-)author. Relatedly, it was argued that the Eurogroup, given its binding powers of decision and its overall close resemblance to the Council when it comes to ESM conditionality, merits to be treated like a *de facto* Council configuration for the purposes of Union legal review. On top of these institutional considerations, it was established from a *regulatory* perspective, that beyond incorporating substantive core elements of ESM-MoUs and carving out a Union competence for ESM conditionality, Regulation 472/2013 (and the MAPs it provides for) appears to have triggered a transferral to the Union of the very power to adopt ESM-MoUs as such. Put concisely, hence, ESM-MoUs not only bear the clearly recognizable mark of EU institutional actors but are also deeply embedded in the Union’s regulatory structures. There seems to be no reasonable doubt, against this backdrop, that ESM-MoUs are to be regarded as EU-authored measures.

4.2. The Rule of Law Implications of the *Ledra* Decision

Having had recourse to the classificatory paradigm of ‘substance over form’ that flows from the broad definition of Union acts underlying the Union principle of the rule of law, it was demonstrated in the foregoing sections that – going beyond the narrow criterion applied in *Ledra*, namely the formal principal-agent dualism – a compelling case can be made for ESM-MoUs to be considered legally binding public law acts of Union origin, i.e. for ESM-MoUs to be regarded as reviewable Union measures. It follows that the Court, by dint of having excluded ESM-MoUs from the notion of Union acts, has reached a conclusion in *Ledra* which does not seem to resonate well with the fundamental Union principle of the rule of law. The procedural guarantee of a complete system of legal remedies associated with this principle, after all, is meant for each and every measure which upon due examination of all pertinent substantive and contextual factors supplies preponderant evidence for its Union character and not only for conventional Union instruments listed in Art. 288-292 TFEU. Had the Court been

sensitive to this, it would have been difficult not to acknowledge – as follows from the alternative review conducted above – that ESM-MoUs must be ultimately deemed Union measures. It may be validly claimed, against this background, that the legal characterisation of ESM-MoUs in *Ledra* – by removing a *de facto* Union act from legality review under both Art. 263 and Art. 267 TFEU – unduly restricts the scope of the fundamental *rule of law* guarantee of a complete system of legal remedies for legality review in respect of *all* Union measures and, in doing so, manifestly interferes with one of the defining norms of the EU legal order – the Union principle of the rule of law.

5. Making the Rule of Law Gap Argument: Future Prospects for Legality Challenges to ESM Conditionality

Finding that the Union judicature has embarked upon a path in the sphere of ESM conditionality which is at variance with one of the cardinal constitutional norms of the European legal order is certainly a striking realization in itself. Yet, the question nonetheless remains what this entails *in practice*. Can this finding be of any use for individuals who might wish to challenge ESM policy conditions in the future?

Before answering this question one should recall – as initially highlighted – the gloomy prospects for *effective* legality control of ESM conditionality which exist post-*Ledra*: It was shown, after all, that the *Ledra* -inflicted exclusion of ESM-MoUs from legality review under both Art. 263 and Art. 267 TFEU corresponds to the foreclosure of the only meaningful options for legality review of ESM conditionality *as such*. Moreover, it was highlighted that this predicament is not likely to be solved anytime soon through the incorporation of the ESM into EU law, as envisaged in the Commission proposal of 6 December 2017. There appears to be no reasonable alternative, hence – at least not in the short-term – to cater for promising options for EU validity control of ESM conditionality other than by triggering a reversal of the *Ledra* dictum on the legal nature of ESM-MoUs. This is where the main finding of this thesis comes into play: It is by reference to the rule of law gap – created through the removal of a *de facto* Union measure from legality review under both Art. 263 and Art. 267 TFEU – that future litigants could endow their claims for a modification of the *Ledra*

dictum with the necessary normative firepower. Litigants could point out, as has been done in this thesis, that the CJEU, if it is to bring its jurisprudence into compliance with one of the defining principles of the EU, must – in light of the broad and encompassing definition of Union acts and the permissive and open-ended classificatory criteria developed to operationalize this definition – accept the EU law nature of ESM-MoUs. Indeed, it would not be the first time that the Union judicature were to legitimize a dynamic and expansive interpretation of the Treaty provisions governing the Union’s system of legality control by reference to the Union principle of the rule of law.¹¹³

Yet, helpful as the rule of law gap argument may be in turning the tide as far as access to legality control of ESM conditionality is concerned, the final and, in fact, crucial issue still remains whether litigants would actually ever stand a chance to win cases on the *substantive merits* of their claims. Considering the sparse CJEU pronouncements there are on material issues raised by (ESM) conditionality one might be tempted to believe that this is not the case: On each occasion where the substance of (ESM-)MoU was challenged, after all, the EU judiciary ultimately found that (ESM-)MoU induced restrictions on the exercise of Union rights could be justified in virtue of the overarching public policy concern of ensuring the financial stability of the euro area/the Union.¹¹⁴ Yet, this case-law, however disillusioning, cannot be construed as pointing at the absolution of (ESM-)MoUs from *substantive* contestation under Union law. Quite the contrary: in line with established human rights jurisprudence, the justifiability of rights interferences on the basis of the financial stability rationale (just like the justifiability of interferences on any other public policy ground) is – and remains – a matter to be assessed on case-by-case basis rather than to be assumed unconditionally and *a priori*. Indeed, if it were any different in the context of financial assistance conditionality, the CJEU could have just as well skipped the proportionality analysis altogether in *Ledra*¹¹⁵ and *Florescu*¹¹⁶. This is not to deny, of

¹¹³ In the momentous *Les Verts* decision, for example, the CJEU, by reference to the Union rule of law, extended the coverage of Art. 263 TFEU *contra legem* so as to make room for for legality review in regard of acts adopted by the EP, see *supra* n. 29, paras. 23-25.

¹¹⁴ For an unsuccessful direct challenge to the substance of an ESM-MoU, see *supra* n. 1, paras. 68-75; For unsuccessful indirect challenges to the substance of MoUs (i.e. to the national measures enacted pursuant to them), see *supra* n. 6, paras. 49-60, see Case C-41/15, *Dowling v. Minister for Finance*, EU:C:2016:836, paras. 43-55.

¹¹⁵ *Supra* n. 1, paras. 70-75. Although, admittedly, the proportionality analysis in *Ledra* may be justifiably described as ‘far too succinct, if not deeply illusive’, see Paul Dermine, ‘The End of Impunity? The Legal Duties of ‘Borrowed’ EU Institutions under the European Stability Mechanism Framework’, p. 377.

¹¹⁶ *Supra* n. 6, paras. 53-60.

course, the considerable margin of discretion the Union judicature is apparently willing to afford the conditionality actors when they are called on to take complex economic policy choices reflected in (ESM-)MoUs. But this discretion is not without clear substantive limitations. In a rules-based polity like the Union, litigants will always be entitled to rely on – and the CJEU will be always bound to preserve – the very essence of their rights. Given that respect of the essence of a right means that the dignity of the human person must be safeguarded at any cost¹¹⁷, it is hardly imaginable, for instance, that in light of Art. 31 of the EU Charter the Court would ever tolerate wage cuts to specific segments of the population (e.g. young workers) which forced them to live below the poverty line.¹¹⁸ Besides, as of recently, there are signs that the CJEU is willing to take Union rights ever more seriously vis-à-vis the financial stability rationale: the recent *Florescu* decision and the relatively more conscientious and lengthy proportionality analysis performed therein constitutes a great leap forward from a fundamental rights perspective.¹¹⁹ Ultimately, it is very worth pointing out, moreover, that not every Union rule on the basis of which ESM-MoUs could theoretically be challenged assume the structure of rights. Indeed, there are EU law norms whose significance for the Union's constitutional character is of such a nature that their application may, as a matter of principle, not be restricted on any public policy ground – not even on the basis of the seemingly almighty financial stability imperative. A case in point in this regard is the Union principle of conferral: it is quite impossible, indeed, to think of any instance where encroachments on this principle, for example, through the imposition of ESM-MoU policy conditions in fields expressly excluded from the scope of Union action such as wage setting and industrial action¹²⁰, could be ever deemed justifiable. Evidently, hence, although the prospects for successful legality challenges to the substance of ESM-MoUs are not splendid, they are certainly real and

¹¹⁷ See Explanations Relating to the Charter of Fundamental Rights 2007/C 303/02 (2007) OJ C 303/02, Explanation on Art. 1 – Human Dignity.

¹¹⁸ Take, for example, cuts of the minimum wage by 32 % for young workers below the age of 25 required by the MoU addressed to Greece in the context of its second bailout which, inasmuch as seeking a reduction of the minimum wage to a level below 50 % of the national average wage, was deemed to violate the right to a fair wage by the European Committee of Social Rights, see European Committee of Social Rights, Decision on the Merits: GENOP-DEI and ADEDY v. Greece, Complaint No. 66/2011 paras. 57-65. (May 23, 2012).

¹¹⁹ Note, in particular, the substantially more thorough assessment as to whether the essence of the right had been respected, *supra* n. 6, paras. 54-56.

¹²⁰ The second addendum to the Greek ESM-MoU, for example, mandates specific legislation in the area of '*industrial action*', including the adoption of a law enabling 'a fast-track judicial procedure used to judge the legality of *strikes*', see Supplemental Memorandum of Understanding between the European Stability Mechanism and the Hellenic Republic of 5 July 2017 (2017), p. 31. The Cypriot ESM-MoU, in turn, provides for, amongst others, a reform of 'the *wage*-setting framework for the public and private sector' which rests on a transformation of the *wage* indexation system through, see *supra* n. 76, p. 25.

tangible. Litigants could always rely – at the very least – on the essence of their Union rights vis-à-vis ESM-MoU policy conditions. Further, they could, at any time and unreservedly, plead violations of Union norms of an absolute-like stature such as the principle of conferral to successfully strike down ESM-MoUs.

Hence, as became apparent in the preceding paragraphs, advancing the rule of law gap argument can certainly make a notable difference in prospective ESM-MoU legality challenges. Given the absence, at present, of any meaningful options for effective legality review of ESM conditionality, convincing the Court to readjust its *Ledra* formula might be the best shot individuals could get at securing effective validity review of ESM policy prescriptions. While doing so will obviously not be easy, sustaining that judge-made EU law, as it stands, conflicts with the fundamental procedural guarantee of the rule of law, could certainly make for a very powerful and legitimate ground on the basis of which to launch such efforts. Although the substantive hurdle is notable which litigants would have to face once access to ESM-MoU legality review were secured, it is not insuperable at all: Litigants could always plead interferences with overarching Union norms of the likes of the principle of conferral or restrictions to the very *nucleus* of their fundamental rights to successfully challenge the legality of ESM-MoUs under EU law. Viewed from this angle, making the rule of law gap argument could help to finally cater for *credible* substantive checks on unfettered executive policy discretion exercised under the pretext of the financial stability imperative.

6. Conclusion

To conclude this thesis, the central argument and the key-steps underlying its formulation are reiterated. The main argument advanced in this study was that the Court's classification of ESM-MoUs in *Ledra* is at odds with one of the cardinal constitutional norms and procedural guarantees of the European legal order, namely the Union principle of the rule of law. To arrive at this proposition, the following steps were taken:

First, the reasoning and classificatory approach underlying the Court's finding in *Ledra* that ESM-MoUs do not constitute Union acts was revisited and it was pointed out that an isolated formal indicator, namely the formal principal-agent link between

the ESM and the EU institutions, centrally informed the Court's denial of the EU law nature of ESM-MoUs.

Second, to set the scene for a review of the *Ledra* dictum on the legal character of ESM-MoUs in light of the Union principle of the rule of law an adequate theoretical framework was drawn up for these purposes. Doing so, it was shown that the rule of law constitutes a foundational value of the Union, functions as the normative basis of the Union's system of legality review and as such entails the procedural guarantee of a complete system of legal remedies to review the legality of Union measures. Further, by reference to the *ERTA* and *Grimaldi* lines of cases, the broad and inclusive definition of Union measures underlying the rule of law guarantee of a complete system of legal remedies was illustrated. It was demonstrated, moreover, how this definition is put into practice by the Union judicature through permissive and open-ended classificatory criteria such as substance and context when it comes to determining the legal nature of non-standard measures.

Third, based on this analytical framework, the characterisation of ESM-MoUs resorted to in *Ledra* was duly scrutinized in light of the Union principle of the rule of law. This was done via two steps: First, the legal character of ESM-MoUs was reassessed in virtue of the dominant classificatory paradigm of 'substance over form' which flows from the Court's case-law on atypical acts. Doing so, it was argued that ESM-MoUs should be considered mandatory public law acts of EU origin. Second, based on this reassessment, the main argument of this thesis was arrived at: It was submitted that the CJEU's characterisation of ESM-MoUs in *Ledra* – inasmuch as it entails the removal of a *de facto* Union act from legality review under both Art. 263 and Art. 267 TFEU – has unduly circumscribed the scope of the fundamental *rule of law* guarantee of a complete system of legal remedies for legality control (which is reserved for *all* Union measures) and, in doing so, has manifestly encroached upon one of the defining norms of the EU's constitutional system, namely the Union principle of the rule of law.

Fourth, and finally, this thesis was rounded off by means of a brief elaboration on the practical added-value of its central argument for the purposes of prospective legality challenges to ESM conditionality: Premised on the view that convincing the Court to readjust its *Ledra* formula might be the best strategy at hand for litigants to secure *effective* legality control of ESM conditionality in the future, the normative

appeal of the rule of law gap argument was highlighted. It was maintained, moreover, that once access to legality review were secured, litigants would always retain an option to challenge the substance of ESM-MoUs by reference to the essence of their Union rights or by recourse to EU norms of an absolute-like nature such as the principle of conferral.

What remains now is to simply wait and hope. For as long as plans to integrate the ESM into EU law prove futile, it is the Union judiciary alone which holds the reins. Should it, against all odds, come to revisit its restrictive stance on the legal character of ESM-MoUs, the Union principle of the rule of law stands ready to guide and steer its reasoning towards what would most certainly be another fateful twist in the CJEU's nascent conditionality jurisprudence. Only this time it would come with concrete, practical benefits – not mere symbolical concessions.

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