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CHALLENGING AUSTERITY: CASE LAW OF THE EUROPEAN COURT OF JUSTICE ON MACROECONOMIC CONDITIONALITY

DESAFIANDO A AUSTERIDADE: LEI DE CASO DO TRIBUNAL DE JUSTIÇA EUROPEU SOBRE A CONDICIONALIDADE MACROECONÔMICA

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Resumo: O artigo tem por objetivo refletir sobre a resposta dada pela União Europeia (UE) à crise bancária desencadeada em 2007, mais tarde transformada em dívida pública, ocorreu pela imposição de condicionalidades macroeconômicas associadas aos diferentes instrumentos de resgate. As medidas impostas aos Estados afetados por meio do Memorando de Entendimento (MoU) e das Decisões de Implementação do Conselho (CID) consistiram em cortes nos gastos sociais - vagas, subsídios, pensões e benefícios públicos; gastos públicos em saúde, educação e serviços sociais, etc. - assim como nas chamadas reformas estruturais relativas ao mercado de trabalho, ao sistema de pensões, ao bem-estar e, entre outras áreas, ao setor financeiro. Na verdade, nenhuma dessas medidas era nova: todas elas foram recomendadas, antes do início da crise, por instituições da UE e outras organizações internacionais como a OCDE ou o FMI. Portanto, a crise ofereceu uma chance de conferir força vinculativa a essas recomendações antigas ou, em outras palavras, de implementar seu programa "máximo". Em matéria metodológica, utiliza-se como método de abordagem o materialismo dialético e como técnica de pesquisa a documental e a bibliográfica.

Palavras-chave: Demandas sociais. Tribunal de Justiça Europeu. Macroeconomia.

Abstract: The article aims to reflect on the response given by the European Union (EU) to the banking crisis triggered in 2007, later transformed into public debt, occurred by the imposition of macroeconomic conditionalities associated with the different rescue instruments. The measures imposed on affected states through the Memorandum of Understanding (MoU) and the Council Implementation Decisions (CID) consisted of cuts in social spending - vacancies, subsidies, pensions and public benefits; public spending on health, education and social services, etc. - as well as in the so-called structural reforms related to the labor market, the pension system, well-being and, among other areas, the financial sector. In fact, none of these measures were new: they were all recommended, before the crisis started, by EU institutions and other international organizations such as the OECD or the IMF. Therefore, the crisis offered a chance to give binding force to these old recommendations or, in other words, to implement its "maximum" program. In methodological matters, dialectical materialism is used as the method of approach and the documentary and bibliographic research technique is used.
Keywords: Social demands. European Court of Justice. Macroeconomics.

1. INTRODUCTION

The EU's response to the banking crisis unleashed in 2007, later turned into a public debt one, took place through the imposition of macroeconomic conditionality attached to the different bailout instruments. In summary, the measures imposed on the affected States through the corresponding Memorandum of Understanding (MoU) and Council Implementation Decisions (CID) consisted of social spending cuts - waves, allowances, pensions and public benefits; public spending on health, education and social services, etc. – as well as in the so-called structural reforms concerning the labor

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market, the pension system, the welfare and, between other areas, the financial sector. Actually, none of these measures were new: all of them were recommended, before the crisis outbreak, by EU institutions and other international organizations such as the OECD or the IMF. So the crisis offered a chance to confer binding force to those old recommendations or, in other word, to implement their "maximum" program.

It can be affirmed, then, that the political direction of the rescued States has been carried out by the European institutions - Council, Commission, Eurogroup and, very especially, the ECB – instead of the corresponding governments. From this point of view, the management of the crisis has meant a real constitutional change in the EU and, especially, in the euro area. The real existing EU and EMU have little to do with those designed in the TEU and the TFEU. Indeed, it is the Community institutions and not the Member States that dictate the economic and budgetary policies, by virtue of a functional competence not foreseen in the Treaties: the maintenance of the stability of the euro area as a whole. In practice, the ECB and the Commission, especially the former, have seen their areas of action greatly expanded, far beyond the original design of the Treaties. However, this enlargement has not been accompanied by the creation of new accountability mechanisms or, at least, the reinforcement of the already existing ones. The management of the crisis, in short, has confirmed the secondary role that fundamental rights play within the EU legal system, despite the fact that the entry into force of the EU Charter of Fundamental Rights (CFR) in 2007 coincided with the outbreak of the crisis.

The impact of these changes have been analyzed from different points of view: the social consequences caused by the austerity measures [GHAILANI, 2016; VAUGHAN-WHITEHEAD, 2014; PE IPOL, 2015], the political and constitutional implications derived from the political and institutional response to the crisis [JOERGES, TUORI and TUORI, GARBEN] or, without exhaustive intention, its repercussion on fundamental rights and the Rule of Law [KILPATRICK, 2018]. The judicial review of these measures and reforms has also been studied, both in relation to the CJEU and to the domestic courts, the ECHR and even other non-jurisdictional bodies set up for the protection of human rights [DONAIRE VILLA, 2018; SILVEIRA and PEREZ; KILPATRICK and DE WITTE, 2014; AYMERICH, 2015; PALMSTOFER, 2014.]. All these works come together in a general conclusion: so far, neither the CJEU, nor the ECHR, nor the internal judges and courts of the Member States, except in very few exceptions, have carried out an effective review of the single acts and norms implementing and organizing, institutionally and functionally, the austerity policies. If anything, until now, the CJEU (and, following it, also the national judicial organs) has legalized a constitutional overturn made outside the treaties2.(JOERGES, 2018:8).

This does not mean, in any case, that it is not worth to analyze the austerity case-law of CJEU. On the one hand, even at the risk of be too optimistic, because it has evolved from an initial rigid closure to a relative opening that could allow, if the evolutionary line is maintained, to achieve the practical results that have not been produced so far. On the other hand, the contrast of this doctrine of austerity with that followed by the court in other areas makes it possible to detect inconsistencies and,

[2] As JOERGES concluded, "After all, the transformations which European crisis politics has brought about have been legalised by the European Court of Justice" (JOERGES, 2018:8).

so, new arguments to challenge the policies of social regression. All this despite the fact that one of the fundamental keys for the full understanding of this jurisprudence is the moment in which each decision was issued and, along with it, the fact that the arguments used have been, in each case, the ones that best allowed the inadmissibility or dismissal of the actions and pretensions exercised3.

The work will therefore consist of two parts: in the first, examining the current state of CJEU austerity case-law analyzing the three types of action provided for in EU law – annulment, preliminary ruling and compensation for damages -, trying to highlight the guidelines, the direction of changes and the temporal context of each decision. In the second, these pronouncements will be contrasted with others dictated by the CJEU in other "normal" areas and in ordinary times, in order to find out if the return to normality opens up new challenges. As a proposal, the final conclusions will explore the possibilities, if any, for successful challenging of austerity measures before the EU Court.

2. THE CJEU AUSTERITY CASE-LAW: STATE OF THE ART

Consistent with the purpose of this paper, references to the jurisprudence of the CJEU on austerity must be understood as made to the resolutions issued deciding actions and preliminary questions related to the conditionality imposed through the corresponding assistance programs.

Without ignoring the heterogeneity of these programs [KOUKIADAKI, 2014; KILPATRICK, 2017], its unitary treatment is justified because, at present, the ESM is the only active mechanism (and, therefore, the new assistance programs that are developed in the future in the Eurozone will be carried out through it) and also because after the "Two Pack" of 2013, the adjustment programs will in any case be approved by "the Council, pronouncing by qualified majority and on the proposal of the Commission"4. So, apparently, this resolves the discussions about the legal nature of the MoU, of its subjection to EU Law and whether or not they constitute a reviewable act in accordance with Article 263 TFEU. Consequently, this unitary consideration is justified from a prospective point of view which is the one adopted in this work.

2.1 Action for annulment

It is noteworthy that although the first adjustment programs date back to 2010, and also that the first actions for annulment have been filed in the same year, the CJEU has declared them inadmissible due to lack of legitimacy of the plaintiffs. Indeed, by means of two orders issued on the same day - November 27, 2012 -, the General Court did not receive actions for annulment filed by a Greek union of public employees (ADEDY) and several public employees individual claims against the Decisions adopted by The Council of the EU in the framework of the excessive deficit procedure which, in sum, reproduced the terms of the MoU signed two days before by the Greek State and the Commission, acting the latter in behalf of the creditors: the rest of Euro-zone member States.

[3] In this sense, KILPATRICK, 2017.
[4] Regulation (EU) nº 472/2013, of May 21, article 7.2.

By means of Orders, the GC was forced to enter into the merits of the case to justify that the contested acts did not individually affect the plaintiffs within the meaning of Article 263 TFEU. The reasoning in respect of the content of the contested decisions was that "all those provisions, given their range, require national implementing measures which will specify their content. In the context of that implementation, the Greek authorities have a wide discretion, provided that the final objective of reducing the excessive deficit is pursued. It is those national measures which, possibly, will directly affect the legal situation of the applicants"5. Taking into account the unusual length of some of these orders, even including obiter dicta concerning the merits of the issues6, according to the jurisprudence of the GC itself, the logical thing would have been to dictate a judgment counting with an AG Opinion.

Anyway, both the absence of this Opinion and the lack of intervention of the CJEU - because the order was not appealed - have prevented in 2012, at the height of the crisis, we could have a clear guide that would have helped to avoid subsequent inadmissibilities such as the one pronounced by the GC in Mallis7, based on the fact that the plaintiffs addressed their action against a decision of the Eurogroup, a body that "cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU". Hence, having the Eurogroup no decision-making powers, internal norms containing the challenged measure "cannot be regarded as having been imposed by a supposed joint decision of the Commission and the ECB that was given concrete expression in the statement [the one adopted by the Eurogroup] at issue".

The mistake committed by the plaintiffs in Mallis can be explained by the absence of a Council Decision - since the Cypriot MoU was signed two months before the entry into force of the "Two Pack" - and because of the fact that the CJEU had not yet clarified, at that time, the legal nature and contestability of MoUs, despite having many opportunities to do so. An error certainly opportune since the claimants in Mallis, unlike the cases ADEDY, did meet the requirement of active legal standing - individual and direct concern – provided for in article 263 TFEU.

Eventhough, Ledra ruling8 – delivered the same day that the Mallis one, on 20 September 2016 – clarified, finally, the legal nature of MoU in non EU-bailouts as it was the case: a MoU celebrated under the ESM Treaty. Recalling the formalistic approach set up in Pringle9, Ledra ruling placed, first, the ESM outside the EU framework and, thus, stating that the creation of such an instrument cannot be qualified as "EU law implementation"; second, following the AG Opinion, that "the fact that one or more institutions of the European Union may play a certain role within the ESM

[5] General Court Order of 27 November 2012, T-541/10, par. 84.

[6] Namely, respecting the reduction of Christmas, Easter and Summer allowances of public employees, CG stresses the margin of discretion enjoyed by the Greek authorities, advancing an argument later embraced by the CJEU: "It is apparent from the very wording of Article 2(1)(f) of the basic act [the Council Decision] that that provision places the obligation on the Hellenic Republic to achieve a budgetary objective, namely saving EUR 1 500 million per year (EUR 1 100 million in 2010) by reducing the bonuses paid to civil servants. However, that provision does not stipulate either the means of making that reduction or the categories of civil servants affected by it, which factors are left to the discretion of the Hellenic Republic". Certainly, CG has a very strange understanding of the notion of "wide discretion".

[7] C-105/15, *Mallis*, ECLI:EU:C:2019:90.

[8] C-8/15 to C-10/15*, Ledra Advertising et al. v European Commission and European Central Bank*, ECLI:EU:C:2016:701.

[9] C-370/12, *Pringle*, ECLI:EU:C:2012:756

framework does not alter the nature of the acts of the ESM, which fall outside the EU legal order". Accordingly, MoU celebrated under ESM cannot be considered an act likely to be challenged before the CJEU through an action for annulment.

2.2 Request of preliminary ruling

Once the action for annulment was closed for non-privileged claimants as individuals or unions, they tried the alternative route of preliminary ruling. However, once again, none of the issues raised by internal courts obtained a satisfactory answer.

A firsts group of preliminary questions deferred by Romanian10 and Portuguese11 courts were declared inadmissible by means of Orders, stating the CG that the referring courts had provided no elements to proof that the challenged measures - Portuguese budgets and Romanian laws - implemented EU Law.

It should be noted that although the plaintiffs and the referring courts could have failed to demonstrate the relationship between the challenged internal rules and EU law - an obvious relationship, moreover, since the corresponding statements of reasons expressly justified the cuts in them contained as a fulfillment of the commitments assumed with the EU through the corresponding MoU -, the CG itself should have drawn up this relationship, redrafting the questions deferred as it normally does on other issues12 or, at least, applying the request for clarification regulated in article 101 of the ECJ Rules of Procedure. Considering the obscurity and legal complexity of the matter and its interest for future cases, this constructive approach seems especially appropriate.

In fact, in other "normal" realms, the case-law holds that questions referred by the internal courts enjoy a "presumption of relevance that can only be destroyed in exceptional cases, for example, as "when it is clear that the requested interpretation of the law Union does not have any connection with the reality or the subject-matter of the main proceedings"13, so that the burden of proof of the lack of relevance lies with the CJEU.

[10] Case C-434/*11 Corpul Naţional al Poliţiştilor*, Order [2011] ECR I-00196; Case C-134/12 *Corpul Naţional al Poliţiştilor*, Order [2012] ECLI:EU:C:2012:288; Case C-462/11 *Cozman*, [2011] ECR I-00197; Case C-262/14 SMCD [2015] ECLI:EU:C:2015:336.

[11] Case C-128/12 *Sindicato dos Bancários do Norte*, Order [2013] ECLI:EU:C:2013:149; Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial – Companhia de Seguros, SA* , Order [2014] ECLI:EU:C:2014:2036; Case C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa - Companhia de Seguros, SA*, [2014] ECLI:EU:C:2014:2327.

[12] "Admittedly, the Court has repeatedly held that, even if, formally, a national court limits its reference to the interpretation of certain provisions of European Union law, the Court is not thereby precluded from providing the national court with all those elements of interpretation of that law which may be of use deciding the case before it, whether or not that court has specifically referred to them in the wording of its question (see, inter alia, *Dyson*, paragraph 24; Case C-392/05 Alevizos [2007] ECR I-3505, paragraph 64; and Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 42)" [Judgment in C-257/11, *Belgian Electronic Sorting Technology NV*, 2013, p. 29].

[13] C-617/10, *Åkerberg Fransson* [2013], ECLI:EU:*C*:2013:280.

In a second group we can include Florescu14 and Associação Sindical dos Juízes Portugueses15 rulings, in which the CJEU resolves on the merits of the questions raised, although, again, dismissing finally the claims of the plaintiffs.

The Florescu ruling resolves, in an unusually slow manner16, a preliminary ruling in which a Romanian court questioned whether the MoU celebrated between Romania and the EU in 2009 required necessarily the adoption of internal norms such as the law that, in the present case, prevented the claimants to accumulate their pension of retired magistrates with the salary received as university professors.

In the first place, the ruling clarifies that a MOU of a bailout carried out within the framework of EU law17 constitutes an act in the meaning of Article 267 TFEU, which can therefore be prejudicially questioned by internal courts. However, should the plaintiffs challenged the Council Decision granting financial assistance, which substantially reproduces the content of the MoU, the same conclusion would be reached18. In any case, in a contradictory manner and with the purpose of closing even stronger the possibility of direct challenge by way of Article 263 TFEU - by excluding the existence of individual and direct affectation -, the CJEU states that "the Memorandum of Understanding, although mandatory, contains no specific provision requiring the adoption of the national legislation at issue in the main proceedings"19.

Having overcome the barrier of admissibility, the CJEU examines then the merits of the plaintiffs' claims, based on the infringement of several fundamental rights proclaimed in the ECFR - fundamentally property (article 17) in relation to equality (article 20), non-discrimination (article 21) and effective judicial protection (article 47). To this end, it recognizes that the Romanian law concerned must be qualified, for the purposes of Article 51 of the Charter, as a state activity implementing EU law.

In this way, it analyzes the compatibility of the Romanian measure with the ECFR through the test of proportionality and respect for its essential content foreseen in article 52 of the Charter. Then, it recognizes that the right to the automatic payment of a social benefit integrates, in accordance with the jurisprudence of the ECHR, a patrimonial interest falling within the scope of application of the property right proclaimed in the Additional Protocol number 1 of the ECHR. However, the aforementioned right has no absolute value since it can be restricted by general interest objectives which is, in the case under examination, to "rationalize public spending in a context of exceptional global crisis in the financial and economic fields ". Having identified this objective, it concludes that the "exceptional and temporary" restrictions imposed by domestic law in application of the MoU, although

[14] C-258/14, *Florescu v Casa Judeţeană de Pensii Sibiu* [2016] ECLI:EU:C:2016:995.
[15] C-64/16, *Associação Sindical dos Juízes Portugueses* [2018], ECLI:EU:C:2018:117.
[16] Between the request - April 3, 2014 - and the date of the judgment - June 13, 2017 - more than three years elapsed.
[17] The MoU between Romania and the EU was concluded within the framework of Regulation 332/2002 of the Council, which established a medium-term financial assistance mechanism for the balance of payments of the Member States (as amended by Regulation 431 / 2009), developing the mechanism of mutual financial assistance established in Article 143 TFEU. The content of the MoU is reproduced in a Council Decision.
[18] KILPATRICK (2015: 18) warns that to focus on MoU “hides' the much more conventional EU legal sources, Council Decisions and Implementing Decisions, firmly encasing individual bailouts".
[19] *Florescu*, p. 41.

within the "wide margin of appreciation" available to the Member States in economic policy matters, do not affect the essential content of the right invoked20, concluding that said regulation "is adequate to achieve the objective of general interest pursued and is necessary to achieve it"21.

In the judgment rendered in Associação Sindical dos Juízes Portugueses,22 the CJEU confirms the criterion established in Florescu by admitting a preliminary ruling which sought to clarify whether "the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance program, from being applied to the members of a Member State's judiciary"23.

The reference made to Article 19.1 TEU is hardly innocent. It is a conscious choice since the question deferred by the Portuguese court included both this precept and also article 47 ECFR, which proclaims the right to effective judicial protection and an impartial judge. The wording of article 19.1 TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") has a wider scope than that resulting from article 51.1 ECFR ("The provisions of this Charter are addressed to the ... Member States only when they are implementing Union law "). In the present case, to the extent that the Tribunal de Contas "may rule … on questions concerning the application or interpretation of EU law … the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU"24. It seems that, somehow, the CJEU assumes that the challenged measures were directly linked with the EU debt-loan activity. This represents a clear shift from the formalistic and restrictive approach followed by the Court in preceding cases25.

In the present case, it should be noted that, as is apparent from the information provided by the referring court, the salary-reduction measures at issue in the main proceedings were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.

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[20] The romanian law challenged "does not call into question the very principle of the right to a pension, but restricts its exercise in well-defined and limited circumstances, namely, when the pension is combined with a professional activity carried out in public institutions and when the amount of the pension exceeds a certain threshold. Thus, Law No 329/2009 is consistent with the essential content of the right to property enjoyed by the applicants" (p. 55).

[21] P. 59.

[22] C-64/16, EU:C:2018:117. In summary, the question asked by the *Supremo Tribunal Administrativo* of Portugal asked whether the reduction of the remuneration of the judges of the *Tribunal de Contas*, derived from the conditionality attached to a financial assistance regulated by EU Law, breaches the principle and the fundamental right to effective judicial protection (articles 19 TEU and 47 CDFUE, respectively) by affecting judicial independence.

[23] P. 27.

[24] P. 40.

[25] " In the present case, it should be noted that, as is apparent from the information provided by the referring court, the salary-reduction measures at issue in the main proceedings were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal" (p. 46).

Regardless of the relevance of the ruling in other important areas26, after stating that the notion of judicial independence implies that the members of the jurisdictional bodies shall "receive a level of remuneration in line with the importance of the functions they exercise" - although it does not specify what this level is, nor according to what criteria it is to be determined - the CJEU makes a hasty proportionality judgment to conclude that in view of its limited, general and temporal nature "the salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas"27. The broader scope of the principle of judicial protection means, in return, that the applied proportionality test is less demanding than that which would result from applying the homonymous fundamental right.

2.3. Compensation for damages

In Ledra, the plaintiffs brought an action seeking a compensation for the damages provoked to them by the measures adopted by the Cyprian Government in order to meet the conditionality imposed through the 2013 MoU28, as it prevented the enjoyment of their property fundamental right (article 17 ECFR). Once excluded the EU nature of MoU celebrated within the framework of ESM, the CJEU clarified that such a finding "cannot prevent unlawful conduct linked, as the case may be, to the adoption of a memorandum of understanding on behalf of the ESM from being raised against the Commission and the ECB in an action for compensation under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU"29. So, as the EU institutions are bound to comply with EU law even when performing the tasks conferred to them by non EU instruments (which is the case of the ESM), this activity can be a source of a non-contractual liability of the EU if the conditions set in articles 268 and 340 TFEU are met: the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage.

This opening to damage claims against austerity measures must be welcomed as a step forward. None the less, requirements are tougher than the established for annulment as the unlawfulness must be a "serious breach of a norm intended to confer rights to the individuals". An interesting finding is that, as a rule, all fundamental rights provisions of the ECFR can be qualified as such a norm.

But, as in the previous cases, the lawfulness of the restriction that the challenged measures suppose for the property right must be ascertained through the proportionality test. In this respect, the CJUE considers that the measures meet the requirement of necessity by responding "to an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system in the euro area, as a whole". For the same reason, "and having regard to the

[26] In particular, it is the duty of all Member States to ensure that their courts, within the meaning of Article 19.1 TEU, "comply with the requirements of effective judicial protection", including judicial independence (p. 35 to 38).
[27] P. 51.
[28] The freezing and partial conversion of their unassured bank deposits into shares.
[29] Ledra, p. 5.

imminent risk of financial losses to which depositors with the two banks concerned would have been exposed30", the measure is considered as proportionate.

In Sotiropulou31, the GC applies the Ledra doctrine admitting the claim brought by several Greek retired public employees seeking a compensation for the reduction of their pensions, to the extent that those measures were adopted by the Greek authorities in order to comply with conditions established through a series of Council Decisions (reproducing the terms of the original MoU and its subsequent amendments). The application was grounded on the violation of the principles of conferral and subsidiarity (articles 4 and 5 TEU) and also on articles 1, 25 and 34 ECFR (human dignity, elderly rights and accession to social security benefits, respectively).

Since the first condition for the existence of non-contractual liability of EU is a serious breach of a norm intended to confer rights to individuals, the first grievance was dismissed since the invoked norms do not confer any individual right. With regard to the violation of fundamental rights, after admitted that such a norms can be deemed as intended to confer rights to individuals, the GC proceed to the proportionality test. In this sense, it stresses the discretion - "wide margin of appreciation" - enjoyed by EU institutions acting in accordance with articles 126 and 136 TFEU, since these dispositions set only the aims to be achieved, entrusting the institutions with the task to make economic policy choices. Finally, taking into account the context – "imminent threat for the financial stability of the euro-area as whole" – and the procedure through which those measures were adopted – negotiated and agreed by the IMF, the ECB and the Commission with the Greek Government – the Court concludes that measures in question were proportionate and cannot be considered as unjustified restrictions of the invoked fundamental rights.

All of these points have been confirmed very recently in Steinhof32 judgment, in which the GC , once declared the admissibility of the compensation claim, stated that liability can stem even from non-binding Opinions or discretionary actions adopted by the institutions within their broad margin of appreciation33, since they are always obliged to comply with fundamental rights and to promote the achievement of EU goals enshrined in articles 2, 3 and 6 TEU. Following Ledra, the Court admitted that this obligation can be breached by default, is to say, when the ECB Opinion do not warn about the violation of fundamental rights and principles.

Anyway, at last, claims were dismissed also in this case, highlighting how difficult is to demonstrate the existence of a "serious breach"34, to identify a norm intended to grant rights to the

[30] P. 74.

[31] T-531/14 [2017], ECLI:EU:T:2017:297.

[32] T-107/17 [2019], ECLI:EU:T:2019:35. Frank Steinhof along with other German private holders of Greek sovereign debt bonds issued in 2011-2012 brought a compensation claim against the ECB based on the Opinion given by this institution prior to the adoption of a Greek parliamentary Law allowing the renegotiation of sovereign debt. The value impairments suffered by the claimants supposed, according with their allegations, a violation of article 17 ECFR (right to property) along with other EU Law principles (pacta sunt servanda) and provisions (as the included in articles 63 and 124 TFEU).

[33] Even when this discretion includes "complex economic and social assessments in situations subjected to a rapid evolution".

[34] According with the case-law, "the decisive test for a finding that this requirement has been satisfied is whether the institution concerned has manifestly and gravely disregarded the limits of its discretion" along with "the complexity of the situations to be regulated" (T-341/07, José María SIson, ECLI:EU:T:2011:687).

claimants35 or to overcome the proportionality test36. Even in a case as the one decided in Steinhof ruling in which, actually, the plaintiffs did not sought to release any austerity measure but, on the contrary, to strengthen cutbacks even more denying Greece's right to renegotiate its sovereign debt.

3. CONCLUDING REMARKS

Until now, no action for annulment against austerity measures has been admitted. Because of the lack of standing of the plaintiffs, the absence of an individual and direct concern or due to the unchallengeability of the acts against which those actions were addressed. Over the time, the CJEU has lifted some of these barriers. It has, for example, corrected the formalistic approach applied in its first ADEDY orders. Others has been removed by the legislator. This is the case of MoU agreed within the ESM framework, since the Regulation (EU) nº 472/2013 put them back within the scope of EU Law, tearing down the separation between EU and non-EU bailouts. However, CJEU has not yet clarified its positions at this regard, as none ESM bailout has been approved after the entry into force of that Regulation. And, as noted above, when it came to issues in which an individual and direct concern could exist (as in Mallis), the action was dismissed because it was addressed against an unsuitable act.

The opening of compensation claims under articles 267 and 340 TFEU is a good new, clouded by the tough conditions set by the case-law. Fundamental right provisions, even the social ones, fulfil the requirement of being a norm intended to confer rights on individuals. Yet, it is much more difficult to find unlawfulness, conceived as a "serious breach", within a realm in which the executive EU institutions enjoy a wide – virtually absolute – margin of appreciation. The deference delivered by the CJEU to economic policy choices, boosted by the excepcionality of the situation and the subsequent need for an imminent response, makes very hard to achieve a positive outcome. Moreover, when it comes to the "technical expertise" of institutions like the ECB, this deference supposes a practical immunity to judicial review.

With regard to the request for preliminary rulings, the European courts insist that if action for annulment are inadmitted, austerity measures can be challenged before the domestic judges according with article 19.1 TEU. But this insistence, accentuated with the development of the principle of effective judicial protection in relation to the judges and courts of the Member States in the Associação Sindical dos Juízes Portugueses ruling, obviates the practical shortfalls of this path.

For example, it is obvious that in Spain, norms having legal rank - including those contained in the numerous crisis Decrees-Law approved since 2010 - cannot be challenged directly by this means, since the citizens have no standing to challenge them directly before the Constitutional Court and that ordinary judges and courts are not obliged to bring before the latter the question of constitutionality, which is an indirect way to do so (DONAIRE VILLA, 2018: 149). From this point of view, the stress put

[35] Respecting the alleged violation of article 124 TFEU, the Court states that as this is not a norm intended to confer rights to the claimants, this provision cannot be invoked for compensation purposes (p. 139 to 141).
[36] Since there is a overriding reason of public interest – the stability of the euro zone as a whole – and an exceptional situation – an unforeseeable crisis –, the measures adopted do not undermine the core content of the right concerned and, so, can be deemed proportional.

by the CJEU on preliminary ruling as a feasible alternative route seems to be motivated by getting rid of the responsibility of deciding matters as sensitive as those related to austerity, rather than by its practical effectiveness.

Regarding the use of fundamental rights as a parameter of legality of austerity measures, the review of the ECHR's case law reveals that limitations in this field are not exclusive to the CJEU. In any case, it can be expected that once the emergency phase is over, the EU courts shall confer to social rights - or, better said, to fundamental rights in matters of austerity - at least the same effectiveness and the same scope of application with respect to the Member States than those already recognized to the rest of fundamental rights and in matters other than austerity.

Concerning the effectiveness and praxis of the proportionality test, the line followed by the CJEU in the Schmidberger judgment could be extended37.

As regards the application of the ECFR to the Member States, the criterion set out in the Åkerberg Fransson 38judgment is useful to review the internal austerity measures adopted to fulfil the conditionality linked to bailout programms.

4. EPILOGUE

Conceived as an imminent and unexpected threat to the stability of the EU and the euro zone as whole, the response to the financial crisis was largely inspired in classic theories about the emergency powers39: in such a situation, the constitution and the ordinary system of government must be suspended in order to do whatever deemed necessary to preserve the very existence of the institutions. However, in a democratic order, those emergency periods shall be temporary. In fact, there lies the difference with fascist regimes in which the emergency powers have a permanent and normal nature40. Once the emergency powers are activated, judges have little or nothing to do. By definition, if emergency is a space beyond or outside the law, a black hole as defined by DYZENHAUS, not only the law but also the rule of law is suspended.

And this is not only a theoretical finding: history shows that judges never reached to prevent or put an end to emergency periods, or even mitigate their worst consequences. Expecting that the CJEU could have played a different role, opposing fundamental rights and values against austerity measures adopted in times of emergency, would be an exercise of naivety. After all, the CJEU is

[37] C-112/00, *Schmidberger* [2003], ECLI:EU:C:2003:333. In this ruling, after a deep proportionality test including the assessment of several alternatives (prohibition, authorisation with stricter restrictions, etc.,) the CJEU concluded, applying the freedom of expression and the freedom of assembly guaranteed both in the ECHR and the Austrian Constitution, that the authorisation of a demonstration that produced the complete closing of the Brenner motorway – a major trade route between Austria and the North of Italy, does not constitutes an unlawful restriction of EU basic freedom of movement of goods.

[38] C-617/10, *Åkerberg Fransson* [2013], ECLI:EU:C:2013:105. As known, this ruling gives a wide interpretaction of “scope of EU Law” in order to apply the CFR to Member States. In this sense, internal norms and acts imposing tax penalties and criminal proceedings for tax evasion concerning VAT shall be considered as falling within the scope of EU Law since this tax is ruled by european Directives.

[39] A critical and complete presentation of those theories in DYZENHAUS, 2006:35.

[40] DYZENHAUS, 2006:36, quoting ROSSITER.

composed by judges and, in addition, it has always acted as a driving force of the European integration process with a clear pro-market bias. In sum, acting the way it did was a matter of instinct.

But once the crisis is over – and along with it also the emergency powers – the new ordinary times cannot be managed as before41. Austerity issues deserve, at least, an equal treatment than the one delivered by the CJEU to other matters as, for instance, competition. As I tried to demonstrate above, this would represent a great progress in the attempt to submit austerity – and, more generally, the economic and financial governance – to an effective judicial review.

In fact, it was the CJEU itself who, in some rare judgments, shows how once the emergency is over, the extraordinary measures can be annulled. This was the case in Kadi42, concerning the emergency raised after 09/11, when the CJEU upheld an action for annulment adressed against a Council Regulation for non-respect of the principle and fundamental right to an effective judicial protection and also the property right.

However, nothing will ever be the same after the crisis. First, because many of the measures adopted – especially the "structural reforms" in fields like labor relations or public spending – have a permanent nature. And, second, because even the temporary ones delivered lasting effects which have not, to date, been effectively reversed.

Even though, this coming back to pre-crisis times involves the return to a case-law with little prospects to recognize social rights and values as effective limits to expansive single market basic freedoms. In this sense, priority given to market over social concerns is a permanent trend on the CJEU doctrine. Confronted with competition rules and the basic single market freedoms, social rights and values are conceived as potential restrictions whose validity needs to be assessed, case by case, through proportionality test. Just before the crisis, Viking, Laval and other subsequent judgments demonstrate the threat that this presumption of unlawfulness and the way in which proportionality is applied to them poses to social rights (GARBEN, 2018). At least, as seen above, the austerity case-law has refined the proportionality test providing it an express positive basis within the ECFR itself, which is its article 52.

BIBLIOGRAPHY

AYMERICH CANO,. C., "El control constitucional de las políticas de austeridad en Portugal y España", REDA n.° 170, 2015

DAVIES, A.C.L., "How has the Court of Justice changed its management and approach towards the social acquis?", European Constitutional Law Review, 14: 2018

[41] Even if it is not the point of view of the EU leaders, as Olli Rehn, former Commissioner for Economics Affaires stated before the European Parliament in 2014: "... once the emergency iso ver, the reform process is continued under the normal procedures of economic governance", is t say, the European Semester (KILPATRICK, 2015).

[42] Cases C-402/05 P and C-415/05 P [2008], ECLI:EU:C:2008:461.

DERMINE, P., “The End of Impunity? The Legal Duties of ‘Borrowed’ EU Institutions under the European Stability Mechanism Framework”, European Constitutional Law Review, 13, 2017.

DONAIRE VILLA, F.J., “El Tribunal de Justicia y la tutela de los derechos en la Unión Económica y Monetaria europea”, Revista Vasca de Administración Pública 110-II, 2018

DYZENHAUS, D., The Constitution of Law. Legality in a Time of Emergency, Cambridge University Press, 2006.

GARBEN, S., The Constitutional (Im)balance between ‘the Market’ and ‘the Social’ in the European Union, European Constitutional Law Review, 13-2017.

GHAILANI, D., Violations of fundamental rights: collateral damage of the Eurozone crisis?, OSE Research Paper, 2016 (www.ose.be).

HINAREJOS, A., The Euro Crisis in Constitutional Perspective, Oxford University Press, 2015

JOERGES, C., Pereat iustitia, fiat mundus: What is left of the European Economic Constitution after the OMT litigation?, Zentra Working Papers in Transnational Studies, nº 60/2015 (www.zen-tra.de).

KILPATRICK, C. and DE WITTE, B., Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges, EUI Working Papers LAW 2014/05 (www.eui.eu).

KILPATRICK, C., “On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts”, Oxford Journal of Legal Studies, (2015).

KILPATRICK, C., The EU and its sovereign debt programmes: The challenges of liminal legality, EUI Working Papers LAW 2017\14 (www.eui.eu).
KOUKIADAKI, A., Can the Austerity Measures be Challenged in Supranational Courts? The cases of Greece and Portugal, ETUC-University of Manchester, 2014 (https://www.etuc.org/en/publication/can-austerity-measures-be-challenged-supranational-courts-cases-greece-and-portugal).

MENDES, J., “Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU”, The Modern Law Review, 2017, 80(3)

PYE, R., “The European Union and the absence of fundamental rights in the Eurozone: A critical perspective”, European Journal of International Relations, 2018, Vol. 24(3)

SILVEIRA, A., FROUFE, P., PEREZ, S. and ABREU, J., “União de direito para além do direito da União – as garantias de independência judicial no acórdão Associação Sindical dos Juízes Portugueses”, Julgar, maio 2018, (https://repositorium.sdum.uminho.pt/handle/1822/54936).