

Bremen, 2014 February 17

# Human Rights in Times of Austerity Policy

**The EU institutions and the conclusion of Memoranda of Understanding**

Legal opinion commissioned by the  
Chamber of Labour, Vienna

(in cooperation with the Austrian Trade Union Federation, the European Trade Union  
Confederation and the European Trade Union Institute)

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This study will be published in the series of the Centre of European Law and Politics,  
University of Bremen: Nomos Verlagsgesellschaft Baden-Baden 2014.

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## B. Legal Questions

Since the beginning of the crisis in the financial markets, some EU Member States, in collaboration with the Troika composed of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), have been pursuing a strict retrenchment or austerity policy. With the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility and the Treaty establishing the European Stability Mechanism (ESM Treaty), the policy has rapidly developed instruments through which the countries concerned have instituted and implemented austerity measures and structural reforms on the basis of Memoranda of Understanding (MoUs). The MoUs contained detailed timetables for austerity measures and structural reforms, to which the countries have to adhere in order to receive the relevant credit tranches. The MoUs are negotiated by the Troika. According to Article 13(4) of the ESM Treaty, for instance, the Commission negotiates the MoUs in liaison with the ECB and the IMF, establishes the funding conditions and signs the MoUs. The Board of Governors then makes the MoUs the basis for financial assistance payments under the ESM. In addition to the direct conditionality for those countries that had to apply directly for money from the bailout funds (Cyprus, Greece, Ireland, Portugal, Romania and Spain), other States were also subject to indirect conditionality. For instance, the conditions the ECB imposed on Italy for the purchase of State loans (on the secondary market) were large-scale privatisation, the transfer of collective bargaining to undertakings, public sector pay cuts, privatisation of public utilities and the introduction of automatic correction mechanisms for deficits.<sup>1</sup>

On the one hand austerity policy is economically highly controversial. In a country report on the measures in Greece in June 2013, the IMF critically reviewed the measures instituted by the Troika and established that there were 'notable failures'. The recessionary effect had been underestimated, the unemployment rate had risen contrary to all assumptions and the social costs had turned out to be more serious than expected. The absence of social stability in the countries concerned had further destabilised the financial situation.<sup>2</sup> In addition to the economic effects, the MoUs and the Troika demands have had a far-reaching impact on human rights in the crisis countries. For instance, minimum wages have been drastically reduced, there have been considerable encroachments on pension systems, additional pay has been abolished, labour markets deregulated and collective bargaining decentralised. In addition, privatisation has been introduced, including on central public services such as water supplies and public service radio. There have also been cuts in social security schemes, education and health care.<sup>3</sup>

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<sup>1</sup> Tobias Piller, 'Geheimer Brief: Drakonische Forderung von Trichet und Draghi an Italien', in: *FAZ*, 30.09.2011.

<sup>2</sup> IMF, Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement (13.06.2013), IMF Country Report No 13/156, p. 1.

<sup>3</sup> For an overview, Council of Europe – Commissioner for Human Rights, Safeguarding human rights in times of economic crisis, Report, November 2013; Christoph Hermann und Karl Hinrichs, *Die Finanzkrise und ihre Auswirkungen auf Sozialstaaten und Arbeitsbeziehungen. Ein europäischer Rundblick*, AK Vienna, November 2012; also Rhea Tamara Hoffmann und Markus Krajewski, 'Staatsschuldenkrisen im Euro-Raum und die Austeritätsprogramme von IWF und EU', in: *KJ* 45 (2012), p. 2 ff.

The legal basis for the action by the EU institutions and the European Commission in that area is questionable. In the light of that situation, this opinion will deal with four aspects.

*(I) Basic issues concerning the relationship between law, politics and economics in the crisis:*

It must first be clarified whether European law is applicable at all in the crisis. On the one hand it is maintained that politics must be assumed to take precedence in the crisis and the rule of law is consequently suspended. On the other hand it is argued that the social aspect should be treated primarily as an intergovernmental issue. European law should not be involved.

*(II) Scope of protection of fundamental and human rights:* It is then necessary to answer the question of whether the EU institutions have fundamental rights obligations when MoUs are concluded and which fundamental and human rights, if any, are affected by the MoUs. The human rights codifications most relevant to the analysis are the Charter of Fundamental Rights of the European Union (CFR), which is binding under Article 6 of the Treaty on European Union (TEU), the European Convention on Human Rights (ECHR) and Protocol No 1 to the Convention (Protocol 1 ECHR) in the version of Protocols 11 and 14,<sup>4</sup> the European Social Charter 1961 (ESC),<sup>5</sup> the Revised European Social Charter 1996 (RESC),<sup>6</sup> the International Covenant on Civil and Political Rights (UN Civil Covenant),<sup>7</sup> the International Covenant on Economic, Social and Cultural Rights (UN Social Covenant)<sup>8</sup> and the UN Convention on the Rights of Persons with Disabilities (UN Disability Convention).<sup>9</sup> Finally, the analysis needs to include the core labour standards of the International Labour Organization (ILO), as set out in eight Conventions: the Freedom of Association and Protection of the Right to Organise Convention (1948), the Right to Organise and Collective Bargaining Convention (1949), the Forced Labour Convention (1930), the Abolition of Forced Labour Convention (1957), the Equal Remuneration Convention (1951), the Discrimination (Employment and Occupation) Convention (1958), the Minimum Age Convention (1973) and the Worst Forms of Child Labour Convention (1999), together with the operative content of those Conventions in the ILO Declaration on Fundamental Principles and Rights at Work summarising the Conventions.<sup>10</sup>

*(III) Encroachment:* It also has to be considered whether the exercise of those fundamental rights is adversely affected by the MoUs, i.e. whether the measures by the EU institutions constitute an encroachment.

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<sup>4</sup> Protocol 14: ETS No 194; Protocol 11: ETS No 155.

<sup>5</sup> ETS No 35.

<sup>6</sup> ETS No 163.

<sup>7</sup> UNTS 999, p. 171.

<sup>8</sup> UNTS 993, p. 3.

<sup>9</sup> UNTS 2515, p. 3.

<sup>10</sup> ILO Conventions 87, 98, 29, 105, 100, 111, 138 and 182. The ILO adopted the 'Declaration on Fundamental Principles and Rights at Work' at its 86th Session in Geneva on 18.06.1996.

*(IV.) Justification:* It then needs to be asked whether the interference with fundamental rights is justified, assuming that the signature of the MoUs is consistent with the division of powers under EU law. The encroachments should also be substantively justified and above all proportionate.

*(V) Legal protection:* Finally, it has to be considered what legal protection remedies are available, in which courts and complaints bodies legal actions and complaints can be brought and which plaintiffs are actively empowered for that purpose.

## **C. Legal opinion**



## I. Law, politics and economics in the crisis

Before the Troika measures can be subjected to legal analysis and their compatibility with fundamental and human rights assessed, it first has to be considered whether the norms of European law can be applied at all in the crisis or whether, in view of the precarious relationship between law, politics and economics in the crisis, consideration from a EU law standpoint is no longer appropriate.

### 1. No Suspension of Law

It is sometimes claimed that a state of emergency is currently in force, in which the law is suspended, that an ‘emergency mentality’ has developed in the crisis policy<sup>11</sup> and that austerity policy has put an end to the rule of law at European level.<sup>12</sup> Where those diagnoses are formulated as a criticism of austerity policy and focus on its dubious legality, they are applied in the context of the current legal system and seek, on the one hand, to show how the actors are casting off their legal obligations and, on the other hand, to identify ways of restoring a legal constitution.<sup>13</sup>

Some writers, however, use the argument of the European state of emergency to present suspension of normal law as (normatively) necessary. Ernst-Wolfgang Böckenförde was one of the first to raise the possibility of suspensive force of the European state of emergency, in the tradition of Carl Schmitt:

‘What can be argued in favour of the measures taken, – once their questionable fitness for purpose has been assumed, is the principle that “necessity has no law” – in legal terms, the establishment of a state of emergency that suspends legal normality.’<sup>14</sup>

That suggests that legal normality should no longer apply during the crisis, that the law should give way to a state of emergency. In legal terms, Ernst-Wolfgang Böckenförde calls that political requirement a political sovereignty which should, in the crisis, be absolved from the minutiae of legal obligations so that vital decisions can be taken. In that sense some writers also cite the ‘state of emergency’ to challenge a legal situation perceived as unsatisfactory. According to Ulrich Hufeld, for instance, the European Stability Mechanism breaches the constitution in the sense of the contrast described by Carl Schmitt. It establishes a system of measures that is set against the normal system and suspends it.<sup>15</sup> This opposition between a co-existing system of measures and a normal

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<sup>11</sup> For a critical analysis, see Florian Rödl, ‘EU im Notstandsmodus’, in: *Blätter* 5/2012, p. 5 ff.

<sup>12</sup> Roland Vaubel, ‘The Breakdown of the Rule of Law at the EU Level’, Working Paper 2013.

<sup>13</sup> See criticism in Lukas Oberndorfer, ‘Vom neuen, über den autoritären zum progressiven Konstitutionalismus? Pakt(e) für Wettbewerbsfähigkeit und europäische Demokratie’, in: *juridikum* 2013, p. 76 ff.

<sup>14</sup> Ernst-Wolfgang Böckenförde, ‘Kennt die europäische Not kein Gebot?’, in: *Neue Züricher Zeitung*, 21.06.2010.

<sup>15</sup> Ulrich Hufeld, ‘Zwischen Notrettung und Rütlichschwur’, in: *Integration* 34 (2011), p. 117 ff (122); for an opposing view see Christian Joerges, ‘Europas Wirtschaftsverfassung in der Krise’, in: *Der Staat* 51 (2012), p. 357 ff.

system is the result – here Hufeld is referring to Carl Schmitt – of an abnormal situation that was unforeseen.<sup>16</sup>

Whilst Ernst Fraenkel fiercely criticised the juxtaposition and interconnection of the prerogative and the normative system in National Socialist ‘law’ as a ‘dual state’<sup>17</sup> and Franz Neumann, in his structural analysis of National Socialism, *Behemoth*, pluralistically radicalised that criticism by showing that in the prerogative state the rule of law as such collapsed into a mixture of different power complexes and actors,<sup>18</sup> current analyses in the Carl Schmitt tradition seek to revive the idea of primacy of the prerogative system not bound by law as against the normative system.<sup>19</sup>

According to that school of thought, there is no longer any independent law. The law becomes an instrument of European governance – of political executives, global economic players and strong interest groups, which, in the state of emergency, create what is needed out of nothingness. As Paul Kirchhof has rightly pointed out, that deprives Europe, as a community based on the rule of law, of its *raison d’être*:

‘The President of the Commission would no longer have a mandate, Heads of State, Ministers, Members of Parliament could no longer take binding action on our behalf, since their mandate is a legal one. The loan agreement would no longer be binding; we would be released from all our debts. But the price would be too high. Internal peace would be jeopardised. The economy would lose its foundations in the binding Treaty.’<sup>20</sup>

Therefore the European legal system cannot countenance a state of emergency. Nor can it allow a system of legal competences to be supplanted by practical political considerations. When authorities take decisions independently of the law, there is no law.<sup>21</sup> As long as the European Treaties are in force, the Charter of Fundamental Rights applies and the regional and international human rights conventions are binding, the rule of law cannot be suspended by political and economic decision-makers. Crisis management measures are not admissible irrespective of the normal legal system, but only when they are justified within that system.

## 2. Interests of the EU institutions

The second objection sometimes made to EU law scrutiny of the austerity measures is *statist provenance*. This holds that crisis policy has led to the restoration of nation states. The interests of nation states’ primary law systems should take precedence over European law. The European

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<sup>16</sup> Carl Schmitt, *Verfassungslehre*, Berlin 1928, p 107.

<sup>17</sup> Fraenkel, Ernst, *The Dual State. A Contribution to the Theory of Dictatorship (1941)*, New Jersey 2010.

<sup>18</sup> Franz L. Neumann, *Behemoth. The Structure and Practice of National Socialism, 1933 – 1944*, Chicago 2009; see also the collected essays of Otto Kirchheimer, *Politics, Law, and Social Change*, Columbia 1969.

<sup>19</sup> Mariano Barbato, ‘Integration als Revolution: Souveränität und Legitimität der EU im Ausnahmezustand der Eurokrise’, in: *ZFAS* 6 (2013), p. 249 ff; for a critical view of the Schmitt revival, see Lukas Oberndorfer, ‘Die Renaissance des autoritären Liberalismus? Carl Schmitt und der deutsche Neoliberalismus’, in: *PROKLA* 42 (2012), p. 413 ff.

<sup>20</sup> Paul Kirchhof, ‘Stabilität von Recht und Geldwert in der Europäischen Union’, in: *NJW* 1-2 (2013), p. 1 ff (1).

<sup>21</sup> Niklas Luhmann, *Das Recht der Gesellschaft*, Frankfurt/Main 1995, p. 414.

institutions should be involved as little as possible in dealing with the social problems created by the crisis. The Commission, the European Central Bank, the European Parliament and the European Court of Justice should give the national ‘masters of the Treaties’ free rein. Martin Nettesheim formulated this paradigm with reference to the *Pringle* judgment:

‘Crisis periods are periods in which national sovereignty comes to the fore ... It would be almost negligent for supporters of integration to oppose the involvement of states to uphold integration for their own institutional interests. The European Court of Justice has recognised that.’<sup>22</sup>

The statist view of austerity policy suggests that the Member States could use EU institutions (the European Central Bank and the Commission) as instruments in the crisis. In the interests of institutional self-preservation, the European Parliament and the ECJ, whose role is actually to exercise democratic and constitutional control of the Commission and the ECB, should not oppose the measures. That sovereign interpretation advocates the suspension of EU law control mechanisms on the grounds of national sovereignty. However, in view of the dual structure of austerity policy, that is inadequate. The ESM provides a mechanism allowing serious and ongoing encroachment by some Member States on the sovereignty of other Member States, with the involvement of the European Commission and the ECB. The ESM Treaty creates a hybrid of inter-governmental and Union governance, which massively curtails the supposed sovereignty of the Member States affected by the MoUs.

If, in this hybrid regulatory structure, the control functions of the European Parliament and the ECJ are excluded but the regulatory functions of the Commission and the ECB are included, that creates a ‘façade of democracy’ in which the European Parliament and the ECJ exist but have no function.<sup>23</sup> Instead it is the government representatives on the ESM Board of Governors who determine the fate of supposedly sovereign European nation states and their populations, after the MoU has been negotiated by the Commission and the ECB. The perpetuation of that façade of democracy creates a risk that in future unlawful and undemocratic measures by the EU institutions will no longer be corrected by the democratic and legitimate institutions of the European Union but through nation states. In future the European Union and not just the euro will be exposed to that risk.<sup>24</sup> Institutionally, such a release of social and national centrifugal forces by Europe’s executives cannot be in the interests of the Union’s institutions.

The visionary European project is based on the ambitious idea of achieving peaceful integration for the benefit of citizens, transcending nation states. Without a Europe that respects the social and democratic achievements of nation states and is organised to take account of those achievements, it will be impossible to develop a transnational strategy that points the way for the future and satisfies

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<sup>22</sup> Martin Nettesheim, ‘Europarechtskonformität des Europäischen Stabilitätsmechanismus’, in: *NJW* 66 (2013), p. 14 ff (16).

<sup>23</sup> Jürgen Habermas/Peter Bofinger/Julian Nida-Rümelin, ‘Einspruch gegen die Fassadendemokratie’, *FAZ*, 03.08.2012.

<sup>24</sup> Wolfgang Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus*, Berlin 2013.

the need for justice.<sup>25</sup> On that point, Jürgen Habermas has rightly emphasised that the scandal of increasing child poverty, widening gaps in income and property distribution and a growing low-wage sector is to be seen as part of the problem ‘which we can only solve if we reverse the global trend of markets over which there is no political control’.<sup>26</sup> The emphasis on national sovereignty in the crisis is no help in solving these international problems. The pressure on nation states is growing. Transnational political action is impossible without a strong Europe, independent of the partial interests of its Member States and acting instead in the interests of its people.<sup>27</sup>

It is therefore in the interests of the European Union institutions to respect the diversity of European social and employment systems, to improve standards of social protection and become an advocate for the excluded. The EU institutions should develop a feeling for the social circumstances of citizens of the Union. At the moment they have no insight into the issues affecting the lives of European workers, pensioners, small savers and students, who are in the same social situation. Instead of involving themselves in encouraging competition between national economies and playing them off against each other, the European institutions should try to improve the lives of the Union’s citizens. The European crisis is not a conflict between nation states. The national context of the lines of conflict, setting national economies against each other, the workers of southern Europe against the workers of northern Europe,<sup>28</sup> distorts social issues into inter-national issues.<sup>29</sup>

The rapidly growing loss of respect for the European institutions as a result of the unsuccessful austerity policy, the apparently unbridgeable gap between the Europe of administrative machinery and the Europe of citizens, can only be overcome if the European institutions recognise that it is also part of their responsibility to solve structural social problems. Without social stability there can be no economic and financial stability in the European Union. This nexus of social and economic stability must be reflected in the way the European institutions organise their responsibilities. The European institutions have an obligation not only to the States, as ‘masters of the Treaties’, but also to the citizens of Europe to obey the law and respect democratic principles. If the institutions continue to deny their responsibility to deal with the ‘social question’ and remain part of an inhumane crisis policy without social solidarity,<sup>30</sup> the public will increasingly reject the idea of Europe.

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<sup>25</sup> Andreas Fischer-Lescano and Kolja Möller, ‘Europäische Grundrechte und die Konstitutionalisierung sozialer Demokratie in Europa’, in: Andreas Fischer-Lescano, Florian Rödl and Christoph Schmid (eds.), *Europäische Gesellschaftsverfassung. Konstitutionalisierung sozialer Demokratie in Europa, Schriftenreihe des ZERP*, Baden-Baden 2009, p. 313 ff.

<sup>26</sup> Jürgen Habermas, *Ach Europa*, Frankfurt am Main 2008, p. 127.

<sup>27</sup> Claudio Franzius, ‘Recht und Politik in der transnationalen Konstellation’, in: *AVR 138* (2013), p. 204 ff.

<sup>28</sup> In the words of Angela Merkel: ‘The point also is that people in countries like Greece, Spain and Portugal cannot retire earlier than in Germany, everyone must put in more or less the same effort. That is important ... We cannot have a single currency and some people get a lot of leave and others very little. In the long run that can’t work’ (quoted in Johannes Aumüller and Javier Cáceres, ‘Ausflug ins Populistische’, in: *Süddeutsche Zeitung*, 18.05.2011).

<sup>29</sup> Also argued by Jürgen Habermas, ‘Demokratie oder Kapitalismus’, in: *Im Sog der Technokratie*, Berlin 2013, p. 138 ff.

<sup>30</sup> See strong criticism in Christian Joerges and Florian Rödl, ‘Informal Politics, Formalised Law and the "Social Deficit" of European Integration’, in: *European Law Journal* 15 (2009), p. 149 ff.

It is the Commission and the ECB which, in the legal form of the ESM but ultimately on behalf of Europe, lay down the conditions that are driving millions of Europeans to despair. Although the ESM Treaty was concluded by nation states, the Commission and the ECB, as institutions of the Union, have undertaken in the Treaty to establish and oversee the austerity plan. So far that has been done in a way in which the framework of responsibility for democratic and human rights is not clarified. However, the European institutions should not let themselves be instrumentalised by national governments in the crisis. The governments of the EU Member States should not dictate the course of the austerity measures, disregarding the European Parliament and the mandatory rules of EU law on human rights and competences. Those mistakes cannot be corrected at national level alone. Structurally, the constitutional containment of the transnational austerity policy places too great a burden on the national constitutional courts and national parliaments.<sup>31</sup> Robert Uerpmann-Witzack therefore rightly criticised that the national parliaments in the ESM are unable to exercise effective control and for that reason control by the European Parliament is needed:

‘Real influence could only be exercised by a European Parliament with appropriate co-decision powers which meets other negotiating partners on an equal footing.’<sup>32</sup>

A social and democratic Europe will only be achieved if the European Parliament and the European Court of Justice jointly take on the core task of imposing legal and democratic standards on the united executives of Europe at European level. That is not merely a question of transforming evolutionary constitutional achievements into the transnational context; it is at the same time genuinely in the interests of the European institutions.

If the citizens of the Union continue to turn away from Europe, to apply a quotation from Niklas Luhmann to the European crisis, the European Union might soon need a ‘huge Amnesty International’ itself. A European Union in which ‘individuals themselves no longer have any interest’<sup>33</sup> will be eroded.

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<sup>31</sup> Structurally they cannot formulate any (social and democratic) alternatives *in* Europe but only normally *on* Europe. A symptomatic example is the German Federal Constitutional Court’s statist eternity clause in disputes on Europe; for a critical view see, for instance, Daniel Halberstam and Christoph Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’, in: *German Law Journal* 10 (2009), p. 1241 ff.

<sup>32</sup> Robert Uerpmann-Witzack, ‘Völkerrecht als Ausweichordnung – am Beispiel der Euro-Rettung’, in: Armin Hatje (ed.), *Die Einheit des Unionsrechts im Zeichen der Krise, Europarecht Beiheft 2/2013*, Baden-Baden 2013, p. 49 ff (55).

<sup>33</sup> Niklas Luhmann, *Recht der Gesellschaft*, Frankfurt/Main 1995, p. 489.

## **II. Scope of protection of fundamental and human rights**

In a legal assessment of the MoUs, the first question to be considered is whether the Troika, or its component bodies (ECB, Commission and IMF), have a legal responsibility for the observance of human rights. The Troika as such is not an accountable subject in international law. As a channel for cooperation between international organisations (the ESM, the EU and the IMF), it does not itself fulfil the conditions for an international organisation, as defined by the ICJ in the *Bernadotte Advisory Opinion*.<sup>34</sup> In fact, Troika measures are joint measures by different subjects of international law (the EU, the ESM and the IMF). Depending on the form of involvement of the Board of Governors set up under the ESM Treaty – to which is assigned, under Article 5(6)(f) of the ESM Treaty, the jointly agreed decision-making power to grant stability assistance through the ESM, including the economic policy conditions laid down in the Memorandum of Understanding (MoU) in accordance with Article 13(3) of the ESM Treaty – any jointly liable subjects of international law may be extended to include the States involved in the decision in the Board of Governors. The decision by the Board of Governors confirms the relevant MoUs, negotiated by the Commission in consultation with the ECB in accordance with Article 13(3) and (4) of the ESM Treaty and then signed by the Commission on behalf of the ESM. Hence the ESM may also be considered a subject of international law as a European counterpart to the IMF. In view of that complex structure, responsibility for the encroachment on human rights under the MoUs can lie with different international law subjects, which might be jointly liable: (1) the Member State in respect of the implementation measures, (2) the Member States represented on the ESM Board of Governors, (3) the ESM, (4) the IMF, (5) the nation states represented on the IMF Board of Governors and (6) the EU itself, since EU institutions were involved in the negotiation of the MoUs with the Commission and the ECB in accordance with Article 13 of the ESM Treaty, through a specific form of delegation of functions in which responsibility was not fully transferred.

All those actors have fundamental rights and human rights obligations. The fundamental and human rights framework for Commission and ECB measures, which, according to Article 13 of the EU Treaty, are both EU institutions, is in the forefront of this analysis. It will be considered below whether the ECB and the Commission have human rights obligations in respect of their involvement in the negotiation and signature of the MoUs and, if so, what these are. The first question to arise is which legislation is the basis for the fundamental rights obligations of the EU institutions (see 1.). It also has to be considered which specific human rights are affected by the measures (see 2.).

### **1. Human rights obligations of the Commission and ECB**

The Commission and the ECB are EU institutions and as such they are subject to the fundamental rights obligations under EU law. The human rights obligations of the Commission and the ECB

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<sup>34</sup> ICJ, *Bernadotte Advisory Opinion*, ICJ Reports, 1949, p. 1 ff.

might therefore be based on the CFR (see 1.1.). A human rights obligation under international law (see 1.2.) and customary international law (see 1.3.) is also to be taken into account.

## 1.1. CFR obligation

Firstly, in the context of the Troika measures the ECB and the Commission might be bound by the CFR. The EU fundamental and human rights obligation is based on Article 6 of the EU Treaty, according to which the fundamental and human rights enshrined in the ECHR, the CFR and, inter alia, in the constitutional traditions of the Member States, are to be taken into account as general legal principles by the EU. The CFR referred to in Article 6(1) TEU became legally binding under the Lisbon Treaty. It sets out the detailed framework for the fundamental rights commitment under EU law.

### 1.1.1. Scope

However, it is questionable whether the CFR is applicable to the MoUs at all. In a series of decisions on the financial crisis the ECJ has clearly adopted a cautious approach and restricted the scope of the CFR, which according to the first sentence of Article 51(1) applies to ‘the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law’, in relation to austerity measures.

For instance, when interpreting Article 51 CFR in *Pringle*<sup>35</sup>, the ECJ ruled that, in view of the Treaty structure of the ESM Treaty, nation states which signed the ESM Treaty under international law outside the Union legal order were not in any case ‘implementing’ EU law. The ESM Treaty is deliberately operating outside the framework of EU law. In other cases, too, the ECJ has ruled that the Charter is not applicable, citing Article 51 CFR, for instance with regard to the implementation of the Troika MoU with Portugal, which provided, inter alia, for wage and pension losses for public sector workers and access to health care. At least the ECJ decided, in regard to the question on that point referred by Portugal for a preliminary ruling in *Sindicatos dos Bancários*, that it concerned conformity of the national implementing law to the CFR, but that that was not an issue of implementation of EU law under Article 51 CFR.<sup>36</sup> And in a Romanian reference for a preliminary ruling concerning the implementation of an MoU signed with the EU, the IMF and the World Bank, the ECJ also found that the nexus for the enforcement of EU law did not exist.<sup>37</sup>

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<sup>35</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 179 f.

<sup>36</sup> Order in ECJ Case C-128/12 *Sindicatos dos Bancários* [2013], paragraph 9 f: ‘*Todavia, importa recordar que, nos termos do artigo 51.º, n.º 1, da Carta, as disposições desta têm por destinatários “os Estados-Membros, apenas quando apliquem o direito da União”, e que, por força do artigo 6.º, n.º 1, TUE, que atribui valor vinculativo à Carta, esta não cria nenhuma competência nova para a União e não altera as competências desta (v. despachos, já referidos, Asparuhov Estov e o., n.º 12, e de 14 de dezembro de 2011, Corpul Național al Polițiștilor, n.º 15; e despacho de 10 de maio de 2012, Corpul Național al Polițiștilor, C-134/12, n.º 12). [12] Ora, não obstante as dúvidas expressas pelo órgão jurisdicional de reenvio quanto à conformidade da Lei do Orçamento de Estado para 2011 com os princípios e os objetivos consagrados pelos Tratados, a decisão de reenvio não contém nenhum elemento concreto que permita considerar que a referida lei se destina a aplicar o direito da União.*’

<sup>37</sup> Case C-434/11 *Corpul National al Politistilor* [2012], paragraph 12 ff.

However, the issue of whether the institutions of the Union as part of the Troika are themselves bound by the CFR is structurally distinct from the issue of whether Member States have obligations when implementing MoUs, which was decided in those preliminary ruling proceedings. The involvement of the ECB and the Commission in the negotiation of the MoUs constitutes a commitment by the EU institutions. Even if it is conceded that a delegation of the functions of the ECB and the Commission in international law is permissible under the ESM Treaty and the Fiscal Treaty – and hence tasks going beyond the competences assigned in the EU Treaties may be transferred in international law<sup>38</sup> – those institutions are still bound by the CFR even in such circumstances. Article 51 CFR provides that the institutions are bound by the CFR quite irrespective of the specific context. Even *ultra vires* acts by the institutions must take account of the Charter.<sup>39</sup> From a EU law standpoint it is also immaterial whether, in the case of delegation of functions, the accountable subject for liability for any unlawful acts in international law has changed, or whether the position with the ESM is so unusual that the integration of the EU institutions into the ESM is grounds not for a change in the accountable subject but for joint liability, since the EU institutions, through their integration into the ESM, are not intended to carry out its tasks but to ensure the observance of EU law. All those issues are irrelevant from the point of view of EU law, since that provides that the EU institutions are bound by the CFR, which is applicable even where there has been a delegation of functions. Thus the Committee on Constitutional Affairs of the European Parliament rightly pointed out “that the EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter of Fundamental Rights of the European Union, apply at all times.”<sup>40</sup>

Advocate General Kokott also took that position in her view on *Pringle*, emphasising that ‘the Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European EU law, including the Charter of Fundamental Rights’.<sup>41</sup> That conclusion appears compelling. Fundamental and human rights obligations cannot be circumvented on the pretext of delegation of functions.<sup>42</sup> Article 51 CFR applies to the EU institutions always and at all times. All measures by the EU institutions must take account of the CFR. The ECJ has consistently held, with regard to the ESM, that the mechanism must operate in a way that will comply with EU law.<sup>43</sup> That also includes the fundamental and human rights that are binding on the EU institutions. For the EU institutions, that means that they

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<sup>38</sup> Martin Nettesheim, ‘Europarechtskonformität des Europäischen Stabilitätsmechanismus’, in: *NJW* 66 (2013), p. 14 ff; for a different view, Andreas Fischer-Lescano und Lukas Oberndorfer, ‘Fiskalvertrag und Unionsrecht. Unionsrechtliche Grenzen völkervertraglicher Fiskalregulierung und Organleihe’, *NJW* 66 (2013), p. 9 ff.

<sup>39</sup> Catherine Barnard, ‘The Charter, the Court – and the Crisis’, in: *Cambridge Legal Studies Research Paper Series Paper*, 18 (2013), before footnote 52: ‘... the EU institutions which are “borrowed” under both the ESM and TSCG, especially the Commission and the ECB, must surely need to act in compliance with the Charter since the Charter is addressed to the EU institutions’.

<sup>40</sup> Committee on Constitutional Affairs, Opinion, 11 February 2014, 2013/2277(INI), para. 11.

<sup>41</sup> View of Advocate Kokott in Case C-370/12 [2012], paragraph 176.

<sup>42</sup> See also, to that effect, Pieter-Augustijn van Malleghem, ‘Pringle: A Paradigm Shift in the European Union’s Monetary Constitution’, in: *GLJ* 14 (2013), p. 141 ff (158f.)

<sup>43</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 69.



are still have fundamental and human rights obligations under EU law even when they undertake tasks under the ESM.

### **1.1.2. Subjective rights under the CFR**

The next question to be considered is whether, in the area under discussion here, the CFR is capable at all of establishing subjective fundamental rights positions that might be affected by the crisis measures. The relevant MoUs, in the conclusion of which the EU institutions are involved, chiefly affect legal positions that have been accepted as ‘social fundamental rights’ in the CFR.

It is disputed in particular whether those norms establish subjective legal positions or whether they are merely general principles with no associated subjective rights.<sup>44</sup> In principle the CFR itself does not *a priori* preclude specific sets of norms, such as the social fundamental rights, from having legal status.<sup>45</sup> It has to be determined for each norm, in the light of the wording and the regulatory structure, whether it embodies a right or a principle and how wide is the scope of protection of the fundamental right, if applicable. The main indication is the wording of the CFR itself, which, in Article 37 for example, refers to the ‘principle of sustainable development’ for the norms that are relevant in the present context, but consistently emphasises that these are rights and entitlements.

The distinction between principles and fundamental rights in the CFR does not therefore detract from the obligation to determine the precise subjective legal status of the norms and their scope. Thus the ‘social fundamental rights’ in the CFR could also establish subjective legal positions constituting entitlements.

## **1.2. Obligations under international human rights codifications**

The EU institutions might, in addition, have obligations under other human rights codifications, firstly, human rights norms protected by agreements under international law relating to liberal human rights guarantees (1.2.1.), secondly codifications of social human rights (1.2.2.) and finally the ILO Convention (1.2.3.).

### **1.2.1. Liberal human rights codifications: ECHR and UN Civil Covenant**

In the implementation of their measures, the ECB and the Commission might be bound by the ECHR and the UN Civil Covenant. That assumes that the EU is required to conform to those norms.

#### **1.2.1.1. ECHR**

It is doubtful whether the ECHR is applicable to measures by the EU institutions.

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<sup>44</sup> Thomas Giegerich, ‘Steuern Völker- und Europarecht die Globalisierung “im Geiste der Brüderlichkeit”’, in: Giegerich/Zimmermann (eds.), *Wirtschaftliche, soziale und kulturelle Rechte im globalen Zeitalter*, Berlin 2008, 7 ff (26 ff).

<sup>45</sup> Eibe Riedel, in: Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd edition, Baden-Baden 2011, Art. 27 CFR, paragraph 37.

At present the EU is not formally a member of the ECHR, even though Article 6 of the EU Treaty requires its accession and a draft accession agreement has now been drawn up.<sup>46</sup> From an international law standpoint, since the ECHR is not formally binding there is no legal obligation on the EU institutions to abide by it. Since the *Wachauf* judgment the Court of Justice of the European Union assumes, even without the EU being bound by international conventions, that ‘measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law’.<sup>47</sup> That is reflected in the emphasis on the importance of the ECHR in Article 6 of the EU Treaty and Article 52(3) of the Charter of Fundamental Rights. The standards set by the ECHR and the European Court of Human Rights (ECtHR) are the main criteria for the protection of fundamental and human rights in EU law. Since the ECHR norms are extensively incorporated into EU law, an infringement of the ECHR indicates an infringement of EU law. Furthermore, in the past the ECJ has consistently based its decisions on ECtHR judgments.<sup>48</sup>

With the opening up of EU law, the ECHR is therefore a second essential fundamental rights criterion for measures by the EU institutions. In addition to the fact that the EU institutions are bound by the ECHR under EU law, the ECHR is applicable to acts of implementation by the Member States, even if these are based on legal acts under EU law. In a number of cases the ECtHR has already been called upon to rule on austerity measures implementing MoUs in that situation.<sup>49</sup>

The ECtHR has not yet given a decision on the extent of Member States’ liability for breaches of the Convention by EU institutions. It would be consistent with its case-law to date<sup>50</sup> if the ECtHR extended the liability for legal acts with joint accountability to situations in which the breaches of the Convention by EU institutions occurred.<sup>51</sup> In that respect the Member States are liable under the ECHR not only for the actions of the Commission and the ECB but also, in particular, for decisions by the Board of Governors, which, under Article 5(6)(f) of the ESM Treaty, has joint decision-making power for the economic policy conditions laid down in Article 13(3) of the ESM Treaty. Since unanimity is required in the ESM Board of Governors, representatives of the States can have direct influence. Therefore, if no veto is entered, that gives rise to legal liability. The ECHR Member States are also legally liable for their conduct in the IMF, in particular the Board of Governors under Article XII Section 2 of the Articles of Agreement of the International Monetary Fund.<sup>52</sup>

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<sup>46</sup> See Draft Accession Agreement: Council of Europe, Final Report to the CDDH (10.06.2013), 47+1(2013)008rev2.

<sup>47</sup> ECJ Case 5/88 *Wachauf v Bundesanstalt für Ernährung und Forstwirtschaft* [1989], paragraph 17.

<sup>48</sup> ECJ Case C-368/95 *Familiapress* [1997], paragraph 26.

<sup>49</sup> Most recently ECtHR judgment in *Mateus and others v Portugal*, Nos 62235/12 and 57725/12, 08.10.2013.

<sup>50</sup> ECtHR judgment in *Matthews v United Kingdom*, No 24833/94–126, 18.02.1999, paragraph 32.

<sup>51</sup> Thorsten Kingreen, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 4th edition, Munich 2011, Art. 6 TEU, paragraph 22.

<sup>52</sup> On the pursuit of national interests through the IMF institutions, see Samuel Dahan, ‘The EU/IMF Financial Stabilisation Process in Latvia and Its Implications for Labour Law and Social Policy’, in: *Industrial Law Journal* 41 (2012), p. 305 ff (312).

### 1.2.1.2. UN Civil Covenant

The Commission and the ECB might also be bound by the UN Civil Covenant. But the EU is not formally a member of that treaty; therefore it is not formally bound by the Covenant under international law. However, the European Court of Justice is also guided in its case-law by human rights established by international conventions to which the EU has not formally acceded. For instance it generally refers to ‘international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories’.<sup>53</sup> The UN Civil Convention and also, for instance, the Convention on the Rights of the Child<sup>54</sup> have therefore been referred to repeatedly by the Court.<sup>55</sup> Thus the Commission and the ECB also have human rights obligations derived from the UN Civil Covenant.

### 1.2.2. Social human rights codifications

For the protection of human rights, the EU institutions are also bound by the social human rights enshrined in the UN Social Covenant and in the Revised European Social Charter (RESC).<sup>56</sup> Although the EU has not formally acceded to the UN Social Covenant or the ESC or indeed the RESC and is therefore not bound by them under international law, it might nevertheless be considered to be bound by social human rights.

#### 1.2.2.1. UN Social Covenant and (R)ESC

That commitment can, firstly, be derived from international law in conjunction with Article 53 CFR. According to that article, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, ‘in their respective fields of application, by EU law and international law and by international agreements to which the Union, the Community or all the Member States are party’.

Not all the Member States have ratified the 1996 RESC<sup>57</sup> and it is therefore debatable whether the level of protection clause in Article 53 CFR is applicable, since, according to the wording, it will only apply when ‘all Member States’ have acceded to the Convention. The position is the same with the 1961 ESC. Here again, not all EU Member States have acceded to the Convention.<sup>58</sup> However, in the past the European Court of Justice has considered it sufficient for the application of that evaluative comparative law laid down in Article 53 CFR for all the Member States to be party to the

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<sup>53</sup> ECJ Case C-540/03 *Parliament v Council* [2006], paragraph 35.

<sup>54</sup> ECJ Case C-540/03 *Parliament v Council* [2006], paragraph 37.

<sup>55</sup> ECJ Cases C-540/03 *Parliament v Council* [2006], paragraph 37; 374/87 *Orkem v Commission* [1989], paragraph 31; C-297/88 and C-197/89 *Dzodzi* [1990], paragraph 68; C-249/96 *Grant* [1998], paragraph 44.

<sup>56</sup> For an overview, Eberhard Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Tübingen 2012; Michael Krennerich, *Soziale Menschenrechte: Zwischen Recht und Politik*, Schwalbach 2013.

<sup>57</sup> The Federal Republic of Germany has signed the Convention but not ratified it. Croatia, the Czech Republic, Denmark, Greece, Latvia, Poland, Spain and the United Kingdom are also not included.

<sup>58</sup> Bulgaria, Estonia, Romania and Slovenia are not included.

signature of that international agreement and did not require ratification by every Member State.<sup>59</sup> Whatever view is taken of that as regards the RESC, the situation is clear as regards the UN Social Covenant, since all the EU Member States have acceded to that.<sup>60</sup>

However, the precise implications of Article 53 ECHR are doubtful. The significance of the norm is disputed. Article 53 CFR, like Article 52, also governs the relationship of the Charter to other fundamental and human rights codifications. Whereas Article 52 refers to the significance of those codifications for the interpretation of the fundamental rights under the Charter, Article 53 defines the relationship between the fundamental rights under the Charter and those other codifications. That article establishes a favourability principle which chiefly implies that the Charter does not affect the level of the obligations laid down in particular in international treaties.<sup>61</sup> That requires a legal comparison in each case, which determines the minimum level of protection. The level of protection clause is therefore relevant when the scope of the relevant international law codifications is opened up. For such instances of competing fundamental rights, Article 53 CFR provides that the higher level of human rights protection in international law may not be undermined by EU law.

The level of protection clause is therefore applied with regard to the UN Social Covenant when the UN Social Covenant itself is applied to measures by international organisations. Article 2(1) of the UN Social Covenant refers to the importance of international cooperation in the work of international organisations and requires every State Party to the Covenant to

‘take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.

The Committee on Economic, Social and Cultural Rights (‘the UN Social Committee’) has consistently inferred from this that not only does it impose an obligation on the Member States to promote the exercise of the rights under the UN Social Covenant in their measures in the context of IOs, but also that the international organisations themselves are bound by the UN Social Covenant.<sup>62</sup> Thus the UN Social Committee, in its General Comment No 8 on economic sanctions, designates as liable parties

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<sup>59</sup> Thomas von Danwitz, in: *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, Munich 2006, Article 53, paragraph 17.

<sup>60</sup> Date of ratification, accession (a) or membership through succession (d): Cyprus 02.04.1969; Bulgaria 21.09.1970; Sweden 06.12.1971; Denmark 06.01.1972; Federal Republic of Germany 17.12.1973; Hungary 17.01.1974; Romania 09.12.1974; Finland 19.08.1975; United Kingdom 20.05.1976; Poland 18.03.1977; Spain 27.04.1977; Austria 09.1978; Portugal 31.07.1978; Italy 15.09.1978; Netherlands 11.12.1978; France 04.11.1980 (a); Belgium 21.04.1983; Luxembourg 18.08.1983; Greece 16.05.1985 (a); Ireland 08.12.1989; Malta 13.09.1990; Estonia 21.10.1991 (a); Lithuania 20.11.1991 (a); Latvia 14.04.1992 (a); Slovenia 06.07.1992 (d); Croatia 12.10.1992 (d); Czech Republic 02.1993 (d); Slovakia 28.05.1993 (d).

<sup>61</sup> Thorsten Kingreen, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 4th edition, Munich 2011, Art. 53 CFR, paragraph 4 ff.

<sup>62</sup> Also to that effect, Concluding Observations 2001 on Germany, which in any event emphasise the liability within the IMF and the World Bank, paragraph 31: ‘The Committee encourages the State party, as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant,

‘the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States.’<sup>63</sup>

The Committee also assumes a direct obligation on IOs in its General Comment on social security:

‘The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to social security in their lending policies, credit agreements, structural adjustment programmes and similar projects, so that the enjoyment of the right to social security, particularly by disadvantaged and marginalized individuals and groups, is promoted and not compromised.’<sup>64</sup>

This basic structure for the inclusion of IOs in the obligation to guarantee human rights has now also been recognised in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, postulated in a joint statement by recognised human rights experts.<sup>65</sup> Like the UN Social Committee, the Maastricht Principles assume a binding human rights structure in which, on the one hand, the signatory states have obligations in their actions in the context of IOs, but at the same time the IOs themselves have obligations.<sup>66</sup> That binding structure is consistent with the case-law of the ECtHR on the application of the Convention to actions by EU institutions. Also according to the ECtHR, the Convention applies to actions by Member States involving international organisations.<sup>67</sup> It is true that the UN Social Committee, unlike the ECtHR, cannot deliver legally binding judgments. However, its opinions are to be taken into account under Article 38(1)(d) of the ICJ Statute. They support an extension of the obligations under the UN Social Covenant to measures by the EU, the ESM and the IMF. Although the EU cannot be directly bound formally by the UN Social Covenant, the EU is bound by those norms through the Member States’ obligations.<sup>68</sup> A level of human rights protection in accordance with Article 53 CFR might be derived for the EU from that obligation.

### 1.2.2.2. Principles of EU law

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in particular the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.’

<sup>63</sup> CESCR, General Comment No 8 (1997), UN Doc. E/C.12/1997/8, paragraph 11.

<sup>64</sup> CESCR, General Comment No 19 (2008), UN Doc. E/C.12/GC/19, Paragraph 38; see also CESCR, General Comment No 15 (2002), UN Doc. E/C.12/2002/11, paragraph. 38: ‘Accordingly, States parties that are members of international financial institutions, notably IMF, the International Bank for Reconstruction and Development (World Bank), and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.’

<sup>65</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28.11.2011, paragraphs. 15 and 16; on that subject see also Rhea Tamara Hoffmann und Markus Krajewski, ‘Staatsschuldenkrise im Euro-Raum und die Austeritätsprogramme von IWF und EU’, in: *KJ 45* (2012), p. 2 ff (11).

<sup>66</sup> Explanation by Cornelia Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards*, Tübingen 2012, p. 146 ff.

<sup>67</sup> Judgment in *Mateus and others v Portugal*, Nos 62235/12 and 57725/12, 08.10.2013, paragraph 32.

<sup>68</sup> Ignacio Saiz, ‘Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis’, in: *Journal of Human Rights Practice 1* (2009), p. 277 ff (289).

This indirect link to obligations, which is enshrined in international law, might be complemented by a genuinely binding structure in EU law.

For instance, Article 21(1) TEU imposes an obligation on the Union to be guided in its action on the international scene by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’. Specifically with regard to the indivisibility of human rights, the EU itself is therefore bound by the UN Social Covenant. However, the Troika measures do not relate to the external action of the EU referred to in Article 21(1) TEU. The MoUs are signed with Member States. Therefore Article 21 TEU is not directly applicable and only ‘indirect guidance’ is involved.<sup>69</sup>

EU law contains other references to social human rights. For instance, Article 151(1) TFEU provides:

‘The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.’

Both those instruments – the Social Charter and the Community Charter – are also mentioned in the preamble to the TEU. The preamble to the CFR also cites the Council of Europe Social Charter, which refers to both the RESC and the ESC. Those references indicate that the ESC is binding, at least for EU measures related to the objectives of Article 151 TFEU.<sup>70</sup> However, the structural norm in Article 151 TFEU does not confer any subjective rights and is purely programmatic.<sup>71</sup> The norm provides guidance on the interpretation of EU law in regard to the objectives it refers to, but that cannot be used for systematic interpretation of EU fundamental rights.

### **1.2.2.3. Social human rights as general principles**

However, the significance of social human rights codifications in EU law is not confined to non-binding programmatic clauses. According to Article 6(3) of the EU Treaty, fundamental rights

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<sup>69</sup> Markus Krajewski, ‘Human Rights and Austerity Programmes’, in: Cottier and others (eds.), *The Rule of Law in Monetary Affairs*, Cambridge 2014, in preparation (manuscript p. 8).

<sup>70</sup> Markus Kotzur, in: Geiger/Khan/Kotzur (eds.), *EUV/AEUV*, 5th edition., Munich 2010, Art. 151 TFEU, paragraph. 10; for a different view see Sebastian Krebber, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 4th edition, Munich 2011, Art. 151 TFEU, paragraph 34.

<sup>71</sup> Urfan Khaliq, ‘EU and the European Social Charta: Never the Twain shall meet?’, in: *Cambridge Yearbook of European Legal Studies 15* (2013-2014), p. 169 ff.

in the Union are based not only on the ECHR and the CFR but also on general legal principles. As Article 6(3) of the EU Treaty explicitly indicates, the institutions of the Union are bound by the general principles even after the entry into force of the CFR. The general principles are also a legal source of human rights protection in EU law, in addition to the other sources of human rights:

‘They represent an additional legal source of EU fundamental rights and have the same status as the Charter. In cases where fundamental rights are affected, it is certainly appropriate to consider the Charter initially, since that is a definitive text. Nonetheless fundamental rights as a legal principle *are still significant*. Firstly they can always be used when the fundamental rights granted by the Charter narrower, for instance when the commitment of the Member States is to be defined more narrowly. Fundamental rights as a legal principle are not restricted by the Charter, as can be inferred from the fact that they are enshrined in Article 6 TEU with equal status.’<sup>72</sup>

The ECJ consistently takes account of the international codifications of human rights when applying the general principles in its settled case-law.<sup>73</sup> For instance, it has invoked the UN Convention on the Rights of the Child and also the UN Civil Covenant. Thus the ECJ not only develops the general legal principles with regard to the constitutional traditions of the Member States but also includes the human rights conventions to which the Member States have acceded.<sup>74</sup> It is consistently argued in the field of social human rights which is relevant in this case that the binding nature of social human rights is derived in the form of general principles from the fundamental rights obligation on the EU under Article 6(3) TEU.<sup>75</sup> The general principles include social human rights as well as liberal human rights.<sup>76</sup> Hence the Court also cites the ESC in particular in its case-law,<sup>77</sup> just as the ECtHR expressly refers to the RESC in *Demir and Baykara v Turkey* in relation to the interpretation of Articles 12 and 28 ECHR.<sup>78</sup> Social human rights, as set out in the RESC and the UN Social Covenant, are therefore binding on the institutions of the Union as general principles.<sup>79</sup>

#### 1.2.2.4. Interim conclusion

Hence there is significant evidence that the social human rights also laid down in the UN Social Covenant and the RESC should be considered binding under EU law, particularly if one accepts the above view that those rights are general legal principles in the human rights acquis under EU law

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<sup>72</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition., Munich 2013, Introduction, paragraph 30.

<sup>73</sup> ECJ Case C-540/03 *European Parliament v Council* [2006], paragraph 37.

<sup>74</sup> Settled case-law, see for instance ECJ Case 4/73 *Nold v Commission* [1974], paragraph 13.

<sup>75</sup> European Parliament, ‘Fundamental Social Rights in Europe’, Working Paper 1999, EP 168.629, on [www.europarl.europa.eu/workingpapers/soci/pdf/104\\_en.pdf](http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf). (last accessed 02.11.2013).

<sup>76</sup> Fons Coomans, ‘Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations’, in: *Max Planck UNYB 11* (2007), p. 359 ff (376).

<sup>77</sup> In particular ECJ Case 149/77 *Defrenne* [1978].

<sup>78</sup> ECtHR judgment in *Demir and Baykara v Turkey*, No 34503/97, paragraph 140 ff, 1211.2008.

<sup>79</sup> Kaarlo Heikki Tuori, ‘The European Financial Crisis: Constitutional Aspects and Implications’, *EUI Working Papers LAW 28/2012*, p. 49.

and hence complementary to the ECHR and the CFR. But even if they are not recognised as formally binding, they provide guidance for the purposes of systematic interpretation. In ECtHR practice too, social human rights are to be given due consideration in the interpretation of the equivalent social fundamental rights under the CFR. The decisions by the supervisory institutions for the UN Social Covenant and the RESC can provide important points of reference for the definition of rights under the CFR. Therefore the three codifications of social human rights and the legal opinions by the supervisory bodies in individual recommendations and General Comments at least provide guidance for the interpretation of the formally binding fundamental and human rights in EU law.

### 1.2.3. ILO Conventions

Almost 190 ILO Conventions are now in existence. Unlike its Member States, the EU is not a member of the ILO. It merely has observer status, but is not involved in legislative proceedings and the ILO agreements are not applicable to the EU. Nonetheless EU law also contains a number of references to ILO agreements. For instance, Article 151 TFEU refers to the 1989 Community Charter of the Fundamental Social Rights of Workers,<sup>80</sup> the preamble of which states that ‘inspiration should be drawn from the Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe’.

Like social human rights, the ILO Conventions, which have been signed by all the Member States, are at least included in the general legal principles binding on the EU institutions under Article 6(3) TEU.<sup>81</sup> In addition, the fundamental commitment of the EU to ILO law is also indicated in the European Court of Justice opinion<sup>82</sup> on ILO Convention No 170.<sup>83</sup> By analogy with the structure of obligations relating to social human rights, with the ILO standards there is also a binding commitment through the CFR. That is derived, firstly, from Article 52(3) CFR, which ensures consistency between the Charter and the ECHR. Since the ECHR incorporates the ILO rules for the interpretation of the ECHR rules<sup>84</sup>, within the scope of the ECHR an indirect commitment to the ILO rules is also derived through the corresponding rules of the ECHR.<sup>85</sup> That also applies to the EU institutions, which are bound by the level of protection in the ILO Conventions in the scope of protection of the ECHR rights, since Article 52(3) CFR provides for that as a minimum guarantee. In the field of industrial dispute law, for instance, the Union is bound by ILO Convention No 87 through Articles 28 and 52(3) CFR in conjunction with Article 11 ECHR.<sup>86</sup>

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<sup>80</sup> COM (1989) 248 final.

<sup>81</sup> Johannes Heuschmid, *Mitentscheidung durch Arbeitnehmer*, Baden-Baden 2009, p. 184 ff.

<sup>82</sup> European Court of Justice Opinion 2/91, ILO Convention No 170, 19 March 1993.

<sup>83</sup> Juliane Kokott, in: Streinz (ed.), *EUV/TFEU*, 2nd edition., Munich 2012, Article 351 paragraph 30 (‘it is obviously intended that the Union should be bound’); for an analysis of EU case-law, see Johannes Heuschmid and Thomas Klebe, ‘Die ILO-Normen in der Rechtsprechung der EU’, in: Däubler/Zimmer (eds.), *FS Lörcher*, Baden-Baden 2013, p. 336 ff.

<sup>84</sup> ECtHR, *Demir and Baykara v Turkey* No 34503/97, paragraphs 147 and 166, 12.11.2008; ECtHR, *Enerji Yapi-Yol Se v Turkey*, No 68959/01, paragraph 40 f, 21.04.2009.

<sup>85</sup> Angelika Nußberger, ‘Auswirkungen der Rechtsprechung des EGMR auf das deutsche Arbeitsrecht’, in: *RdA 2012*, p. 270 ff.

<sup>86</sup> Klaus Lörcher, *Internationale Grundlagen des Streikrechts*, in: Däubler (ed.), *Arbeitskampfrecht*, 3rd edition, Baden-Baden 2011, § 10, paragraph 65 ff.



Finally, as with the above human rights, in line with the structure a binding effect also follows from Article 53 CFR. The ILO Conventions are to be taken into account in the interpretation of the rights guaranteed by the CFR through Article 53 CFR.<sup>87</sup>

#### 1.2.4. UN Disability Convention

The only human rights treaty the EU formally signed and ratified under international law is the UN Disability Convention which has been in force in the EU since 22 January 2011. The Disability Convention reflects a social model of disability, protecting against discrimination (Article 5) and establishing the obligation to take effective and appropriate measures, e.g. in the health sector to enjoy the highest attainable standard of health (Article 25), and in labour relations to exercise labour and trade union rights (Article 27). The convention obliges parties to realize an adequate standard of living and social protection (Article 28).<sup>88</sup> Member states and the EU – as a regional organization, which signed the convention and is therefore bound within the scope of Article 44 of the Convention – share responsibility for the implementation of the convention. In a Code of Conduct the procedural aspects concerning the implementation of this mixed human rights agreement are codified.<sup>89</sup>

### 1.3. Obligations under customary international law

The EU institutions might also have human rights obligations under customary international law.

The ECJ has ruled, in a whole series of judgments, that the EU institutions must observe general international law.<sup>90</sup> That applies, for instance, to the customary international law rules for the termination and suspension of treaty relations<sup>91</sup> and also to the territoriality principle.<sup>92</sup> The commitment of the EU institutions to the customary international law *jus cogens* goes even further. Certainly Article 53 of the Vienna Convention on the Law of Treaties (VCLT)<sup>93</sup> is not directly binding on the EU institutions and the parallel Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations has not yet entered

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<sup>87</sup> Johannes Heuschmid und Thomas Klebe, 'Die ILO-Normen in der Rechtsprechung der EU', in: Däubler/Zimmer (eds.), *FS Lörcher*, Baden-Baden 2013, p. 336 ff (351); also to that effect, Anne Trebilcock, 'An ILO viewpoint on EU development in relation to fundamental labour principles', *EuZA* 6 (2013), p. 178 ff.

<sup>88</sup> Lisa Waddington, *The European Union and the United Nations Convention on the Rights of Persons with Disabilities*, in: *Maastricht Journal of European and Comparative Law* 18 (2011), p. 431 ff.

<sup>89</sup> Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

<sup>90</sup> Basic principle in ECJ Case C-286/90 *Poulsen* [1992], paragraph 9; specific reference in ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008], paragraph 291.

<sup>91</sup> ECJ Case C-162/96 *Racke* [1998], paragraph 45 f.

<sup>92</sup> ECJ Joined Cases 89, 104, 114, 116, 117 and 125-129/85 *Zellstoff* [1993], paragraph 18.

<sup>93</sup> UNTS 1155, p. 331.

into force. However, the *jus cogens* principle applies in customary international law.<sup>94</sup> It is widely considered even to take precedence over primary law.<sup>95</sup> In practice the international law *jus cogens* is significant, particularly as a criterion of legality for international law norms which, directly or indirectly, are effective for the EU institutions. In the *Yusuf* and *Kadi* decisions the ECJ assumed that UN Security Council resolutions which breach *jus cogens* as international *ordre public* cannot justify international obligations for the EU.<sup>96</sup> However, the ECJ made it clear in its subsequent decision on *Kadi* and *Al Barakaat* that a distinction is to be made in that respect between the lawfulness of the Security Council resolution and that of its transposition into EU law.<sup>97</sup> Only the latter is subject to scrutiny by the EU courts and is to be measured according to the precepts of primary EU law, in particular fundamental rights.<sup>98</sup>

It is generally recognised that conflicts between secondary EU law and general international law are as far as possible to be resolved by an interpretation in line with international law.<sup>99</sup> Since the EU institutions are also bound in their legislative activity, it seems reasonable, if rejecting the interpretation consistent with international law, to accept that general international law takes precedence over secondary EU law, in so far as the norm in question is directly applicable to general international law.<sup>100</sup> It would then be logical to assume that general international law has the same binding effect within the Union as the EU's international agreements under Article 216(2) TFEU. The ECJ also considers it possible that general international law might in principle be directly applicable.<sup>101</sup> Depending on its form, in that respect international law is also deemed to be EU law within the European judicial area.

### 1.3.1. International Bill of Rights

In the light of that ECJ case-law, human rights of customary law significance are also binding on the EU institutions. At least that must be the case with the International Bill of Rights norms laid down in the Universal Declaration of Human Rights,<sup>102</sup> the International Covenant on Civil and Political Rights (UN Civil Covenant)<sup>103</sup> and the International Covenant on Economic, Social and Cultural Rights (UN Social Covenant),<sup>104</sup> all dated 16 December 1966, which have acquired

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<sup>94</sup> On the concept and content of the international law *jus cogens*, see, generally, Lauri Hannikainen, *Peremptory norms (jus cogens) in international law*, Helsinki 1988; Christian J. Tams, 'Schwierigkeiten mit dem Ius Cogens', in: *AVR 40* (2002), 331 ff; Stefan Kadelbach, *Zwingendes Völkerrecht*, Berlin 1992; Ian Brownlie, *Principles of Public International Law*, 6th edition., Oxford 2003, 488 f.

<sup>95</sup> Christian Tomuschat, in: von der Groeben/Schwarze (eds.), *EUV/EGV*, Art. 281 EC, paragraph 43.

<sup>96</sup> European Court of First Instance, Case T-306/01 *Yusuf* [2005], paragraphs 277-282. The consequence is an implicit assessment in those decisions of the relevant Security Council resolutions in the light of *ius cogens*. See Ulrich Haltern, 'Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO', in: *JZ 2007*, p. 537.

<sup>97</sup> ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008], paragraph 286 ff.

<sup>98</sup> ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008], paragraph 316 ff.

<sup>99</sup> Specifically in ECJ Case C-286/90 *Poulsen* [1992], paragraph 9.

<sup>100</sup> For instance by Christian Tomuschat, in: von der Groeben/Schwarze (eds.), *EUV/EGV*, Art. 281 EG, paragraph 43; and Karl M. Meessen, 'Der räumliche Anwendungsbereich des EWG-Kartellrechts und das allgemeine Völkerrecht', in: *Europarecht 18* (1973), p. 34.

<sup>101</sup> ECJ Case C-162/96 *Racke* [1998], paragraph 51.

<sup>102</sup> UN General Assembly Res. 217 A (III), 10.12.1948.

<sup>103</sup> UNTS 999, p. 171.

<sup>104</sup> UNTS 993, p. 3.

customary international law status.<sup>105</sup> Those core rules of customary international law are binding not only on States but, as stated in the preamble to the Universal Declaration of Human Rights, on ‘every individual and every organ of society’.

As customary international law, those norms are also binding on the EU institutions. It is generally accepted that, in the light of the structural characteristics of human rights norms, which differ from economic international law rules in their individual orientation, they establish directly subjective rights.<sup>106</sup> Even though they do not extend EU competences, the human rights obligations of the EU based on customary international law go ‘further than current EU law understandings of the EU’s human rights obligations.’<sup>107</sup>

On that point, Markus Krajewski rightly emphasises, in regard to the social human rights relevant in the present context:

‘Economic, social and cultural rights such as the right to work, the right to an adequate standard of living and health and the right to education, are enshrined in the Universal Declaration of Human Rights, which is generally considered to contain customary law obligations at its core. Furthermore, a large majority of states has signed and ratified international human rights treaties which contain these rights. It can therefore be concluded that the basic elements of these rights are of customary nature. The possibility that international organisations such as the IMF are bound by human rights insofar as they represent customary international law was also conceded by the IMF’s General Counsel François Gianviti in a paper presented in 2002. Even if one does not want to go as far as accepting positive obligations of international organisations under customary human rights law, it seems safe to assume that international organisations are obliged not to frustrate the attempts of states to honour their human rights obligations.’<sup>108</sup>

The EU institutions are therefore bound by those human rights applicable in customary law.<sup>109</sup> The ILO’s core standards are also part of customary international law.<sup>110</sup> Even if it is not accepted that there is a duty on the EU itself as an IO to guarantee such rights, the EU institutions still have an obligation not to frustrate efforts by the States to guarantee them.

### 1.3.2. Odious debts doctrine

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<sup>105</sup> See contributions in Gert Westerveen, *The international Bill of Human Rights*, Utrecht 1995; cf. Hersch Lauterpacht, *International Bill of the Rights of Man*, New York 1945.

<sup>106</sup> On the distinction, see Armin von Bogdandy, ‘Rechtsgleichheit, Rechtssicherheit und Subsidiarität im transnationalen Wirtschaftsrecht’, in: *EuZW* (2001), p. 363.

<sup>107</sup> Tawhida Ahmed and Israel de Jesús Butler, ‘The European Union and Human Rights: An International Law Perspective’, in: *EJIL* 17 (2006), p. 777 ff (801).

<sup>108</sup> Markus Krajewski, ‘Human Rights and Austerity Programmes’, in: Cottier and others (eds.), *The Rule of Law in Monetary Affairs*, Cambridge 2014, in preparation (manuscript, p. 8).

<sup>109</sup> OHCHR, *The European Union and the International Human Rights Law*, 2010, p. 22 ff.

<sup>110</sup> Klaus Lörcher, in: Däubler (ed.), *Arbeitskampfrecht*, 3rd edition., Baden-Baden 2011, § 10, paragraph 45 with further citations; Philip Alston, ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’, in: *EJIL* 15 (2004), p. 457 ff (493).

The ‘odious debts’ doctrine,<sup>111</sup> according to which the Troika MoUs with nation states should be consistent with the ideas set out in the UN Charter of promoting human rights (Article 55 of the Charter) and self-determination of peoples (Articles 1 and 2 of the Charter), goes further. If MoUs conflict with the rights in the Charter, whether because they have been concluded undemocratically or they disregard the interests of the populations of the States concerned, according to that doctrine the rights derived from the UN Charter under its Article 103 should take precedence. Even if the argument by supporters of that theory with regard to the legal consequence of nullity of conflicting agreements is not accepted<sup>112</sup>, it must be emphasised that the odious debts doctrine is also based on the principle that the Union and the institutions acting on its behalf have a human rights obligation under international law. The basis in Article 103 of the UN Charter is through the organisational hierarchy, but that is functionally equivalent to an approach deriving the human rights obligation of the EU institutions from Article 6 TEU.

## 2. Specific scope of protection of human rights

The question then arises whether the scope of protection of the above human rights is opened up at all in respect of the situations governed by the MoUs.

It has now been frequently established that the measures to control the crisis affect the exercise of the rights guaranteed in the universal and regional fundamental and human rights norms.<sup>113</sup> That includes more difficult access to work, threats to the living wage and the unavailability of food, housing, water and other basic needs.<sup>114</sup> The MoUs negotiated by the Troika regularly encroach on fundamental and human rights. It needs to be considered below on which areas of fundamental and human rights the restrictions laid down in the MoUs in which the Troika is involved<sup>115</sup> are having a consistent impact.<sup>116</sup>

### 2.1. Labour and trade union rights

Firstly, the MoUs affect fundamental rights related to work, in particular the freedom to choose an occupation, freedom of collective bargaining and fair pay. These are protected in their various forms inter alia in Article 31 CFR (fair and just working conditions), Article 28 CFR (right of collective bargaining) and Article 30 CFR (protection against unjustified dismissal). Articles 1 to 6

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<sup>111</sup> For an explanation of the doctrine, see Sabine Michalowski, ‘Ius cogens, transnational justice and other trends of the debate on odious debts’, in: *Columbia Journal of transnational Law* 48 (2009), p. 59 ff.

<sup>112</sup> Eric Toussaint und Renaud Vivienne, ‘Greece, Ireland and Portugal: Why Agreements with the Troika are odious’, 25.08.2011, <http://cadtm.org/Greece-Ireland-and-Portugal-why> (last accessed 02.11.2013).

<sup>113</sup> For a general overview of relevant human rights: M. Rodwan Abouharb und David Cingranelli, *Human Rights and Structural Adjustment: The Impact of the IMF and World Bank*, New York 2007, p. 133 ff.

<sup>114</sup> OHCHR, Report on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it (A/HRC/13/38); OHCHR Background Paper (Bat-Erdene Ayush, Chief, Right to Development Section): Promoting a rights-based approach to economic stabilization, recovery and growth, April 2013.

<sup>115</sup> MoUs only signed with the IMF are not included below.

<sup>116</sup> That can only be a cursory and unrepresentative overview. For a more wide-ranging attempt, see OHCHR Report: Austerity measures and economic, social and cultural rights, E/2013/82, 07.05.2013.

and 24 of the RESC and Articles 6 to 8 of the UN Social Covenant also relate to the protection of work. Article 11 of the ECHR guarantees freedom of assembly, Article 27 of the UN Convention on the Rights of Persons with Disabilities protects fundamental employment rights for the disabled. Finally, the ILO's Declaration on Fundamental Principles and Rights at Work provides for a minimum level which is specified in particular in ILO Convention No 98 on the Right to Organise and Collective Bargaining.<sup>117</sup>

Even if it is disputed in specific cases how far those CFR norms allow subjective legal positions in each case and the case-law has not yet defined the scope of protection in more detail, Article 31 CFR is in any event a protective instruction to guarantee a minimum level of fair working conditions. Article 30 CFR is anything but a superfluous norm without regulatory content;<sup>118</sup> it establishes an objective scope of protection which is encroached upon if the EU impedes adequate protection by Member States against unfair dismissal, including in employment relationships between private individuals.<sup>119</sup> Even if the EU has no collective powers in those areas under Article 153(5) 5 TFEU, the EU institutions should at least not frustrate the efforts of the Member States in that regard.

The MoUs affect the scope of protection of those fundamental and human rights in many respects, by laying down obligations for:

- reductions in the minimum wage level<sup>120</sup>
- cuts in payment entitlements, leave, etc. in the public sector<sup>121</sup>
- sanctions on jobseekers<sup>122</sup>
- reduction in unemployment benefit<sup>123</sup>
- lower standards of protection against unfair dismissal<sup>124</sup>

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<sup>117</sup> On that point and the implications of European Court of Human Rights case-law for the austerity measures, see Keith D. Ewing, 'Austerity and the Importance of the ILO and the ECHR for the Progressive Development of European Labour Law', in: Däubler/Zimmer (eds.), *Arbeitsvölkerrecht. FS für Klaus Lörcher*, Baden-Baden 2013, p. 361 ff.

<sup>118</sup> Although that is the view expressed by Sebastian Krebber, in: Calliess/Ruffert (eds.), *EUV/TFEU*, 4th edition. Munich 2011, Article 30 CFR, paragraph 2.

<sup>119</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition, Munich 2013, Article 30 CFR, paragraph 8.

<sup>120</sup> MoU on Specific Economic Policy Conditionality, 28.11.2010 (Ireland), p. 5: 'Reduce by €1.00 per hour the nominal level of the current national minimum wage'.

<sup>121</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: COM, The Second Economic Adjustment Programme for Greece: First Review – December 2012, p. 187 ff (250 f).

<sup>122</sup> MoU on Specific Economic Policy Conditionality (Ireland), 28.11.2010, p. 6: 'the application of sanction mechanisms for beneficiaries not complying with job-search conditionality and recommendations for participation in labour market programmes'.

<sup>123</sup> MoU on Specific Economic Policy Conditionality (Portugal), 17.05.2011, p. 21 ff (21): 'reducing the maximum duration of unemployment insurance benefits...'.  
<sup>124</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: COM, The Second Economic Adjustment Programme for Greece: First Review – December 2012, p. 187 ff (223.): 'the Government reduces the maximum dismissal notification period to 4 months and caps statutory severance pay at 12 months'; MoU on Specific Economic Policy Conditionality (Portugal), 17.05.2011, p. 21 ff.

- the undermining of national collective bargaining agreements through the introduction of temporal, spatial and personal restrictions on the validity of collective bargaining agreements.<sup>125</sup>

But, in addition, the exercise of the above human and fundamental rights is being affected on a massive scale by the dismantling of fundamental employment rights in the European employment and social models, on which the MoUs have had a decisive influence.

How the MoUs are affecting rights in the field of the European ‘labour constitution’<sup>126</sup> is illustrated by two provisions relating to the reduction in the minimum wage and the restriction on collective bargaining autonomy:

### 2.1.1. Article 31 CFR (fair and just working conditions)

The MoU with Ireland laid down detailed conditions for the minimum wage. It imposed an obligation on Ireland to:

‘reduce by €1.00 per hour the nominal level of the current national minimum wage’.<sup>127</sup>

The 2012 MoU with Greece also sets requirements for specific restrictions on the minimum wage:

‘*Exceptional legislative measures on wage setting* – Prior to the disbursement, the following measures are adopted: The minimum wages established by the national general collective agreement (NGCA) will be reduced by 22 per cent compared to the level of 1 January 2012; for youth (for ages below 25), the wages established by the national collective agreement will be reduced by 32 per cent without restrictive conditions. Clauses in the law and in collective agreements, which provide for automatic wage increases, including those based on seniority, are suspended’.<sup>128</sup>

Both provisions might affect the scope of protection of Article 31, which protects the continuance of a minimum level of job security, fair working conditions, prevention of work-related risks, the introduction of maximum working hours and annual leave and rest period entitlements. A fair wage also falls within the scope of protection of the fundamental right<sup>129</sup> and for that reason the requirement to establish a minimum wage is sometimes also inferred from it.<sup>130</sup> Even when the

<sup>125</sup> General overview in Bernd Waas, ‘Tarifvertragsrecht in Zeiten der Krise’, in: Schubert (ed.), *Anforderungen an ein modernes kollektives Arbeitsrecht, Liber Amicorum in honour of Otto Ernst Kempfen*, Baden Baden 2013, p. 38 ff.

<sup>126</sup> On the concept, Florian Rödl, ‘The Labour Constitution’, in: von Bogdandy/Bast (eds.), *Principles of European Constitutional Law*, 2nd edition, Oxford 2010, p. 623 ff.

<sup>127</sup> MoU on Specific Economic Policy Conditionality, 28.11.2010 (Ireland), p. 5.

<sup>128</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, paragraph 4.1.; for implementation see COM, The Second Economic Adjustment Programme for Greece: First Review – December 2012, Table 10A, p. 116.

<sup>129</sup> See pending Case C-264/12 *Companhia de Seguros*, referred to the ECJ for a preliminary ruling.

<sup>130</sup> Heinrich Lang, in: Tettinger/Stern (eds.), *Kölner Gemeinschaftskommentar zur Grundrechte-Charta*, Munich 2006, Art. 31 CFR, paragraph 8; Anke Bernert, *Rechtlich-funktionale Aspekte für die Zulässigkeit von Mindestlöhnen, Working Paper Fachbereich Rechtspflege der Hochschule Wirtschaft und Recht Berlin 1* (2013), p. 34; see also Hans D.

norm does not alter the EU system of competences and the EU legislator is therefore not itself required to guarantee a minimum wage, the EU institutions are prohibited by Article 31 CFR from undermining efforts by the national governments to establish a minimum wage. The MoUs with Ireland and Greece are inconsistent with that requirement. They are designed specifically and in detail to derogate from Article 31 CFR.

### **2.1.2. Art. 28 CFR (freedom of collective bargaining)**

The MoUs negotiated with Greece consistently lay down detailed restrictions on collective bargaining authority. For instance, the 2010 MoU required the Greek Government

‘... to reform wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time. Government ensures that firm level agreements take precedence over sectoral agreements which in turn take precedence over occupational agreements. Government removes the provision that allows the Ministry of Labour to extend all sectoral agreements to those not represented in negotiations.’<sup>131</sup>

The 2012 follow-up MoU also imposes specific restrictions on Greece in regard to the setting of wages:

*‘Measures to foster the re-negotiation of collective contracts – Prior to the disbursement, legislation on collective agreements is amended with a view to promoting the adaptation of collectively bargained wage and non-wage conditions to changing economic conditions on a regular and frequent basis. Law 1876/1990 will be amended as follows:*

- Collective agreements regarding wage and non-wage conditions can only be concluded for a maximum duration of 3 years. Agreements that have been already in place for 24 months or more shall have a residual duration of 1 year.
- Collective agreements which have expired will remain in force for a period of maximum 3 months. If a new agreement is not reached, after this period, remuneration will revert to the base wage and allowances for seniority, child, education, and hazardous professions will continue to apply, until replaced by those in a new collective agreement or in new or amended individual contracts.’<sup>132</sup>

Both MoUs impose an obligation to change the Greek collective bargaining system through the introduction of temporal, spatial and personal restrictions on the validity of collective bargaining.<sup>133</sup>

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Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition., Munich 2013, Art. 31 CFR, paragraph 6 ff; Marita Körner, ‘Mindestlohnansforderungen im internationalen Arbeitsrecht’, in: *Neue Zeitschrift für Arbeitsrecht* 28 (2011), p. 425 ff.

<sup>131</sup> MoU on Specific Economic Policy Conditionality 06.08.2010 (Greece), p. 34.

<sup>132</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, paragraph 4.1.

<sup>133</sup> General overview in Bernd Waas, ‘Tarifvertragsrecht in Zeiten der Krise’, in: Schubert (ed.), *Anforderungen an ein modernes kollektives Arbeitsrecht, Liber Amicorum in honour of Otto Ernst Kempfen*, Baden Baden 2013, p. 38 ff.

That might affect the exercise of the rights under Article 28 CFR, which establishes a subjective individual and collective right with a view to guaranteeing freedom of collective bargaining.<sup>134</sup> It is closely linked to Article 11 ECHR and the ILO Declaration on Fundamental Principles and Rights at Work codifying customary international law, which provides for a minimum level of protection, specified mainly in ILO Convention No 98 in the field of collective employment law.<sup>135</sup> Both collective bargaining and works agreements come within the scope of protection of the norm. Subjective (enforceable) guarantee rights exist in respect of both, as is also apparent from the close connection with Article 11 ECHR. The restriction on the validity of collective bargaining in particular constitutes an encroachment in this case. A mission of ILO experts, referring to collective bargaining autonomy with regard to Greece<sup>136</sup> and a Greek MoU with the Troika, took a highly critical view:

‘The commitments undertaken by the Government in this framework, and in particular as set out in Act No 3845 based on the May 2010 Memoranda, have been translated into a series of legislative interventions in the freedom of association and collective bargaining regime which raise a number of questions in particular with regard to the need to ensure the independence of the social partners, the autonomy of the bargaining parties, the proportionality of the measures imposed in relation to their objective, the protection of the most vulnerable groups and finally, the possibility of review of the measures after a specific period of time. ... The High Level Mission understands that associations of persons are not trade unions, nor are they regulated by any of the guarantees necessary for their independence. The High Level Mission is deeply concerned that the conclusion of “collective agreements” in such conditions would have a detrimental impact on collective bargaining and the capacity of the trade union movement to respond to the concerns of its members at all levels, on existing employers’ organizations, and for that matter on any firm basis on which social dialogue may take place in the country in the future.’<sup>137</sup>

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<sup>134</sup> On recognition of the right to strike, see decision contested on the grounds of the penalty imposed in the assessment in relation to allegedly conflicting fundamental freedoms, ECJ Case 438/05 *Viking* [2007], paragraph 43: ‘In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ C 364, 18.12.2000, p. 1)’.

<sup>135</sup> On that point and the implications of ECtHR case-law for the austerity measures, see Keith D. Ewing, ‘Austerity and the Importance of the ILO and the ECHR for the Progressive Development of European Labour Law’, in: Däubler/Zimmer (eds.), *Arbeitsvölkerrecht. FS für Klaus Lörcher*, Baden-Baden 2013, p. 361 ff.

<sup>136</sup> See also Joanna Pagonis, ‘The European Union’s Response to the Sovereign Debt Crisis. Its Effect on Labor Relations in Greece’, in: *Fordham Int’l L.J.* 36 (2013), p. 1517 ff.

<sup>137</sup> ILO, Report on the High Level Mission to Greece, Athens (19-23.09.2011), paragraph 304 ff.



The general erosion and destabilisation of the collective bargaining right have on the whole become more radical in the countries with which MoUs have been signed.<sup>138</sup>

In so far as the MoUs provide for specific limits on the scope of collective bargaining, they restrict the right to freedom of collective bargaining. Since Article 28 CFR, which protects a free collective bargaining and industrial action system against encroachments, 'also provides protection against indirect encroachments',<sup>139</sup> the fundamental right within the meaning of Article 28 CFR is affected not only in the implementation by the Member State but as soon as the MoU is concluded.

### 2.1.3. Interim conclusion

The MoUs affect the rights to freedom to choose an occupation, freedom of collective bargaining and remuneration for work under Articles 27 to 32 CFR in conjunction with Articles 1 to 6 and 24 RESC, Articles 6 to 8 UN Social Covenant, Article 11 ECHR, Article 27 UN Disability Convention and the ILO core labour standards.

## 2.2. Housing and social security

Rights to housing and social security are also affected. Those fundamental rights are protected by Article 34 CFR. They are also guaranteed in Articles 12 and 13 RESC and Articles 9 and 11 of the UN Social Covenant. Minimum protection for social guarantees may also be derived from the ECHR.<sup>140</sup> Even if the ECtHR adopts a somewhat cautious approach as regards the development of minimum socio-economic guarantees, a number of basic guarantees may be inferred from the ECHR, which are at least not wholly irrelevant to the regulatory field of the MoUs.<sup>141</sup> That applies in particular to the prohibition on discrimination under Article 14 ECHR<sup>142</sup>, the right to life protected by Article 2 ECHR, the prohibition on inhuman treatment in Article 3 ECHR<sup>143</sup> and the right to a private life guaranteed in Article 8 ECHR, for which certain minimum guarantees are enshrined in law.<sup>144</sup> Especially in the light of their overall scheme, the first of those rights may be taken to mean that they require measures to prevent serious social need with severe physical and mental suffering.<sup>145</sup> In so far as the measures provided for in the MoUs create such suffering, those rights are at any rate affected.

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<sup>138</sup> On the Greek example, with extensive criticism of the MoU, see Dimitris Travlos-Tzanetatos, 'Die Tarifautonomie in kritischer Wende', in: Oetker/Joost/Paschke (eds.), *Festschrift für Franz Jürgen Säcker*, Munich 2012, p. 325 ff.

<sup>139</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition., Munich 2013, Art. 28, paragraph 3.

<sup>140</sup> For an overview, Arno Frohwerk, *Soziale Not in der Rechtsprechung des EGMR*, Tübingen 2012; also Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', in: *European Human Rights Law Review* 5 (2008), p. 583 ff.

<sup>141</sup> See Arno Frohwerk, *Soziale Not in der Rechtsprechung des EGMR*, Tübingen 2012.

<sup>142</sup> Mel Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?', in: *Journal of Social Security Law*, 16 No 3 (2009), p. 120-138.

<sup>143</sup> See in particular ECtHR decision in *Z and others v United Kingdom*, No 29392/95, 10.5.2001, paragraph 69 ff.

<sup>144</sup> Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', in: *European Human Rights Law Review* 5 (2008), p. 583 ff.

<sup>145</sup> Stefanie Schmahl und Tobias Winkler, 'Schutz vor Armut durch die ECHR', in: *AVR* 48 (2010), p. 405 ff (423).

In implementation of the EU objective under Article 3(3) TEU, the CFR protects membership of social security schemes. That relates firstly to non-discriminatory access to social security benefits under Article 34(2) CFR. Certainly the extent to which the EU can and should provide its own guarantees is disputed in regard to Article 34(1) (right of access to social security benefits and social services) and Article 34(3) CFR (combating social exclusion and poverty), especially since the CFR does not alter the primary law competences. However, it is not disputed that the EU should not frustrate efforts by the Member States in this regard. The norms require a minimum level of social security and establish a right to a guarantee which is subject to legal scrutiny.<sup>146</sup>

The MoUs impose an obligation to encroach on those rights in a number of respects, in that, inter alia, they require:

- reduced expenditure on housing schemes,<sup>147</sup>
- removal of free transportation rights, family transfer payments and other welfare payments,<sup>148</sup>
- drastic cuts in wages and pensions.<sup>149</sup>

The UN Social Committee, referring to the example of Spain, criticised the measures agreed in the MoUs on the grounds that they disproportionately affect the most vulnerable groups in society. The Committee therefore recommended, in regard to the right to social security, that it should be ensured

‘that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups.’<sup>150</sup>

In that sense Cephas Lumina, the UN expert on the effects of foreign debt and other financial obligations, noted, in regard to the situation partly caused by the MoUs in Greece:

‘The austerity programme is being implemented in the context of a social protection system characterized by protection gaps and which, in its current form, is not able to absorb the shock of unemployment, reductions of salaries and tax increases. Instead of strengthening the social safety net and making it more comprehensive, priority appears to have been accorded to fiscal consolidation at the expense of the welfare of the people in Greece. On the basis of the memorandum signed between the Troika and the Government massive cuts to pensions and other welfare benefits have been made while taxes have been increased.

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<sup>146</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition, Munich 2013, Art. 34 CFR, paragraph 3.

<sup>147</sup> MoU on Specific Economic Policy Conditionality (Cyprus), 29.08.2013, paragraph 2.9. p. 13.

<sup>148</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: Commission, *The Second Economic Adjustment Programme for Greece: First Review – December 2012*, p. 187 ff (251 f.).

<sup>149</sup> MoU on Specific Economic Policy Conditionality, 28.11.2010 (Ireland), p. 5.

<sup>150</sup> CESCR, *Concluding Comments upon the review of the fifth periodic report of Spain (18.05.2012)*, UN Doc E/C.12/ESP/C0/5, paragraph 8.

Consecutive cuts have reduced pensions up to 60 per cent (for higher pensions) and between 25-30 per cent for lower ones.’<sup>151</sup>

Finally, the European Economic and Social Committee also stated, in its decision published in April 2013, that the huge cuts in Greece were affecting the right to social security:

‘In contrast, the Committee considers that the cumulative effect of the restrictions, as described in the information provided by the complainant trade union (see paragraphs 56-61 above), and which were not contested by the Government, is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned.’<sup>152</sup>

The MoUs are therefore having a sustained effect on the fundamental rights protected by Article 34 CFR and hindering access to social security systems for large sections of the population.

### 2.3. Health

The right to health protected by Article 35 CFR, Article 11 RESC, Article 25 of the UN Disability Convention and Article 12 of the UN Social Covenant is also affected. The fundamental right under EU law based on Article 35 CFR is affected if EU institutions disrupt access to healthcare and medical treatment, particularly when they impede the access to health care facilities granted or ensured by the Member States.<sup>153</sup> The guarantee obligation under the UN Social Covenant refers to ‘the provision of a public, private or mixed health insurance system which is affordable for all.’<sup>154</sup>

Inter alia, the MoUs lay down obligations to:

- reduce the number of doctors<sup>155</sup>
- restrict cost exemptions for treatment<sup>156</sup>
- increase extra payments for hospital visits and medication<sup>157</sup>

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<sup>151</sup> United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mr Cephias Lumina Mission to Greece, statement 26.04.2013.

<sup>152</sup> European Committee of Social Rights, Complaint No 76/2012, *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, decision 07.12.2012, paragraph 78 f.

<sup>153</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition, Munich 2013, Art. 35 CFR, paragraph 8.

<sup>154</sup> CESCR, General Comment No 14 (2000), UN Doc. E/C.12/2000/4, paragraph 36.

<sup>155</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: Commission, *The Second Economic Adjustment Programme for Greece: First Review – December 2012*, p. 187 ff (210; paragraph 2.9).

<sup>156</sup> MoU on Specific Economic Policy Conditionality (Cyprus), 29.08.2013, p. 16, paragraph. 3.2: ‘abolish the category of beneficiaries class “B” and all exemptions for access to free public health care based on all non-income related categories except for persons suffering from certain chronic diseases depending on illness severity. Introduce as a first step towards a system of universal coverage a compulsory health care contribution for public servants and public servant pensioners of 1.5% of gross salaries and pensions. ... increase fees for medical services for non-beneficiaries by 30% to reflect the associated costs of medical services and create a co-payment formula with zero or low admission fees for visiting general practitioners, and increase fees for using higher levels of care for all patients irrespective of age’.

Cephas Lumina was therefore rightly critical of the consequences of the MoU signed with Greece in the light of its devastating effects on the fundamental right to health:

‘Nevertheless, I am concerned that the public health system has become increasingly inaccessible, in particular for poor citizens and marginalized groups, due to increased fees and co-payments, closure of hospitals and health care centres and more and more people losing public health insurance cover, mainly due to prolonged unemployment. While emergency health care is provided to all persons, user fees have been increased. For example, in 2011 fees were increased from €3 to €5 in outpatient departments of public hospitals and health centres. Law 4093/2012 introduced a €25 fee for admission to a public hospital from 2014 onward and a €1 fee for each prescription issued by the national healthcare system. According to information available to me, non-resident foreigners and irregular migrants are required to pay higher fees. If this information is correct, the requirement may constitute a breach of the principle of non-discrimination that is enshrined in the human rights treaties ratified by Greece.’<sup>158</sup>

The cuts imposed by the MoUs interfere with the right to health, particularly for those sections of the population that are already particularly vulnerable.

## 2.4. Education

Rights to freedom of education are also affected. Those rights, protected by Article 14 CFR, Articles 9 and 10 RESC, Article 2 Protocol 1 ECHR, Article 24 of the UN Disability Convention and Article 13 of the UN Social Covenant, are definitively designed to guarantee access to educational establishments. According to Article 28(1)(b) of the UN Convention on the Rights of the Child, efforts are needed to make secondary education available free of charge. Like Article 2 Protocol 1 ECHR, the fundamental right under Article 14 CFR protects against interference with access to education, and as a participatory right, not merely as a principle.<sup>159</sup> It guarantees non-discriminatory access, (free) compulsory education, vocational training and general education independent of that (Article 14(1) CFR).<sup>160</sup>

The MoUs lay down a number of restrictive obligations in this area, providing for instance for:

- a general reduction in costs<sup>161</sup>

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<sup>157</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: Commission, The Second Economic Adjustment Programme for Greece: First Review – December 2012, p. 187 ff (251; paragraph 9.6).

<sup>158</sup> United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mr. Cephas Lumina Mission to Greece, statement 26.04.2013.

<sup>159</sup> Johannes Caspar, ‘Die EU – Charta der Grundrechte und das Bildungsrecht’, in: *RdJB* 49 (2001), p. 165 ff.

<sup>160</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edition, Munich 2013, Art. 14 CFR, paragraph 2 ff.

<sup>161</sup> MoU on Specific Economic Policy Conditionality (Cyprus), 2013, p. 14, paragraph 2.12: ‘Introduce as of the budget year 2014 structural reform measures in the educational system, notably, a reduction of the number of teachers

- restructuring of the educational system with a view to improving human capital<sup>162</sup>
- ‘streamlining’ of educational grants<sup>163</sup>
- an increase in the student contribution.<sup>164</sup>

Those measures hamper access to the educational system, restrict general education and promote economisation of the academic system, which encroaches on individual participatory rights as well as academic freedom per se.

## 2.5. Property

The right to property protected by Article 17 CFR and Article 1 Protocol 1 ECHR might also be affected by the MoUs. That is particularly the case with the reduction in pensions achieved by

- raising the pensionable age<sup>165</sup>
- or introducing pension reductions and raising the minimum age for full pension entitlement.<sup>166</sup>

Thus the ECtHR reviewed the pension cuts in Portugal,<sup>167</sup> Greece<sup>168</sup> and Hungary<sup>169</sup>, all resulting from MoUs,<sup>170</sup> in the light of that fundamental right and, in interpreting the ECHR norms, also referred in the latter decision to the minimum social standards protected by Article 34 CFR.

## 2.6. The right to good administration

Finally, the MoUs affect the right to good administration guaranteed under Article 41 CFR and Article 6 ECHR. The right protects procedural fairness, imposes an obligation to investigate the relevant facts thoroughly (Article 41(1) CFR) and lays down rights to be heard, to be given reasons and to receive consideration.<sup>171</sup> Those obligations are reflected in Article 11 TEU, according to which the EU institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society (paragraph 2) and carry out broad consultation with parties concerned when implementing measures. The Maastricht Principles also follow on from

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seconded to the Ministry of Education and Culture, the removal of 1:1.5 teaching time ratio from evening schools of general and technical and vocational education, the elimination of teaching time concession to teachers for being placed in two or more educational districts, the elimination of mentoring components for pre-service and in-service training for newly appointed teachers and the reduction of the cost of afternoon and evening programmes.’

<sup>162</sup> MoU on Specific Economic Policy Conditionality (Portugal), 17.05.2011, p. 25, paragraph 4.10: ‘raise the quality of human capital.’

<sup>163</sup> MoU on Specific Economic Policy Conditionality (Cyprus), 2013, p. 34, paragraph I.23.

<sup>164</sup> MoU on Specific Economic Policy Conditionality (Ireland), 03.12.2010, p. 8, paragraph 24: ‘We are also planning to move towards full cost-recovery in the provision of water services and ensuring a greater student contribution towards tertiary education, while ensuring that lower-income groups remain supported.’

<sup>165</sup> MoU on Specific Economic Policy Conditionality (Cyprus), 2013, paragraph 3.1. (p. 15).

<sup>166</sup> Ibid.

<sup>167</sup> ECtHR judgment in *Mateus and others v Portugal*, Nos 62235/12 and 57725/12, 08.10.2013, paragraph 18.

<sup>168</sup> ECtHR judgment in *Koufaki and ADEDY v Greece*, Nos 57665/12 and 57657/12, 07.05.2013.

<sup>169</sup> ECtHR judgment in *R.Sz. v Hungary*, No 41838/11, 02.07.2013 – Grand Chamber decision still pending.

<sup>170</sup> For Hungary: MoU (Hungary), 19.11.2008.

<sup>171</sup> Kai-Dieter Classen, *Gute Verwaltung im Recht der Europäischen Union*, Berlin 2008, p. 425.

those procedural requirements, in that they require an impact assessment process with public participation.<sup>172</sup>

Those procedural rights, which are protected as fundamental rights, are also affected by the MoUs. The Troika and national bodies that are implementing the MoUs have a joint responsibility for compliance with minimum procedural requirements such as adequate reasons, a hearing, appropriateness, consideration of all essential factors and information. The ILO report on Greece documents the impact of the MoU negotiating procedure on those procedural rights, noting that in the negotiations with the Troika essential parameters for the consequences of the decision were not discussed, including the special requirements for particularly vulnerable groups in society, the general risk of pauperisation and the overall impact on social security systems.<sup>173</sup> Therefore the right to good administration has also been affected by the failure to take account of crucial factors when establishing norms.<sup>174</sup>

### 3. Interim conclusion

The MoUs affect the rights to freedom to choose an occupation, freedom of collective bargaining and remuneration for work under Articles 27 to 32 CFR in conjunction with Articles 1 to 6 and 24 RESC, Articles 6 to 8 of the UN Social Covenant, Article 11 ECHR, Article 27 of the UN Disability Convention and the ILO core labour standards; the human right to housing and social security under Article 34 CFR in conjunction with Articles 12 und 13 RESC, Articles 9 und 11 of the UN Social Covenant and Articles 2, 3, 8 and 14 ECHR; the human right to health under Article 35 CFR in conjunction with Article 11 RESC, Article 12 of the UN Social Covenant, Articles 2, 3 and 8 ECHR and Article 25 of the UN Disability Convention; the human right to education under Article 14 CFR in conjunction with Articles 9 and 10 RESC, Article 2 Protocol 1 ECHR, Article 13 of the UN Social Covenant, Article 24 of the UN Disability Convention and Article 28 of the UN Convention on the Rights of the Child; the human right to property under Article 17 CFR in conjunction with Article 1 Protocol 1 to the ECHR and the right to good administration under Article 41 CFR in conjunction with Article 6 ECHR.

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<sup>172</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28.11.2011, paragraph 14.

<sup>173</sup> European Committee of Social Rights, Complaint No 79/2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, decision 07.12.2012, paragraph 32.

<sup>174</sup> Darren O'Donovan, *The Insulation of Austerity*, 16.05.2013 (last accessed: 04.10.2013):

<http://humanrights.ie/uncategorized/the-insulation-of-austerity-the-charter-of-fundamental-rights-and-european-union-institutions/>.

### III. Encroachment on fundamental rights by the MoUs

The question, however, is whether those encroachments are the result of the cooperation by the Commission and the ECB in Troika measures, i.e. whether it is the MoUs that are encroaching on those rights in a legally relevant manner. The structure of the MoUs as an agreement supporting the grant of credit lines is derived from a common practice in international law, particularly with credit granted by the IMF and the World Bank. In the past those institutions, too, imposed certain conditionalities on lending, for which they obtained assurances from the states concerned in a letter of intent. The purpose of a letter of intent or MoU is always to impose certain macroeconomic principles on the grant of the loan. The precise classification of such agreements in (international) law has always remained controversial.

#### 1. Legal status of the MoUs

As regards the question of whether the MoUs in this case can themselves prejudice human rights, the main issue is whether in that respect they constitute an encroachment. Firstly, it might be problematic that in many cases the MoUs allow the Member States a margin of discretion in their implementation.<sup>175</sup> And even if the MoUs do not allow a margin of discretion but lay down specific measures, the regulatory structure of the MoUs might preclude their being considered to prejudice human rights if they did not impose legal obligations.

##### 1.1. MoUs as *sui generis* legal acts

The ECJ consistently classes even indirect and *de facto* effects of legal acts as encroachment on fundamental rights if their object is to encroach or at any rate they necessarily cause third parties to do so.<sup>176</sup> In order to be covered by that case-law, which has been developed authoritatively with regard to encroachment by directives allowing a margin of discretion in their implementation, MoUs should be regarded as legal acts. The fact that these are treaties under international law would be taken into account. According to Article 216 TFEU, the EU may conclude international agreements within the meaning of Article 38(1) of the ICJ Statute. Whether an international document constitutes a treaty under international law depends on the circumstances. Since treaties may be implied, their treaty status is not dependent on their ratification.<sup>177</sup> In fact, subjects of international law are free to decide how they wish to express their consent to be bound by a treaty.<sup>178</sup> That is indicated by Article 11 of the Vienna Convention on the Law of Treaties (VCLT). The deciding factors are the circumstances and the content of the document in question. Its description (e.g. treaty, MoU, convention) might indicate whether or not it is to be classified as a

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<sup>175</sup> See EU General Court order in Case T-541/10 *Adedy and others v Greece* [2012], paragraph 69 f.

<sup>176</sup> ECJ Case C-200/96 *Metronome* [1998], paragraph 28.

<sup>177</sup> ICJ judgment in *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Jurisdiction and Admissibility)*, ICJ Reports 1994, p. 112.

<sup>178</sup> Malgosia Fitzmaurice, 'Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties', in: Klabbers/Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag*, The Hague/Boston 1998, p. 59.

treaty, but the crucial factor is whether the content of the agreement clearly indicates that the international law subjects concerned consent to be legally bound by it.

In practice, the choice of the MoU form specifically ensures that binding effects under international law are excluded,<sup>179</sup> although at the same time the possibility is recognised that international law behaviour can also have an unintended legal effect. Some authors even go so far as to class all MoUs as international law treaties. That view is based on a decision by the ICJ in which an agreement not in traditional treaty form was nonetheless considered to be an international law treaty.<sup>180</sup> On that basis, any agreement between international law subjects with any kind of normative structure would be classed as a treaty if it set out expectations of behaviour.<sup>181</sup> In that sense the Portuguese Constitutional Court, for instance, has emphasised the legally binding effect of the MoUs.<sup>182</sup>

Even if it is not accepted that the MoUs are contractually binding, in international law practice legal consequences must in any case be attached to MoUs, in which expectations of payment are linked to conditionality.<sup>183</sup> The binding effect of the MoUs is then based on the principle of legitimate expectations.<sup>184</sup> In that sense it is, for instance, established in regard to official MoUs:

‘Non-binding agreements can be an expression of mutual confidence that the international law system can be recognised even if direct commitments by the parties were not intended’.<sup>185</sup>

In that interpretation, MoUs such as the Troika MoUs which provide such comprehensive and detailed support for the terms and conditions of financial transactions create legitimate expectations, set out reciprocal expectations of behaviour and are the basis for the resulting synallagmatic relationships. In the context of the ESM, the MoUs are negotiated by the Commission in consultation with the ECB, in accordance with Article 13 of the ESM Treaty, and signed by the Commission. They thereby create obligations and legally protected confidence. In that respect, in *Pringle* the ECJ held, with regard to Article 13(4) of the Treaty, that the function of the MoU was that its signature established ‘the conditions attached to any stability support’ and compliance with general EU law is guaranteed.<sup>186</sup> The conditions were intended to impose a sound budgetary policy.<sup>187</sup> It is true that at the same time the Court stresses that the ECB and the Commission do not have ‘any power to make decisions of their own’ under the ESM Treaty.<sup>188</sup> But that merely refers to the fact that the institutions of the Union have no decision-making powers in this instance that are

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<sup>179</sup> Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition, Cambridge 2007, p. 32 ff.

<sup>180</sup> ICJ judgment in *Qatar v Bahrain (Jurisdiction and Admissibility)*, ICJ Reports 1994, p. 112.

<sup>181</sup> Jan Klabbers, *The Concept of Treaty in International Law*, The Hague 1996.

<sup>182</sup> Tribunal Constitucional, Acórdão No 187/2013, *Lei do Orçamento do Estado* [2013], paragraph 29.

<sup>183</sup> Anthony Aust, *Modern Treaty Law and Practice*, 2nd edition, Cambridge 2007, p. 49 ff and p. 54.

<sup>184</sup> ICJ judgment in *Cambodia v. Thailand*, ICJ Reports 1962, p. 6 ff; Christoph Möllers, ‘Transnationale Behördenkooperation’, in: *ZaöRV* 65 (2005), p. 351 ff (370).

<sup>185</sup> Christoph Möllers, ‘Transnationale Behördenkooperation’, in: *ZaöRV* 65 (2005), p. 351 ff (370).

<sup>186</sup> ECJ Case C-370/12 *Pringle* [2012], paragraphs 69 and 112.

<sup>187</sup> Wolfgang Weiß and Markus Haberkamm, ‘Der ESM vor dem EuGH’ in: *EuZW* 24 (2013), p. 95 ff (99).

<sup>188</sup> BGBl. [German Federal Law Gazette] 1990 II, p. 1430.



geared to the forms of action under EU law (Article 288 TFEU). Nonetheless the MoUs are binding, since it is the Commission that sets the binding conditions. Even the fact that, under Article 13(4) of the ESM Treaty, MoUs require the consent of the Board of Governors does not mean that they are not legally binding, since in international law the legal obligation applies irrespective of the arrangements in the consent procedure within the organisation. For instance, Article 27(2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,<sup>189</sup> even if it is not yet in force, codifies the customary international law rule that the external obligation applies irrespective of internal procedural requirements. The MoU obligation in international law therefore arises from the fact that the Commission sets the conditions after negotiation with the Member States. The ECJ also takes that view. As the Court states in *Pringle*, ‘the activities pursued by those two institutions within the ESM Treaty ... *commit* the ESM’.<sup>190</sup> In other words, the institutions of the Union commit the ESM; they enter into legal commitments which differ in form from action under EU law but are legal acts.

The ESM ‘conditionality’ is therefore not identical to the ‘recommendations’ for the general coordination of economic and employment policy under Articles 121(2) and 148(4) TFEU. Both Article 136(3) TFEU and Article 13(3) of the ESM Treaty, which provides that the MoU should detail the conditionality attached to the financial assistance facility, refer to ‘conditionality’ and not ‘recommendations’. The ECJ, too, consistently emphasises that the legal character of that ‘conditionality’ is different from that of the general economic policy coordination measures in the form of recommendations; the ‘conditionality’ specifically does not

‘constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, *inter alia*, Article 125 TFEU and the coordinating measures adopted by the Union’.<sup>191</sup>

The establishment of ‘conditionality’ and its relationship to EU law therefore mean more than voluntary and non-binding coordination of behaviour. The signature of the MoUs has binding effects with consequences in international law, which establish precise conditions in each case and can give rise to reciprocal claims for compensation for infringements. Thus, in so far as in the ESM context, when implemented by the States, the MoUs as *sui generis* legal acts lead to breaches of fundamental rights, these are indirect and *de facto* effects of legal acts which the ECJ considers to be encroachments on fundamental rights.

## 1.2. MoUs as real acts

However, even if MoUs are not to be classed as *sui generis* legal acts but merely recommendations or real acts they might encroach on fundamental rights. In the past, the ECJ has consistently held that real acts are an encroachment on fundamental rights.<sup>192</sup> That view is ultimately supported by a

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<sup>189</sup> BGBl. 1990 II, p. 1430.

<sup>190</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 161, emphasis added.

<sup>191</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 111.

<sup>192</sup> For instance Case C-465/00 *Österreichischer Rundfunk* [2003], paragraph 74.

parallel with fundamental freedoms. The Court recognises in settled case-law that ‘measures having equivalent effect’ can lead to encroachments on fundamental freedoms that need to be justified.<sup>193</sup> On that basis, even indirect and *de facto* actual or potential encroachments on trade flows constitute an encroachment on fundamental freedoms. That is also indicated by the case-law of the ECtHR, which has ruled that even letters of a non-legislative nature constitute encroachment.<sup>194</sup>

Even for non-legal acts, the fundamental rights commitment is systematically based definitively on the obligation on the EU institutions to protect fundamental rights and means that the EU institutions must ensure that their behaviour, together with the behaviour of third parties, does not lead to encroachments on fundamental rights. Hence they must be able to counter any allegation that they have not made preliminary arrangements for the behaviour of third parties through appropriate measures and legal acts in order to prevent encroachments on fundamental rights.<sup>195</sup> Thus the institutions of the Union are obliged under MoUs, when opting for that form of regulation, to prevent encroachments on fundamental rights by fulfilling their duty to protect and ensuring compliance with the CFR through appropriate legal or non-legal measures. The institutions cannot claim that the behaviour of Member States might not fall within the scope of Article 51 CFR, since the institutions of the Union themselves have a duty to protect. It is immaterial which form of behaviour applies to any third party involved in enforcement of the rule. Article 13(3) of the ESM Treaty codifies that idea precisely, establishing that the MoU negotiated with the Member State applying for stability assistance must be fully consistent with EU law and in particular with the measures taken by the Union to coordinate the economic policies of the Member States. The EU institutions cannot avoid their fundamental rights obligations by opting for the MoU form of regulation. They must ensure that appropriate regulatory measures are taken to prevent either the Member States or other third parties involved, such as private entities or international organisations, from encroaching on fundamental rights.

## 2. Encroachment

It is debatable whether the MoUs encroach on the fundamental and human rights in question or merely have a negative impact on those fundamental rights.

Particularly when third parties are involved in the implementation of measures, the distinction between encroachments on fundamental rights and effects not involving fundamental rights is always problematic. Fundamental rights have undoubtedly been encroached on when a legal act directly causes the encroachment.<sup>196</sup> However, that is not always the case with MoUs. Certainly the ECJ holds that even indirect and *de facto* effects of legal acts constitute encroachments on fundamental rights if their object is to encroach or at any rate they necessarily cause third parties to do so.<sup>197</sup> The ECtHR has a similarly broad concept of encroachment, holding that even mere

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<sup>193</sup> Settled case-law since Case 8/74 *Dassonville* [1974].

<sup>194</sup> ECtHR judgment in *Brumarescu v Romania*, No 28342/95, 28.10.1999, paragraph 43 ff.

<sup>195</sup> Hans-Werner Rengeling and Peter Szczekalla, *Grundrechte in der Europäischen Union*, Cologne 2005, § 7, paragraph 515 ff.

<sup>196</sup> ECJ Case C-219/91 *Ter Voort* [1992], paragraph 36 f.

<sup>197</sup> ECJ Case C-200/96 *Metronome* [1998], paragraph 28.

announcements which have not at that stage had any legal consequences might affect the legal positions in the ECHR in a legally relevant manner. For instance, the ECtHR has in the past established that exclusion from a magazine distribution system was an encroachment on freedom of speech<sup>198</sup> and also ruled that a letter giving notice of a sanction which was not legally binding was an encroachment.<sup>199</sup> Thus the ECHR concept of encroachment covers all measures adversely affecting the scope of protection of a fundamental right.<sup>200</sup> And the ECJ also requires ‘a significant effect’ on the exercise of human rights for an encroachment ruling.<sup>201</sup>

In the case of the MoUs those conditions are fulfilled. In the MoUs the States concerned undertake to implement the rules laid down in the MoUs that are relevant to fundamental rights. It is true that fundamental rights are only indirectly affected by the implementation, but those cutbacks are the object of the MoUs. Only when national implementation goes further than the rules in the relevant MoUs, is the attributive link broken. However, in so far as the encroachments are the object of the MoUs, they encroach on the above fundamental rights as soon as they are made binding by the Commission and the Member State.

### **3. Interim conclusion**

Accordingly, the MoUs are an encroachment on fundamental rights. The MoUs under the ESM Treaty are consistently *sui generis* legal acts. Even in the exceptional cases where MoUs do not have legal status, they at least constitute encroachments as real acts. Through their involvement in the signature of the MoUs, the Commission, which signs the MoUs, and the ECB, which is involved in their negotiation, are therefore encroaching on the above fundamental rights.

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<sup>198</sup> ECtHR, *Vereinigung demokratischer Soldaten v Austria*, No 15153/89, 23.01.1994, paragraph 27.

<sup>199</sup> ECtHR, *Brumarescu v Romania*, No 28342/95, 28.10.1999, paragraph 43 ff.

<sup>200</sup> Hans-Werner Rengeling and Peter Szczekalla, *Grundrechte in der Europäischen Union*, Cologne 2005, § 7, paragraph 516.

<sup>201</sup> ECJ Case C-435/02 *Spiegel* [2004], paragraph 49.

## IV. Justification

The encroachments on fundamental rights by the EU institutions (the Commission and the ECB) associated with the signature of the MoUs might be justified under the first sentence of Article 51(1) CFR, assuming that the Commission and the ECB have acted within their respective spheres of competence and the fundamental and human rights encroachments associated with the measures are substantively justified.

### 1. Compliance with the system of competences under EU law

The first question to be considered is whether the mandate of the Commission and the ECB in the Troika is compatible with the competence requirements of primary law.

#### 1.1. The ESM and EU law

It might not be considered consistent with primary law, in that the delegation of functions introduced in the ESM Treaty does not satisfy the conditions of the TEU and the TFEU. It is true that, at that fundamental level, the ECJ has established, in *Pringle*, that the ESM Treaty is compatible with EU law. However, contrary to what is implied in discussions of that decision, the ECJ has not shown a general readiness to accept a decision in favour of multinational action in the context of the euro rescue measures, at least if no express formal objection is made.<sup>202</sup> As regards structures for the delegation of functions, in *Pringle* the ECJ does not replace the strict EU law procedures for amendment of the Treaty with an ‘objection procedure’ for which there is also no arrangement anywhere in EU law, but makes it a condition for the transfer of functions that the functions to be performed under the ESM do not conflict with EU law.

The ECJ does not therefore consider that the ESM Treaty encroaches on the exclusive competence of the Union. It is not concerned with the coordination of the economic policies of the Member States, but constitutes a financing mechanism.<sup>203</sup> Specifically, however, the ECJ has set numerous conditions for action by the Commission and the ECB under the ESM Treaty. For instance, the Court has emphasised the importance of the consistency clause in Article 13(3) of the ESM Treaty and imposed a requirement that the ESM measures must be compatible with EU law. The ECJ requires in particular

‘that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States’ economic policies.’<sup>204</sup>

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<sup>202</sup> Martin Nettesheim, ‘Europarechtskonformität des Europäischen Stabilitätsmechanismus’, in: *NJW 2013*, p. 14 ff (16).

<sup>203</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 110.

<sup>204</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 69.

That also relates to Article 5 TFEU and includes economic, employment and social policy. In its ESM mandate, the Commission must promote ‘the general interest of the Union’ and ensure that the MoUs are consistent with EU law.<sup>205</sup> In particular, the Court makes the transfer of tasks subject to the proviso that the new tasks ‘do not alter the essential character of the powers conferred on those institutions by the EU and TFEU Treaties’.<sup>206</sup> The Court thereby also makes the admissibility of action by the EU institutions under the ESM dependent on their supporting general economic policies in the Union, in accordance with Article 282(2) TFEU.<sup>207</sup>

The Court thus establishes a series of conditions to be fulfilled in order for the specific mandate of the Commission and the ECB in the ESM activities to be lawful: (1) compatibility with the measures to coordinate the economic policies of the Member States; (2) no distortion of the allocation of competences in the EU by the introduction of new decision-making powers for the Commission and the ECB; (3) protection of the general interests of the Union. Certainly in a generally abstract sense the ESM Treaty does not infringe EU law. However, the EU law conditions imposed by the ECJ bind the EU institutions closely to EU law in their action under the ESM and make the ESM subject to the primacy of EU law. In so far as the measures by the institutions in that context are inconsistent with the coordination of economic policies, they distort the system of competences or are contrary to general interests; where the measures by the EU institutions under the ESM no longer conform to primary law, the EU institutions should not be involved in them.

## **1.2. *Ultra vires***

The present situation is problematic as regards MoU practice in the ESM and the preservation of collective and institutional competences.

### **1.2.1. Competences on EU level**

The MoUs provide for wide-ranging measures in the fields of education, employment, health and social policy. According to the ECJ, the functions transferred by the ESM Treaty should be consistent with the tasks based on EU law. That is the case if the general economic policies of the Union are supported in accordance with Article 282(2) TFEU.<sup>208</sup>

However, that sphere of competence is not unlimited. The Union cannot lay down detailed rules for health, employment, social and educational policy through the ‘economic coordination’ rules. The MoUs provide for wide-ranging measures in the fields of education, employment, health and social policy. The competence for economic coordination is restricted by the subsidiarity rule in Article 5(3) TEU and the principle of conferred powers. In particular, with regard to the specific provisions it is necessary to comply with the specialised competences that cannot be cancelled out through a general competence rule.<sup>209</sup>

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<sup>205</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 164.

<sup>206</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 158.

<sup>207</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 165.

<sup>208</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 165.

<sup>209</sup> ECJ Case C-376/98 *Germany v Parliament and Council* [2000], paragraph 83.

The ESM Treaty cannot assign competences to the EU institutions that they do not already have under EU law. In the case of the substantive connections governed by the MoU, that means that the EU institutions are acting *ultra vires* if they disregard the collective powers of the EU. They may be involved in the agreement and implementation of provisions only to the extent that the EU also has collective competence. The *ultra vires* nature of the MoUs is therefore particularly apparent where they lay down detailed rules for levels of pay.<sup>210</sup> The ECB and the Commission have no competence to act in that area. In addition, Article 153(5) TFEU also removes other areas from the competence of the EU, particularly with regard to regulation of the right to organise, the right to strike and the right to impose lock-outs. The Union also does not have general competence for educational policy (Article 165 TFEU), health policy (Article 168 TFEU) or social policy (Article 153 TFEU). Furthermore, the Economic and Monetary Affairs Committee (ECON) of the European Parliament has insisted in its draft report on the Troika that “the mandate of the ECB is limited by the TFEU to monetary policy and that the involvement of the ECB in any matter related to budgetary, fiscal and structural policies is therefore on uncertain legal grounds”.<sup>211</sup>

When the ECJ requires that the transfer of tasks to the Commission and the ECB should not extend or distort competences, the EU institutions should then take due account of their limited powers in the areas mentioned. They should not be involved in setting or implementing rules outside those limits. The EU institutions should not be involved in regulating wages, the right of association, extra payments for health care, the restructuring of education and the restriction of minimum social guarantees. That would be a distortion of their competences under EU law.

### 1.2.2. Separation of powers

The exercise of institutional powers in relation to the conclusion of the MoU is also problematic as regards the principle of democracy protected in primary law in Article 10 TEU. When the ECJ requires that the conclusion of MoUs should be compatible with primary law, that means, *inter alia*, that the European Parliament must be involved in the signature of the MoUs in such a way that the principle of democracy protected by Article 10 is upheld. However, the European Parliament is not at present as involved in the enforcement of the ESM Treaty as EU law requires:

‘The Union too has a democratic obligation, as is clear from Articles 2 and 10(1) and (2) TEU. That direct link between European sovereignty and a European people is impaired if the character of the Union is altered by the establishment of parallel levels of international law. That is likely to increase the widely criticised democratic deficit.’<sup>212</sup>

When defining its compatibility requirements, the ECJ left room for a democratic readjustment assigning the European Parliament an appropriate role in the negotiation of the MoUs. In that they predefine normative expectations, MoUs as *sui generis* legal acts are similar to international law

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<sup>210</sup> See, for example, MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: European Commission, The Second Economic Adjustment Programme for Greece: First Review, December 2012, p. 187 ff (250 ff).

<sup>211</sup> ECON-Report (draft 16/01/2014), 2013/2277(INI), para. 34.

<sup>212</sup> Paulina Starski, ‘Das supranational disziplinierte Völkerrecht’, in: *European Law Reporter* 6 (2013), p. 186 ff (193).

treaties, even though they are not international law treaties in the formal sense. Parliament should therefore be more involved in the legislative process, as provided for in Article 218(6) TFEU. If the European Parliament continues to be excluded from decision-making through MoUs, any real control on equal terms remains impossible<sup>213</sup> and Parliament's participatory rights under primary law are removed, so that compatibility with the minimum democratic requirements of EU law would no longer be guaranteed.

The total exclusion of the European Parliament from the measures by the Commission and the ECB in the negotiation and conclusion of the MoUs thus distorts the structure of the separation of powers under EU law. This view is also taken in an opinion issued by the Committee on Constitutional Affairs of the European Parliament, where the Committee regrets "that the system of financial assistance has not yet been brought under proper parliamentary scrutiny and accountability in the framework of the EU Treaties". It insists "that primarily the European Commission as one of the European institutions involved in defining, deciding and monitoring the compliance of national governments economic adjustment programmes with the MoU must be accountable to the European Parliament", and "underlines the need to ensure the direct democratic accountability of the European Institutions to the European Parliament and of Member State governments to their national parliaments".<sup>214</sup>

## 2. Substantive justification of encroachments

The human rights encroachments are also unlawful if they are not substantively justified. According to the second sentence of Article 51(1) CFR, that assumes that the principle of proportionality has been adhered to in the encroachments, that they are therefore necessary and actually consistent with the aims of serving public policy or the requirements of protecting the rights and freedoms of others recognised by the Union. Specific criteria, which will first be outlined below (2.1), apply for the assessment in the case of social human rights. Secondly, the specific framework conditions for justification of encroachment into the fundamental and human rights are to be formulated (2.2.).

### 2.1. Criterion for assessment of justification

In respect of social human rights, the threefold duty to protect, respect und fulfil human rights has been clarified in a number of respects. With specific reference to austerity measures, for instance, compliance with five criteria is consistently required:

- The general reference to necessary financial discipline is not sufficient in regard to the implementation of austerity measures. It must be demonstrated systematically in each case why the measures are *in the public interest*.<sup>215</sup> The second sentence of Article 52(1) CFR

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<sup>213</sup> Robert Uerpmann-Witzack, 'Völkerrecht als Ausweichordnung – am Beispiel der Euro-Rettung', *EuR-Beiheft* 2013, p. 49 ff (55).

<sup>214</sup> Committee on Constitutional Affairs, Opinion, 11 February 2014, 2013/2277(INI), paragraphs 4 and 7.

<sup>215</sup> For an overview, see Report of the United Nations High Commissioner for Human Rights: Austerity measures and economic, social and cultural rights, E/2013/82 (07.05.2013), paragraph 15 ff.

requires on that point that encroachments can only be considered justified if the grounds genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- The measures must result from a weighing up of interests which compares the human rights consequences if the measure is not implemented with the consequences of implementing the measure and demonstrates that the measure is reasonable, confined to a limited period and *proportionate*.<sup>216</sup> The non-regression clause is to be taken into account. Less drastic measures should be given full consideration.<sup>217</sup> The second sentence of Article 52(1) CFR reflects those requirements, in that justification is linked to observance of the ‘principle of proportionality’.
- The cuts should not have a *discriminatory effect* and in particular deny access to especially vulnerable groups. That is based on the general prohibition on discrimination laid down in Article 21 CFR.<sup>218</sup>
- A ‘social protection floor’ must be identified, leaving the substance of the human rights in question unaffected.<sup>219</sup> That is also provided for in the first sentence of Article 52(1) CFR.
- The social groups and individuals concerned must be properly involved in the measures.<sup>220</sup> This *participation requirement* is also definitively derived from Article 46 CFR.

This list of criteria is cumulative. Even if the decision-makers are to be allowed a certain latitude for decision-making and future projections, observance of those criteria is subject to full legal scrutiny.

## 2.2. Details of substantive justification

It is questionable whether the Commission and the ECB have paid sufficient attention to those criteria in the MoUs.

As indicated above, through their involvement in the signature and negotiation of the above-mentioned problematic regulatory content, the Commission and the ECB have encroached on a number of fundamental and human rights: the rights to freedom to choose an occupation, freedom of collective bargaining and remuneration for work under Articles 27 to 32 CFR in conjunction with Articles 1 to 6 and 24 RESC, Articles 6 to 8 of the UN Social Covenant, Article 11 ECHR, Article 27 of the UN Disability Convention and the ILO core labour standards; the human right to housing and social security under Article 34 CFR in conjunction with Articles 12 und 13 RESC, Articles 9 und 11 of the UN Social Covenant and Articles 2, 3, 8 and 14 ECHR; the human right to

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<sup>216</sup> Xenophon Contiades und Alkmene Fotiadou, ‘Social Rights in the age of proportionality: Global economic crisis and constitutional litigation’, in: *I-CON 10 (2012)*, p. 660 ff.

<sup>217</sup> Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16.05.2012; Statement by Mr. Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, 67th Session of the United Nations General Assembly 2012 (23.10.2012) New York.

<sup>218</sup> CESCR, Concluding Comments, fifth periodic report of Spain (18.05.2012), E/C.12/ESP/C0/5, paragraph 8.

<sup>219</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Report on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it’ (A/HRC/13/38), paragraphs 21 and 25.

<sup>220</sup> Report of the United Nations High Commissioner for Human Rights: Austerity measures and economic, social and cultural rights, E/2013/82 (07.05.2013), paragraph 21.



health under Article 35 CFR in conjunction with Article 11 RESC, Article 12 of the UN Social Covenant, Articles 2, 3 und 8 ECHR and Article 25 of the UN Disability Convention; the human right to education under Article 14 CFR in conjunction with Articles 9 and 10 RESC, Article 2 Protocol 1 ECHR, Article 13 of the UN Social Covenant, Article 24 of the UN Disability Convention and Article 28 of the UN Convention on the Rights of the Child; the human right to property under Article 17 CFR in conjunction with Article 1 Protocol 1 to the ECHR and the right to good administration under Article 41 CFR in conjunction with Article 6 ECHR.

Justification of the encroachment requires that the measures are necessary in the public interest (2.2.1.), that the interests have been fully weighed up and less drastic measures have been given full consideration (2.2.2.). In addition, the substance of the human rights in question must be preserved (2.2.3.). The measures should not have a discriminatory effect (2.2.4.) and the affected groups should be involved in the decisions (2.2.5.).

### **2.2.1. No public interest**

The first question that arises is whether the austerity measures are in the public interest. In the present situation, the public interest of stabilising budgetary and financial policy has to be considered. The ECJ requires that the conditions agreed in MoUs should be ‘such as to prompt that Member State to implement a sound budgetary policy’.<sup>221</sup> It is true that the Court does not explain that criterion further,<sup>222</sup> but it has to be said that measures that obviously have no objective connection with sound budgetary and financial policy or prove to be clearly dysfunctional as far as those aims are concerned cannot be considered appropriate. As a general rule, when scrutinising a measure to determine whether it is an appropriate means of achieving its aims, the ECJ requires that it reflects a concern to attain the objective ‘in a consistent and systematic manner’.<sup>223</sup>

It is questionable whether the austerity measures agreed in the MoUs are appropriate in that sense. The IMF was first to express doubts as to whether the measures were appropriate. For instance, it stated in a 2013 report on Greece:

‘Market confidence was not restored, the banking system lost 30 percent of its deposits, and the economy encountered a much-deeper-than-expected recession with exceptionally high unemployment. Public debt remained too high and eventually had to be restructured, with collateral damage for bank balance sheets that were also weakened by the recession’.<sup>224</sup>

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<sup>221</sup> ECJ Case C-370/12, *Pringle* [2012], paragraph 137.

<sup>222</sup> Criticism on those grounds in Martin Nettesheim, ‘Europarechtskonformität des Europäischen Stabilitätsmechanismus’, in: *NJW 2013*, p. 14 ff (16).

<sup>223</sup> ECJ Case C-159/10 *Fuchs* [2011], paragraph 85.

<sup>224</sup> IMF, Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement (13 June 2013), IMF Country Report No 13/156, p. 1.

But it is not only in the case of Greece that the appropriateness is questionable. It is generally doubted whether austerity is a suitable strategy for restoring budgetary and financial stability.<sup>225</sup> Extensive research has shown that the austerity measures have made considerable incursions into social rights but that the declared objectives were not achieved by the measures and indeed could not be achieved, since the approach was wrong.<sup>226</sup> Studies generally indicate that stable budgetary and financial policy depends on a stable social framework.

In that respect, the aim of stabilising the budgetary and financial system calls for two capabilities:

‘to facilitate both an efficient allocation of economic resources – both spatially and especially intertemporally – and the effectiveness of other economic processes (such as wealth accumulation, economic growth, and ultimately social prosperity)’.<sup>227</sup>

Financial and budgetary stability ultimately depend on social stability.<sup>228</sup> Without social stability there can be no financial stability.<sup>229</sup> When ‘populations frustrated by austerity policies may expand social unrest and public anger’,<sup>230</sup> that affects financial stability as well as social stability.

It is clear from the criticism by the European Economic and Social Committee of the drastic effects of the measures in Greece, leading to ‘large scale pauperisation of a significant segment of the population’,<sup>231</sup> that the combination of various austerity mechanisms can infringe the right to social security guaranteed by the ESC. However, not only does the pauperisation of large sections of the population infringe the social rights of those affected but the effects also cast doubt on the general appropriateness of the measures in stabilising the financial situation. Even if decision-makers have to be allowed discretion as regards future projections for complex economic trends, certain minimum conditions have to be set for the arrangements in order to ensure appropriateness to the objective. In particular, it has to be ensured when setting the conditions that it is possible to react promptly to dysfunctional developments. In view of the close link between financial and social stability, that in turn calls for the monitoring of human rights.<sup>232</sup> The possibility of making changes

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<sup>225</sup> Diane Desierto, ‘Growth versus Austerity: Protecting, respecting, and Fulfilling International Economic and Social rights During Economic Crisis’, in: *Ateneo L. J.* 57 (2012), p. 373 ff (389 f.).

<sup>226</sup> Klaus Armingeon and Lucio Baccaro, ‘Political Economy and the Sovereign Debt Crisis: the Limits of Internal Devaluation’, in: *Industrial Law Journal* 41 (2012), p. 254 ff.

<sup>227</sup> Garry Schinas, *Defining Financial Stability*, IMF Working Paper 04/187, October 2004, p. 8.

<sup>228</sup> Vestert Borger, ‘How the Debt Crisis Exposes the Development of Solidarity in the Euro Area’, in: *European Constitutional Review* 9 (2013), p. 7 ff (26).

<sup>229</sup> Simon Deakin, ‘From Constraining to Rebalancing: The Role of Transnational Social Rights in Shaping European Union Economic Policy’, in: Däubler/Zimmer (eds.), *Arbeitsvölkerrecht. FS für Klaus Lörcher*, Baden-Baden 2013, p. 353 ff (360).

<sup>230</sup> Aristeia Koukiadaki and Lefteris Kretsos, ‘Opening Pandora’s Box. The Sovereign Debt Crisis and Labour Market Regulation in Greece’, in: *Industrial Law Journal* 41 (2012), p. 276 ff (303).

<sup>231</sup> As in European Committee on Social Rights, Complaint No 76/2012, *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, paragraph 81; same criticism in European Committee on Social Rights, Complaint No 77/2012, *Panhellenic Federation of Public Service Pensioners (POPS) v Greece*; Complaint No 78/2012, *Pensioners’ Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*; Complaint No 79/2012, *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece*; Complaint No 80/2012, *Pensioners’ Union of the Agricultural Bank of Greece (ATE) v Greece*, paragraph 77 in each case.

<sup>232</sup> Radhika Balakrishnan and Diane Elson, ‘Auditing Economic Policy in the Light of Obligations on Economic and Social Rights’, in: *Essex Human Rights Review* 5 (2008), p. 6.

must be an essential component of MoUs; the procedures and rules must provide for the nexus of social and financial stability to be taken into account in the implementation procedures.<sup>233</sup>

### 2.2.2. Disproportionality

The measures provided for in the MoUs must also be proportionate. With regard to that condition, the ECJ consistently states that this requires that ‘measures adopted ... do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’.<sup>234</sup>

#### 2.2.2.1. Insufficient regard for the non-regression principle

Firstly, the non-regression principle indicates that, in an assessment of proportionality, regressive measures can always only be proportionate in exceptional cases. The State must show in detail that the measures are necessary. The progression clause in Article 2(1) of the UN Social Covenant, stating that social human rights are to be achieved ‘progressively’, implements a form of guarantee obligation, reflecting the fact that many social human rights are resource-dependent. The progression clause incorporates a limited non-regression principle that

‘any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’<sup>235</sup>

Specific conditions and a reversal of the burden of proof therefore apply to regressive measures relating to the exercise of social human rights.<sup>236</sup> It is incumbent on those responsible for fundamental rights to ensure and if necessary to prove that ‘rights and obligations arising from external debt, particularly the obligation to repay external debt, do not lead to the deliberate adoption of retrogressive measures’.<sup>237</sup>

On that point the MoUs contain a number of problematic provisions. For instance, it is argued that the increase in extra charges for outpatient health care in Greece (from EUR 3 to EUR 5), the cut in

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<sup>233</sup> Oskar von Homeyer and Steffen Kommer, ‘Verfassungsgericht kippt Sparhaushalt. Anmerkungen zum Urteil des Tribunal Constitucional de Portugal vom 5. April 2013’, in: *KJ* 46 (2013), p. 325 ff (317).

<sup>234</sup> ECJ Case C-2/10 *Franchini* [2011], paragraph 73.

<sup>235</sup> CESCR, General Comment No 3, E/1991/23, 14.12.1990, paragraph 9.

<sup>236</sup> CESCR, General Comment No 3, E/1991/23, 14.12.1990, paragraph 10 und General Comment No 12, E/C.12/1999/5, 12.05.1999, paragraph 17.

<sup>237</sup> Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Cephias Lumina – Guiding principles on foreign debt and human rights (10.04.2012), A/HRC/20/23, paragraph 19 f.; see also Diane Elson, ‘The reduction of the UK budget deficit: a human rights perspective’, in: *International Review of applied Economics* 26 (2012), p. 177 ff.

resources for the reduction of unemployment and the restrictions on freedom of collective bargaining are incompatible with the non-regression principle.<sup>238</sup>

### **2.2.2.2. Disproportionate deficit limits**

The fact that insufficient consideration was given to more lenient methods such as less stringent deficit limits and cutbacks is further evidence of disproportionality.

The MoUs lay down detailed conditions for the trend in the budget deficit. For instance, the MoU with Portugal provides that the deficit for 2011, 2012 and 2013 is to be limited to 5.9%, 4.5% and 3.0 % respectively.<sup>239</sup> At times of economic crisis especially, such conditions further limit the scope for the exercise of fundamental and human rights.

In its General Comment No 2 on International Technical Assistance Measures, the UN Social Committee sets out detailed conditions for appropriate protection in the implementation of austerity programmes, stressing the common obligation on States and IOs to safeguard human rights in the context of financial measures.

‘A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.’<sup>240</sup>

The avoidance of cutbacks, debt cancellation and compensatory schemes can therefore be a requirement for proportionality. The European Fundamental Rights Agency also lays down

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<sup>238</sup> Rhea Tamara Hoffmann und Markus Krajewski, ‘Staatsschuldenkrise im Euro-Raum und die Austeritätsprogramme von IWF und EU’, in: *KJ 45* (2012), p. 2 ff (12 f).

<sup>239</sup> MoU on Specific Economic Policy Conditionality, 17.05.2011, No 1, Fiscal policy (Portugal): ‘Reduce the Government deficit to below EUR 10 068 million (equivalent to 5.9% of GDP based on current projections) in 2011, EUR 7 645 million (4.5% of GDP) in 2012 and EUR 5 224 million (3.0% of GDP) in 2013’.

<sup>240</sup> CESCR, General Comment No 2, UN Doc E/1990/23, 02.02.1990, paragraph 9.

procedural conditions to that effect for implementation of the debt limit in EU law.<sup>241</sup> Exceptional rules in the deficit procedure might be a less drastic method than regressive measures in the field of fundamental rights.

### 2.2.2.3. No long-term income protection

Measures are also disproportionate if there is no *long-term income protection*. Privatisation conditions such as those agreed in the MoU with Greece are a problem in that respect.<sup>242</sup> Instead, a guarantee of long-term income protection through the introduction of a brake on privatisation should be required. Even the possibility of alternative income mechanisms can be a less draconian instrument in austerity policy.<sup>243</sup> For instance, in view of the private wealth situation in Europe<sup>244</sup> the introduction of a wealth tax<sup>245</sup> might make a number of encroachments on fundamental rights unnecessary. Austerity measures can only be considered proportionate when those less severe measures have been exhausted.

### 2.2.2.4. Insufficient consideration of alternative cuts

The MoUs are also problematic if insufficient consideration was given to *alternative cuts* and recourse at least to the transnational banks and undertakings whose behaviour is responsible for the development of the crisis. That is another rule of proportionality. For instance, it is rightly pointed out that the MoU with Greece is unlawful in that alternative cuts were not considered:

‘cuts in government spending on health and education, while not reducing expenditure on the armed forces is likely to violate the principle of non-retrogression’.<sup>246</sup>

To ensure that the encroachments are proportionate, cuts in expenditure that do not directly impact on human rights should be made first. Only when military and other expenditure is reduced to a minimum should there be any question of cuts in expenditure encroaching on social human rights.

### 2.2.2.5. Insufficient balancing

Justification of the encroachment calls for careful consideration of the human rights consequences of measures in each case. Special justification requirements are derived from the fact that the parties

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<sup>241</sup> European Union Agency for Fundamental Rights, *Protecting Fundamental Rights during the Economic Crisis*, Working Paper 12 (2010), p. 47.

<sup>242</sup> On the admissibility of a prohibition of privatisation in the management of services, see ECJ Joined Cases C-105 to 107/12 *Essent and others* [2013]; on legal issues relating to the prohibition of privatisation in general, see Hans-Peter Bull, ‘Die “Privatisierungsbremse” in verfassungsrechtlicher Sicht’, in: *Weiterdenken. Diskussionsimpulse des Julius-Leber-Forums der FES* (2012), p. 4 ff.

<sup>243</sup> ECB Survey, ‘The Eurosystem Household Finance and Consumption Survey’, *Statistics Paper Series 2*, April 2013.

<sup>244</sup> Margit Schratzenstaller, ‘Vermögensbesteuerung. Chancen, Risiken und Gestaltungsmöglichkeiten’, in: *Diskussionen und Dokumentationen zur Wirtschafts- und Sozialpolitik*, FES, April 2011.

<sup>245</sup> MoU on Specific Economic Policy Conditionality (Greece), 09.02.2012, reproduced in: Commission, *The Second Economic Adjustment Programme for Greece: First Review – December 2012*, p. 187 ff.

<sup>246</sup> Markus Krajewski, ‘Human Rights and Austerity Programmes’, in: Cottier and others (eds.), *The Rule of Law in Monetary Affairs*, Cambridge 2014, in preparation.

affected by the encroachments cannot consistently be held responsible for the systemic fiscal problems. For instance, in a decision on Hungary relating to tax rises resulting from the MoU, the European Court of Human Rights expressed serious doubt as to whether the measures were proportionate:

‘serious doubts remain as to the relevance of these considerations in regard to the applicant who only received a statutorily due compensation and could not have been made responsible for the fiscal problems which the State intended to remedy. While the Court recognises that the impugned measure was intended to protect the public purse against excessive severance payments, it is not convinced that this goal was primarily served by taxation.’<sup>247</sup>

In the event the ECtHR left that question open, but it did rule that the measures were unlawful on the grounds that ‘those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons.’<sup>248</sup> In other decisions on the austerity measures, too, although the ECtHR did not ultimately object to the measures, it set out more detailed proportionality requirements and, for instance, imposed a time limit on encroachment as a condition of proportionality<sup>249</sup> and required that, for the encroachment to be justified, if the applicant was placed ‘at risk of having insufficient means to live on’<sup>250</sup> the facts needed to be particularly carefully considered.<sup>251</sup> The Portuguese Constitutional Court has also ruled that the greater the sacrifices imposed on a particular group, the stricter the requirements for justification.<sup>252</sup>

#### 2.2.2.6. Interim conclusion

Austerity measures that prevent or impair the exercise of social human rights are therefore only to be considered proportionate in clearly defined exceptional circumstances. They may always only be considered if there is no possibility of other cuts that would be less prejudicial to the exercise of social human rights, if the prohibition on regression was taken into account and a careful assessment was carried out, with valid grounds.

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<sup>247</sup> ECtHR, *N.K.M v Hungary*, No 66529/11, 14.05.2013, paragraph 59.

<sup>248</sup> ECtHR, loc. cit., paragraph 75. That conclusion has since been confirmed (judgments in *Gall v Hungary* No 49570/11, Second Section, 25.06.2013 and *R. Sz v Hungary*, No 41838/11, Second Section, 02.07.2013, decision by Grand Chamber still pending in each case). In that connection, see also decisions by Latvia on pension cuts (Constitutional Court, No 2009-43-01, judgment of 21.12.2009) and Portugal on cuts in, *inter alia*, holiday pay for public servants and pensioners and in unemployment and sickness benefit (Constitutional Court, Nos 2, 5, 8 and 11/2013, judgment 5.04.2013); on the latter, see Oskar von Homeyer and Steffen Kommer, ‘Verfassungsgericht kippt Sparhaushalt. Anmerkungen zum Urteil des Tribunal Constitucional de Portugal vom 5. April 2013’, in: *KJ 46* (2013), p. 325 ff.

<sup>249</sup> ECtHR decision in *Mateus and others v Portugal*, Nos 62235/12 and 57725/12, 08.10.2013, paragraph 29.

<sup>250</sup> ECtHR decision in *Koufaki and ADEDY v Greece*, Nos 57665/12 and 57657/12 07.05.2013, paragraph 46.

<sup>251</sup> For a critical view, Klaus Lörcher, ‘Stellungnahme zum EGMR’, in: *HSI Newsletter 2* (2013), on <http://www.hugo-sinzheimer-institut.de/hsi-newsletter/europaeisches-arbeitsrecht/2013/newsletter-022013.html> (last accessed 02.11.2013); on assessment, see Xenophon Contiades and Alkmene Fotiadou, ‘Social Rights in the age of proportionality: Global economic crisis and constitutional litigation’, in: *International Journal of Constitutional Law 10 No 3* (2012), p. 660 ff.

<sup>252</sup> Tribunal Constitucional, Acórdão No 187/2013 *Lei do Orçamento do Estado*, judgment 05.04.2013, paragraph 37.

### 2.2.3. No regard for core obligations

The substance of the Charter of Fundamental Rights is also to be taken into account in accordance with Article 52(1) CFR. The ECJ requires that the measures should not constitute ‘disproportionate and intolerable interference, impairing the very substance of the right so guaranteed’.<sup>253</sup> The specific substance will depend on the particular nature of the fundamental right in question. The substance of specific social human rights in the UN is identified in each case by certain core obligations and social protection floors.<sup>254</sup> Particularly relevant in the present context are the core obligations relating to the right to social security, protected by Article 34 CFR. According to the UN Social Committee, these include ensuring

‘access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.’<sup>255</sup>

In so far as the MoUs fail to fulfil those obligations by preventing access to health care, housing and social security systems, but also in so far as they require specific reductions in the minimum wage, which falls below the living wage, they are unlawful.<sup>256</sup> Even if, according to the Charter of Fundamental Rights, only limited claims arise against the Union itself for benefits, the EU institutions may not take any action that prevents the exercise of the core rights. Therefore the EU institutions may not require the Member States to lower the core rights requirements only in specific regulations. When agreeing to cuts, brakes on deficits and other austerity measures, the EU institutions should also ensure that States are not deprived of the means to guarantee minimum rights.

### 2.2.4. Discriminatory effect

Furthermore, the measures should not contravene the prohibition on discrimination referred to in Article 21 CFR, Article 14 ECHR, Article 9 TEU and in the programmatic clause in Article 3(3) TEU.

The prohibition on discrimination is contravened not only directly, through the link to group characteristics in the statutory rules, but also when rules are not linked to any of the characteristics but the distinction in question ultimately always, or in the great majority of cases, amounts to use of the characteristic (*indirect or covert unequal treatment*).<sup>257</sup>

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<sup>253</sup> ECJ Case C-402/05 P *Kadi* [2008], paragraph 355.

<sup>254</sup> Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, (16.05.2012): ‘the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organisation, and ensure the protection of this core content at all times.’

<sup>255</sup> CESCR, General Comment No 19 (2008), UN Doc E/C.12/GC/19, paragraph 59.

<sup>256</sup> CESCR, General Comment No 19 (2008), UN Doc E/C.12/GC/19, paragraph 59.

<sup>257</sup> Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, Article 21 CFR, paragraph 10.

With social human rights in particular, there is a risk that especially vulnerable groups will be affected by specific cuts that contravene the prohibition on discrimination.<sup>258</sup> In that respect, for instance, in its recommendations on Spain, the UN Social Committee took the view that austerity measures are unlawful if they infringe

‘the enjoyment of their rights by disadvantaged and marginalized individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers’.<sup>259</sup>

The Portuguese Constitutional Court, too, has made a general assessment in relation to social groups and found the austerity measures to be unconstitutional on the grounds of seriously unequal treatment of social groups.<sup>260</sup> Not only is that an issue of lawfulness with regard to the national implementation measures, it also concerns the MoUs themselves, in so far as they do not provide for adequate protection and measures to avoid such discrimination. The Troika MoUs make no provision for equality. Certain supporting schemes, for instance to reduce youth unemployment, are not sufficiently coordinated with the MoUs and are not systematic enough. The MoU conditions clearly penalise those who are in any case suffering from social inclusion problems. The MoUs do not satisfy the requirements for non-discriminatory measures.

#### **2.2.5. No regard for participation requirements**

Finally, it is doubtful whether the Commission and ECB measures are justified procedurally. That applies in particular to the rights provided for in Article 41 CFR in conjunction with Article 6 EHCR, including the right to be heard and participation in a general sense.<sup>261</sup> In the case of social policy, particular emphasis has been placed on the right to good administration. Article 152 TFEU requires the Union to recognise the role of the social partners at Union level and to facilitate social dialogue, respecting the autonomy of the social partners. The minimum requirements for a procedure consistent with those norms are that the parties concerned should be heard, the facts thoroughly investigated and full reasons stated – principles that are also mentioned in Article 11(2) and (3) TEU.

The ECJ clarified the procedural requirements in *Volker and Schenke*. In that case it adopts a procedural approach and requires that the institutions seek

‘to strike such a balance between the European Union’s interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in ... the Charter, on the other.’<sup>262</sup>

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<sup>258</sup> ILO, Report on the High Level Mission to Greece, Athens (19-23.09.2011), paragraph 304 ff.

<sup>259</sup> CESCR, Concluding Comments, fifth periodic report of Spain (18.05.2012), E/C.12/ESP/C0/5, paragraph 8.

<sup>260</sup> Tribunal Constitucional, Acórdão No 187/2013, *Lei do Orçamento do Estado*, judgment 05.04.2013, paragraph 37.

<sup>261</sup> ECJ Case C-32/95 P *Lisrestal* [1996], paragraph 21.

<sup>262</sup> ECJ Cases C-92/09 and C-93/09 *Volker und Schenke* [2010], paragraph 80.



The ECB and the Commission ignored those procedural requirements when negotiating the MoUs. The European Economic and Social Committee noted, with regard to Greece, that<sup>263</sup>

‘Despite the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue. It has not been discovered whether other measures could have been put in place, which may have limited the cumulative effects of the contested restrictions upon pensioners. The Government has not established, as is required by Article 12§3, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population, as has been observed by various international organisations.’<sup>264</sup>

That criticism is directed not only at the implementing State but also at the EU institutions that negotiated the MoUs. According to the ILO:

‘In response to a question from the High Level Mission, the Government indicated that data from ELSTAT showed that approximately 20 per cent of the population was facing the risk of poverty *but that it did not have an opportunity, in meetings with the Troika, to discuss the impact of the social security reforms on the spread of poverty, particularly for persons of small means and the social security benefits to withstand any such trend. It also did not have the opportunity to discuss the impact that policies in the areas of taxation, wages and employment would have on the sustainability of the social security system.* In the framework of the obligations undertaken under the Memoranda and in order to maintain the viability of the social security system, Article 11(2) of Act No 3863 stated that the expenditures of the social security funds had to remain within 15 per cent of GDP by 2060. A contracting GDP would necessarily lead to shrinking expenditures. Even though this did not endanger the viability of the system from a technical point of view, it did affect the levels of benefits provided and could eventually put into questioning the functions of the social welfare state. The Government was encouraged by the fact that these issues were on the agenda of an

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<sup>263</sup> ILO, Report on the High Level Mission to Greece, Athens (19.-23.10.2011), paragraph. 88; see also European Committee of Social Rights, decision on Complaint No 79/2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, 07.12.2012, paragraph 32.

<sup>264</sup> European Committee of Social Rights, decision on Complaint No 76/2012, *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, 07.12.2012, arguments on Art. 12 § 3; see also Aristeia Koukiadaki und Lefteris Kretsos, ‘Opening Pandora’s Box. The Sovereign Debt Crisis and Labour Market Regulation in Greece’, in: *Industrial law Journal* 41 (2012), p. 276 ff (283): ‘There was no public consultation over the reforms.’

international organization and hoped that the ILO would be in a position to convey these issues to the Troika.<sup>265</sup>

That does not only apply to the MoU with Greece. In the case of the MoU with Spain, too, the facts were not properly investigated and the relevant actors were not consulted. The UN Social Committee expressed concern that even information that would allow the individuals and groups to be identified was still not available.<sup>266</sup>

The failure to take account of crucial factors and affected groups when setting the rules is a breach of the right to good administration. It is rightly stressed, therefore, that in the light of the ILO findings on the failure by the Troika to discuss key aspects,

‘the participating EU institutions acted illegally. I choose to emphasise the procedural aspects such as information and consultation because it underlines the wholly dismissive attitude of the institutions to human rights norms. This is not about taking away their right to make economic judgment calls or to take tough decisions: this is about the most basic entitlements of democratic populations.’<sup>267</sup>

Since the Commission and the ECB disregarded the procedural requirements when negotiating the MoUs, the measures are therefore unlawful.

### 3. Interim conclusion

Through their involvement in the signature of the MoUs and negotiation of the problematic regulatory content mentioned above and their disregard of relevant procedural, justification and proportionality requirements, the Commission and the ECB have encroached on the following fundamental and human rights: the rights to freedom to choose an occupation, freedom of collective bargaining and remuneration for work under Articles 27 to 32 CFR in conjunction with Articles 1 to 6 and 24 RESC, Articles 6 to 8 UN of the Social Covenant, Article 11 ECHR, Article 27 of the UN Disability Convention and the ILO core labour standards; the human right to housing and social security under Article 34 CFR in conjunction with Articles 12 und 13 RESC, Articles 9 und 11 of the UN Social Covenant and Articles 2, 3, 8 and 14 ECHR; the human right to health under Article 35 CFR in conjunction with Article 11 RESC, Article 12 of the UN Social Covenant, Articles 2, 3 und 8 ECHR and Article 25 of the UN Disability Convention; the human right to education under Article 14 CFR in conjunction with Articles 9 and 10 RESC, Article 2 Protocol 1 ECHR, Article 13 of the UN Social Covenant, Article 24 of the UN Disability Convention and Article 28 of the UN Convention on the Rights of the Child; the human right to property under Article 17 CFR in

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<sup>265</sup> ILO, Report on the High Level Mission to Greece, Athens (19-23.10.2011), Ziff. 88; see also European Committee of Social Rights, decision on Complaint No 79/2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, 07.12.2012, paragraph 32, emphasis added.

<sup>266</sup> Concluding Comments of the Committee on Economic, Social and Cultural Rights on the review of the fifth periodic report of Spain (18.05.2012), E/C.12/ESP/C0/5, paragraph 8.

<sup>267</sup> Darren O’Donovan, *The Insulation of Austerity*, 16.05.2013, on: <http://humanrights.ie/uncategorized/the-insulation-of-austerity-the-charter-of-fundamental-rights-and-european-union-institutions/> (last accessed: 04.10.2013).

conjunction with Article 1 Protocol 1 to the ECHR and the right to good administration under Article 41 CFR in conjunction with Article 6 ECHR. The MoU procedure does not safeguard the general principles of EU law. Collective and institutional powers are infringed; in particular the European Parliament is not sufficiently involved. The encroachments on the above-mentioned human rights are disproportionate. To some extent they fail to take account of the substance of the fundamental rights, they contravene the prohibition on discrimination and are not consistent with the procedural requirements for good administration laid down in Article 46 CFR.

## V. Legal protection

Whereas it is beyond dispute that national courts and institutions have no obligation to implement illegal (parts of) MoUs, it is not certain which judicial bodies at European or international level can be used to enforce those legal requirements in order to ensure that the process of conclusion of MoUs is in future organised in accordance with the democratic and procedural requirements and that the unlawful contractual clauses are declared non-binding in a review of the content of the agreements.

There are already a number of legal and political procedures for challenging austerity measures, from referral to the International Criminal Court<sup>268</sup> to a planned investigation report by the European Parliament's Committee on Economic and Monetary Affairs.<sup>269</sup> A few possible legal procedures will be outlined briefly below, with their advantages and disadvantages.

### 1. EU law institutions

Firstly, the review might be assigned to EU law institutions.

It does not seem sensible for the Commission itself to undertake the review of legality. Structurally, Treaty infringement proceedings to be brought by the Commission would be against a Member State and not against the measures by the Commission and the ECB.

Certainly the MoUs could be challenged through the Ombudsman in the procedure under Article 228 TFEU. The procedure is simple and convenient. For instance, complaints can be lodged by legal persons established in a Member State, as well as by EU citizens. There are no specific time limits.

The ECJ also might deal with the MoUs. The procedure introduced under Article 37 of the ESM Treaty, in which disputes between an ESM member and the ESM or between ESM members on the interpretation and application of the ESM Treaty, including any disputes on the compatibility of decisions by the ESM with the ESM Treaty, can be referred to the ECJ for a decision, can certainly also relate indirectly to the interpretation or application of provisions of EU law.<sup>270</sup> However, the ESM Treaty does not establish an exclusive legal recourse for MoUs but can only create an additional legal remedy. The ESM Treaty does not amend the TEU. The TEU/TFEU are not to be considered in the light of the ESM Treaty but vice versa: the actions of the Commission and the ECB in implementing the ESM Treaty must conform to EU law. The assessment of that requirement is subject to the general procedural requirements; otherwise the ESM Treaty would distort the division of powers under the TEU.

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<sup>268</sup> Marc Lowen, 'Greeks seek austerity trial at The Hague', *BBC* 24.04.2012.

<sup>269</sup> Florian Eder, 'Europaparlament greift die Troika an', in: *Die Welt* 29.10.2013.

<sup>270</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 174.

## 1.1. Action for annulment

The first possibility is an action for annulment in the ECJ under Article 263 TFEU. In view of the relatively short time allowed for bringing proceedings (two months), prompt action is necessary. Actions for annulment are problematic in view of, firstly, the classification of MoUs as acts of the EU institutions within the meaning of Article 263(1) TFEU and, secondly, the *locus standi*.

### 1.1.1. 'Act' of an EU institution

Only 'acts' by the EU institutions are suitable subject-matter for actions for annulment. The concept of an act is not linked to the list in Article 288 TFEU; it merely depends on whether it is an act with binding effects.<sup>271</sup> The ECJ includes in that legal acts having a binding external effect, i.e. only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment. It does not include acts capable of affecting the interests of an individual, such as confirmatory measures and implementing measures with no binding legal effects, that are merely preparatory to binding decisions.<sup>272</sup>

If MoUs are included in the decision-making process predefined by the ESM Treaty as acts preparatory to decisions by the Board of Governors under Article 13 of the ESM Treaty, they cannot be the subject of proceedings. However, that is not consistent with the legal status of MoUs, which in that respect are not a legal act within the meaning of an international law treaty,<sup>273</sup> but a *sui generis* legal act. In the conditionality procedure for the ESM, the Commission and the ECB lay down payment conditions that are legally binding. Through their actions they bind the ESM and the States. According to the ECJ in *Pringle*, 'the activities pursued by those two institutions within the ESM Treaty ... commit the ESM'.<sup>274</sup>

Unlike codes of conduct, which the ECJ has ruled are 'the expression of purely voluntary coordination' and hence has not classed as an act within the meaning of Article 263 TFEU,<sup>275</sup> MoUs lay down binding reciprocal expectations. MoUs constitute an 'act' within the meaning of Article 263 TFEU. They may therefore be challenged in proceedings under Article 263 TFEU.

### 1.1.2. *Locus standi*

It is also doubtful whether the *locus standi* applies in such proceedings.

For non-privileged plaintiffs, the *locus standi* question is probably the main obstacle. In the *Adedy* case, which admittedly concerned a challenge to a Council decision affecting Greece and not an

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<sup>271</sup> ECJ Case C-131/03 P *Reynolds Tobacco* [2006].

<sup>272</sup> ECJ Case C-131/03 P *Reynolds Tobacco* [2006], paragraph 54.

<sup>273</sup> On international treaties as the subject-matter of actions, see Markus Kotzur, in: Geiger/Khan/Kotzur (eds.), *EUV/TFEU, 5th edition.*, Munich 2010, Art. 263 TFEU, paragraph 14.

<sup>274</sup> ECJ Case C-370/12 *Pringle* [2012], paragraph 161.

<sup>275</sup> ECJ Case C-58/94 *Netherlands v Council* [30.4.1996], paragraph 27.

MoU, the ECJ did not accept that the criterion of direct concern had been met, since the clause was too indeterminate in that it does not give details of the proposed cuts, the manner in which they will be implemented and the categories of government employees who will be affected.<sup>276</sup> Thus the ECJ only considers very specific clauses in MoUs, which fulfil those criteria, to be sufficiently determinate.

Privileged plaintiffs – the Member States, the Council, the Commission and the European Parliament – do not face the obstacle of *locus standi*. The European Parliament could bring legal proceedings in the ECJ for all the above breaches of the law through an action for annulment with reference to certain especially problematic clauses in MoUs. That would require a majority in the European Parliament.

It might also be possible for a minority in the European Parliament to make such an application in a representative action, although that has not happened so far. Certainly, as with representative actions in institutional disputes under German constitutional procedural law,<sup>277</sup> there would be good reasons to link that possibility of a representative action to the objective function and preventive nature of an action for annulment. However, it is not at all certain that that argument would gain a hearing in the ECJ. Certainly the inadmissibility of a representative action could indicate a need for change *de lege ferenda* if it were unsuccessful.

## 1.2. References for a preliminary ruling

The ECJ has jurisdiction under Article 267 TFEU when an issue of EU law has arisen in domestic legal proceedings. It is difficult to raise the issue of legality of the MoUs in such proceedings and that has not so far succeeded. That is due to the complex regulatory structure of the MoUs. This form of interlegality (signature of an MoU -> national implementation) – which in that respect is a parallel to the regulatory structure considered in the *Kadi* case in the ECJ (Security Council resolution -> transposition into EU law),<sup>278</sup> since in both instances different legal systems are interrelated – raises a question as to the circumstances in which legal proceedings are to be brought, for which legal act, at which level and in which form.

However, the possibility of a reference for a preliminary ruling in regard to the extent of an obligation to implement an MoU cannot immediately be ruled out.<sup>279</sup> That would then be, on the one hand, a question of application of the ESM Treaty, but since the MoUs can also be classed as acts of the EU institutions (Article 267(1)(a) TFEU),<sup>280</sup> it is at any rate admissible to refer questions relating to them for a preliminary ruling. Even if the ECJ decided, in regard to the question referred in *Sindicatos dos Bancarios*, that it concerned the conformity of the national implementing law to

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<sup>276</sup> EU General Court order in Case T-541/10 *ADEDY* [2012], paragraph 69 f.

<sup>277</sup> BVerfG (German Federal Constitutional Court) 118, 244/254 ff.

<sup>278</sup> ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008], paragraph 286 ff.

<sup>279</sup> See reference for a preliminary ruling pending in ECJ Case C-264/12 *Companhia de Seguros*.

<sup>280</sup> The concept of an act under Article 167 TFEU also refers to non-binding legal acts and in that sense is broader than the concept of an act under Article 263 TFEU; see ECJ Case C-320/90 *Frescati* [1993].

the CFR and that was not an issue of implementation of EU law under Article 51 CFR,<sup>281</sup> questions referred for a preliminary ruling which deal explicitly with the binding effect of certain MoUs must have some chance of succeeding. However, that assumes that it is possible in each case to show the relevance. Such proceedings would at any rate need to be clearly focused on the question of the conformity of the measure in question to EU law.

### 1.3. Claim for damages on the basis of official liability

Another possibility is a claim for damages on the basis of official liability under Article 268 in conjunction with Article 340(2) TFEU.<sup>282</sup> In that case, however, apart from the subsidiarity relationship between an official liability claim and an action for annulment, it might be problematic that such cases seldom succeed in the ECJ, since the Court always requires ‘a sufficiently flagrant violation of a superior rule of law for the protection of the individual’<sup>283</sup> and has rarely allowed claims for damages even when legal norms are unlawful.

### 1.4. Article 37(3) of the ESM Treaty

Disputes between the ESM and a Member State that is affected may also be referred to the ECJ under Article 37(3) of the ESM Treaty. Court proceedings may be brought on the issue of legality of the MoUs even in such disputes. In that case, however, the question of the legality of acts by the EU institutions is purely incidental.

## 2. Council of Europe institutions

There is not currently any possibility of bringing a direct court action against measures by the EU institutions, but even an indirect action might at least be possible.

It is true that the ECtHR – which does not at present have any direct jurisdiction over the EU – has so far been extremely reserved in its judgments on austerity policy<sup>284</sup> as far as its judgments of crisis measures are concerned. The Court has also been reserved in its scrutiny of acts by the EU institutions, at least in so far as they constitute acts of secondary law under Article 288 TFEU.<sup>285</sup>

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<sup>281</sup> Order in ECJ Case C-128/12 *Sindicatos dos Bancarios* [2013], paragraph 9 f: ‘*Todavia, importa recordar que, nos termos do artigo 51.º, n.º 1, da Carta, as disposições desta têm por destinatários “os Estados-Membros, apenas quando apliquem o direito da União”, e que, por força do artigo 6.º, n.º 1, TUE, que atribui valor vinculativo à Carta, esta não cria nenhuma competência nova para a União e não altera as competências desta (v. despachos, já referidos, Asparuhov Estov e o., n.º 12, e de 14 de dezembro de 2011, Corpul Național al Polițiștilor, n.º 15; e despacho de 10 de maio de 2012, Corpul Național al Polițiștilor, C-134/12, n.º 12). [12] Ora, não obstante as dúvidas expressas pelo órgão jurisdicional de reenvio quanto à conformidade da Lei do Orçamento de Estado para 2011 com os princípios e os objetivos consagrados pelos Tratados, a decisão de reenvio não contém nenhum elemento concreto que permita considerar que a referida lei se destina a aplicar o direito da União.*’

<sup>282</sup> On a pending case, see EU General Court Case T-79/13 *Accorinti and others v ECB*, action brought on 11.02.2013.

<sup>283</sup> ECJ Case C-5/71 *Schöppenstedt* [1971].

<sup>284</sup> See ECtHR judgments in *Mateus and others v Portugal*, Nos 62235/12 and 57725/12, 08.10.2013; *Koufaki and ADEDY v Greece*, Nos 57665/12 and 57657/12, 07.05.2013; *R.Sz. v Hungary*, No 41838/11, 02.07.2013.

<sup>285</sup> In that respect the ECtHR judgment in *Bosphorus v Ireland*, No 45036/98, 30.06.2005, starts from a presumption of legality, which may, however, be rebutted (see ECtHR, loc. cit., paragraph 156): ‘However, any such presumption can

Nevertheless, further cases should be brought in that Court against measures by nation states, on wider grounds. Individuals and affected legal persons have the right to appeal. There is also a (very rarely used) State appeal procedure in which the nation States concerned may if necessary apply to the Court, for instance to challenge the cooperation of other States in decisions in the ESM Treaty Board of Governors as contrary to human rights.

The measures should also be referred to the European Economic and Social Committee even more than they have been up to now. There is a collective appeal procedure under the optional protocol. Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden have opened up that procedural possibility. Cases may be referred to the Committee both through shadow reports in the reporting procedure under Article 21 ESC and through collective complaints.<sup>286</sup> Complaints can be brought against individual States that are implementing the austerity programme, but might also be against States that are failing to fulfil their protection obligations in the institutions concerned (IMF, ESM, EU).<sup>287</sup>

To change the structure, pressure should be exerted for the EU to become a member of the RESC,<sup>288</sup> and also for greater acceptance of the collective appeal procedure and ratification of the related optional protocol.

### 3. International bodies

Internationally, too, a number of more or less effective enforcement instruments are available.

#### 3.1. ILO

In the ILO, complaints may be made to the Committee on Freedom of Association (CFA) and the Committee of Experts (COE).<sup>289</sup> The procedure can be instituted by States and social partners. In the case of the ILO, too, the structure needs to be changed by urging the EU to become a member.<sup>290</sup>

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be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.'

<sup>286</sup> On the reporting procedure and the potential for optimisation, see Ulrike Davy, 'Welche rechtlichen Grundregeln müssen für einen wirksamen Menschenrechtsschutz gelten? Bedeutung gerichtlicher und außergerichtlicher Schutzverfahren', in: Christoph Gusy (ed.), *Grundrechtsmonitoring. Chancen und Grenzen außergerichtlichen Menschenrechtsschutzes*, Baden-Baden 2011, p. 238 ff.

<sup>287</sup> CESCR, General Comment No 15 (2002), UN Doc E/C.12/2002/11, paragraph 38.

<sup>288</sup> See arguments by Urfan Khaliq, 'EU and the European Social Charta: Never the Twain shall meet?', in: *Cambridge Yearbook of European Legal Studies 15* (2013-2014), p. 169 ff.

<sup>289</sup> Overview in Gerald Neubauer, 'Judicialisierung und Effektivität quasi-gerichtlicher Streitverfahren in der ILO', in: Senghaas-Knobloch (ed.), *Weltweit geltende Arbeitsstandards trotz Globalisierung. Analysen, Diagnosen und Einblicke*, Münster 2005, pp. 125-153.

<sup>290</sup> EU accession to the ILO would of course have to be organised in such a way that it did not weaken the role of the social partners. See Rachel Frid, *The Relations between the EC and International Organizations. Legal Theory and Practice*, The Hague 1999, pp. 299f. and 317f.



### 3.2. Human Rights Committees

The measures should also be scrutinised in the committees under the UN Civil Covenant and the UN Social Covenant.<sup>291</sup> That might be done in the reporting procedure (shadow reports) or through individual complaints against either the States implementing the measures or the States that do not adequately fulfil their protection obligations in the financial institutions. Here again, the structure should be changed by working towards EU membership. The optional protocol to the UN Social Covenant, which establishes an individual communication procedure, has now entered into force, but so far it has been ratified by only a few States, including Portugal and Spain.

The only human rights body which has the possibility to review the actions of EU institutions is the Committee on the Rights of Persons with Disabilities. Even though the EU did not ratify the additional protocol of the convention which establishes an individual complaint procedure, it is possible to scrutinize the EU measures via the review procedure of Article 35 which obliges State parties and, via Article 44, also regional organizations to submit comprehensive reports on measures taken to give effect to its obligations under the present Convention. The first report of the EU has been overdue since January 2013, as it has to be delivered two years after entry into force of the convention for the relevant party to the treaty (Article 35 para 1). Shadow and alternative reports on the EU policy concerning the labour, health and social security rights guaranteed in the UN Disability Convention could be an appropriate means for ensuring the attention of the Committee on the Rights of Persons with Disabilities towards EU austerity policy. NGOs like the European Disability Forum could also use the European compliant mechanisms, e.g. the Ombudsman procedure.

### 3.3. IMF compliance

The international law responsibility of the IMF, which is part of the Troika, also has to be considered. The IMF is bound by its statutes, by international agreements to which it is a signatory and by the general rules of international law, including human rights.<sup>292</sup> On the basis of a cooperation agreement with the UN, the IMF is also required to take account of the UN bodies, such as the UN Committee under the UN Civil Covenant. Despite that, the IMF has so far largely ignored the decisions of the UN human rights institutions.<sup>293</sup> That obligation should, firstly, be enforced through the two UN committees,<sup>294</sup> but consideration should also be given to creating an intra-organisational compliance structure. The IMF has a weaker self-regulation structure than any other financial institution; it is 'one decade behind'.<sup>295</sup> In that area further changes are important, so

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<sup>291</sup> For an overview of this (and other) procedures, Urfan Khaliq and Robin Churchill, 'The protection of economic and social rights: a particular challenge?', in: Keller/Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge 2012, pp. 199-260.

<sup>292</sup> Sigrun Skogly, *The Human Rights Obligations of the World Bank and the IMF*, London 2001, p. 65 ff.

<sup>293</sup> Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Oxford 2003, p. 280 ff.

<sup>294</sup> Also to that effect, Adam McBeth, *International Economic Actors and Human Rights*, London 2009, p. 165 ff.

<sup>295</sup> Bahram Ghazi, *The IMF, the World Bank Group and the Question of Human Rights*, Ardsley 2004, pp. 213 ff and 240.

that, if necessary, the joint liability of the IMF, the ESM and the EU can be enforced under international law.

### **3.4. ICJ**

Issues related to the compatibility of austerity measures with human rights and the human rights obligations of international organisations could also be referred to the ICJ through an advisory opinion procedure (reference by the General Assembly or other UN bodies such as the WHO) under Article 65 of the ICJ Statute.

#### D. Summary of main conclusions

1. The European bodies and institutions are bound to comply with EU law even in the financial crisis. There is no state of emergency that suspends EU law. In their own institutional interests, the EU institutions must take vital social issues affecting Union citizens seriously.
2. The Commission and the ECB have fundamental rights obligations under international human rights codifications and customary international law as well as the CFR. The essential obligations are derived in particular from the CFR, the ECHR, the UN Social Covenant, the RESC and the ESC.
3. Through their involvement in the signature of the MoUs, the ECB and the Commission are encroaching on many of the rights protected by those norms. Although MoUs cannot formally be regarded as international law within the meaning of Article 38(1) of the ICJ Statute, as *sui generis* legal acts they encroach on rights protected by those codifications.
4. Through their involvement in the negotiation, signature and implementation of the MoUs, the EU institutions are infringing primary law. They are acting unlawfully. Specifically, the following rights are being breached: rights to freedom to choose an occupation, freedom of collective bargaining and remuneration for work under Articles 27 to 32 CFR in conjunction with Articles 1 to 6 and 24 RESC, Articles 6 to 8 UN Social Covenant, Article 11 ECHR, Article 27 UN Disability Convention and the ILO core labour standards; the human right to housing and social security under Article 34 CFR in conjunction with Articles 12 and 13 RESC, Articles 9 and 11 of the UN Social Covenant and Articles 2, 3, 8 and 14 ECHR; the human right to health under Article 35 CFR in conjunction with Article 11 RESC, Article 12 of the UN Social Covenant, Articles 2, 3 and 8 ECHR and Article 25 of the UN Disability Convention; the human right to education under Article 14 CFR in conjunction with Articles 9 and 10 RESC, Article 2 Protocol 1 ECHR, Article 13 UN of the Social Covenant, Article 24 of the UN Disability Convention and Article 28 of the UN Convention on the Rights of the Child; the human right to property under Article 17 CFR in conjunction with Article 1 Protocol 1 to the ECHR and the right to good administration under Article 41 CFR in conjunction with Article 6 ECHR. The encroachments cannot be considered justified, for the following reasons:

- (1) In their actions the Commission and the ECB are breaching the general rules of EU law. In so far as the MoUs lay down conditions for remuneration for work, the right of association, the right to strike and the right to impose a lockout, they are infringing Article 153(5) TFEU, since the Commission and the ECB have no collective powers in that respect. In implementing the MoUs the EU institutions are also acting *ultra vires* in the fields of education, health and social policy. Furthermore the institutional competences under EU law are being disregarded, since the European Parliament is not sufficiently involved under the ESM Treaty.

- (2) The encroachments on the above human rights are also not substantively justified. The measures ignore the fact that financial and social stability are indivisible. They are disproportionate and to a certain extent contrary to the substance of the fundamental rights, they infringe the prohibition on discrimination and fail to meet the procedural requirements laid down in EU law for fundamental rights encroachments.
5. Claims of breaches of those human rights can, firstly, be brought in national courts, European courts and committees, but international proceedings are also possible:
  - (1) At European level, apart from referral to the Ombudsman under Article 228 TFEU, an action for annulment in the ECJ might be appropriate. In particular the European Parliament, as a privileged plaintiff in those proceedings (for which there is, however, a two-month time limit), might bring an action both for disregard of collective and institutional powers in the signature of the MoUs and also for the breaches of human rights, since, as ‘acts’ of the EU institutions, the MoUs are suitable subject-matter for proceedings within the meaning of Article 263 TFEU. Proceedings cannot (yet) be brought directly against the EU in the ECtHR and the European Economic and Social Committee. However, they can be instituted not only against the States implementing the MoUs but also against the States that, for instance, are failing to fulfil their human rights obligations in the ESM.
  - (2) Internationally, the breaches of the law can be pursued in the ILO and before the UN committees. Here again, it is true that – apart from the Committee on the Rights of Persons with Disabilities – direct action cannot be taken against the EU, but it is possible to take action against the States implementing the MoUs (before the UN Social Committee against Spain and Portugal in particular) and also against the States that are failing to fulfil their protection obligations in the IOs. Issues relating to the compatibility of austerity measures with human rights and the human rights obligations of international organisations could also be referred to the ICJ through a legal opinion procedure.
6. Internationally and in the Council of Europe, the main obstacle to effective legal enforcement with regard to the measures by the EU institutions is the fact that the EU has – apart from the UN Disability Convention – not signed the relevant codifications. It has been announced that the EU will accede to the ECHR and that should therefore be followed by ratification of the RESC and the optional protocol on a collective complaints system and by accession to the UN Covenants (and their optional protocols) and the ILO. That would also ensure that more consideration was given to the codifications and the decisions of the relevant enforcement bodies in EU law.