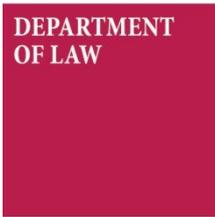




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The EU and its sovereign debt programmes:  
The challenges of liminal legality

Claire Kilpatrick



European University Institute  
**Department of Law**

**THE EU AND ITS SOVEREIGN DEBT PROGRAMMES:  
THE CHALLENGES OF LIMINAL LEGALITY**

Claire Kilpatrick

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## **Abstract**

This analysis focuses on the challenges the EU sovereign debt programmes raise for our understanding of legality in the EU by developing in particular the idea of liminal legality. Liminal legality, in the sense I develop it here, concerns legal issues awaiting legal location within one or more legal orders. I consider how long, and through which kinds of practices, do EU institutions allow unresolved legal spaces in the sovereign debt programmes to endure or re-emerge. This entails assessing the various EU judicial pathways through which sovereign debt programmes have been challenged. By stressing the temporal dimensions of liminal legality and the importance of viewing law as a practical enterprise, my analysis suggests that a narrowly doctrinal approach to recent cases such as *Ledra Advertising*, *Mallis* and *Florescu* does not capture the problematic dimensions of legality in the EU sovereign debt programmes.

## **Keywords**

EU sovereign debt programmes; liminal legality; *Ledra*, *Mallis*, *Florescu*

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And when the Foreign Office find a Treaty's gone astray,  
Or the Admiralty lose some plans and drawings by the way,  
There may be a scrap of paper in the hall or on the stair—  
But it's useless to investigate—Macavity's not there!  
And when the loss has been disclosed, the Secret Service say:  
'It must have been Macavity!'—but he's a mile away.  
You'll be sure to find him resting, or a-licking of his thumb;  
Or engaged in doing complicated long division sums.

T.S. Eliot, *Macavity the Mystery Cat*

## Introducing the EU's sovereign debt decade\*

Sovereign debt loan arrangements constitute a distinctive and prominent mode of EU activity over the last decade. They are distinctive because EU law typically operates by setting standards to be applied across Member States or to categories of individuals across Member States (eg dairy farmers). EU sovereign debt programmes instead operate by setting out detailed and distinctive arrangements aimed at one Member State. While this is mirrored in EMU in the country-specific recommendations under the European Semester, the normativity (requirements for states as opposed to recommendations for states) differs. It is a new and distinctive area of EU law. Sovereign debt programmes are also a prominent feature of the EU landscape over the last decade. There have been ten sovereign debt programmes (not including the very substantial financial sector assistance granted to Spain under the European Stability Mechanism) since 2008. Overall EU institutions have been involved in the disbursement of around 500 billion euros (when the EU's annual budget currently sits at around 140 billion euros or 1% EU-28 GNI).

While in a programme, many central choices normally reserved to the state, especially those concerning the organisation and funding of its public sector and its welfare state, become governed by detailed loan conditions and intensive EU institutional oversight and surveillance. The primary location of these conditions is the MoU, the Memorandum of Understanding agreed between the programme state and the programme. For someone interested in the law and policy of Social Europe, as I am, these are the most significant sources to examine of the last decade. The kind of medicine your GP can prescribe, how much you will be paid as a civil servant, the level of the minimum wage or your pension, the organisation of collective bargaining: all these are matters often covered in detail and often over significant periods of time by programme requirements. These conditions create tensions with fundamental and human rights.

This analysis focuses on the challenges the programmes raise for our understanding of legality in the EU by developing in particular the idea of liminal legality. To give the context for the challenges for legality, we need first to go back to the EU's capacity to grant sovereign debt loan assistance. From a legal point of view the EU was unprepared for sovereign debt crisis. The Treaties provided the possibility to offer balance of payments assistance under Article 143 TFEU<sup>1</sup>; before the sovereign debt

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\*\* Forthcoming in *Current Legal Problems* (OUP, 2017). I am very grateful to all those who asked me great questions at the Current Legal Problems lecture delivered at UCL in May 2017 and also to the many EUI Law Department colleagues who provided insights and helpful suggestions on a written version at a Faculty Seminar in June 2017. An early version of this paper was delivered at the University of Padua in April 2017 and I thank the organizers of the conference for the opportunity to try out my thoughts. The text was finalised in early July 2017.

<sup>1</sup> **Treaty on the Functioning of the European Union [2007] OJ C 115/47 (TFEU).** Prior to EMU, all states had potential access to Community law balance of payments loan assistance under a 1988 Regulation and Article 108 of the Rome Treaty (now Article 143 TFEU): Council Regulation 1969/88 **establishing a single facility providing medium-term financial assistance for Member States' balances of payments. This replaced earlier mechanisms dating from 1971 whereby**

crisis, in 2002 it had introduced a new Regulation scaling back the amount of money available on the basis that less was needed.<sup>2</sup> So what did it do? For non-euro states, the first to go into programmes, it increased five-fold the amount available under the existing EU mechanism.<sup>3</sup> For euro states, the crucial moment is May 2010. The first state to receive assistance, Greece, had its first programme, of 80 billion euros, funded by pooled bilateral loans from euro states. In a flurry of activity the EU looked for ways to create other loan assistance mechanisms. It used Article 122(2) TFEU<sup>4</sup> to create the EFSM (the European Financial Stability Mechanism) but the amount available was limited by what was available in the EU budget, around 60 billion euros, less than what had just been lent to Greece. So at the same time it created the EFSF (European Financial Stability Facility) by immediately effective international agreement between the euro area states with an initial funding capacity of over 400 billion euros. In Autumn 2010 the euro area states decided to create a permanent stability mechanism, the European Stability Mechanism (ESM), and following negotiations on its content, it was set up as an international organization between euro area states in 2012.

This then is the legal backdrop against which we can look at the ten sovereign debt programmes that have operated to date. One set of programmes are wholly or partly based in EU law. This includes the three non-euro states, wholly EU-law based, and Ireland and Portugal with equal funding from the EU based EFSM and the temporary international facility the EFSF set up in 2010.

Table 1. EU-based programmes

State	Period	From EU states (EUR billion)	Legal Basis EU only or EU and EFSF (international)
Hungary	Nov 2008-Nov 2009	5.5	EU Article 143 TFEU-balance of payments assistance to non euro states Reg 332/2002 Decision 2009/103/EC providing Community medium-term financial assistance for Hungary
Latvia	Jan 2009-Jan 2011	2.9	EU (balance of payments)

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**Member States granted assistance to each other under Community law Decisions which were renewed every few years alongside a Community loan mechanism.**

<sup>2</sup> **Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002]** OJ L 53/1 was introduced specifically to respond to the small number of beneficiary states following the introduction of the single currency as Recitals (7) and (8) explain: '(7) Since 1 January 1999 the Member States participating in the single currency no longer qualify for medium-term financial assistance. However, the financial assistance facility should be retained in order to meet not only the potential needs of the present Member States which have not adopted the euro but also the needs of new Member States until such time as they adopt the euro. (8) The introduction of the single currency has led to a substantial reduction in the number of Member States eligible for the instrument. A downwards revision of the present ceiling of EUR 16 billion is therefore justified. The loan ceiling should, though, be kept at a sufficiently high level in order to satisfy properly the simultaneous needs of several Member States. A reduction in the loan ceiling from EUR 16 billion to EUR 12 billion seems apt to meet this need and also to take account of forthcoming enlargements of the European Union.'

<sup>3</sup> The Regulation was amended (most recently by **Council Regulation (EC) 431/2009 of 18 May 2009 amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2009]** OJ L 128/1) to increase its loan capacity to EUR 50 billion because 'The scope and intensity of the international financial crisis affects the potential demand for Community medium-term financial assistance in the Member States outside the euro area and calls for a significant raising of the ceiling for the outstanding amount of loans to be granted to Member States'.

<sup>4</sup> 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.'

Romania	May 2009-June 2011	5	EU (balance of payments)
Ireland	Nov 2010-Dec 2013	67.5	EU and international EFSM and EFSF
Portugal	May 2011-May 2014	78	EU and international EFSM and EFSF
Greece bridging loan	July 2015	7	EU EFSM, Council Implementing Decision of 17 July 2015 on granting short-term financial assistance to Greece.

The second set of programmes are those based on different kinds of international agreements between the euro area states. These are the basis for Greece's three main programmes and that of Cyprus.

Table 2. The euro area based programmes

State	Period	From EU states (EUR billion)	Legal basis
Greece I	May 2010-Mar 2012 (scheduled until 2014)	80	Pooled bilateral agreements with other euro area states (Greek Loan Facility)
Greece II	Mar 2012 –until end June 2015 (scheduled until end 2014, extended when Syriza elected Jan 2015)	145	EFSF
Cyprus	May 2013-Mar 2016	9 (70% disbursed)	ESM
Greece III	Aug 2015-Aug 2018	85	ESM

## Liminal legality

From this starting point I suggest that the programmes are a challenge for EU law and legal scholars because they present features of what I term liminal legality. Liminal has got two linked meanings, both of which resonate here. A first is occupying a position at, or on both sides of, a boundary or threshold. A second is relating to a transitional or initial stage of a process. Liminal legality, in the sense I develop it here, accordingly concerns legal issues awaiting legal location within one or more legal orders.<sup>5</sup>

### *Boundaries of law and legal orders*

Connecting to the first definition, elements of the programmes exist in unresolved legal spaces. In this respect, liminal legality exhibits itself in two ways in the sovereign debt programmes. Some parts of the programmes exist in a contested border zone between law and non-law. And the most important programmes, in terms of scale and length, exist in an unclear zone between EU law and non-EU law.

<sup>5</sup> This captures more accurately the features that are problematic in sovereign debt legality than other possible candidates such as *delegalisation* or *a-legality*. Delegalisation, as used by Joerges, fits less well here as the problem is not centrally an escape from law or an absence of justiciable legal norms: see Christian Joerges, 'Constitutionalism and the Law of the European Economy' in Mark Dawson, Henrik Enderlein, and Christian Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (OUP 2015) 216, 225. A-legality, as used by Lindahl, is not suitable. A-legality is used to identify legally disruptive behaviour which both makes apparent and at the same time questions the decisions and boundaries of an extant legal order: see Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2013).

### ***Law or not?***

All the programmes contain two common elements:

1. A Loan agreement setting out the detailed financial terms
2. A MoU on the conditions (on typically fiscal consolidation, financial sector reform and structural reform) to be met for loan payments to be made.

The MoU is clearly a central source in programmes as it is that source which contains the detailed requirements to, for example, cut public sector pay or health spending or minimum wages or modify collective bargaining arrangements. However, it is one that has been and remains elusive. It is physically elusive by which I mean the MoU is often difficult to locate and read especially as it is frequently amended during the life of the programme. It is also legally elusive as its legal status and authorship are often challenging to ascertain and contested. Moreover, its legal status is likely to be different according to whether the legal basis of the programme of which it forms part is based on EU law or not.

### ***EU law or not?***

As noted in the Tables above, there are EU law-based programmes and euro area based programmes under international agreement. However, beyond the multiple and somewhat complex programme bases, one might well ask whether it is not all rather straightforward, especially now that the ESM is the primary basis for ongoing and future programmes. Let me start showing why that is not the case by turning to the euro area international programmes, those for Greece and Cyprus. A feature of these programmes is that while not fully inside EU law they have never been fully outside it either.

First, these loan assistance facilities or mechanisms, although based on international agreements between euro area states, are deeply connected, indeed would not be needed, without membership of the single currency, a core EU policy. And those euro area agreements themselves concern themselves with that connection. Hence the ESM Treaty provides in Article 13(3) for MoU consistency with EU economic governance sources.<sup>6</sup>

Second, each euro area programme is deeply entangled with EU institutions and decision-making. The central role of EU institutions especially the European Commission in managing every single bailout, whether it has an EU or international law basis, should be underlined. In the Greek and Cypriot bailouts the Commission negotiates the MoUs, signs them, monitors compliance with the MoUs to see if loan disbursements can be made, and revises the MoU throughout the life of the programme.<sup>7</sup> The Euro-group, the finance ministers of the euro area states, also plays a central role in these programmes.<sup>8</sup>

Third, no euro area programme has ever been created without at the same time creating a parallel EU law source. The first are Excessive Deficit decisions addressed to Greece and Cyprus in relation to all the programmes. Hence, for example, the Greek Excessive Deficit Decision adopted on 10 May 2010 repeats some of the MoU content.<sup>9</sup> The second is the introduction from 30 May 2013 of the requirement

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<sup>6</sup> Treaty Establishing the European Stability Mechanism (ESM) [2012], available at <https://www.esm.europa.eu/legal-documents/esm-treaty> 'The MoU shall be fully consistent with the measures of economic policy co-ordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendations or decision addressed to the Member State concerned.'

<sup>7</sup> See **Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010]** OJ L 118/1 (EFSF), ESM Article 2(1)(a); Articles 5(6)(g), 13(4) and 13(7). Note that while in the EFSF the EU institutions act on behalf of the euro area states, in the ESM the Board of Governors mandates MoU negotiation, signature and monitoring by the Commission but itself approves the MoU.

<sup>8</sup> See Article 137 TFEU and Protocol 14.

<sup>9</sup> Excessive Deficit Procedure Decisions under Article 126 and Art 136 TFEU addressed to Greece and Cyprus: Council Decision of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit

in Regulation 472/2013, one half of the so-called 2-Pack, that the loan assistance programme, whatever its provenance, is to be matched with a Macro-Economic Adjustment Programme, an EU-MAP, under EU law.<sup>10</sup>

Figure 1. Matrix of Legal Sources

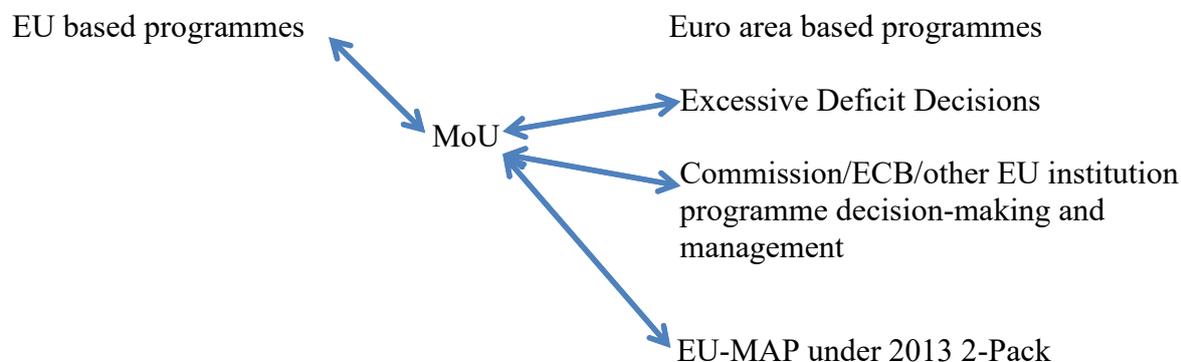


Figure 1 recaps the features requiring legal clarification and constituting this aspect of liminal legality. The left shows the EU law based programmes where the main issue is the status of the MoU. The novelty or difficulty therefore resides only in the unusual nature of wide scale provision of EU sovereign debt assistance, on the one hand, and on the MoU as an unusual feature of the chain of sources on the other.<sup>11</sup> The right shows the euro area agreements based programmes and their potential links with EU law which require legal construction and interpretation.

Liminal legality is a disturbance for EU law. When significant sources are not clearly in or not clearly outside a legal order, or their status as law or non-law is and remains unresolved, that is a challenge to its rational, coherent and systemic self-understanding and its justification. Neil MacCormick brings out this feature well. In a reflection on the usefulness of legal doctrine as an activity of rational reconstruction he notes, ‘The usefulness of legal doctrine is as a picture of the actually-ideal order of a given law-community, not as a picture of an absolutely-ideal order... Actual decisions do not necessarily replicate doctrinal ideal order. But they can, and it is possible to demand that they do. The special gift of legal doctrine to politics is that it sustains the possibility of demands for the Rule of Law, for the governance of laws rather than that of arbitrary discretion. This depends on the governing law being objectively statable, and stated’.<sup>12</sup>

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[2010] OJ L 145/6, adopted on the basis of Arts 126(9) and 136 TFEU; Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth [2013] OJ L 141/32, adopted on the basis of Art 126(6) and Art 136(1) TFEU.

<sup>10</sup> **Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability** [2013] OJ L 140/1; Council Implementing Decision 2013/463 of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU [2013] OJ L 250/40; Council Implementing Decision 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece [2015] OJ L 219/12.

<sup>11</sup> This is indubitably the case for the non-euro area programmes. The Portuguese and Irish programmes were based on both EU and euro area agreement instruments. Despite doubts expressed by some authors, these programmes had a clear EU law basis. Not only is part of the programme underpinned by EU law but the non-EU law part (the EFSF) expressly tied itself and made itself subordinate to the EU law sources: see for further references and analysis, Claire Kilpatrick, ‘Are the bailout measures immune to EU Social challenge because they are not EU Law?’ (2014) 10 *EuConst* 393.

<sup>12</sup> See Neil MacCormick, ‘Four Quadrants of Jurisprudence’ in Werner Krawietz, Neil MacCormick and Georg Henrik von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers* (Duncker & Humblot 1994) 53-70.

Moreover, liminal legality is a distinct further concern in so far as it makes EU fundamental rights review out of reach in relation to sources that have been the subject of many findings of non-compliance or concern by a range of international human rights bodies. In essence, one must find a path through liminal legality as a precondition to being able to make arguments about the applicability and substantive protection afforded by EU fundamental rights protection.

### *Time matters*

MacCormick draws a helpful distinction between law's capacity to be objectively storable, on the one hand, and its actually being objectively stated on the other. As noted above, a further meaning of liminal is the initial stage of a process which can be equated to law's capacity to be objectively storable. The period elapsing between law's capacity to being objectively storable and it actually being objectively stated deserves identification and analysis. It might be argued that in the early days of the euro area crisis, in 2010, solutions had to be patched together with some urgency and little regard for legal clarity or fundamental rights compliance. However, over many years and many programmes, the EU institutions had the opportunity to address these problems and place the programmes on a clearer legal and fundamental rights footing. The Court of Justice of the European Union, both the Court of Justice and the General Court, was given multiple opportunities to consider a range of issues related to the legal nature and fundamental rights in the programmes. Moreover, as the programmes proceeded, ample evidence and findings of their non-compliance or concerns they raised in relation with international human rights became clear. Multiple aspects of the programmes were either condemned by or elicited strong expressions of concern from, to give just some examples, the European Committee of Social Rights,<sup>13</sup> the ILO Committees,<sup>14</sup> CEDAW,<sup>15</sup> and others with special positions from the UN<sup>16</sup> and the Council of Europe.<sup>17</sup> These findings provided clear guidance on the shortfalls of the programmes as well as, one might imagine, an impetus for the EU to address those shortfalls. Legal and political analysis began to explore and challenge the approaches of the Court of Justice and other EU institutions to sovereign debt programmes. The EU legislature and the EU Commission could accordingly make proposals and take actions to address liminal legality and fundamental rights shortfalls. Moreover, this could in turn limit the space for the Court of Justice to make choices to amplify or rely upon the existence of liminal legality in order to place contested elements of programmes outside EU law. We shall see that shifts did occur across the board: by the Court of Justice, by the EU legislature and by the EU Commission.

This dimension of liminal legality draws our attention to how long, and through which kinds of practices, do EU institutions allow unresolved legal spaces to endure or re-emerge. In this regard, it is important to take account of the fact that each sovereign debt programme has a specific duration, and that overall the peak of EU sovereign debt activity has now passed, with only Greece still in a programme. In such a scenario, keeping legal spaces unresolved for long enough can have the practical effect of only proceeding to resolve legal questions after the access-to-justice and broader accountability utility of such

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<sup>13</sup> See for example the Collective Complaints, mainly from Greek union and pensioner organisations: European Committee of Social Rights, Complaint 65/2011 and Complaint 66/2011, Decisions of 23 May 2012; Complaints 76/2012, 77/2012, 78/2012 and 79/2012, Decisions of 7 December 2012; Complaint 111/2014 pending.

<sup>14</sup> For example, ILO Committee on the Freedom of Association, *Report on Greece* (1–16 November 2012) paras 950–1003.

<sup>15</sup> For example, CEDAW, Concluding Observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session (11 February – 1 March 2013).

<sup>16</sup> For example, Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights concerning 'the protection of the Covenant rights in the context of the economic and financial crisis'; UN Human Rights Office of the High Commissioner, *Report on Austerity Measures and Economic and Social Rights* (2013).

<sup>17</sup> For example, 'Safeguarding Human Rights in Times of Economic Crisis', *Issue Paper from Council of Europe Commissioner for Human Rights* (2013).

resolution has largely passed. Two significant institutional practices emerge in this regard, one judicial and one executive, both explored further later in this analysis. The first concerns the Court of Justice's management of cases. The sovereign debt judicial challenges were first dealt with by swift dispatch in the least prominent and reasoned kind of decision the Court of Justice can make. This was succeeded by placing a number of legal challenges on hold for more than twice as long as the average wait time for a pending case. The second concerns executive practices: the requirement to mirror euro area programmes with an EU-MAP from May 2013 has not been followed in the same way for all programme states with Greece subject to very different treatment from all other states.

### ***Pathways of law***

I proceed by exploring liminal legality through the lens of judicial challenges before the Court of Justice and then looking more closely at the position over time of the EU legislature and the EU Commission. There is a sense in which these too echo, in distinctive ways, the boundaries and temporal issues I suggest are central and captured by the term liminal legality.

A significant body of challenges to these sources before the Court of Justice now exists, mainly asserting non-compliance with the EU Charter of Fundamental Rights. Two rather different groups of losers from the sovereign debt programmes brought cases before the Court of Justice: trade unions representing workers and pensioners challenging cuts and a worsening of their working conditions and 'bailed-in' depositors who lost their savings. In particular, we shall see three different EU judicial avenues used to challenge different components of the programmes: preliminary references on their validity, annulment actions and actions for damages against the European Commission. While clearly EU-based programmes were challenged only via preliminary references, programmes based primarily on international euro area agreements were never challenged via preliminary references but via annulment actions and actions for damages. Each of these judicial avenues and actions comes with their procedural constraints and possibilities which shape how the Court approaches the challenges. Hence the pathways of EU legal challenges create their own important boundaries and thresholds. One example is that an act of an EU institution can be challenged, regardless of its legal status, via one channel (preliminary reference) but not via others (annulment action or action for damages). A further relevant example is that an infringement of EU law by an EU institution may result in its annulment but not in founding an action for damages. Another pathway for law is legal reform. Yet we shall see that sovereign debt reforms either did not play out in the way the law states or as the law reform announcements promised.

While no challenge to a sovereign debt programme condition has been successful, the reasoning and the reasons for failure allow us to assess the dynamics of liminal legality. The jurisprudence highlights the legal difficulties the sources themselves present across the key dimensions we have identified: law's boundaries, times and pathways. As noted earlier the liminal legality issues arising differ for EU-based programmes and non-EU based programmes and I divide the analysis accordingly. My goals in this analysis are to evidence problematic legality boundaries and explore how and when the Court of Justice and other EU institutions assisted or failed to assist those affected by programmes to navigate the law/non-law and EU/non-EU law boundaries. I do not explore why the EU institutions acted as they did.

### ***How liminal legality compares with other analyses of legality and sovereign debt***

The problematic legality features explored here have been the focus of limited attention in legal analysis of the sovereign debt programmes. While the euro-crisis more broadly has been the object of extensive policy and scholarly analysis across a range of disciplines, the legal analysis has focused more on issues of transformation of the European economic 'constitution' or on particular high-profile constitutional encounters and issues before the Court of Justice, exemplified by the challenge to the legality of the

ESM in *Pringle*<sup>18</sup> or the legality of the ECB's Outright Market Transactions programme in *Gauweiler*<sup>19</sup> concerning the compatibility of these mechanisms and programmes with EMU law.<sup>20</sup> My focus instead is less on constitutional and EMU-compatibility issues raised by euro-crisis law and more on legal issues raised by the nature of the programmes themselves and legal challenges to the conditionality contained in those programmes.

The approach developed here can also usefully be distinguished from the response to a series of recent and high-profile (Grand Chamber) judgments by the Court of Justice in 2016 and 2017 on legal challenges to the sovereign debt programmes which we shall examine in this analysis. These have begun to result in mainly doctrinally oriented analysis and evaluation of those decisions.<sup>21</sup> Yet such analyses, while critical of aspects of the judgments, tend to see these judgments as a significant step forward in opening the door to legal challenges and resolving the legal status of sovereign debt programmes. By stressing the temporal dimensions of liminal legality and the importance of viewing law as a practical enterprise, my analysis suggests that a narrowly doctrinal approach does not capture the problematic dimensions of legality in the EU sovereign debt programmes. While doctrinal approaches focus on 'until', 'once' and 'how' the legal position is clarified, even in part, my analysis looks at how those processes go backwards as well as forwards and stresses that even clarifications are partial and may come too late to fulfil purposes other than doctrinal clarification.

Finally, liminal legality has a number of distinct benefits over other ways of assessing the legality and institutional issues these sources raise.<sup>22</sup> It lends itself to paying attention to the matrix of sources producing these uncertain legal statuses and how they play out institutionally over time.

## The pathways of legal challenge before the CJEU

### *Court of Justice and EU programmes*

There have been a good number of preliminary references from Romanian and Portuguese courts on EU-based programmes.<sup>23</sup> These are all references arising from challenges by unions and pensioner

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<sup>18</sup> Case C-370/12 *Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756.

<sup>19</sup> Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400.

<sup>20</sup> For an overview of the legal scholarship see Thomas Beukers, Bruno De Witte and Claire Kilpatrick, 'Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead' in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (CUP 2017).

<sup>21</sup> See the analyses of *Ledra Advertising*: Anastasia Poulou, 'The Liability of the EU in the ESM framework' 24 *Maastricht Journal of European and Comparative Law* (2017) 127-39; Paul Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism' 13 *EuConst* (2017) 369-82.

<sup>22</sup> It differs from critical Rule of Law and abnormal source/institutional action analysis I have previously carried out in focusing less on the shortcomings of the sources from these perspectives (eg non-public promulgation, complexity, accessibility, difficulties of judicial challenge, incompatible institutional mandates): see Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 35 *OJLS* (2015) 325 and Claire Kilpatrick, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis: ECB crisis management and the sovereign debt loans' in Marise Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (OUP forthcoming). It also differs from earlier analysis I carried out to argue that in many important respects the sovereign debt programmes were straightforwardly subject to EU law. That was an analysis intended to bring the most EU legal clarity possible in light of over-stated institutional and scholarly assertions and assumptions that all the sovereign debt programmes were beyond EU law: Claire Kilpatrick, 'Are the bailout measures immune to EU Social challenge because they are not EU Law?' (2014) 10 *EuConst* 393. Here I am interested more in the construction and dynamics of the spaces of unclear legality created by the design of EU sovereign debt programmes.

<sup>23</sup> Challenges came only from Romanian and Portuguese courts: Case C-434/11 *Corpul Național al Polițiștilor*, Order [2011] ECR I-00196; Case C-134/12 *Corpul Național al Polițiștilor*, Order [2012] ECLI:EU:C:2012:288; Case C-462/11 *Cozman*, [2011] ECR I-00197; Case C-128/12 *Sindicato dos Bancários do Norte and others v BPN*, Order [2013]

organizations on the EU Charter compatibility of pay and pension cuts and limitations with various Charter provisions: the right to property in Article 17 or Article 28 on collective bargaining or the requirement to protect a worker's dignity in Article 31.

What these show is that even when a programme is fully embedded in EU law, the mere fact of being in a programme and the MoU as an elusive source creates liminal legality. Many courts in these states did not make preliminary references on the validity of the MoU in part at least because they could not make sense of the sources.<sup>24</sup> The references that were made did not closely cite the relevant EU sources. But note also that the Court of Justice did not help them. In the first six of these references, between 2011 and 2014, it rejected them in summary fashion by Order, with no Advocate General Opinion. It said that as the referring courts provided no elements from which it could be considered that the contested national provision implemented EU law, as required under Article 51(1) EUCFR, the Court had no competence to decide the reference. These references were halted long before approaching questions concerning the legal status of MoU's and the applicability of fundamental rights in EU-based sovereign debt programmes. The Court of Justice failed to grant them the treatment it has applied in comparable references where it offered a creative reformulation of the questions referred in order to make them admissible.

Hence, in the first phase of its case-law, while many programmes were in progress, the Court of Justice failed to take steps to address the programmes' liminal legality through its admissibility approach. These cases were managed firmly under the radar; dispatched with the most minimal reasoning by Order with no Opinion from an Advocate General. Although these cases spanned a period of three years, there was no sign of institutional adjustment by the Court of Justice. The Court spurned a series of opportunities to clarify the legal status of the MoU and how the Charter applied to the programmes.

In a second phase, however, a Romanian reference, *Florescu*,<sup>25</sup> and a recently referred pending Portuguese reference have been treated differently by the Court of Justice. In *Florescu*, this may be because the national court, perhaps learning from earlier failures, sent a more precise and wide-ranging reference concerning the legal status of the MoU and of specific provisions being challenged. Those provisions concerned new requirements precluding those working in public institutions from receiving vested pensions if they were still in employment and the pension exceeded gross average national salary.<sup>26</sup> The applicants were former judges still teaching law at universities who were not paid their judicial pensions as a result. The referring court asked whether such requirements complied with a range of EU law provisions, including Article 6 TEU, a range of Charter provisions (the right to property in

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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; Case C-262/14 *SMCD* [2015] ECLI:EU:C:2015:336; Case C-258/14, *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448; Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2017] ECLI:EU:C:2017:395, Opinion of AG Saugmandsgaard Øe (judgment currently pending).

<sup>24</sup> For fuller analysis of the constitutional position in all sovereign debt states, with ample examples of this issue, see Thomas Beukers, Bruno De Witte and Claire Kilpatrick, 'Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead' in Thomas Beukers, Bruno De Witte and Claire Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (CUP 2017).

<sup>25</sup> Case C-258/14, *Florescu v Casa Județeană de Pensii Sibiu* [2016] ECLI:EU:C:2016:995.

<sup>26</sup> One earlier Romanian reference had focused on compatibility of a linked measure in the same 2009 Law with the age discrimination prohibition in Directive 2000/78: the measure automatically ended the employment relationship of those receiving pensions higher than average income if the affected individual had not opted to continue it within a prescribed period: 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. This was decided by Chamber judgment in July 2015 without an AG Opinion. It was relied upon by the AG in Case C-258/14, *Florescu v Casa Județeană de Pensii Sibiu*, [2016] ECLI:EU:C:2016:995, Opinion of AG Bot, to dismiss the age discrimination challenge on the basis that this is not age-based discrimination but based on the status of being a public sector employee with a pension higher than national gross average salary.

Article 17, to equality and non-discrimination in Articles 20 and 21 and the right to effective judicial protection in Article 47) as well as the principle of legal certainty and the Framework Equal Treatment Directive. It is the first EU-based sovereign debt programme to be the subject of an AG Opinion, in December 2016, and a judgment of the Grand Chamber of the Court of Justice of 13 June 2017. This reference illustrates the important temporal dimension to the Court's management of fundamental rights challenges to sovereign debt conditions in that over three years elapsed between the referral and the ruling (when the average time for deciding a preliminary reference is currently fifteen months).

As for the unclear legal boundaries, for EU programmes, for the reasons set out earlier, the main clarification required was the status of an MoU. The Advocate General (Bot) in *Florescu* was Janus-faced in his approach to the legal construction of an MoU in an EU-based programme. The first half of his Opinion points to the MoU being non-challengeable because it is non-binding and not tightly enough related to the challenged measure. He considered that such an MoU was an act of the EU institutions, a position that was hard to avoid for the non-euro area programmes for the reasons set out earlier. However, and crucially, he accepted without reasoned argument the Commission's view that the MoU 'does not produce binding legal effects'.<sup>27</sup> This meant the MoU was placed by the Advocate General on the non-law side of the law/non-law divide. In any event, the Advocate General continued, the MoU did not require Romania to adopt the pension measure. While making other more precise measures conditions for loan assistance and requiring pensions' reform and fiscal consolidation, it did not specifically require the prohibition of combining public service pension with employment income above a fixed level. While this is the case for this particular measure, it is worth noting that this is far from typical, especially in the ongoing revised MoUs addressed to Romania throughout the programme.

However, in the second half of the Opinion, the AG went in a very different and not easily coherent direction with the first half. He considered that although the pension measure itself was not directly required by EU law, the national Act of Parliament containing it was clearly in terms entirely aimed at fulfilling the requirements for obtaining EU sovereign debt loan assistance under the terms of the MoU. The latter was now considered to be '*part of EU law*' given that it 'gives concrete form to the procedure arising under Article 143 TFEU. On that basis [...] Council Decision 2009/459 was adopted which provides that the disbursement of each further instalment of financial assistance is to be made when the implementation of the new economic programme of the Romanian Government, the conditions of which are laid down in that Memorandum of Understanding'. Hence, the Advocate General considered the entire piece of national legislation should be considered as 'an implementation of EU law' for the purposes of Article 51 EUCFR. The discretion given to Romania by the MoU was circumscribed so that the objectives referred to in the Council Decision and the MoU were 'sufficiently detailed and precise to constitute a specific rule of EU law'.<sup>28</sup>

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<sup>27</sup> *Florescu*, Opinion of AG Bot, para 53: 'Admittedly, as the Commission pointed out at the hearing, the Memorandum of Understanding does not produce binding legal effects'. While this would be fatal for an annulment action, it did not prevent a preliminary reference as these can be made in relation to any acts of EU institutions including non-binding legal acts.

<sup>28</sup> *Florescu*, Opinion of AG Bot, para 70. As for substantive infringement of the Charter, the Advocate General would not consider Articles 20 and 21 on equality and non-discrimination as he considered that the national court had not explained how the pension measure could infringe those articles. As a result he addressed only the Article 17 right to property. Drawing extensively and exclusively on Strasbourg case-law, he found that the measure did not deprive the pensioners of their property right as they could opt to stop work. It therefore only restricted the right to property (the contributory pension) and this could be permitted if 'regulated by law in so far as necessary for the general interest'. Meeting MoU obligations and reducing the effects of the economic crisis was certainly ('it does not seem open to debate') an objective of general interest. It also met the requirement of necessity as in this very particular context the Member States and the EU institutions were best placed to decide on the appropriate measures and also did not place an excessive burden on the individuals as they will get their pension once they stop work, which they can opt to do at any time, and meanwhile continue to receive income from employment. Therefore the measure was not precluded by the right to property in the EU Charter.

The judgment of the Court of Justice found the MoU to be ‘mandatory’ but not specific enough to have required the Romanian vested pension rule.<sup>29</sup> However, because of the broad sphere of Charter application it had established in earlier cases whereby an implementation of EU law can occur in a wide range of circumstances, including where the national legislature has substantial discretion, the Court proceeded to examine whether there had been a breach of the right to property in Article 17 of the Charter. It concluded there was not as, on the one hand, the cuts served the general interests and, on the other, the individuals affected could choose at any time to stop work and receive their pension.

A subsequent and still pending Portuguese reference<sup>30</sup> concerns judges from the domestic Court of Auditors whose trade union argued that pay-cuts breached the principle of judicial independence safeguarded in Art 19(1) TEU and Art 47 EUCFR. Although this is a short and poorly drafted reference<sup>31</sup> it is treated differently from the first wave of references.<sup>32</sup> This is the first time an Advocate General focuses on a mixed EU/international law programme. Unlike the previous references, it was processed speedily, with the AG Opinion delivered three months after referral. He considered questions about the status of an Excessive Deficit Recommendation as well as the Council Implementing Decisions which formed part of the chain of sources for the EFSM-based programmes. He argued that an Excessive Deficit Recommendation under Article 126(7) TFEU was not an implementation of EU law for the purposes of Charter application but the Council Implementing Decision under the EFSM granting loan assistance could be (with some hesitation based on the clarity of the national decision accompanying the reference in relation to the latter as it did not reference the CID applicable at the time of the dispute but an earlier one). He considered no breach of the principle of judicial independence had taken place.

## **Challenging the euro area programmes before the Court of Justice**

### ***Annulment Actions***

The EU annulment action makes it easy for States and EU institutions to mount fundamental rights challenges to EU acts - as privileged applicants they need only meet a two-month time-limit for instituting proceedings. However, it is not easy to imagine either a Member State or an EU institution taking an annulment action against the programmes. Again, the liminal legality of the programmes in the eyes of the main EU institution not driving the programmes, the European Parliament, is an important element to bear in mind.<sup>33</sup>

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<sup>29</sup> Case C-258/14, *Florescu v Casa Judeţeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448, para 41 ‘..the Memorandum of Understanding, although mandatory, contains no specific provision requiring the adoption of the national legislation at issue in the main proceedings’.

<sup>30</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*.

<sup>31</sup> The full reference asks, ‘In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by EU rules, must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter of Fundamental Rights of the European Union and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law No 75/2014 of 12 September?’ However, the AG gleans more relevant details from the judgment of the referring court.

<sup>32</sup> The AG argued the Court should consider itself competent to consider the reference as, comparatively, the referring court ‘has supplied more explicit, albeit relatively summary, information as to the existence of such an implementation of EU law in the present case’. See Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2017] ECLI:EU:C:2017:395, Opinion of AG Saugmandsgaard Øe, para 45.

<sup>33</sup> *Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries* (EP Committee on Economic and Monetary Affairs, 28 February 2014). See paras 59-60 (political rather than legal responsibility of the Eurogroup at core of bailouts) and para 32 where the EP ‘regrets the inclusion in the programmes for Greece, Ireland and Portugal of a number of detailed prescriptions for health systems reform and expenditure cuts; regrets the fact that the programmes are not bound by the Charter of Fundamental Rights of the European Union’.

Everyone else (the non-privileged applicants) needs additionally to be able to establish direct and individual concern: ‘Any natural or legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to them’ (Article 263(4) TFEU). It is clear that the annulment action can only be used to challenge legal acts of the EU. That means the challenge must focus on using one of the three paths identified above (see Figure 1) linking the euro area programmes to EU law and institutions to find an EU legal act which can be challenged for its fundamental rights’ compatibility. Annulment actions based on EU fundamental rights were taken by two rather different groups of programme ‘losers’: unions and their members challenging measures negatively affecting pay and working conditions and bank depositors whose savings were taken to recapitalise Cypriot banks.<sup>34</sup> Both actions were clearly required in the MoUs addressed to Greece and Cyprus.

In *ADEDY* the Greek civil servants’ confederation challenged the validity of the Excessive Deficit Decision of May 2010 for its effects on income and working conditions. They lost because they were found not to be directly concerned by the EU measure. Take for instance their challenge to this: ‘Greece shall adopt ...before the end of June 2010...a reduction of the Easter, summer and Christmas bonuses paid to civil servants with the aim of saving EUR 1500 million for a full year’. The General Court found they were not directly concerned because the measure did not directly affect their legal (but only their factual) situation and it also left discretion in its application to the person to whom it is addressed (here Greece).<sup>35</sup> The General Court said nothing about whether an Excessive Deficit Decision provided a basis for challenging a loan condition.

In 2016, the Court of Justice on appeal from the General Court, rejected two annulment actions from depositors in Cyprus.<sup>36</sup> Depositors with over 100000 euros were bailed-in and saw their savings turned into securities resulting in a loss. They argued this breached their right to property in Article 17(1) EU Charter.

The depositor bail-in was in the draft memorandum negotiated with the Commission in March 2013. It was approved by the Euro-group (ie the finance ministers of the euro states) in a March statement, carried out in late March, and included in the final MoU approved by the ESM in April 2013.

The depositors failed in three different ways to find a legal act by an EU institution which could be the object of an annulment action:

1. The relevant parts of the MoU could not be annulled as this was an act of the ESM and hence outside the EU legal order;
2. The Eurogroup statement preceding the MoU could not be the subject of an annulment action as it was (i) not a legal act but a political agreement and (ii) the Eurogroup was not a formal EU Council configuration or a body, agency or office of the Union;
3. The Commission and the ECB could not be seen as the real authors of the MoU or Euro-group statement as these institutions have no decision-making powers of their own in the ESM structure.

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Union or by the provisions of the Treaties, notably Article 168(7)TFEU’. See: <http://www.europarl.europa.eu/committees/en/econ/subject-files.html?id=20140114CDT77307>

<sup>34</sup> T-541/10 and T-215/11, *ADEDY and others v Council supported by the Commission*, Orders of the General Court 2012 ECLI:EU:T:2012:626 & ECLI:EU:T:2012:627; Joined Cases C-105/15 P to C-109/15 P *Mallis v Commission and ECB* [2016] ECLI:EU:C:2016:702; Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701.

<sup>35</sup> It is also worth noting that the Court refused to adjust its direct concern jurisprudence to proceed to examine the substance on the basis of arguments by the Greek union that the measures challenged raised issues so grave that they risked undermining the confidence of EU citizens in EU institutions.

<sup>36</sup> A number of other depositor bail-in cases are pending before the General Court such as: T-149/14 *Anastasiou v Commission and ECB*; T-495/14 *Theodorakis and Theodoraki v Council*; T-786/14 *Bourdouvali v Council*; T-161/15 *Brinkmann (Steel Trading) v Commission and ECB*.

It is the cumulative and sequential features of this jurisprudence against our knowledge of the sovereign debt measures that place these judgments in their appropriate context for evaluation. We know that there was an EU legal act, the Excessive Deficit Decision addressed to Cyprus when its programme was adopted (the EU-MAP under the 2-Pack was adopted only later). In *Ledra Advertising* and *Mallis*, the Cyprus depositors lost not because of the absence of an EU legal act but rather because of the failure, by the litigants and by the Court, to *identify* such an EU legal act although one contender clearly existed. Moreover, the failure by the Court in *ADEDY* to clarify the connection between the Excessive Deficit Decision and the MoU feeds into this failure. And, unlike the union and workers in *ADEDY*, the Cyprus bank depositors actually might have belonged to the exceptional category of individuals able to meet the requirements of being individually and directly concerned.<sup>37</sup>

This makes the sequencing of the Court's reasoning in the cases worthy of more searching scrutiny. Had the Court examined direct and individual concern in *Ledra* and *Mallis*, it would, even if it had retained its incomplete reasoning on the existence of an EU legal act, have created an important advance in clarifying the status of individuals wishing to judicially review programme measures. Had the Court examined whether the Excessive Deficit Decision was an EU legal act embodying the MoU in *ADEDY*, rather than confining itself to the issue of direct concern, it would have laid the ground for a fuller and more persuasive set of EU law arguments in *Ledra* and *Mallis*.<sup>38</sup> The extreme parsimony of the Court's reasoning, in particular that an EU law source not raised by the parties in the case before the Court will not be considered, is noteworthy. Certainly the Court of Justice, in making its choices, did not assist the applicants in navigating the crucial and difficult EU law/non-EU law boundary.

### ***Action for damages***

In *Ledra*<sup>39</sup> the Court took its first step towards linking the EU with the euro area programmes. Disagreeing with the General Court and the AG it found that an action for damages could be taken by the depositors against the Commission under Article 268 TFEU and Article 340 TFEU. This is on the basis that the Commission, as guardian of the EU Treaties, is required under EU law not to sign an MoU whose consistency with EU law it doubts. In particular, the Court confirmed that the Charter is addressed to EU institutions even when they act outside the EU legal framework. Unlike annulment actions, applicants have five years to bring an action from when the event triggering liability occurred, although in most programme states this time has already passed. However, there are multiple complex cumulative hurdles in the EU action for damages. The applicants fell at the need to show a breach of a rule of law intended to confer rights upon the individual. There was none here as any restriction on the depositors'

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<sup>37</sup> There is a good case that the depositors were individually concerned as no-one else could even potentially join the class of those whose deposits were bailed in by the Bank of Cyprus; the class was closed in theory and closed in fact on the date the bail-in occurred. As for direct concern, the Court accepts that the action affected their property rights and accordingly their legal position. The main stumbling block is whether Cyprus had any discretion in deciding on which depositors to bail in. While the Cypriot government originally aimed to also bail-in secured depositors (those with deposits under 100000 euros) protected under EU law, which position was rejected by the Cypriot Parliament, at no stage were unsecured depositors not included in the set of persons to be bailed-in. That suggests an absence of discretion by Cyprus and its Central Bank in bailing-in the unsecured depositors. AG Wathelet in *Mallis* asserted that the depositors would not be individually concerned but without providing any reasons. See Joined Cases C-105/15 P to C-109/15 P *Mallis v Commission and ECB* [2016] ECLI:EU:C:2016:294, Opinion of AG Wathelet, footnote 35.

<sup>38</sup> Though even here questions remain open because of the many different stages under the Excessive Deficit Procedure. Article 126 TFEU sets out a long chain of steps to be taken before excessive deficit sanctions may be imposed on a Member State. In that chain under Article 126, Article 126(6) entails a Council Decision that an excessive deficit exists, Article 126(7) entails a Recommendation on how to address that deficit, Article 126(8) allows that Recommendation to be made public in the event of inadequate action while Article 126(9) is the beginning of legally binding measures against States with excessive deficits. The Cyprus Decision was under Article 126(6) TFEU while Greece's was under Article 126(9) TFEU though both were also linked to Article 136 TFEU. For the Advocate General in *Tribunal de Contas*, as noted above (n 30), this is a legally relevant difference.

<sup>39</sup> Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701.

property rights was justified by the need to ensure the stability of the euro area banking system and prevent spillover to other sectors of the economy. It remains unclear if this will be the strongest bridge between EU law and the programmes and how robust it will turn out to be. However, a recent follow-up concerning pension cuts indicates its fragility.

*Sotiropoulou*<sup>40</sup> concerned an action for damages in relation to Greek pension cuts where just under 1 million euros of damages was claimed by 64 applicants on the basis inter alia of breach of Article 1 (the right to dignity), 25 ('The Union recognises the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life') and 34 (social security and assistance) of the EU Charter. The action was taken against the Council for its Excessive Deficit Decision accompanying the first Greek MoU. Again, like *Florescu*, the action was pending for much longer than average: 32 months when the average time to deal with a case in 2016 by the General Court was just over 18 months. Unlike *Ledra*, it concerned the compatibility of social rights of worker/pensioners with the EU Charter. The disposal of cases through reliance on the limited protection of the right to property in Strasbourg case-law, relied upon in *Ledra* and *Florescu*, was accordingly not available. This action for damages failed because of how the General Court approached the need for the EU to have committed a sufficiently serious breach by manifestly and gravely disregarding the limits of its discretion, another standard element in establishing an EU action for damages. Because of the deterioration of the public finances in Greece, and its implications for euro area stability, detailed conditions were agreed in order to grant Greece loan assistance. It was therefore, the General Court found, not manifestly unjustified to cut pensions and the Council, in adopting the challenged Excessive Deficit Decisions, had not disregarded the limits of its discretion. Even if the substance of the rights to social security and assistance had to be examined, which was not the case, those were not absolute rights and had rightly been restricted to pursue objectives of general interest.

Now it does seem striking that almost a decade into the sovereign debt programmes, and following multiple challenges, not only has no one won a claim but we still have limited answers to many of the issues identified as constituting liminal legality in the boundary sense in the programmes.<sup>41</sup> From mid-June 2017, we know from *Florescu* that EU-based MoUs can be considered binding, though this comes six years after the end of the most recent EU-based programme. We do not know the legal meaning for validity actions to be given to the links between the MoU and Excessive Deficit Decisions or the EU-MAPs. We do know that the four AG Opinions of the last few months of 2016 in *Florescu*, *Ledra* and *Mallis* and of 2017 in the *Tribunal de Contas* case took radically different positions. A first AG fully resisted any contact between the programmes and EU law or institutional responsibility. AG Wahl in *Ledra* argued that the programmes have nothing to do with EU law. In his opinion fundamental rights challenges must be dealt with only as a matter of international law and EU law challenges are an attempt to circumvent that. A second, AG Wathelet in *Mallis*, embraced the link between EU law and the euro area sovereign debt programmes he found in the parallel EU law sources identified in Figure 1: the Excessive Deficit Decisions and the EU-MAP. Moreover, he does not distinguish between the legal relevance of the different decision steps in the Excessive Deficit Procedure under Article 126 TFEU. AG Saugmandsgaard Øe in the *Tribunal de Contas* reference, by contrast, rejected the Excessive Deficit link where it consists only of a Decision that a deficit exists (under Article 126(6) TFEU followed by a Recommendation under Article 126(7) TFEU). AG Bot in *Florescu* is, as already noted, Janus-faced on the status of an EU-MoU. The range of views itself demonstrates the central and enduring feature of liminal legality. The Court of Justice was bolder than the General Court or the Advocate General in *Ledra* in finding the Commission is required to observe compliance with commitments across EU law,

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<sup>40</sup> T-531/14 *Sotiropoulou v Council* [2017] ECLI:EU:T:2017:297.

<sup>41</sup> This can be fruitfully contrasted with the timing and case management of those cases challenging primarily the *EMU compatibility* of sovereign debt funds or ECB actions. *Pringle* (n 18) was decided by the Full Court (a treatment accorded to a few cases each year), and by accelerated procedure, so that it was referred on 31 July 2012 and decided by the CJEU on 27 November 2012. *Gauweiler* (n 19) was referred in January 2014 by the German Constitutional Court and decided in June 2015 by Grand Chamber.

not simply economic policy co-ordination, in its MoU roles. This is certainly its only significant step so far towards taking legal cognisance of EU centrality in sovereign debt programme. Its contribution to resolving liminal legality is important but partial. Most significantly, time is as significant a dimension as substance. There is a real sense in which legality delayed is legality denied.

The recent crop of decisions in 2016 and 2017 do, nonetheless, give some sense of what EU fundamental rights protection lies behind the obstacles presented by liminal legality. They show that there is little to be gained from inventive and thoughtful legal arguments linking sovereign debt conditions with EU law; one set of obstacles will simply give way to another in which the rights in the Charter, related to social and acquired monetary rights protection, are all rightly restricted by the public interest in euro area stability<sup>42</sup> or, outside the euro area, to rationalize public spending in an exceptional context of global financial and economic crisis.<sup>43</sup>

## **The pathways of law reform**

### *In the programme sources themselves: Greeks beware!*

The most prominent step towards both legal clarity and fundamental rights commitments in sovereign debt programmes was undoubtedly the introduction of the requirement from May 2013 (in the Two-Pack) for each programme to be mirrored in an EU-law based Macro-economic Adjustment Programme (EU-MAP). The EU-MAP Regulation links itself to a range of social constitutional and rights commitments in primary EU law. Hence its Preamble references Article 9 TFEU, the mainstreaming social clause introduced by the Lisbon Treaty,<sup>44</sup> and states that social partners and civil society organisations should be involved in programmes. Moreover the Regulation requires each EU-MAP to fully observe collective labour rights, both Article 152 TFEU<sup>45</sup> and Article 28 EU Charter, as well as requiring budgetary consolidation efforts to take into account ‘the need to ensure sufficient means for fundamental policies, such as education and health care’.<sup>46</sup>

We have seen that no cases brought to the Court of Justice so far have concerned a state covered by an EU-MAP so they have not served as a way of judicially challenging fundamental rights compliance. None the less, the EU-MAP could be seen as a significant step forward towards reducing liminal legality and embedding commitments to fundamental rights. The Council Implementing Decisions adopting the EU-MAPs for Cyprus and for Greece indeed refer to involving the social partners and to the programmes promoting ‘growth, employment and social fairness’ as well the financial stability and the sustainability of public finances.

However, the actual unfolding of the EU-MAPs tells a different story, raising further questions about the commitment of the EU to legality and fundamental rights in its programmes. One might expect

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<sup>42</sup> *Ledra* (n 38) para 69, *Sotiropoulou* (n 40) paras 88-90.

<sup>43</sup> *Florescu* (n 25) paras 56–58.

<sup>44</sup> Article 9 of the Treaty on the Functioning of the European Union (TFEU) provides that, in defining and implementing its policies and activities, the Union is to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

<sup>45</sup> Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47

‘The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.’

<sup>46</sup> **Charter of Fundamental Rights of the European Union [2012]** OJ C 326/391 Article 7(2) and (6); **Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability** [2013] OJ L 140/1.

programme states to be treated similarly, and according to the requirements laid down once the requirement to have an EU-MAP came into effect in May 2013. And indeed for Cyprus (and Portugal and Ireland before that), the EU-MAP works as its parent Regulation says it should. The first EU-MAP for Cyprus was created in September 2013 and was after that date regularly amended to reflect the changing MoUs addressed to Cyprus. A strong continuity between the Cyprus Excessive Deficit Decision and the EU-MAP was forged by repealing the former when the latter was introduced.<sup>47</sup> In the words of the EU-MAP Decision for Cyprus this was done ‘for reasons of legal clarity and legal certainty’.

Contrast this with Greece. The EU-MAP for Greece, undoubtedly the most important given the special difficulties with the EU law status of the Greek bailout and its size, conditionality, scope and duration, was not made until 19 August 2015, well over 2 years after the ‘requirement’ in the Two-Pack to have such a Macroeconomic Adjustment Programme took effect. No less importantly, the EU-MAP has never been updated to reflect the important changes from August 2015 in the Greek programme such as the substantial Supplemental MoU of July 2016.

The contrasts continue. Unlike Cyprus, the EU-MAP for Greece of August 2015<sup>48</sup> and the Excessive Deficit Decision of August 2015 continue to co-exist. Moreover, the Excessive Deficit Decision preceding that of 2015 is from December 2012, leaving a parallel EU law ‘gap’ of two and a half years for the Greek programmes. Hence for Greece EU institutional and legislative practice continues to push away from EU legality and towards liminality. Challenges to Greek programme measures are on shakier legal ground than the evolving legal sources might have led one to believe.

### ***The reform proposals of the Juncker Commission***

Institutional shifts in Social Europe via EMU, especially in the new European Commission, are important to trace. As Commission President-elect, in July 2014 Juncker presented 10 policy areas for his mandate to the European Parliament. Under the policy heading, ‘A Deeper and Fairer Monetary Union’ the Social Europe emphasis went on containing the excesses and mistakes of the sovereign debt programmes. Comparing the crisis measures to ‘repairing a burning plane while flying’, Juncker accepted that mistakes were made, namely, ‘There was a lack of social fairness. Democratic legitimacy suffered as many new instruments had to be created outside the legal framework of the European Union’. He committed to a medium-term goal of social impact assessment for programmes and replacement of the troika with a more ‘democratically legitimate and more accountable structure, based around European institutions with enhanced Parliamentary control both at European and at national level’. Mr Juncker in his first State of the Union speech to the European Parliament in September 2015 announced the launch of development of a new European Pillar of Social Rights as part of ‘A new start for Greece, for the euro area and the European economy’.

Again, however, the headline differs from the content. In fact, the opportunity to test this more social vision of sovereign debt programmes came soon after with the agreement of the third Greek programme in August 2015. For the first time, a sovereign debt programme was subjected to a social impact assessment.<sup>49</sup> This assessment is however better characterised as a Commission defence, using figures or estimates on distributive effects, of the Greek programmes from 2010.

The European Pillar of Social Rights was the subject of a year-long extensive consultation process, from March 2016 to March 2017, the results of which were announced by the Commission on 26 April 2017.

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<sup>47</sup> The Excessive Deficit Decisions for Cyprus and Greece only acknowledge the need to ‘minimize any negative social impact’.

<sup>48</sup> Council Implementing Decision 2015/1411 of 19 August 2015 approving the macro-economic adjustment programme for Greece [2015] OJ L 219/12.

<sup>49</sup> Commission Staff Working Document, *Assessment of the Social Impact of the new Stability Support Programme for Greece*, SWD (2015) 162 final (26 March 2017).

Despite its focus on social rights in the euro area, and its genesis in the legitimacy issues raised most sharply by EU sovereign debt programmes, the consultation and its outcomes shows that the European Pillar of Social Rights is not at all targeted at embedding sovereign debt programmes within EU law and fundamental rights' commitments. It is rather about proclaiming an attachment in the normal run of economic policy co-ordination, especially in the euro area, to social commitments.<sup>50</sup>

### **Conclusion: the EU as Macavity**

It is difficult to avoid the conclusion that the EU, in the sovereign debt programmes, is like Macavity the mystery cat. While its paws are everywhere, a reason can always be found why it's never found at the scene of any particular programme or programme condition or, if it exceptionally is, has not done anything wrong. And, most importantly, this is not just a feature of the first wave of the crisis but an ongoing feature which is particularly marked in the successive Greek programmes. That is one reason why keeping a close eye on what happened and how the Court of Justice and the other EU institutions manage these sources is important. Limited, inconsistently applied and sometimes purely cosmetic moves have been taken to addressing the legality and fundamental rights issues the programmes raise. Liminal legality is a productive lens through which to examine these phenomena. It focuses attention on the legal boundaries across which sources find themselves situated. It stresses the importance of the duration and re-emergence of uncertainty for legality particularly with regard to sources with a limited period of application. It shows how the pathways of EU law interact with these threshold dimensions in important ways.

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<sup>50</sup> Communication from the Commission **Establishing a European Pillar of Social Rights**, COM (2017) 250 final (26 April 2017).



