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Uma Crise Entre Crises:  
Contextualização da Jurisprudência do Tribunal  
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of Crisis In Context

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## UMA CRISE ENTRE CRISES: CONTEXTUALIZAÇÃO DA JURISPRUDÊNCIA DO TRIBUNAL CONSTITUCIONAL PORTUGUÊS

### A CRISIS BETWEEN CRISES: PLACING THE PORTUGUESE CONSTITUTIONAL JURISPRUDENCE OF CRISIS IN CONTEXT<sup>1</sup>

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**Abstract:** The authors criticize the Constitutional Court's jurisprudence of crisis on the main ground that it articulates the relationship between EU law and internal constitutional law in such a manner as to deny any possible conflict and need for reconciliation. This "autarchic" approach to EU Law suffers from two main flaws. First of all, it can only be achieved by construing EU Law obligations as purely obligations of result, leaving the Member states free to determine how the result is to be achieved. However, a strict separation between objectives and means is methodological inconsistent and, furthermore, it is simply incorrect to state that EU Law only imposes objectives and goals. Second, the Court appears oblivious to the composite, plural, discursive, multi-level nature of the EU legal order. This strategy can only lead to disempower national institutions (notably

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the Constitutional Court) in shaping of European integration.

**Summary:** 1. The Portuguese jurisprudence as a jurisprudence of crisis; 2. The Portuguese jurisprudence vis-à-vis EU Law obligations: objectives and means; 2.1 The context: the EU legal framework; 2.2 The relevance of EU Legal Acts on the definition of government deficit targets to achieve by EU Member States; 2.3 The legal effects of country-specific recommendations adopted by the Council; 2.4 The relevance of EU Legal acts as regards the type of measures to be adopted by Member States in order to comply with government deficit targets; 3. The comparative contexts; 3.1 The first comparative context: an outlook on different debtors' jurisdictions; 3.2 A broader comparative context: debtors vs. creditors' constitutional jurisprudence.

**Keywords:** EU Law, Stability and Growth Pact, European economic governance system, Portuguese Constitutional Court, European Court of Justice, Jurisprudence of Crisis.

**Resumo:** Os autores criticam a jurisprudência da crise do Tribunal Constitucional com base em a mesma articular a relação entre Direito da União e direito constitucional interno de um modo que visa negar qualquer possível conflito e esforço de reconciliação. Esta abordagem “autárquica” ao Direito da União enferma de dois principais vícios. Em primeiro lugar, pode apenas ser alcançada através da construção das obrigações de Direito da União como puras obrigações de resultados, deixando aos Estados-Membros a liberdade de determinar como será atingido o resultado. Contudo, uma separação estrita entre objetivos e meios é metodologicamente inconsistente e, além disso, é simplesmente incorreto afirmar que o Direito da União impõe apenas objetivos e metas. Em segundo lugar, o Tribunal Constitucional parece esquecer a natureza compósita, plural, discursiva e multinível da ordem jurídica da União Europeia. Esta estratégia pode apenas ter como resultado o enfraquecimento da conformação nacional da integração Europeia.

**Sumário:** 1. A jurisprudência portuguesa como jurisprudência da crise; 2. A jurisprudência portuguesa em face das obrigações do direito da UE; 2.1 O contexto: o quadro normativo da UE; 2.2 A relevância dos atos jurídicos da UE na definição dos limites do défice a serem atingidos pelos Estados-Membros da UE; 2.3 Os efeitos jurídicos de recomendações adotadas pelo Conselho para países específicos; 2.4 A relevância dos atos jurídicos da UE na perspetiva dos tipos de medidas a serem adotadas pelos Estados-Membros tendo em vista o cumprimento dos limites do défice; 3. Os contextos comparativos; 3.1 O primeiro contexto comparativo: uma visão das diferentes jurisdições de países devedores; 3.2 O contexto comparativo mais amplo: a jurisprudência constitucional dos países devedores e dos países credores.

**Palavras-chave:** Direito da União Europeia, Pacto de Estabilidade e Crescimento, sistema europeu de governança económica, Tribunal Constitucional Português, Tribunal Europeu de Justiça, jurisprudência da crise.

This article aims at placing the so called Portuguese Constitutional Court's jurisprudence of crisis in context. It takes into account the much discussed recent case law of the Tribunal Constitucional stemming from the crisis, and dealing with austerity measures, already described by other contributors of this same issue. Economic and financial crisis, like many other today's complex phenomenon, is a supranational phenomenon, which cannot be treated, including in legal terms, as if existing in a territorially delimited world: it must be examined in the context of an interdependent world and social, cultural, political and economic factors.

In this sense we contextualize the Portuguese jurisprudence by placing it in the two contexts where it exists and manifests its effects:

- In the context of EU Law, since large part of legal instruments adopted in reaction to the Eurozone crisis were European or supranational in nature;

- In comparative context, to examine if the Portuguese jurisprudence is similar or different to others and coherent or not with others in the European realm.

The paper will present, in the first part, our analysis of the Portuguese case law; it will place it, in the second part, in the context of EU Law; it will conclude, in the third part, with the comparative analysis.

### **1. The Portuguese jurisprudence as a jurisprudence of crisis**

Our main research questions can be summarized as follows: To what extent *have* EU Law obligations shaped the jurisprudence of crisis of the Portuguese Constitutional Court? To what extent *ought* EU Law to shape that jurisprudence of crisis and how? What exactly are the obligations stemming from EU Law? How does the approach undertaken by the Portuguese constitutional court compares with that of other constitutional courts faced with measures adopted following the economic and financial crisis? And are these different approaches compatible in the context of the EU legal order itself? (in other words, when one looks not only at debtors countries' case law but also creditors countries' case law, are these different national jurisprudences of crisis compatible within the same legal order of the EU?).

These questions stem naturally from the analysis of the Portuguese Constitutional Court's jurisprudence of crisis. Overall, it can be briefly summarized. It starts by stating that austerity measures restrict constitutionally protected social rights<sup>5</sup>. But it also clearly states that these rights are not, however, absolute<sup>6</sup>. Such restrictions may be acceptable, in times of crisis, subject to two conditions:

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5. Cf. Ana Maria Guerra Martins, Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law, *Maastricht Journal of European and Comparative Law*, 2015, vol. 22, n.º 5, p. 688.

6. Cf. Ana Maria Guerra Martins, Constitutional Judge, p. 695.

1) they must be transitory (temporary); 2) they must be proportional. Such proportionality is, in turn, assessed as part of the principles of legal certainty (including legitimate expectations) and equality. To be precise, the Court (and this is also made clear by its members writing in a non judicial capacity)<sup>7</sup> refers independently to the principles of equality, legal certainty and proportionality but, in fact, the latter is almost never applied on its own but mainly as part of the assessment on equality and/or legal certainty.

The focus is therefore on the proportionality of the measures. The exact criteria used in the proportionality assessment is, however, not frequently explicitly articulated in the judgments.

One thing is, however, clear: for the measure to be proportional it must, first of all, pursue a legitimate public interest. It is mostly in this respect that the Court has referred to both international and EU legal obligations of the Portuguese State. The Court has not identified the public interest at stake solely with the respect for such international and EU obligations. Particularly in the earlier decisions<sup>8</sup>, there is a recognition that the economic and financial situation of the country required exceptional austerity measures to be taken. In fact, in its initial decisions the Court did not give relevance to the European obligations of the Portuguese State in the context of the Euro. But after both the MoU and the development and reinforcing of EU obligations in the context of the Euro governance (particularly the European semester obligations and the Stability Treaty) the Court increasingly invoked these obligations to support the existence of a public interest justifying the adoption of austerity measures<sup>9</sup>. Such international and European obligations confirmed the economic and financial circumstances justifying the adoption of measures restrictive of certain fundamental rights. But the Court also appears to recognize that EU obligations, in particular, could justify on themselves restrictions on fundamental rights<sup>10</sup>. Whether such obligations could, in abstract, be invoked to justify a public interest in adopting similar restrictions on fundamental social rights, even in the absence of the economic and financial circumstances recognized early on by the Court, is, in fact, largely a moot question because EU obligations, in this respect, only emerge as a consequence of such economic and financial circumstances.

To sum up: both international obligations, arising from the Economic and Financial Assistance Program and the MoU, and European obligations, resulting from a variety of legal instruments (of EU Law or related inter-governmental agreements) have been used by the Court to support the recognition of the exceptional financial and economic circumstances that produce a public interest justifying restricting certain fundamental social rights.

However, the recognition of such public interest did not amount to granting the

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7. Cf. Ana Maria Guerra Martins, Constitutional Judge, p. 697.

8. Cf. Ana Maria Guerra Martins, Constitutional Judge, pp. 681-682.

9. Cf. Ana Maria Guerra Martins, Constitutional Judge, p. 685.

10. See in particular Acórdão n.º 574/2014 from the Tribunal Constitucional, available at [www.tribconstitucional.pt](http://www.tribconstitucional.pt).

legislator broad discretion with respect to the measures to be adopted. Much to the contrary. It would become clear, as the case law progressed, that the Constitutional Court was ready to get deeply involved in defining the type of austerity measures acceptable to the extent of, arguably, directing the legislature towards revenue measures (assumed by the Constitutional court to be more neutral in their application to all citizens and respectful of existing social rights).

While the Court's judgments regarded measures based on the MoU the issues they addressed are equally likely to appear in the context of the corrective or preventive arms of the macroeconomic imbalance procedures of the European Semester. The difficult constitutional questions such issues raise, in particular with respect to the relation between the national constitution and EU Law, will therefore not go away with the end of the Financial Assistance Program. On the contrary, they might become a regular topic of constitutional debate and be harder to decide. This is so for two reasons. First, it will be more difficult to argue that measures adopted as a consequence of the rules of the European semester are transitory (temporary). In its most recent decision the Court has underlined a return to "normality" (as the Court itself puts it) as a consequence of the closure of the Economic and Financial Assistance Program. Even if the Court has not strictly linked the transitory character of the austerity measures with the duration of the MoU it has, to a large extent, highlighted that the transitional nature justification becomes thinner with the return to "normality" that the conclusion of the MoU signals. The problem is that similar measures may be necessary on the basis of the European Semester rules and the latter are, by definition, of indefinite duration. To put it simply: the normality of the European semester is a different normality than the past and it may require the adoption of some form of austerity measures in the future. A constitutional jurisprudence of crisis based on the transitional character of the measures will be under increased tension with the permanent nature of our EU Law obligations under the Euro system.

The second reason why this issue will, legally (let's hope not financially and economically), become more, and not less, relevant, is that the rules governing the European semester are, without a doubt, EU law while the same could not be said of the MoU<sup>11</sup>. As such, they benefit from the full force of the EU legal order. This means that, not only both the status and enforcement of such rules in national constitutional law will be higher but also that, in case of conflict, the stakes are much more serious.

Judging from the way the Court has, so far, articulated the relationship between EU obligations and the national constitution in this respect we should have, on its face, no reason to be concerned. The Court has denied any possible tension between EU law and the national constitution. The way the Court does this is rendered clearer in its latest judgment of the "jurisprudence of crisis"<sup>12</sup>.

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11. See on this debate Claire Kilpatrick, Are the Bailout Measures Immune to EU Social Challenge because they are not EU Law?, *European Constitutional Law Review*, 10, 2014, p. 393.

12. Judgment of the Portuguese Constitutional Court n.º 574/2014 of July 14, 2014. This is the first (and, to date, also the last) judgment of the Portuguese Constitutional Court which

On the one hand, the Court construes EU Law obligations as purely obligations of result, therefore leaving the State free to determine how that result is achieved. When referring in particular to the recommendations adopted by the Council in the context of the excessive deficit procedure the Court states that, independently of their disputed legal binding nature, such recommendations “do not impose on Portugal concrete and specific measures for the reduction of the deficit, limiting themselves to articulate the objectives or goals that must be achieved as a consequence of the primary or secondary rules of EU law”<sup>13</sup>. For the Court, the legal binding character of EU law is limited, in this domain, to the objectives or goals imposed on the Member States<sup>14</sup>. This leaves the Court free to control the means chosen by the national legislature exclusively in light of the Constitution. It allows the Court to operate as if the realm and interpretation of the national constitution is left untouched. Implicit is, however, another assumption: that the constraints that the constitution imposes on the national legislature means are not such that they could put the pursuit of the objectives themselves into question (a question the Court simply does not address).

On the other hand, the Court also highlights that, in any event, the principles used by the Court to review the challenged measures are principles that are also part of the general principles of law upon which the European Union is founded. In the words of the Court: “the constitutional principles of equality, proportionality, legal certainty (or legitimate expectations), that have been those used by the Constitutional Court to review the constitutionality of the measures in question, are part of the core of the rule of law and the common constitutional traditions of Europe to which the Union is bound”<sup>15</sup>. The assumption is that because the principles applied, in the review of the contested measures, are common to the national constitutional order and the European Union legal order there can be no conflicts between the obligations arising from the national constitution and EU law. This ignores, naturally, that though the principles may be common their interpretation might not always be the same...

This approach of the Constitutional Court has a very important consequence: it strictly separates the hermeneutics of the national constitution from EU law. EU law obligations are not used, in any way, to affect or alter the interpretation of national constitutional provisions. For these purposes it is as if EU law did not exist at all in this domain. The interpretation of the national constitution remains fully immune to EU law. As the Court itself clearly states: “there are no consequences from the point of view of the application of the constitutional norms”<sup>16</sup>.

The scope of national constitutional provisions and their interpretation is not

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directly addresses (on paragraph 12 of the judgment) the problematic of the relation between the Portuguese Constitution and EU Law, in particular, EMU Law.

13. Judgment n.º 574/2014, paragraph 12.

14. It seems that there is also some difficulty in defining what is an objective or a means to achieve that objective. See below on this.

15. Cf. Judgment of the Constitutional Court n.º 574/2014, paragraph 12.

16. Cf. Judgment of the Constitutional Court n.º 574/2014, paragraph 12.

affected because EU law is interpreted in such a way as to make it irrelevant for the assessment of the measures adopted, even the latter are so as a consequence of EU obligations.

The first point to highlight is that such conclusion is possible because of the Constitutional Court's interpretation of EU Law. The Constitutional Court is interpreting EU Law when it states that EU law only imposes, in this domain, obligations of result or that there can be no divergence between EU law and national constitutional law in this area because they both share the same fundamental legal principles of equality, proportionality and legal certainty (legitimate expectations). Somehow paradoxically, the Constitutional Court keeps EU law outside of these national constitutional questions by way of interpreting EU law and not national constitutional law.

In our view, the approach followed by the Court to prevent conflicts with EU Law mirrors the general approach it follows to attempt to legitimate and protect its case law in broader terms by not questioning the goals of the legislator but the means adopted to pursue them.

In fact, the Court does not question the necessity of austerity but only how its burden is distributed (mostly in terms of public versus private sector). As stated by Miguel Nogueira de Brito "this line of reasoning allows the Court to recognize that (citing the Court) 'we are in a very serious economic and financial situation, in which it is important to achieve the public deficit objectives set out in the memorandum of understanding in order to ensure the financial subsistence of the State' and, at the same time, to consider unconstitutional the provisions (...) which the government deemed necessary to pursue those objectives"<sup>17</sup>.

This approach presents however three main problems.

First, economic and social redistributive issues are among those more difficult for constitutional courts to get into. They are deeply contentious and difficult to assess<sup>18</sup>. Courts often lack both the technical expertise and institutional capacity to perform such task<sup>19</sup>. They are also well aware of the legitimacy questions that emerge when courts get involved in this type of judgments<sup>20</sup>. Most constitutional courts have, de facto albeit implicitly, made substantive review of redistributive measures subject to an priori institutional choice question: is there such a severe

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17. Cf. Miguel Nogueira de Brito, Putting social rights in brackets? The Portuguese experience with welfare rights challenges in times of crisis, *European Journal of Social Law*, n.º 1-2, janeiro-junho, 2014, p. 98.

18. See generally, in the recent literature, Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge, 2008, and Jeff King, *Judging Social Rights*, Cambridge, 2012.

19. See in this respect Jeff King, *Judging Social Rights*, p. 211 et seq., and, for extensive reflections, N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, Chicago, 1994.

20. Cf. Gonçalo Almeida Ribeiro, O Constitucionalismo dos Princípios, in Gonçalo Almeida Ribeiro e Luís Pereira Coutinho (eds.), *O Tribunal Constitucional e a Crise: Ensaios Críticos*, Coimbra, 2014, pp. 95 et seq.



malfunction in the political process that justifies for the court to replace its assessment for that of the political process? It is therefore no surprise that, across jurisdictions, constitutional and supreme courts have generally shy away from redistributive questions and have developed a variety of criteria to restrict their intervention in such cases, from limiting their review to cases involving suspect categories to only intervening when the redistributive impact amounts to the confiscation of the affected individuals or group. We find no such approach in the Portuguese Constitutional Court case law in this area.

Second, such approach is difficult to be implemented in a consistent manner<sup>21</sup>. This difficulty is manifest in the case law of the Portuguese constitutional court with the Court being accused of being inconsistent across cases but also on the comparison it makes between generations and, most notably, between the private and public sectors<sup>22</sup>.

The third challenge involves precisely the relationship with EU Law, the focus of our analysis. In fact, the approach described above only solves the EU law challenge on its face. It is deeply unsatisfactory in how it deals with EU obligations and EU Law in general for two fundamental reasons that we will address in more detail next:

- First, not only is a strict separation between objectives and means methodologically flawed but it is simply incorrect to state that EU Law only imposes objectives and goals. We argue that EU Law, including in this domain, regards not only certain objectives but also how they are to be achieved.
- Second, the Court appears oblivious to the composite, plural, discursive, multi-level nature of the EU legal order<sup>23</sup>. This legal order, as we will try to demonstrate, does not simply require for EU rules to be applied in the different national legal orders composing the EU legal order; it requires for a cooperation or dialogue to take place between the different interpreters of such rules and principles in the European legal order, including both the national and European judiciary. This is so to guarantee that such rules and principles are given a consistent meaning in the scope of application of EU Law; in other words to guarantee the uniform application of EU law. But it is also an instrument for national courts to shape the interpretation of such rules and principles at EU level and in other Member States. A Court that excludes itself from this judicial cooperation and dialogue certainly risks infringing the principle of uniform application of EU law. But also deprives itself from the stronger instrument at its disposal to shape the development of EU law itself. Such autarchic dynamics in the approach to

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21. Cf. Jeff King, *Judging Social Rights*, p. 189 et seq.

22. Cf., for example, Vital Moreira 'Dilema Constitucional', posted 18.11.2013, in <https://causa-nossa.blogspot.pt/2013/11/dilema-constitucional.html>, last accessed 8<sup>th</sup> February 2017.

23. Even if it refers to the multi-level constitutional nature of the EU Legal Order, in which different legal orders interact» («*sistema constitucional multinível, no qual interagem várias ordens jurídicas*»). See Judgment of the Constitutional Court n.º 574/2014, paragraph 12.

EU law are not unique to the Portuguese Constitutional Court however, in the jurisprudence of the crisis. Other constitutional courts have, albeit to different degrees, demonstrated a tendency to develop such approaches. The risk is that, instead of EU law being a space to mediate and make compatible the “demands” from different national judiciaries, it will increasingly be unable to prevent conflicts between the approaches developed by different national judiciaries with respect to the rights or duties flowing from EU law to their citizens. This point will be rendered clearer with a comparison between the constitutional jurisprudence of crisis from debtor countries with that of creditor countries.

## **2. The Portuguese jurisprudence vis-à-vis EU Law obligations: objectives and means**

### *2.1 The context: the EU legal framework*

As stated, a fundamental assumption of the Tribunal Constitucional is that EU law only imposes obligations of result, regarding objectives or goals, in this domain. A circumstantiated analysis of EU law in this area will demonstrate that this is not the case.

There is an extensive system of EU legal obligations and measures imposed in particular on EMU Member States.

In essence, such constraints on Member States substantiate obligations and measures which, as has been generally pointed out, «impact directly on national decisions concerning the budget, situated at the heart of the political constitution»<sup>24</sup>.

Such obligations relate to the definition not only of the budgetary/deficit targets to be achieved by Member States, but also obligations on how to achieve those targets. Associated with the (non)compliance of such targets there are sanction oriented mechanisms. Among the Declarations concerning the provisions of the Treaties, we find Declaration 30 on Article 126 of the TFEU, which, instructively, states with respect to such Article 126 that the Stability and Growth Pact (SGP) “is an important tool to achieve the goals of raising growth potential and securing sound budgetary positions which constitute the two pillars of the economic and fiscal policy of the Union and the Member States”. The purpose of the SGP was to ensure fiscal discipline in the EU by setting reference values for annual national budget deficits at 3% of GDP and public debt at 60% of the GDP.<sup>25</sup> The

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24. See, *inter alia*, C. Caruso and M. Morvillo, European Governance and budgetary rules in the European context: a call for a new European constitutionalism, *paper presented at the 2014 World Congress of the International Association of Constitutional Law – Workshop 12 – Constitutions and financial crisis, 2014*, available at the website <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws12/w12-caruso&morvillo.pdf>, last access 24<sup>th</sup> November 2016, p. 2.

25. These values are further explained in Protocol 12 on the excessive deficit procedure

SGP – applicable to all EU members, but with stricter enforcement mechanisms for the Member States of the Eurozone – is formed by Regulation (EU) 1466/97, of the 7<sup>th</sup> July, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation 1467/97 of the same date, on speeding up and clarifying the implementation of the Excessive Deficit Procedure (EDP).

Art. 121 TFEU outlines the “preventive arm” of the SGP and is deepened by Regulation 1466/97 which sets forth specific instruments for economic stabilization policy. Article 126 of the Treaty forms the basis for the so-called “corrective arm” of the SGP and the EDP and is deepened, namely by Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

The “preventive arm” rules of the SGP bind EU Member States to their commitments towards sound fiscal policies and coordination by setting those EU Member states’ medium-term budgetary objectives (MTO’s). Euro-zone Member States must outline how they intend to reach their MTOs in *stability programmes*<sup>26</sup>, which are then evaluated by the European Commission during the so-called *European Semester*, specifically designed, since 2011, to reinforce the surveillance and coordination, at European level, of the economic policies and budgetary planning exercises of the Member States<sup>27</sup>.

Differently, the “corrective arm” of the SGP is the EDP which is basically triggered when a member state’s budget deficit exceeds 3% of GDP. When the Council decides that a Member State’s deficit is excessive, it addresses recommendations to that Member State, setting also a deadline for bringing the deficit back below the reference value. If an euro-zone Member State fails to comply with such recommendations, financial sanctions, including fines, might be imposed by the Council.

The need for political agreement within the Council, in order to impose sanctions typically meant, since the adoption of the SGP in 1997, that its “corrective arm” lacked effectiveness. This was well revealed in 2002 and 2003, when the Commission initiated excessive deficit procedures against Germany and France. At the time, these Member States adopted measures not considered effective enough by the Commission. The Commission therefore, urged the Council to pursue more forceful action, but the Council decided not to follow the Commission’s recommendations. We all recall that the Commission challenged the Council’s decisions before the ECJ, but the Commission’s claim was, basically rejected by the Court of Justice.<sup>28</sup> In essence, it became clear that, at the end of the day, the Commission could not request the Council to take effective

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annexed to the Treaties.

26. Member States outside the euro-zone submit *convergence programs*.

27. Based on its assessment on the stability and convergence programs, the Commission draws up country-specific recommendations on which the Council adopts opinions, including recommendations for appropriate policy actions for member States.

28. See Case C-27/04, *Commission v Council* [2004] ECR I-6649.

measures against France, Germany or any other Member State infringing the Pact. The Pact was eventually reformed in 2005<sup>29</sup>. Its rules were made more flexible, allowing for even greater discretion. It became relatively clear that there were no credible sanctioning mechanisms put in place to enforce the SGP.

Since 2011, the reinforcement of the principles of economic governance and coordination of financial policies, has, however, been significantly deepened. This is so in order to combat more effectively the financial crisis, particularly in the Eurozone, but also in order to raise the quality and robustness of the EMU. This translated into the adoption of new and strengthened mechanisms and tools directed towards the prevention, monitoring and correction of economic and financial imbalances in the Member States, with the consequent increase on Member States binding commitments towards the relevant European Institutions.

As regards, in particular, the strengthened mechanisms regarding the “corrective arm” of the SGP, Damian Chalmers has pointed out that “[t]he finding of an excessive deficit brings Member States and EU institutions into a process of co-government of debt and deficits”<sup>30</sup>. This process is one of «wide-ranging and intensive nature» requiring from each Member State in EDP the «setting out [of] structural reforms to ensure an ‘effective and durable correction’ of its deficit”. According to Chalmers, “[c]o-government is not simply therefore about debt reduction but about extensive reform which will limit the State’s need to borrow, either because it has smaller expenditure requirements (i.e. a smaller welfare State) or has secured higher tax receipts”. This process shall therefore go “to the structure and rationale of a State’s fiscal and welfare systems”.

The measures adopted, in particular since 2011, came to establish, therefore, a renewed structure of European economic governance system, based on three main groups of regulatory instruments.

First the so-called “six-pack” adopted in November 2011, that the European Commission considered the “legislative package containing the most comprehensive reinforcement of economic governance in the EU and the euro area since the launch of the Economic and Monetary Union”<sup>31</sup>. This package had in view ensuring, in the words of the Commission, that a “broader and enhanced surveillance of fiscal policies, but also macroeconomic policies and structural reforms is sought in the light of the shortcomings of the existing legislation. [Moreover] [n]ew enforcement mechanisms are foreseen for non-compliant Member States”.

This six-pack is composed of:

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29. See Council Regulation (EC) N.º 1055/2005 amending Regulation (EC) N.º 1466/97 and Council Regulation (EC) N.º 1056/2005 amending Regulation (EC) N.º 1467/97.

30. See Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, *European Law Journal*, Vol. 18, Issue 5, September 2012, p. 680.

31. EU economic governance: the Commission delivers a comprehensive package of legislative measures, IP/10/1199, Brussels, 29 September 2010.

- Regulation 1175/2011/EU of the 16 November 2011 and Regulation 1177/2011 of 8 November 2011 which proceed to the changes to the (SGP). - Regulation 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area;
- Regulation 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area;
- Regulation 1176/2011 of 16 November 2011, on the prevention and correction of macroeconomic imbalances;
- Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

Second, the Treaty on stability, coordination and governance in the Economic and Monetary Union, of 2 March 2012 (Fiscal Compact or Fiscal Stability Treaty) which entered into force on 1 January 2013. It is an intergovernmental Treaty that is, however, closely related, both from an institutional point of view, and a substantive point of view, with European Union Law, in particular to the extent that it establishes obligations which are then embodied in EU legal acts.

Thirdly and last, the so-called “two-pack” adopted in May 2013, composed of:

- Regulation 472/2013 of 21 May 2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability;
- Regulation 473/2013, of 21 May 2013, on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

All these legal instruments, amount to a normative framework (or network of norms), which is complex and which develops and deepens the pre-existing legal framework on economic, financial and budgetary coordination in the Union, enshrined, in particular, in Articles 121, 126, 136 TFEU and in the original SGP.

The overall process through which many obligations are now reviewed and enforced has come to be known as the European Semester, already alluded. Though EU Law obligations regarding financial and economic stability are not limited to what is covered by the European Semester, most are, and for the sake of simplicity we mostly refer to the European Semester in general throughout this paper.

## *2.2 The relevance of EU Legal Acts on the definition of government deficit targets to achieve by EU Member States*

Article 126 (1) of the TFEU provides that “Member States shall avoid excessive government deficits”. This is recalled by the EU Legislator on Recital 4 of

Regulation 1467/97 – with the wording resulting from Regulation 1056/2005 and Regulation 1177/2011 – where it is stated that “Member States are, according to Article 126 TFEU, under a clear Treaty obligation to avoid excessive government deficits”.

Recital 6 of the same Regulation 1467/97 points out, moreover, that, despite the fact that “Member States remain responsible for their national budgetary policies” they remain “subject to the provisions of the Treaty” and “will take the necessary measures in order to meet their responsibilities in accordance with the provisions of the Treaty”.

Article 126 (2) TFEU, establishes, then, limits to the budget deficit of the Member States, in accordance with defined criteria which take into account the reference values specified in the Protocol on the procedure applicable in case of excessive deficit, annexed to the Treaties.

This protocol specifies that the reference values referred to in Article 126 (2) TFEU, are: – 3% for the ratio of the planned or actual government deficit to gross domestic product at market prices; – 60% for the ratio of government debt to gross domestic product at market prices.

Article 126 (6) TFEU provides, on the one hand, that “[t]he Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists”<sup>32</sup>.

Article 126 (7) provides subsequently that “[w]here the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period”.

Having in view speeding up and clarifying the implementation of the excessive deficit procedure, Regulation 1467/97, with its current wording<sup>33</sup>, provides, *inter alia*, in article 3 (4) that:

“The Council recommendation made in accordance with Article 126(7) TFEU shall establish a maximum deadline of six months for effective action to be taken by the Member State concerned. When warranted by the seriousness of the situation, the deadline for effective action may be three months. The Council recommendation shall also establish a deadline for the correction of the excessive deficit, which shall be completed in the year following its identification unless

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32. This was the legal basis for decisions, such as the Council Decision of 19 January 2010 on the existence of an excessive deficit in Portugal (2010/288/EU), which conclude that “that an excessive deficit exists in Portugal”.

33. That is to say, after the amendments introduced in 2011 by Regulation 1177/2011. This later Regulation is part of the Six-Pack and reinforces at the level of the proceedings concerning excessive deficits, the efficacy of the Recommendations of the Council and the sanction mechanisms in case of non-performance of such Recommendations.

there are special circumstances. In its recommendation, *the Council shall request that the Member State achieve* annual budgetary targets which, on the basis of the forecast underpinning the recommendation, are consistent with a minimum annual improvement of at least 0,5 % of GDP as a benchmark, in its cyclically adjusted balance net of one-off and temporary measures, *in order to ensure the correction of the excessive deficit within the deadline set in the recommendation.*<sup>34</sup>

On the basis of article 126 (7) TFUE complemented by these provisions of Regulation 1467/97 just mentioned, several Council country specific Recommendations have been adopted within the legal framework of Excessive Deficit Proceedings, involving several Member States<sup>35</sup>.

Even though the legal effects of EU recommendations are disputed, and article 288 TFEU even states, in general that “recommendations and opinions shall have no binding force”, as we will see further bellow, recommendations are undoubtedly “EU legal acts” that according to the Court of Justice “cannot be regarded as having no legal effect” and that “national courts are bound to take into consideration” namely in the context of the interpretation and application of national law. Moreover, as we will develop further, recommendations adopted in the context of the SGP Regulations (and of article 126 TFEU) have some very peculiar features that turn them into *sui generis* recommendations, which are probably recommendations only from a formal perspective. In other words, these Recommendations are, in substance, legally binding for member States – they have to be put in practice by the Member States to whom they are addressed and in case of non-compliance with those Recommendations, those Member States become subject to actual sanctions imposed by the Council.

Additionally, the changes introduced in 2011 to Regulation 1467/97, have strengthened the legal force attributed to the Council Recommendations in the context of an EDP. In effect, the Regulation now creates certain additional legal binding obligations ensuing from the above mentioned Recommendations.

For example, Article 3(4a) of Regulation 1467/97, as amended in 2011, provides that “[w]ithin the deadline provided for in paragraph 4, the Member State concerned shall report to the Council and the Commission *on action taken in response to the Council’s recommendation* under Article 126(7) TFEU. The report shall include the targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side *consistent with the Council’s recommendation*, as well as information on the measures taken and the nature of those envisaged to achieve the targets. The Member State shall make the report public<sup>36</sup>.”

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34. Emphasis added.

35. All the country specific recommendations and other information concerning the Excessive Deficit Proceedings of the various Member States can be found at [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/corrective\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm).

36. Emphasis added.



Also Article 7 of Regulation No 1467/97 (as amended in 2011) sets out in more detail, deadlines for the imposition of sanctions on the Member States that fail to act in compliance with the successive legal acts of the Council adopted “in accordance with Article 126(7) and (9) TFEU” which are, precisely, specific Council Recommendations addressed to Member States in EDP.

Moreover, it is worth recalling that, at TFEU level, Article 126(8) and (9), provide that “[w]here it establishes that there has been no effective action in response to its recommendations within the period laid down”, not only may the Council make its recommendations public, as also, if the Member State “persists in failing to put into practice the recommendations of the Council”, it “may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation”.

It appears from all these provisions that the specific recommendations addressed to a Member State under an EDP are legal acts that have to be complied with, or otherwise that Member State may become subject to penalties provided for, *inter alia*, in Article 126 (11) TFEU. Moreover, Articles 4 and 5 of Regulation 1173/2011 further provide for specific sanctions (interest and non-interest bearing deposits with the Commission) both in the context of a Member State failing to take measures “in response to Council recommendation” in the preventive arm of the SGP and in the context of the corrective arm of the SGP “if the Commission identifies particularly serious violations of budgetary policy obligations laid down in the SGP”.

In light of this, one could rightly consider that it does not matter, strictly speaking, to discuss, generally, whether Recommendations themselves, according to their nature, have binding force, since are the very provisions of the TFEU and Regulations that impose certain obligations on Member States, in particular to those under an EDP to comply with Council Recommendations. Such provisions, in particular, impose duties to act in line with those recommendations and to respect and to implement those recommendations. Moreover, as we have seen, the Treaty and EU Regulations do provide for penalties in case of non-compliance with such Council Recommendations.

Be as it may, however, Council recommendations addressed to Member States in the context of the SGP framework are EU administrative legal acts with significant diversity among them that might be regarded as having an “unclear” normative force<sup>37</sup>. Indeed some recommendations set more general goals or targets, some, more specific ones; some set forth more specific measures to be adopted by Member States to pursue such goals, some do not. The Council may introduce changes to its recommendations, and sometimes it considers that even

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37. See in this sense, Damian Chalmers, *The European Redistributive State*, pp. 683-684: “The measures — be they stability programmes, Recommendations, or corrective action programmes — are not required to have qualities associated with laws, such as those of generality or formal equality before the law. Instead, they are administrative measures which can be highly targeted in nature. Their normative force is, moreover, unclear”.



though recommendations have not been complied with by the Member States to which they were addressed, sanctions should not be applied to those Member States. In this context, it appears useful to go further on the analysis of the problematic of the legal effects of EU recommendations according to EU Law.

### *2.3 The legal effects of country-specific recommendations adopted by the Council*

When Article 288 TFEU expressly provides that “[r]ecommendations and opinions shall have no binding force”, this statement must be taken with caution. First, according to this article, recommendations and opinions are counted, side by side with regulations, directives and decisions, among the “legal acts” that the Institutions of the EU “shall adopt» «to exercise the Union’s competences”. Secondly, it is common knowledge there are opinions, such as those of the Court of Justice, which have binding force derived, namely, from the circumstance that the EU legislator has, in some instances expressly provided that such Opinions shall be respected<sup>38</sup>. Also recommendations cannot be regarded as deprived of any legal effects, or even deprived of any sort of binding character for Member States to whom they are addressed.

Thirdly, Article 267 TFEU states that The Court of Justice of the European Union shall have jurisdiction to give “preliminary rulings concerning [...] the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”. This includes all legal acts of secondary EU law described in 288 TFEU and, therefore, also recommendations.

In this regard, the Court of Justice has, in various occasions, been involved with the interpretation of recommendations of the Commission and with the problematic of the legal effects produced by such recommendations<sup>39</sup>.

In the *Grimaldi* judgment, the court did begin by stating that recommendations “even as regards the persons to whom they are addressed, are not intended to produce binding effects» and, in particular, that «they cannot create rights upon which individuals may rely before a national court”. However, it added that recommendations “cannot be regarded as having no legal effect” and that “national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where

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38. See, for instance, article 218(11) TFEU: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”.

39. See, for example, Judgments in cases 113/75, *Frecassetti*, [1976], and 90/76, *Van Ameyde*, [1977]. See also, judgment in cases 322/88, *Grimaldi v. Fonds des maladies professionnelles*, [1989] ECR 4407, C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I-8875 and C-318/08 to C-320/08, *Alassini et al.* [2010].

they are designed to supplement binding Community provisions”<sup>40</sup>.

The Judgment of 2003 in *Altair Chimica*<sup>41</sup> ruling on the interpretation of Recommendation 81/924/EEC of 27 October 1981 concerning the tariff structures for electricity in the Union, seems to reveal that the Court might go beyond calling national jurisdictions to “take recommendations into consideration in order to decide disputes submitted to them” and affirming a duty of consistent interpretation of national provisions with recommendations. In *Altair Chimica*, the Court held, in effect, that although the Recommendation at stake gave “indications as to the different costs that the prices may include, there is nothing in it to suggest that it can be interpreted as applying to the introduction of a tax on electricity consumption”<sup>42</sup>. The Court then concluded that, in such circumstances, the recommendation at hand “[did] not prevent a Member State from levying surcharges such as those at issue in the main proceedings”. The reasoning of the Court clearly opens the door to an *a contrario* interpretation, according to which, if the Recommendation could be interpreted in the sense that it applied also to situations involving the introduction of taxes on electricity consumption, then, notwithstanding being a recommendation, it would prevent a Member State from charging supplements like those involved in the proceedings at hand. In practice, the result would be that the Member State would be prevented, according to EU Law, to act in violation of the recommendation. In essence, the Court’s reasoning relies much more on the interpretation of the content of the Recommendation in order to realize its substantive scope of application, than on the rather formal element that what it had at hand to interpret was a recommendation, non-binding according to the black-letter of article 288 TFEU.

Be as it may, it clearly results from the jurisprudence of the European Court of Justice that recommendations, even if they are not considered legally binding – at least in the sense that «they cannot create rights upon which individuals may rely before a national court» – may produce legal effects, and, notably, an obligation to interpret national law in light of such recommendations<sup>43</sup>.

It may also happen that, in certain areas of the law, such recommendations may acquire an even more binding legal effect. This will be so, when certain EU provisions, namely of Regulations, expressly refer to recommendations and order Member States to comply with them, thus turning such recommendations,

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40. See *Grimaldi v. Fonds des maladies professionnelles*, paragraph 18, *Altair Chimica*, para 41 and *Alassini et al.*, paragraph 40.

41. See C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I-8875.

42. See *Altair Chimica*, paragraph 42.

43. According to Damian Chalmers/Gareth Davies/Giorgio Monti, *European Union Law*, 2<sup>nd</sup> edition, Cambridge, 2010, p. 300, “[i]t might have been thought, in the wake of Von Colson, that national courts would be required to consider only such instruments as may be directly enforceable in national courts (i.e. Treaty Provisions, Regulations, Decisions and Directives). As early as 1989, however, the Court established that the duty of consistent interpretation was a free-standing principle in its own right. It may have been developed in the context of seeking ways to make Directives effective before national courts, but from as early as 1989 that has not been its sole purpose. In *Grimaldi* the Court held that national courts were to take into account not just of ‘hard law’ but also of legally non-binding recommendations”.

in substance, into truly mandatory legal instruments. In this instance, it is not that recommendations will, self-standing, have legal binding force, but that such legal binding force results from a rule mandating compliance with such recommendations. That may be the case in this particular area of the law.

In particular Council Recommendations addressed to Member States in the context of EDP's, should be regarded as EU legal acts vested with a special or reinforced legal significance for the Member States to which they are addressed, *vis-à-vis* recommendations adopted by EU Institutions in other domains. Council Recommendations addressed to Member States in the context of EDP's should be considered to have, as we have already alluded, a binding character derived from the express reference made to them not only by article 126 TFEU, but also by EU Regulations, namely, Regulation 1467/87 which is a legal act with unequivocal binding force and directly applicable in all member States according to article 288 TFEU.

When EMU Treaty Provisions and SGP Regulations provide that national budgets have to be coherent with the Recommendations adopted in the context of the SGP and that Member States must put in practice and comply with such recommendations, it is appropriate to consider that we are in the face of Recommendations that, by virtue of those other rules, legally bind member States to whom they are addressed. It might be said that these Council Recommendations, in substance, decisively complete/complement the SGP Regulations which unequivocally have a binding force of their own. This is even more so if we recall that non-compliance with such Council recommendations, triggers the operation of the sanction mechanisms alluded in article 126(11) TFEU and the proceedings to be followed for the adoption of those sanctions detailed in articles 5, 6 and 7 of Regulation 1467/97 as well as, additionally, in articles 4, 5, 6, and 7 of Regulation 1173/2011. Given this procedural legal framework of control by the Commission and the Council (with a *quasi-automatic* character)<sup>44</sup>, of the fulfillment of the national deficit objectives and of the measures which might be included to that effect in the recommendations, in particular in those recommendations addressed to Member States in EDP, such Recommendations can hardly be regarded as deprived of legal effects as regards the Member States to whom they are addressed.

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44. See E. Chiti / P. Teixeira, The Constitutional Implications of the European Responses to the Financial and Public Debt Crises, *Common Market Law Review*, vol. 50, 2013, p. 701, considering that "the increasing involvement of the EU executive power in fiscal matters takes place mainly through quasi-automatic procedures". See also E. Marco-Peñas, Reform of the budgetary discipline of the European Union and the role of the Court of Justice, *Paper submitted to the 2014 World Congress of the International Association of Constitutional Law – Workshop 12 – Constitutions and financial crises*, 2014, p. 13, referring to the reinforcement of sanctions mechanisms on the six-pack, namely on Article 5(2) of Regulation 1173/2011 (non-interest-bearing deposits), points out that the system of reverse qualified majority voting in Council upon the proposal of sanctions by the Commission "constitutes an advance in its execution, to the extent that it provides a certain automaticity to the decision of the Commission". See also, P. Schlosser, 'Tightening the knot': strengthening fiscal surveillance in EMU during the euro crisis, *LUISS Guido Carli – School of European Political Economy, Working Paper*, 12/2015, 1-34, p. 9.

In other words, Council Recommendations adopted in the context of the SGP, and in particular those addressed to Member States in EDP, are EU legal acts that, not only produce legal effects for the Member States to whom they are addressed, but also might be rightly regarded as effectively or ‘de facto’ binding those Member States, since non-compliance with those recommendations involves an actual and concrete risk for such Member States of becoming subject to significant sanctions.

Given the peculiar binding force of these Council Recommendations, the principle of sincere cooperation among Member States and the EU, set forth in article 4 TEU where it is stated that Member States “shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”, must not be regarded with indifference in this context. Council Recommendations addressed to Member States and adopted in the legal framework of the SGP are, without a doubt, EU legal acts and, even more, since they are expressly referred to by Treaty provisions and the SGP Regulations, as having to be put into practice and complied with by the Member States to which they are addressed. In this context it becomes clearer the need for these Member States, in light of the principle of sincere cooperation, to ensure compliance with them.

Of course, the specific normative force of Council recommendations adopted in the context of the SGP, may still raise some doubts and difficulties, in particular when those recommendations have a more general character, setting forth deficit targets and objectives but no specific measures to achieve them. The legal binding character of such recommendations cannot, in any case, be excluded, well to the contrary. It will certainly require for a national court confronted with this question to refer the matter to the European Court of Justice.

The Portuguese Constitutional Court, opted, however, in its later judgment on the crisis, for not referring such questions to the Court of Justice since it was of the view that the legal nature of such recommendations was irrelevant once they only impose objectives or goals but do not address the means to achieve them. Is this really the case?

#### *2.4 The relevance of EU Legal acts as regards the type of measures to be adopted by Member States in order to comply with government deficit targets*

The rules of the European semester and financial and economic governance of the Euro do not simply establish some deficit or debt objectives. Indeed, the Union law also imposes obligations as to how, specifically, these deficit targets should be guaranteed by the States in the “preventive” and, particularly, in the excessive deficit procedure (the “corrective” arm of the SGP).

The relevant regulations make it clear that the obligations imposed may extend so far as to the type of measures appropriate to achieve the necessary budgetary targets. See article 6 (1) of Regulation 473/2013, Article 7 (2) and Article 10 (3)

of the same Regulation as well as Article 2-A (3) of Regulation 1466/97.

A brief look at the Recommendations approved by the Council makes clear that, particularly for a country in excessive deficit procedure, it is the ‘how’ and not only the ‘what’ that is at stake. Such recommendations can prioritize or impose certain types of measures to achieve the required objectives.

It is certainly possible to say that those are still goals to be achieved and not specific measures. They would be more concrete objectives but still objectives, not questioning the objectives vs means distinction in which the Constitutional Court has supported its approach. But then, if we don’t want to simply play with words, the question becomes the extent to which the means that the Court considers constitutionally acceptable to achieve the objectives are still compatible with the objectives themselves. In other words, if the reduction of the public wage bill imposed in a Council Recommendation is, in light of the Courts approach, to be considered an objective (and not a means to achieve the broader budget deficit objective) constitutional review should either assess the constitutionality of the austerity measure in light of the scope of alternative measures available for that specific objective or then address the constitutionality of the objective itself (raising the difficult question of a possible conflict between the constitution and EU Law). What cannot be done is to ignore the reality of EU constraints by reverting always to the broader deficit objectives in order to artificially preserve a hypothetical budget autonomy of the legislator with respect to the type of measures to be adopted.

This difficulty and its consequences is rendered clear in a recent article by a member of the Constitutional Court. In this article it is recognized that the objectives imposed on the Portuguese States extended so far as to impose an “obligation to reduce a certain percentage of public expenditure concerning civil servants or health services”. But, the illusion of the objectives vs means distinction, then leads the author to state that “raising taxes” may be one of the “certainly appropriate means to achieve the delineated objectives”. How can public expenditure be reduced by raising taxes is difficult to conceive. This example demonstrates well how the artificial goals vs. means distinction might have lead the Court to provide what becomes an artificial solution to a real problem...<sup>45</sup>

If anything this highlights the extent to which a strict separation of goals and means is methodologically flawed and cannot provide a sustainable basis for the Court to claim that EU law leaves untouched the margin of choice of the legislator so long as it achieves the ultimate deficit targets.

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45. See Ana Maria Guerra Martins, Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law, p. 702: “the Memoranda imposed on the Portuguese state the obligation to reduce a certain percentage of the public expenditure concerning civil servants or health services, but they did not explicitly indicate the concrete measures that the government had to take in order to achieve this goal. Cutting wages, pensions or social benefits, *raising taxes* or intervening in public private partnerships are certainly appropriate means to achieve the delineated objectives” [emphasis added].

The reality is that European Semester rules bring with them much more deep and difficult questions for national constitutions: the extent to which the EU can interfere with national budgetary autonomy and if and how EU obligations ought to be embedded in the interpretation of national constitutional provisions regarding the exercise of budgetary power and its impact on economic and social rights.

The objective vs. means distinction used by the Court may avoid this hard question but it will not make it go away. On the contrary, the more it will be ignored the higher becomes the likelihood in the longer term of a growing tension between the domestic and European constraints.

Such approach also comes at a cost for the Constitutional Court's "participation" in the shaping of EU Law in this domain. We said before that the approach followed by the Tribunal Constitucional is intended to make the national constitution's interpretation fully immune to EU law: but, in this sense, it also makes EU law and its development fully immune to national constitutional principles and influences.

This leads us to our second critique of the Court's jurisprudence of crisis in its relationship with EU Law. It ignores the nature of the EU legal order in such a way as to put into question its institutional obligations under this legal order but also abdicating from its own power in that context.

In our view these obligations result not only from EU law but also from the European integration and openness clause included in the national constitution. It is both EU law and national constitutional law that impose on the constitutional court an institutional commitment to contribute to the EU legal order.

This institutional commitment does not authorize the Court to use the national constitution as an obstacle to EU law but it is also not simply an obligation to defer to EU law or use the force of the national constitution to enforce EU law. It is a much more complex obligation. The purpose is two-fold: first, to establish a systemic identity between the fundamental legal values of the national constitution and the EU legal order, justifying the incorporation of EU Law into the national legal order (including the Constitution itself); second, to commit to a development of the EU legal order in light of those values. The latter commitment must reflect itself in the construction of the EU legal order as a product of the plurality of constitutional orders that are its foundation. At the same time, this commitment is only fulfilled if it entails on the part of national and European courts an engagement to make compatible the conceptions of their respective legal orders.

When both the national constitution and the EU legal order assume a fundamental identity as to their core legal values, including the rule of law and the protection of fundamental rights and principles this helps preventing constitutional conflicts but also to guarantee the effective development and application of EU Law in a deeper sense. EU Law should only be adopted if it conforms to the fundamental principles common to our constitutional traditions but, at the same time, it can

only be expected to be effectively implemented in national legal orders that also conform to those principles. Such an identity of fundamental legal values is therefore an existential requirement for a genuine and effective EU legal order.

But the meaning of these legal principles is not always unequivocal and also changes with time. This means that this identity cannot simply be a given but it needs to be constantly constructed in common. Assuming that the identity exists without engaging in a cooperative and dialogical process in the interpretation of such principles does not prevent conflicts but simply ignores them.

When the Constitutional Court simply assumes that there can be no conflict with EU Law since the legal principles it uses to review the measures under challenge are also part of the EU legal order it simply begs the question of the interpretation of those legal principles... Different institutions (including judicial institutions) can make a different interpretation of such principles. The fact that they exist in the EU legal order does not mean that they will be given the same meaning by the European Court of Justice.

By acting in this way, and not referring, for example, to the case law of the ECJ with regard to those principles or even requesting a preliminary ruling, the Constitutional Court may be trying to avoid an open conflict between what itself understands to be the right interpretation of those principles under the national constitution and what it fears might be a different interpretation of those principles by the European Court of Justice. However, this may be simply deferring the problem instead of facing it, and it comes at an important cost.

On the one hand, it does not contribute to a coherent interpretation and application of EU law. The obligations of EU law need to be uniformly applied in the different Member States and that includes, for example, both the legal binding force of the Council recommendations under the European semester but also the compatibility of those recommendations with certain legal principles and fundamental rights.

On the other hand, the Court, at the same time, abdicates of its possible influence in shaping the interpretation of those legal principles or the obligations stemming from the European semester.

In this respect, it is to be noted that while the Portuguese Constitutional Court has decided not to engage in dialogue with the Court of Justice of the EU, other Portuguese courts have made preliminary references to the Court of Justice on the compatibility of austerity measures with the Charter of Fundamental Rights and, namely, with EU social rights therein<sup>46</sup>. Portuguese labor courts, in

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46. See Order of the Court of the 7<sup>th</sup> March 2013, C-128/12 *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA*, ECLI:EU:C:2013:149; Order of the Court of 26<sup>th</sup> June 2014, C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros SA*, ECLI:EU:C:2014:2036. See also Order of the Court of the 21<sup>st</sup> October 2014 C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Direta Companhia de Seguros*, ECLI:EU:C:2014:2327.



particular, have asked the Court of Justice to rule on the compatibility of the wage cut to civil servants included in the Budget Laws of 2011 and 2012 with, among others, the principles of non-discrimination and of fair and just working conditions provided by the Charter. The Court of Justice has consistently replied in its rulings in all these Cases that “it clearly had no jurisdiction to hear and determine the questions referred [...] taking into account the fact that the order[s] for reference did not contain any specific evidence to support the view that [the national laws allegedly in violation of the Charter] intended to implement EU law”<sup>47</sup>.

It is worth mentioning, however that such cases were framed in terms of challenges to national provisions (and not on the compatibility of EU provisions themselves with the Charter or on the effects of EU obligations for national provisions) and involved national provisions that ultimately were adopted – as the referring jurisdiction in at least one of those cases expressly pointed out – “[f]or the duration of the Economic and Financial Assistance Programme (EFAP), as an exceptional measure of budgetary stability”<sup>48</sup>. According to Cisotta and Gallo, the Court of Justice seems “willing to preserve the essentially international nature of the rescue package, probably at the same time keeping the EU legal order uninvolved in the delicate issue of the contrast between austerity measures and fundamental rights”<sup>49</sup>. Of course, as regards so-called “Bailout Measures” such as those involved in Portugal for the duration of the EFAP, the nature of EU Law of such measures is debatable<sup>50</sup>. However, when “Stability and Growth Pact measures” are at stake it is not easy to challenge their EU Law nature. Therefore, as long as the application of such measures is at stake at national level, the ECJ may not easily decline the analysis of questions possibly referred by national courts, concerning their interpretation, or validity.

This leads to a final reflection. As we have seen, Council Recommendations adopted in the context of the SGP Regulations, and namely those addressed to

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47. See for instance Orders on cases C-264/12, para. 19, and C-665/13, paragraphs 13 and 14.

48. See Order of the ECJ on case C-665/13, para. 4. The referring jurisdiction (the Tribunal de Trabalho de Lisboa) expressly mentioned in its reference for preliminary ruling to the ECJ the Economic and Financial Assistance Programme, agreed between the Portuguese authorities and the European Union and the International Monetary Fund (IMF) in May 2011 which constituted the basis for the adoption of the austerity legal measure adopted by the Portuguese legislator and whose compatibility was being challenged by the plaintiff Union (Sindicato Nacional dos Profissionais de Seguros e Afins). The EFAP was formalized in the letter of intent, signed by the Governor of the Bank of Portugal and the Minister of State and Finance, and the memoranda of understanding (the Memorandum of Understanding on Specific Economic Policy Conditionality, with the European Commission, and the Memorandum of Economic and Financial Policies, with the IMF).

49. See R. Cisotta and D. Gallo, The Portuguese Constitutional Court Case-law on Austerity Measures: a Reappraisal, in Claire Kilpatrick and Bruno De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, *EUI Working Papers*, 2014/05, p. 89.

50. See, for instance, on the discussion about the EU legal nature of Bailout Measures, R. Cisotta and D. Gallo, *op. cit.*, and Claire Kilpatrick, Are the Bailout immune to EU Social Change because they are not EU Law?, p. 398.



member States under the EDP, are EU legal acts which are not deprived of legal effects for the Member States to whom they are addressed. To the contrary, they are *sui generis* recommendations, with a binding force derived from the Treaty and EU regulations' provisions which (under the threat of sanctions) mandate Member States to comply with those Recommendations and put them in practice.

But what legal relevance may those Council Recommendations have in a context where legislative measures adopted, at national level, to fulfill the goals, objectives and measures prescribed by those Recommendations, are allegedly contrary to national Constitutional provisions or principles? In other words, what is the relevance of such Council Recommendations *vis-à-vis* member States' Constitutional provisions?

It is not necessary (or desirable) to adhere to an absolute conception of the primacy of EU law to ensure compliance with the obligations that the law of the Union imposes on Member States either in the context of the EDP or in the context of the European Semester. However, in our view, the interpretation of Member States Constitutions should minimize the risks of conflict between such constitutions and EU Law commitments for such Member States.

All efforts must be made to ensure compliance with Council Recommendations through an interpretative conciliation of national Constitutions with the legal acts of the European Union be they the TFEU, the SGP EU Regulations or Council Recommendations themselves (adopted within the SGP framework), which set forth those obligations for Member States. It is sufficient and preferable, in short, that the interpretation of national Constitutions should be made in a way that minimize the possible risks of conflict between those Constitutions and EU Law.

In a non-hierarchical framework of cooperation and compromise between the national Constitutional jurisdictions and European jurisdiction regarding the interpretation and application of the national Constitutions and European Union law, it is possible that such cooperation takes place, preferably, through the preliminary ruling mechanism whenever the national jurisdiction has doubts regarding the interpretation of the relevant legal acts of the Union law, namely of the specific measures contained in those Recommendations and their scope. If that is not the case, however, national constitutional jurisdictions should undertake an interpretation and application of the Constitution in accordance with Union law, in order to minimize as much as possible the risks of conflicts between national and EU law and also, of course, the risks of exposing the Member States to sanctions possibly adopted in case of non-compliance with the EU Council Recommendations.

### **3. The comparative contexts**

There is a final issue resulting from what we defined as the Tribunal Constitucional's autarchic approach to the EU legal order. If adopted by other constitutional courts it risks putting the constitutional commitments of different

Member States under EU Law in conflict themselves.

This issue has not raised attention so far because comparative exercises have focused on the jurisprudence of crisis of the constitutional courts in the countries interested by austerity measures. In this final version of the paper we will follow this path as well; but we also argue that it is equally, if not more interesting, important to compare such case laws with that of the constitutional courts of creditors countries, in particular Germany.

### *3.1 The first comparative context: an outlook on different debtors' jurisdictions*

Several studies have been devoted in these years to a comparative appraisal of the constitutional jurisprudence in European countries stemming from the crisis<sup>51</sup>.

The case law of Portugal has been often presented as a paradigm of judicial activism in this respect<sup>52</sup>. The Tribunal Constitucional's judgments, in particular those related to various austerity measures contained in the 2011, 2012, 2013 and 2014 Portuguese State Budgets, have been described as the forefront of the new tendency by national constitutional courts to sanction political responses to the economic and financial crisis. Such a tendency has been described as a major change prompted by the crisis, since it goes against a well established tradition of judicial restraint in adjudicating social rights and intervening in the political process' sphere of discretion<sup>53</sup>.

The same path has been in various ways followed, according to recent comparative surveys, by a bunch of debtors countries' jurisdictions, according to the specificities of their own legal systems: a new judicial attention on social rights curbed by austerity would be visible at least in Italy, Greece, Spain, Latvia, Romania<sup>54</sup>.

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51. Among the many, see Claire Kilpatrick / Bruno de Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, *EUI Working papers*, 2014/05; C. M. Akrivopoulou, *Striking Down Austerity Measures : Crisis jurisprudence in Europe*, *Int'l J. Const. L. Blog*, June 26 2013, available at the website <http://www.icconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe/>, and Xenophon Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Farnham, 2013.

52. See, for instance, D. Roman, *La jurisprudence sociale des Cours constitutionnelles en Europe: vers une jurisprudence de crise?*, *Nouveaux Cahiers du Conseil Constitutionnel*, n. 45, 2014, p. 7: "(...) c'est certainement du Portugal qu'est venu, à ce jour, le meilleur exemple d'interventionnisme judiciaire en matière de politiques d'austérité".

53. *Ibidem*, p. 1: "La justiciabilité des droits sociaux poserait de la sorte des questions constitutionnelles spécifiques et recevrait une réponse atténuée (...) Un tour d'horizon des jurisprudences constitutionnelles européennes en matière de droits sociaux amène néanmoins à nuancer le constat : d'une part, le panorama est assez contrasté, et montre la diversité des politiques jurisprudentielles menées par les juges suprêmes en Europe (...) D'autre part, la crise économique et financière récente et les politiques européennes d'austérité adoptées dans la foulée ont contribué récemment à un renouvellement des cadres de pensée, faisant du juge un garant des droits sociaux et, partant, un acteur majeur de l'État de droit social".

54. See the similar reflections, on the same cases, by D. Roman, *La jurisprudence sociale*

The first level of comparative analysis offered by scholars is surely interesting, and useful for understanding the growing political tensions in European countries and how they are more and more taking the form of judicial initiatives.

Still, such a first level of analysis is limited, and we argue that it is possible to go more in depth with a comparative analysis, in search of other meaningful results.

The first aspect to be noted, in this respect, is a sort of paradoxical mismatch in the results proclaimed by the comparative research.

The new attention posed by judges in the constitutional adjudication of social rights is described, as said, as breaking an opposite tradition of restraint; however, at the same time, those comparative studies that focused in particular on the interpretative methods adopted by courts in such adjudication highlighted some curious aspects. In particular, it has been described, at least in the case of a large bunch of debtor countries' constitutional jurisdictions, a clearly prevailing continuity in terms of interpretative tools employed by courts<sup>55</sup>: actually the renewed judicial enforcement of social rights against austerity measures is depicted, in terms of legal reasoning and argumentation, as very much in consistency with the courts' previous judgments on the same matters.

This is at first sight paradoxical: taken to the extreme, it would mean that a major jurisprudential change would have happened without any trace of evolution at the level of interpretation...

But, in hindsight, this is very much connected with the analysis we made of the Portuguese case law, and actually makes once again of the Portuguese case a paradigm of a more specific, complex phenomenon.

We defined the *Tribunal Constitucional's* jurisprudence as an exercise of autarchism, played by the removal/repression of the interrelation of EU law and national constitutional law in the adjudication on the recent austerity measures. Such removal, we also said, is performed precisely by perpetuating old interpretative schemes vis-à-vis new substantial challenges in national constitutional budgetary laws. In other words, the hermeneutics of national constitutionalism are "protected" from any impact from EU Law. Such practice could be classified as a *removal* since it aims at avoiding that different competing interpretations on the same matters may find their space in the multilevel/plural judicial architecture and need to be reconciled.

Portugal can be seen again, in this specific respect, as a major example of a common trend that we can clearly identify at the comparative level.

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des Cours constitutionnelles en Europe: vers une jurisprudence de crise?, and Kilpatrick and De Witte, Social Rights in Times of Crisis in the Eurozone : The Role of Fundamental Rights' Challenges.

55. See C. Fasone, Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective, *EUI Working Paper MWP 2014/25*, in particular at pp. 3-4, 16-17. At p. 3: "elements of continuity seem to prevail, even in the case of Portugal, whose Court has been severely criticized, in particular for judgments from 2013 onwards".

Several controversies of constitutional nature concerning austerity measures adopted in various jurisdictions showed the same dynamics, and thus developed the same tactical removal.

In Greece, for instance, given the absence of a constitutional court, constitutional complaints took the way of formal demands of annulment of general administrative acts executing legal provisions before the local Council of State, i.e. the supreme administrative court<sup>56</sup>. One of the most discussed cases, the Decision 668/2012 by the Council of State Plenum, 20 February 2012, took the form of a complaint by Athens Bar Association (DSA) and several individual lawyers, the Supreme Administration of the Public Employees' Unions (ADEDY), the Greek Confederation of the Civil Pensioners (POPS), the Journalists' Union (ESHE), the Technical Chamber of Greece (TEE), the Federation of Workers' Executives and many other trade union associations, together with private individuals, against the Minister of Finance and the Minister of Employment and Social Security. The action sought the annulment of several (regulatory, general and individual) administrative decisions legally based on Law 3845/2010, ratifying the Memorandum of Understanding agreed with international institutions, recognizing constitutional competences to those organizations, and implementing the measures under the Memorandum of Understanding: in particular those measures imposing cuts on the revenues (wages and pensions) of the plaintiffs were under challenge. Various arguments were put forward by the plaintiffs, ranging from formal doubts on the voting procedure or on the delegation of powers to sign memoranda to many arguments based on the supposed infringement of human rights. These were framed, as in the Portuguese cases, as references to a vast number of economic and social rights, including the right to property and to economic liberty, and collective labour rights; and were measured against the usual backgrounds of the principle of equality, of the proportionality test and of the legitimate expectations of the plaintiffs. The general and automatic character of the measures was generally reproached, as well as their retroactive force and their permanent nature in some cases. It is important to note that the plaintiffs explicitly demanded a preliminary ruling by the European Court of Justice on the compatibility of the national measures and of the Council Decision 2010/320/EU to European law<sup>57</sup>.

Given this construction by the plaintiffs, it is important to note that the judgment rejected these early claims and confirmed the constitutionality of Law 3845/2010 and of the implementing administrative acts. But it is even more important to note how the reasoning of the court was modeled. In fact, it consisted first of a long contextualization about the European treaties and on the process of European integration known by Greece until the economic crisis, as well as of the relevant international conventions, especially regarding the International Monetary Fund. Such a long contextualization led the court to reject the contested violation on the lack of procedural and substantial conditions, by stating that «even though

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56. See the country report written by A. I. Marketou and M. Dekastros, Greece, at the website <http://eurocrisislaw.eu.eu/greece>, in particular at point V.4.

57. *Ibidem*, at X.8.

it was a result of negotiations and agreement between Greece and certain international authorities, the Memorandum did not constitute an international treaty binding the Greek Government, but only the program of the Government for the confrontation of the economic problems of the country»<sup>58</sup>. Therefore, as a mere political program, the Memorandum did not result in the transfer of competences to international authorities, it did not create legal norms and it did not possess a direct effect in the domestic legal order: very similarly to what we saw in Portugal, the MoU was depicted as a mere manifesto of goals and objectives, and it was, stated that only the implementing measures enacted, for its application, by the constitutionally competent organs enjoyed real legal value.

Moreover, the Greek court engaged in a classic proportionality test involving the alleged breach of economic and social rights and the legitimate expectations of the plaintiffs, and concluded, in this instance somehow differently from the Portuguese Court, that the cuts in the salary, the allowances and the pensions of the public sector employees were justified by the compelling public interest of consolidation of the public finances, embodied in the common interest of the Eurozone member states.

The measures were part of a general economic programme planned and negotiated by the Greek Government to face the economic crisis: the judges considered them as not manifestly inappropriate or unnecessary for this purpose, according to the reasonable appreciation of the legislator vis-à-vis such a public interest. Also in here, the “quasi-transitional character”<sup>59</sup> of many measures contained in the Law 3845/2010 played an important role for finding them proportional.

All in all, it must be noted that in the Decision 668/2012 by the Greek Council of State Plenum we find precisely the same interpretative moves of the Portuguese constitutional tribunal, in terms of minimization of the legal value of the international acts on the context of which the national provisions were adopted and a consequent construction of proportionality tests. In this respect, it must also be noted that the Decisions n. 1283/2012 and n. 1284/2012, also published on the 2<sup>nd</sup> April 2012, were discussed in the same Plenum and are identical in reasoning.

Another interesting example in this respect can be found in Cyprus.

As also emphasized by a specific country report commissioned by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament<sup>60</sup>, the local Supreme Court recently ruled on two important cases on austerity measures prompted by the crisis. These took the form of pension cuts in the public sector.

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58. Ibidem.

59. Ibidem.

60. See C. Demetriou, The impact of the crisis on fundamental rights across Member States of the EU, *Country Report on Cyprus, Directorate General for Internal Policies, European Parliament*, available at the website [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510017/IPOL\\_STU\(2015\)510017\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510017/IPOL_STU(2015)510017_EN.pdf), pp. 66-67.

In June 2014, in a first ruling<sup>61</sup>, the court had to decide on the application of a group of public sector employees seeking to annul the legislative deductions of amounts from their salaries<sup>62</sup>. They claimed that those deductions violated the Cypriot constitution, and the construction of their arguments was typical: they invoked economic and social rights, the principle of proportionality, and their legitimate expectations as a specification of the principle of equality.

The Supreme Court with a majority decision rejected these claims; also in here, the repeated recommendations from the Council of the EU towards the Cypriot government to take measures to reduce public spending and reduce public deficit were explicitly recalled by the judges, but as a mere contextualization for a typical proportionality test to assess whether the political process adjusted the public spending in a reasonable manner. In this respect, the conclusion of this first judgment was to acknowledge a wide discretion of the state to manage its finances.

The second Cypriot decision of October 2014 was different<sup>63</sup>. This had to do with a Law of 2011 which abolished multiple pensions for state officials who take up a second post following their retirement<sup>64</sup>, obviously as an effort to reduce public spending also of symbolic nature. A group of retired public officers affected by the Law sought its annulment by claiming a violation of the right to property as embodied in the local constitution and the ECHR. The Supreme Court, in this case, decided in favor of the applicants: the “European obligations” of Cyprus were again recalled as a contextualization, but were considered as articulating mere broad objectives or goals, since the reasoning stressed the point that “any restrictions to fundamental rights can only be done in accordance with the Constitution and there has to be a pressing need for these, which must be shown in the provisions of the law and in the justification report attached to the law”<sup>65</sup>, specifically, and this was not done in the case at hand.

The comparative review can interestingly proceed with the Latvian example.

Latvia is another so called debtor country in which Memoranda of Understanding with international institutions played a prominent position as bailout components. It was also the first jurisdiction in which, already in 2009, the local Constitutional Court had to adjudicate on the constitutionality of austerity measures<sup>66</sup>.

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61 See Giorgos Charalambous et al. v. The Minister of Finance and the Auditor General, Case no. 1480/2011, available at [http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_3/2014/3-201406-1480-11etc\\_minor.htm&qstring=%E3%E9%F9%F1%E3\\*%20and%20%F7%E1%F1%E1%EB%E1%EC%F0%EF\\*%20and%201480%20w/1%202011](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2014/3-201406-1480-11etc_minor.htm&qstring=%E3%E9%F9%F1%E3*%20and%20%F7%E1%F1%E1%EB%E1%EC%F0%EF*%20and%201480%20w/1%202011).

62. Law on extraordinary contributions of officials, employees and pensioners of the public service and the wider public sector of 2011 N. 212(I)/2011, available at [http://www.cylaw.org/nomoi/indexes/2011\\_1\\_112.html](http://www.cylaw.org/nomoi/indexes/2011_1_112.html).

63. Maria Koutselini-Ioannidou et al. v. the Republic, 7 October 2014, available at <http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/mero>.

64. Law on pensions of state officials (General Principles) of 2011, N.88(I)/2011, available at [http://www.cylaw.org/nomoi/arith/2011\\_1\\_88.pdf](http://www.cylaw.org/nomoi/arith/2011_1_88.pdf).

65. C. Demetriou, The impact of the crisis on fundamental rights across Member States of the EU Country Report on Cyprus, p. 67.

66. As noted by D. Roman, La jurisprudence sociale des Cours constitutionnelles en Europe:

The famous Latvian judgment n.º 2009-43-01<sup>67</sup> was another case in which cuts to social insurance schemes were at stake, and were again attacked by claiming that they run against economic and social rights of the individuals and the principle of proportionality. In this respect, the proportionality test played a decisive role, since the Constitutional Court found the legislative measures unconstitutional (in breach of the individual right to social security) because the Parliament did not foresee alternative and less restrictive measures and especially progressive ones to attain the same budgetary goals.

But the case is even more relevant because, in this context, the specific point of the legal value of international obligations was explicitly debated. The judgment clearly took into account that, in the MoU of 13 July 2009 signed by Latvia with the IMF and also, specifically, with the European Commission, there was a pledge by the national Government to make certain specific cuts, so specific to be precisely defined in their measure (“to reduce the outlays of pensions by 10 % for non- employed pensioners and by 70 % for employed pensioners”). Still, the judgment appears to consider the pledge, though so explicit and specific, as not legally binding: “*the fact that the above documents contain the pledge of the Government to adopt the challenged provisions does not mean that the international creditors have stipulated these particular conditions (...) The Constitutional Court did not receive any information attesting that the international creditors stipulated the adoption of the impugned provisions as a prerequisite for granting the loan (...) The measures in the [MoU] are to be characterized as an action of the State with the aim to reduce budget expenditure and, consequently, to be eligible for the international loan*”<sup>68</sup>.

Thus, in here as well, there was a judicial move to interpret the international obligations of the state so as to make the national constitutional interpretation immune from those.

Finally, it has already been noted by scholars that the same trend of removal of any possible conflict with supranational sources, by assessing the constitutionality of the national laws with no correlation to EU foundations, can be “implicitly” found also in the Romanian Constitutional Court case law<sup>69</sup>.

In Romania we had a large number of important decisions taken between 2009 and 2011 on the constitutionality of various measures cutting pay, pensions and social benefits, as well as collective bargaining and employment protection<sup>70</sup>.

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vers une jurisprudence de crise?, p. 5.

67. See Latvia, Constitutional Court, 21 December 2009, aff. nº 2009-43-01 (Disbursement Law), available in English at the website : [http://www.satv.tiesa.gov.lv/wp-content/uploads/2009/07/2009-43-01\\_Spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf).

68. Ibidem, p. 47.

69. See in this sense Claire Kilpatrick, Constitutions, Social Rights and Sovereign Debt States in Europe: a Challenging New Area of Constitutional Inquiry, *EUI Department of Law Research Paper No. 2015/34*, p. 23.

70. See the country report written by V. Vitas, Romania, at the website <http://eurocrisislaw.eui.eu/romania/>, and the list of relevant cases thereby described: Decision 1414/2009 (constitutionality of various measures concerning public sector employment conditions); Decision



The local Constitutional Court presented a reasoning that is very similar to the comparative case law that we already explored, based on a classic proportionality test: for instance, in a debated case in 2010, it made clear that the Government is in theory free to adopt restrictive measures in a context of “threat to economic stability”, and it even specified a possible numeric threshold; at the same time, pensions cuts with no specific limit in quantity or time were deemed unconstitutional<sup>71</sup>.

Still, it is important to note that the Romanian Constitutional Court, in its various judgments, did not tackle the point of the legal nature of the bailout measures and did not elaborate on that, “limiting itself to noting the Government was responding in a timely manner” to international obligations<sup>72</sup>. This is particularly relevant because there is a whole debate on whether, in certain specific cases of EU member states receiving bail-outs, the consequent measures are within or ‘outside’ or ‘beyond’ the scope of application of EU law and of its guarantees<sup>73</sup>: but Romania, scholars argue, can be surely considered as a EU-based bailout, where “loan conditionality is not contained only in the MoUs but in entirely standard EU sources too, Council Decisions and Council Implementing Decisions”<sup>74</sup>, and in particular on Decisions adopted under Regulation 332/2002, which fleshes out Article 143 TFEU<sup>75</sup>.

In the light of this brief review, we can say that a comparative analysis of national jurisprudences of crisis shows that the same dynamics showed by the Portuguese constitutional case law can be found, more or less explicitly, in almost all the EU

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1415/2009 (constitutionality of capping salary additions and a new regime for compensating overtime); Decisions 872/2010 and 874/2010 (constitutionality of cuts to pensions, public sector salaries, judges’ salaries); Decision 873/2010 (constitutionality of cuts to judicial pensions); Decision 1237/2010 (constitutionality of changes to basis for calculating public pensions); Decision 1655/2010 (prolongation of salary cuts in 2011); Decision 1658/2010 (cap on bonuses for public employees); Decision 383/2011 (changes to labour code e.g. increase in probation period, possibility to suspend labour contract, dilution of unions’ rights during elaboration of labour norms); Decision 574/2011 (outlawing right of association, collective bargaining and industrial action for liberal professions and magistrates; repeal of certain rights of unions to formulate proposals to local authorities); Decision 575/2011 (replacing collective bargaining on teachers’ salaries to setting them by law); Decision 765/2011 (cut in maternity leave and monthly child-raising allowance); Decision 1533/2011 (compatibility of scheduling state compensation to those whose pensions had been unconstitutionally reduced).

71. Decisions 872/2010 and 874/2010 of 25 June 2010, available at the website: [http://www.ccr.ro/files/products/D0872\\_101.pdf](http://www.ccr.ro/files/products/D0872_101.pdf). See on this also A. Zegrean, T. Toader, *La Cour constitutionnelle de Roumanie, Les Nouveaux Cahiers du Conseil Constitutionnel*, n.º 38, 1/2013, p. 251-259.

72. See Claire Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: a Challenging New Area of Constitutional Inquiry*, p. 31.

73. See Claire Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, p. 421.

74. *Ibidem*, p. 409.

75. E.g. Council Decision of 16 March 2010 amending Decision 2009/459/EC providing Community medium-term financial assistance for Romania, OJ L83/19, 30 March 2010, setting out loan conditions for Romania and stating that “the Commission shall agree with the authorities of Romania [...] the specific economic policy conditions as laid down in Article 3(5). Those conditions shall be laid down in a Memorandum of Understanding”.



debtor countries. We find, in their constitutional adjudication, the same kind of legal reasoning, even if the outcomes may not always turn out to be the same. Fundamentally, we identify an overall tendency to remove the Constitution from possible constraints of international or EU obligations and an autarchic construction of legal arguments.

The debate on whether this is ultimately correct in legal terms and desirable has already been done above but it is also put forward by authors such as Kilpatrick<sup>76</sup> as important to ensure proper EU accountability with respect to austerity measures<sup>77</sup>. In this respect, it is interesting to note that criticism on the actual state of the national jurisprudences and pleas for recognition of the EU law nature of bailouts can come from different ideological backgrounds and for different purposes: Kilpatrick seems to conceive the national courts' autarchic insulation as a strategic measure not to take into account the guarantees of EU's protection of social rights, and openness to supranational interplay as a way to strengthen and harmonize social protection<sup>78</sup>; the opposite reading could be equally plausible and maybe even more likely, since the realistic purpose of autarchic moves by national jurisdictions, as we saw, seems to be free discretion on whether to enforce or not national constitutional principles, in particular about social protection, with no openness and harmonization towards the dialogue in the European constitutional space. This latter view is reinforced by the fact that, as stated, the same approach has led to very different results in the assessment of similar austerity measures by national constitutional courts.

### *3.2 A broader comparative context: debtors vs. creditors' constitutional jurisprudence*

The last point on the openness to the European constitutional space leads us to the last relevant comparative reflection.

We have tried in the previous lines to specify and go more in depth in the comparison of debtors countries jurisprudences. Based on our reflections, we can say that almost all the debtors countries' constitutional jurisdictions draw, in political terms, a sort of case-by-case conditionality on whether certain austerity measures can be constitutionally accepted without effectively engaging with international and EU Law obligations. There is no confrontation and

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76. See Claire Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, and *idem*, *Constitutions, Social Rights and Sovereign Debt States in Europe: a Challenging New Area of Constitutional Inquiry*.

77. See Claire Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, p. 398 et seq.

78. Also termed, in her works, 'EU social constitution', whose core components are the EU Charter of Fundamental Rights, the treaties' social constitutional clauses and its social *acquis*: see Claire Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, p. 394 and, on the specific reading of the national courts strategic choices, Claire Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: a Challenging New Area of Constitutional Inquiry*, p. 32.

no harmonization through judicial dialogue; quite the opposite, the courts' interpretative moves lead them to insulate and decide on a case-by-case basis on the raising number of judicial attacks to austerity measures adopted in the framework of assistance programmes. The specific outcomes vary significantly however depending on the domestic proportionality assessment.

In this sense, the first obvious result of the jurisprudence of crisis is uncertainty: austerity measures can be struck down even years after their enactment; governments can be potentially in trouble to face the consequent financial imbalances; governments can be particularly in trouble when such imbalances endanger the fulfillment of EU and international obligations in the framework of assistance programmes. Uncertain is also the impact of all of this in EU Law itself.

But, in assessing the sustainability of the jurisprudence of crisis in an even more realistic vein, its evolution must be confronted with the evolution of creditor countries' constitutional jurisprudence. For the sake of the exercise, we can limit our analysis to two major examples.

The classic case in this respect is Germany. Its relationship with supranational obligations has always been based on conditionality by the Federal Constitutional Tribunal.<sup>79</sup> The recent evolution makes no exception, and since the beginning of the financial crisis in 2008 the *Bundesverfassungsgericht* had to decide several cases about the conformity of various German laws implementing EU rescue measures with the national Constitution.

A first challenge concerned already the Greek bailout and the EFSF rescue fund; it was decided with a famous judgment issued on 7 September 2011, which rejected the constitutional complaints as unfounded but developed important standards of review that set the ground for subsequent euro-case rulings. The judgment is in fact a manifesto of conditionality: it constructed the link between the *Bundestag*'s budgetary responsibility and the individual fundamental right to vote embodied in Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the constitution, and stated that this last is violated if the parliament loses or abandons its budgetary responsibility leading to a situation in which current or future compositions of the assembly do no longer have the possibility to make political decisions about the budget because the "indebtedness" of the German budget caused by a prior parliamentary decision does factually not allow for such decisions; as a result of the *Bundestag*'s budgetary responsibility, the Tribunal further pointed out that the parliament may not transfer its budgetary responsibility to other actors; the Court determined that the Federal Government could only issue guarantees if they are approved by the parliamentary Budget Committee beforehand, so that, as a result of the judgment, the German parliament had to modify the participation rights of the

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<sup>79</sup> See, among the many, N. MacCormick, *Juridical Pluralism and the Risk of Constitutional Conflict*, *Questioning Sovereignty*, Oxford, 1999, and, recently, G. Beck, *The German Constitutional Court versus the EU: self assertion in theory and submission in practice – Euro Aid and Financial Guarantees*, available at the website <https://eutopialaw.com/>.

*Bundestag.*

A second important judgment of the Federal Constitutional Court was that of the 19<sup>th</sup> June 2012 concerning the ESM Treaty and the Euro-Plus-Pact. The court found that the Federal Government had violated its information obligations towards the *Bundestag* when negotiating those treaties, and mandated the Federal Government to inform the *Bundestag* «in matters concerning the European Union fully and [...] as soon as possible», in this sense strengthening once more, in institutional terms, the conditionality for every other future negotiation of similar measures.

Even more importantly, the Federal Constitutional Tribunal issued on 18 March 2014 a well-known judgment concerning ESM Treaty, Fiscal Compact, and the Article 136 TFEU Amendment. In the complaints, the aforementioned German constitutional provisions containing the democratically founded right to vote for the *Bundestag* were considered violated by the fact that the power to take decisions of the parliamentary assembly was severely limited by the financial obligations laid down in the national laws approving European fiscal agreements. The infringement of the constitutional rights to equality (Article 3), to property (Article 14) and the right to resistance (Article 20) was also claimed, in connection with the supposed overstepping of the role of the parliament caused by the European character of the assistance mechanisms which makes it legally and factually impossible to influence the decisions taken at the European level. This would have resulted in a substantial reduction of Germany's democracy.

The *Bundesverfassungsgericht* rejected such claims, but again with a comprehensive exercise of conditionality. The court confirmed its prior case law by stating that the individual fundamental right to vote embodied in Article 38 of the constitution could be violated, in particular if the German parliament relinquishes its budgetary responsibility with the effect that it or a future composition can no longer exercise the right to decide on the budget on its own. It follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and conditionality and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*'s control and influence. Therefore, no permanent mechanism may be created under international treaties which is tantamount to accepting liability for decisions of other states, above all if they entail consequences which are difficult to calculate in advance. Moreover, again, it was stated that the German parliament cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which it is accountable. Against such a background, it was made clear that the new Article 136(3) TFEU neither starts a mechanism with financial effect, nor does it transfer budgetary authorizations to other actors, and merely enables the Member States of the euro currency area to establish a stability mechanism to grant financial assistance on the basis of an international agreement confirming that they remain the masters of the Treaties; the legitimacy of the ESM-Treaty ratification was confirmed after controlling

that the absolute amount of the payment obligations did not exceed the ultimate limits which could, at most, be derived from the principle of democracy.<sup>80</sup>

Against the existential threats to the enactment of supranational emergency mechanisms, all these *Bundesverfassungsgericht's* judgments were actually welcomed and praised by the public in the immediate aftermath. Still, it is easy to read in them the perpetuation of the conditionality scheme: Germany can constitutionally participate in euro-crisis assistance programmes, from the creditors' side, only if certain strong specific conditionality requirements are met and imposed on the "assisted" states, and the Constitutional Tribunal has also made clear that the existence of such necessary requirements can be reviewed on a case-by-case basis<sup>81</sup>.

Germany is not even an isolated example. The case of Estonia was also much discussed in this respect. The Estonian Supreme Court was asked in 2012, on the basis of reasoned requests by the local Chancellor of Justice, to rule on the constitutionality of the European Stability Mechanism ratification by the country. The main claims, here again, were about a possible violation of the principles of parliamentary democracy and the budgetary powers of the Riigikogu. In particular, it was claimed that the nominal value of the capital stock to be subscribed by Estonia in the Treaty – about 8.5% of the local GDP – was an extremely vast proprietary obligation, which significantly reduces the discretionary powers of the Riigikogu in making choices about the state budget, while Article 4(4) of the Treaty, which enables the ESM to approve financial assistance by a qualified majority of 85% of the votes cast and, thus, potentially only on consent of the six largest Member States, could simply outweigh the formal parliamentary powers<sup>82</sup>.

In fact, the court explicitly found Article 4(4) of the Treaty interfering with the financial competence of the Riigikogu and with the constitutional principle of financial sovereignty of the state of Estonia; and, in order to assess the constitutionality of the contested provision, it weighed up such an interference with other principles and its objectives, in particular with the need «to eliminate a threat to the economic and financial sustainability of the euro area». A proportionality test was conducted, and the court found that Article 4(4) of the ESM Treaty provides for an appropriate, necessary and reasonable measure: but for doing so, it must be noted that the court had even to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. Only in this strict sense it was stated that Article 4(4) of the ESM Treaty was, for the time being, acceptable.

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80. See for all the details the country report written by S. Mair and M. Kröger, Germany, at the website <http://eurocrisislaw.eui.eu/germany/>, in particular at points IV.5 and V.4.

81. See in this respect Bruce Ackerman and Miguel Poiars Maduro, Broken Bond, *Foreign Policy*, 17 September 2012.

82. See the country report written by M. L. Laatsit, Estonia, available at the website <http://eurocrisislaw.eui.eu/estonia/>, in particular at point VIII.4.

Thus, also in the Estonian case, we have a constitutional adjudication that poses conditions to the subscription of capital stock of anti-crisis stability mechanisms; and, in doing so, it emphasizes the transient nature of the decision, and suggests that future different appreciations can come on a case-by-case basis, for instance in the actual implementation of the ESM Treaty.

This leads us to our final comparative reflection. We have multiple jurisprudences of crisis, or at least we have different dimensions, possibly different and incompatible dimensions, of the same jurisprudence of crisis.

We see, in debtor countries' constitutional adjudication, the construction of a radical autarchy in constructing the national constitutional relation with EU obligations arising from assistance Programmes and, more generally, the European semester. This is a problem *per se*, as said. But it is even more problematic if we think that a similar move is made in creditor countries' constitutional adjudication. There is no unconditioned openness to financial assistance programmes, not even those adopted in the immediate aftermath of emergency. Quite on the contrary, we see here again the construction of a radical conditionality: financial assistance is granted by creditor countries on a case-by-case basis, and it depends here again on the compatibility with national principles (only vaguely harmonized, in the form of a vague *Europafreundlichkeit*) but this compatibility requires imposing conditions on the other's laws (and possibly constitutions....)

The hermeneutics employed by the two sides are very similar, yet they are also incompatible...

From the creditors' perspective, the substantive question is naturally at the other side of the problem: to what extent is constitutionally acceptable for the German or the Estonian people to become financially liable, through EU law obligations, by virtue of decisions and facts occurring in other Member States? This is challenged fundamentally as hindering the democratic autonomy of the local constituencies (in the German case in particular, by affecting the budget powers of parliament).

At its core, however, is the same fundamental question inherent in the Portuguese cases: to what extent can EU law affect the budget autonomy of the State? Can we really construct EU law, on both sides, by relinquishing budget sovereignty, in such a way that parliaments remain fully sovereign, on a case by case basis, to determine how much financial assistance can be given and the conditions under which it may be used by the recipient State?

In fact, when we read creditor countries' courts claiming that the scope of national budgetary powers is left untouched because the *means* through which their State participates in supranational programmes are controlled by the State itself, we face a similar approach to the *goals vs. means* distinction of the Portuguese Constitutional Court. The irony is that, at the same time, when put together, these case laws are not compatible. If on the one hand debtor countries' courts claim that they are bound by budget targets but are free on how to reach them, creditor countries' courts make the financial assistance dependent on a concrete

involvement on how those funds will be spent.

We have a jurisprudence of crisis, developed in the different national interpretative settings, in which the potential role of EU law as a space to mediate and make different demands compatible is removed. And this creates a potential if not the certainty for a legal crisis.

The right approach to the difficult questions raised by EU law growing powers on national budgetary matters is not to carve out artificial legal distinctions on either side of creditors and debtors constitutional fences. It is not to assume, as stated by the Tribunal Constitucional, that EU Law has no consequences in this domain. It has consequences and the right way to deal with them is to engage on a construction of the national constitution that is sensitive to EU Law. This does not require abdicating from national fundamental legal values but reconstructing them in light of our participation in European integration. Only this approach will ultimately empower the national constitution in times of integration by also empowering the national shaping of that integration.

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