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HOW TO LEGALISE THE ILLEGALITY

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List Of Abbreviations

1. Advocate General (AG)
2. Charter of Fundamental Rights (Charter)
3. Court of Justice of the European Union (CJEU)
4. Emergency Liquidity Assistance (ELA)
5. European Central Bank (ECB)
6. European Community (EC)
7. European Economic Community (EEC)
8. European Financial Stability Facility (EFSF)
9. European Financial Stabilization Mechanism (EFSM)
10. European Stability Mechanism (ESM)
11. European Union (EU)
12. Gross Domestic Product (GDP)
13. International Monetary Fund (IMF)
14. Member States (MSs)
15. Memorandum of Understanding (MoU),
16. Treaty establishing the European Community (TEC)
17. Treaty on European Union (TEU; Treaty of Maastricht)
18. Treaty on the Functioning of the European Union (TFEU)
19. Treaty on the Functioning of the European Union (TFEU; Treaty of Rome)

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ABSTRACT

Since 2008, the European Union has been suffered by serious economic and financial crises whose influences and the level to which they have impacted policy change remain yet unclear and debatable. The financial crisis of Cyprus and more precisely, the bailout programme that offered by the European Union (the well-known bank accounts haircut) has fairly considered one of the most controversial financial cases of the Eurozone which have legally and politically affected the stability of the European Union. The legal/illegal implications and ambiguities that arose from this unprecedented bank accounts haircut were brought into discussions in *Mallis* and *Ledra* cases, the first judgments of the European Court of Justice of the European Union which brought by Cypriot depositors seeking to challenge the haircut's legality and to claim damages. Despite the variety of sources regarding the well-known bank accounts haircut of Cyprus, little is known about the legality of the particular EU bailout and more specifically none of the pieces of research are updated, especially after the very recent judgments of *Mallis* and *Ledra*. The overall aim of the particular thesis is to prove that the EU and the EU law can be manipulated/amended through 'permissible and valid' mechanisms in order to ensure the justifiability of austerity or crisis-management actions and in a way that leaves no room for doubting or challenging the legality/validity of these measures.

1. INTRODUCTION

The European Union (EU) is in troubled waters since 2008, more precisely, since the Eurozone crisis started plaguing the EU and bringing to the light crucial and complicated issues regarding the EU's construction which come along with numerous analytical and normative misconceptions[1]. The term Eurozone crisis (also known as the European debt crisis or the European sovereign debt crisis) refers to a multi-year period of debt crisis which has been occurring in several Eurozone Member States (mainly in Greece, Portugal, Ireland, Spain and Cyprus) due to high government debt, the collapse of monetary institutions or failed attempts for bailout under national supervision without seeking assistance[2]. Through the reactions of the EU and state governments to the Eurozone crisis, it has been observed the appearance of a new approach of 'discretionary governance' that has

[1] Christian Joerges and Christian Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' [2017] ELJ 1

[2] 'European Sovereign Debt Crisis' (*Investopedia*) <https://www.investopedia.com/terms/e/european-sovereign-debt-crisis.asp> accessed 4 July 2018

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fundamentally transformed the principal pillars of the legal order of the EU and has also revealed and raised long concealed international conflicts[3]. In the view of what came to be supposed as a substantial risk for the entire EU, both the European institutions and the executives of Member States (MSs) implemented 'rescue measures' which were, in some cases, contrary to the current legal system, in other cases, incompatible with the European legal regime, and, in most cases, in infringement of the standard of democratic ruling[4]. One of the most complicated 'rescue' innovations that contravened the legal standards of both EU and MSs is the emergency credit facilities such as the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) which have existed with their separate legal personality out of the confines of EU's primary law in order to circumvent the 'no-bailout clause' and to permit the 'Troika' to enforce austerity actions on MSs in need of financial support with mainly 'unfettered executive discretion'[5].

The case of Cyprus crisis has been fairly considered one of the most controversial in the Eurozone as it clearly illustrates the legal complexities and infringements that have been occurred during all these years of the Eurozone crisis[6] and it also proves how the EU citizens have financially affected by those 'rescue' measures. In 2013, Cyprus was under urgent need of financial bailout due to its great external debt that was impossible to be repaid and the collapse of its banking system[7]. Without having any other options, Cyprus agreed to receive €10 billion financial bailout from the ESM and in return, it had to close the Cyprus Popular bank (also known as Laiki Bank) which at the time was the country's second-largest bank and also to impose a one-time uninsured deposit levy to the deposits over €100,000 of the Laiki Bank (also known as bank accounts haircut). The illegal implications and the unfair provisions of this unprecedented bank accounts haircut in Cyprus were challenged in the cases of *Mallis*[8] and *Ledra*[9], the first judgments of the Court of Justice of the European Union (CJEU) that brought by Cypriot depositors who suffered from the haircut and sought to challenge the haircut's legality and to claim damages.

This thesis discusses the aforementioned judgments by examining the most important issues raised

[3] Ibid (n 1) 3
[4] J. White, 'Authority after Emergency Rule' (2015) 78 MLR 585, 587–593
[5] Ibid (n 1) 3
[6] Stavros A. Zenios, 'The Cyprus Debt: Perfect Crisis and a Way Forward' (2013) 7 CyEPRev 3
[7] Ibid
[8] Mallis v European Commission (C-105/15 P) EU:C:2016:294 (AGO)
[9] Ledra Advertising Ltd v European Commission (C-8/15 P) EU:C:2016:290 (AGO)

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through the Cyprus crisis in order to eventually criticise/challenge the 'democratic and legal' ways with which the EU imposes its supremacy over the financial matters of its MSs. Particularly, the research starts by explaining the relevant legal framework of the EU and more precisely, by focusing on how the EU operates in financial affairs and how the EU institutions should have normally functioned. This descriptive information is needed in order to be proved later on that the original structure and principles had been unlawfully changed so as to 'rescue' Cyprus from the financial crisis. Subsequently, it briefly provides the historical background of Cyprus crisis until the bank accounts haircut in order to be understood better the critical analysis of the two judgments that it follows. Finally, the thesis makes an empirical contribution through discussion of the cases by identifying the legal infringements that took place under the EU 'rescue' mechanisms; by proving the political and legal crisis of the EU and by suggesting ways which could strengthen the EU without violating the EU policies. Especially today that Cyprus faces the exact same bank crisis like in 2013 and the Cooperative Central Bank of Cyprus is about to close (which again, it is now the country's second-largest bank), it is essential for the EU to realise its mistakes and so not to repeat them.

The above aimed perspectives will be better demonstrated by dividing the thesis into three chapters: 1. Legal Framework – How the EU operates in the finances of its members; 2. Cyprus haircut and the relevant cases of the CJEU; 3. Challenging the EU mechanism. Finally, the thesis methodology will be a combination of doctrinal and empirical research by extracting information from both primary sources such as legislation, case law, EU policies, directives, regulations etc. and secondary sources such as books, journal articles, reports and others studies.

2. CHAPTER 1: LEGAL FRAMEWORK – HOW THE EU OPERATES IN THE FINANCES OF ITS MEMBERS

2.1. Introduction

At the central of the EU and the EU functions are the Union's 28 MSs and their citizens[10]. The relationship between the EU and its MSs is quite exceptional and weird because even though all the EU MSs are autonomous, sovereign states, they have 'shared' some of their 'autonomy' so as to obtain strength and the advantages of size[11]. In essence, sharing autonomy means that the MSs

[10] European Commission, 'How the European Union works' (Luxembourg, Publications Office of the European Union 2014) 3 <https://europa.rs/images/publikacije/HTEUW_How_the_EU_Works.pdf> accessed 28 June 2018
[11] Ibid

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grant some of their administrative powers to the common EU institutions which have generated in order to make decisions, democratically and at European Level, over particular matters of mutual interest[12]. Therefore, it could be argued that the EU 'sits between the fully federal system found in the United States and the loose, intergovernmental cooperation system seen in the United Nations'[13].

Since its existence in 1950, the EU has attained much. It created a single market which allows free movement of goods, services and people between its 28 MSs which have population over 500 million[14]. It created the euro, the single currency that is nowadays one of the most widespread currencies in the world and that assists the efficiency of the single market[15]. Moreover, the EU is one of the world's largest suppliers of humanitarian aid and development programmes; it is in the first line of the campaign against climate change; it supports neighbouring states; and it carries on negotiations for expansions[16]. The aforementioned are only a few of the EU's attainments so far[17]. Looking ahead, for the purpose of this research, it should be mentioned that the EU is also attempting to get its MSs out of the financial crisis without much success though. This chapter provides information for the legal framework of the EU. Particularly, it explains the functions of the main EU institutions and the treaties that form the EU constitutional basis by focusing on the relevant, for this thesis, articles of the treaties. Then it gives details regarding the functions of those EU institutions that are related with the objectives of this research and which have been generated in order to assist the financial affairs of the EU MSs. The overall aim of this chapter is to notify what are the original legal standards of the EU functioning in order to show in the following chapters how the EU has infringed its own policies.

2.2. The main EU Treaties

The EU is functioned under the rule of law[18]. Namely, every undertaking executed by the EU is based on treaties which have been democratically and voluntarily accepted by all EU MSs[19]. All the EU MSs negotiate and approve the treaties and then ratify them through a referendum or their

[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid (n 10)
[16] Ibid
[17] Ibid
[18] Ibid
[19] Ibid

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parliaments[20]. The treaties ratify the EU's objectives, the EU institutions' rules, the EU-MSs relationship and how the decisions are made[21]. They have been altered every time new MSs have entered the EU and they have also been altered to reform the institutions of the EU and to add new duties to the EU[22]. The Treaty on the Functioning of the European Union (TFEU; also known as the Treaty of Rome) and the Treaty on European Union (TEU; also known as the Treaty of Maastricht) are the two main functional treaties of the EU which set out how it functions[23]. However, since they were originally signed, the TFEU in 1957 and the TEU in 1992, they have been repeatedly altered by other treaties[24]. Particularly, the Treaty of Rome which established the European Economic Community (EEC, a regional institution aiming to generate the economic integration among the EU members) that has been significantly altered by the TEU which established the EU, made the EEC one of the three main pillars of the EU and renamed it to European Community (EC). Therefore, the TEU also renamed the Treaty of Rome to Treaty establishing the European Community (TEC). Subsequently, the treaties have importantly amended by the Treaty of Lisbon which was established in 2009. This treaty abolished the EC by incorporating the EC's bodies into the wider framework of the EU[25]. This led to the TEC to be renamed again to the Treaty on the Functioning of the European Union (TFEU)[26].

The very important Treaty of Lisbon has also endorsed the Charter of Fundamental Rights (well known as Charter), a separate legally binding document which preserves certain social, economic and political rights for European citizens and people live under the EU law[27]. According to the Charter, the EU must operate and legislate in consistence with the Charter and under Article 51 (1), the EU's institutions and MSs should apply the Charter when establishing EU legislation[28]. The courts of the EU can in turn abolish laws that implemented by the EU's institutes and infringe the Charter[29].

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[20] Ibid
[21] Ibid
[22] Ibid
[23] Iyiola Solanke. *EU Law* (Pearson 2015) 13
[24] Ibid
[25] Council of the European Union, 'Presidency Conclusions – Brussels, 21/22 June 2007' (Brussels, 20 July 2007) <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf> accessed 5 July 2018
OR
Cf. Brussels European Council of 21/22 June 2007, Conclusions, 11177/1/07 REV 1, Annex 1
[26] Ibid
[27] Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (4th edn, OUP 2007) 15
[28] Article 51(1) of the Charter of Fundamental Rights
[29] Ibid (n 23)

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It is noteworthy to mention here that Article 51(2) of the Charter itself constrain the Charter from expanding the EU's competences[30]. This means that the EU cannot legislate to justify a right defined in the Charter if the power to enact such law is not set out in the Treaties.

As it has been illustrated above, the EU treaties can be revised to adjust EU policies and laws to the modern society's challenges[31]. Article 48 of the TEU describes the two possible ways to alter the treaties; the ordinary revision procedure and the simplified revision procedure. The ordinary revision procedure is utilised for making major alterations to the treaties, such as expanding or decreasing the authorities of the EU. In that case, a proposal to alter the Treaties is submitted to the Council by the national governments of the EU MSs, the EU Parliament or the Commission. If the Council agrees with the proposal, a Convention consisted of the EU Parliament, the Commission and the representatives of national Parliaments and the Heads of MSs is assembled. Then, the President of the Council convenes a Conference of representatives of the EU governments with a purpose to approve the alterations to the treaties. The simplified revision procedure is used for amending the EU's internal policies and actions such as internal market, economic and monetary policy, agricultures and fisheries. This procedure attempts not to assemble an Intergovernmental Conference and a European Convention. Here, the European Commission has to reach a unanimous decision for a treaty's amendment to became possible and if the change is about monetary matters, it has to consult with the EU Parliament, the Commission and the European Central Bank before acting. The simplified revision procedure has been used for the creation of the European Stability Mechanism for which a long discussion is followed. Finally, whenever of these two revision procedures is applied, alterations to the Treaties will be only put into effect if all 28 EU MSs unanimously ratify them[32].

2.3. The main EU Institutions

Now that the legal framework of the EU has been explained, it is important to clarify what are the main bodies which execute the EU's functions as these set out in the treaties. The EU is coordinated by five core institutions: the European Council, the European Commission, the European Parliament,

[30] Article 51(2) of the Charter of Fundamental Rights

[31] 'Revision of EU Treaties' (*EUR-Lex.europa*, 17 November 2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0013> accessed 5 July 2018

[32] Ibid

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the Council of the EU and the Court of Justice of the EU[33]. The European Council was formalised as an institution under the Treaty of Lisbon; it is consisted by the heads of state/government of the MSs, the president of the European Council and the President of the European Commission; and its main function is to demonstrate the EU's priorities and its general policy agenda[34]. The European Council meets minimum four times the year and more frequently when is needed[35]. It is also notable here that the European Council is completely different entity from the Council of the EU which is also known as 'the Council' or the 'the Council of Ministers'[36]. The policy agenda designed by the European Council is implemented within the legislation of the EU for which the European Commission, the Council and the European Parliament are responsible[37]. The majority of EU laws are passed under the ordinary legislative procedure[38]. Namely, the European Commission proposes new EU laws after consulting with the interested parties and other EU institutions and then both the Council (that is formed of government ministers) and the European Parliament (that is composed of directly elected representatives from MSs) must approve the draft EU law[39]. The two aforementioned institutions can consider the draft law together and they can also amend it[40].

Undoubtedly, there are restrictions on the new laws that can be passed through the EU institutions[41]. First of all, laws cannot be passed unless a particular article of a Treaty permits the EU to act on the specific matter[42]. Moreover, the EU bodies should take into consideration the principle of subsidiarity in order to decide whether and how to enact new laws[43]. This principle is found in Article 5(3) of the TEU and it indicates three preconditions for interference by the EU organisations regarding the principle of subsidiarity:

> (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore,

[33] Paul Craig, 'How the EU works: who runs the EU?' (*FullFact*, 22 April 2016) <https://fullfact.org/europe/how-eu-works-who-runs-eu/> accessed 3 July 2018
[34] Ibid (n 33)
[35] Ibid
[36] Ibid
[37] Ibid
[38] 'Parliament and Council adopt' (*Europa*) <https://ec.europa.eu/info/law/law-making-process/adopting-eu-law_en> accessed 5 July 2018
[39] Ibid (n 31)
[40] Ibid
[41] Ibid (n 33)
[42] Ibid
[43] Ibid

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by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).[44]

Under the Lisbon Treaty, the national parliaments can have a say at an initial phase of the EU law-making process to examine whether draft laws conform to the subsidiary principle[45]. More precisely, in the context of the 'early warning' procedure, the national parliaments have eight weeks after a draft legislative act being forwarded to send to the European Parliament, the Commission and the Council a reasoned opinion explaining why they believe that the particular draft does not conform with the principle of subsidiarity[46]. The draft will be reviewed ('yellow card') if at least one-third of the votes distributed to the states' parliaments agree with the reasoned opinion[47].

Once a new EU law is passed, it must then be effected[48]. This is the responsibility of the European Commission which by working closely with the MSs should ensure that the new law is implemented[49]. Laws enacted by the EU institutions can be invalidated by the CJEU for many reasons[50]. The process through which the CJEU examines the legality of EU acts and decisions is called judicial review and is set out in Article 263 TFEU[51]. Under Article 263 TFEU, the EU institutions, the MSs or any other natural or legal person can bring an action to the CJEU in order to examine the legality of an act 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'[52]. For the claim can be reviewed, it must be made within two months of the enforcement of the act and the claimant must have the requisite standard[53]. Apart from the legality of an EU act, a judicial review claim to the CJEU may be also made for a failure to act (Article 265 TFEU) or illegality (Article 277 TFEU)[54]. Moreover, whenever an EU institution or institutions' servants operate illegally and cause damage as a consequence, this loss should be recovered under

[44] Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
[45] Article 6 of the Protocole on the Application of the Principles of Subsidiarity and Proportionality
[46] Roberta Panizza, 'The principle of subsidiarity' (*European Parliament*, May 2018) <http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> accessed 5 July 2018
[47] Ibid
[48] Ibid (n 33)
[49] Ibid
[50] Ibid
[51] 'Judicial review and the European Union' (*Webstroke Law*) <https://webstroke.co.uk/law/eu-law/judicial-review-and-the-european-union#grounds-of-review> accessed 6 July 2018
[52] Article 263 TFEU
[53] Ibid
[54] Ibid (n 51)

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(Article 340 TFEU)[55] and the CJEU is the body which has 'jurisdiction in disputes relating to compensation for damage' (Article 268 TFEU)[56]. In Schoppenstedt [1971] (concerning financial policy), it was held that damages may be awarded under Article 268 or 340 TFEU only if there is a 'sufficiently flagrant' infringement of EU law[57]. A few years later, Bergaderm [2000] changed the necessities for the particular Articles, giving that damages must be caused by a sufficiently serious violation of rights[58].

2.4. The Institutions and Mechanisms related to the financial crisis

The European debt crisis made the money lending to EU MSs indisputable need and so it resulted to the foundation of loan mechanisms, the well-known bailouts[59]. For the creation of such mechanisms, it was required the reform of the Eurozone functioning and so the aforementioned EU treaties along with the EU institutions and EU law have played a crucial role here. This section will chronologically provide all the important details regarding the new loan mechanisms that implemented by the EU institutions in order to financially support the EU MSs which were suffering from the European debt crisis.

To start with, in May 2010, an intergovernmental agreement was concluded between Greece and the other euro countries in order to provide financial assistance to Greece through bilateral loans[60]. The Commission was asked by the euro states to organise the lending process but the EU was not formally implicated in the agreement. A few days later, a Regulation was adopted by the Council founding the European Financial Stabilization Mechanism (EFSM) which could be employed in upcoming cases similar to that of Greece[61]. The EFSM was based on Article 122(2) TFEU which permits the EU to provide economic aid to a MS which 'is in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'[62]. At the same Council conference, the ministers of the euro countries endorsed a Decision through

[55] Article 340 TFEU
[56] Article 268 TFEU
[57] Case 5-71 Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities [1971] ECJ I-975
[58] Case C-352/98 Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities [2000] ECJ I-5310
[59] Ibid (n 31)
[60] Bruno de Witte, 'The European Treaty Amendment for the Creation of a Financial Stability Mechanism' (2011) 6 European Policy Analysis 1, 5
[61] Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1.
[62] Article 122(2) TFEU

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which they bound themselves to brace a distinct and supplementary loan mechanism[63]. This mechanism was called the European Financial Stability Facility (EFSF, also known as a Special Purpose Vehicle) and in legal terms, it was a private company operated in Luxembourg and conjointly directed by the euro countries[64]. These two mechanisms would lend money to EU MSs in financial need together with the International Monetary Fund (IMF) in like manner the European Central Bank (ECB) gives loans to European banks[65]. At that point, it should be informative mentioned that the IMF is an international organisation comprising of '189 countries working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world'[66] while the ECB is an EU institution, the central bank of the 19 euro countries whose main objective is to sustain price stability in the Eurozone[67] by setting and establishing the monetary policies for the euro area and directing foreign exchange procedures[68].

From a legal perspective, there were two 'constitutional' ambiguities with the EFSM and EFSF due to the absence of legal basis under the treaties of the EU[69]. In the first place, it is not absolutely sure that the intergovernmental measures adopted by the euro MSs conform with the 'no bailout' rule of Article 125 TFEU which forbids EU MSs from providing economic assistance to each other[70]. Undoubtedly, it can be claimed here that a measure of loaning money under several conditions, as was the case for Greece within the EFSF, does not contradict with the Treaty forbiddance on directing financial assistance, but still there are some uncertainties[71]. Secondly, there are doubts as to whether the aforementioned EU Regulation of May 2010 is in accordance with the scope of Article 122(2)[72]. Particularly, it can be fairly argued that Greece was not confronting 'exceptional occurrences beyond its control' as the requirement of Article 122 TFEU indicates, since its government had been one of the major contributors of causing its sovereign debt crisis[73]. This latter

[63] Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union
[64] Ibid (n 60) 6
[65] Ibid
[66] 'The IMF at a Glance' (*International Monetary Fund*) <https://www.imf.org/en/About> accessed 7 July 2018
[67] Article 2 of the Statute of the European Central Bank
[68] Article 3 of the Statute of the European Central Bank
[69] Ibid (n 60) 6
[70] Article 125 TFEU
[71] Ibid (n 60) 6
[72] Ibid
[73] Ibid

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ambiguity appeared to be the most controversial, especially from the view of German government, as the German Constitutional Court came across with complaints claiming that this Council Regulation was an 'ultra vires' undertaking of the EU that must be affirmed conflicting with the German Constitution[74]. Due to the erratic record of the court and the insufficient conclusion given to those complaints, the German government suggested that a treaty amendment was necessary[75]. Thus, it is this contentious legal basis of the 'EU law pillar of the financial stability regime' established in May 2010 that driven the MSs, a few months later, to impel a treaty amendment for introducing a permanent crisis mechanism which would substitute the extraordinary and legally doubtful EFSM and EFSF[76].

At that time, a treaty amendment was seemed to be the solution for both legal uncertainties stated above[77]. By adding a clear provision in the TFEU that permits the euro countries to introduce a mechanism for financial support to MSs in economic and budgetary trouble, the prohibition of the bail-out under Article 125 TFEU would become neutral by a supplementary provision with equal treaty standard[78]. In the meantime, the legally uncertain EU Regulation of May 2010 could be withdrawn due to the intergovernmental character of the upcoming mechanism and so any potential constitutional challenges before German Courts or any other court in EU would not continue[79]. Although a treaty amendment seemed to be the only solution to the legal controversies explained above, many EU governments greeted with much scepticism the prospect of reopening treaty amendment only a few months after the difficult endorsement of the Lisbon Treaty[80]. However, in October 2010, the German government convinced the French government for the need of a new treaty amendment and so Germany's request gained the support of the European Council too[81]. Consequently, in December 2010, the simplified procedure was used to permit a two-line alteration to Article 136 TFEU[82]. The amendment was first agreed by the European Council[83] and

[74] Ibid
[75] D. Thym, 'Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle' [2011] Europäische Zeitschrift für Wirtschaftsrecht 167-171
[76] Ibid (n 60) 6
[77] Ibid
[78] Ibid
[79] Ibid
[80] Honor Mahony, 'Van Rompuy wants clearer 'hierarchy' to deal with future crises' (*EUobserver*, 25 May 2010) <https://euobserver.com/institutional/30132> accessed 13 July 2018
[81] P.M. Kaczynski and P. ó Broin, 'From Lisbon to Deauville: Practicalities of the Lisbon Treaty Revision(s)' (2010) CEPS Policy Brief 216 < https://www.ceps.eu/publications/lisbon-deauville-practicalities-lisbon-treaty-revisions> accessed 13 July 2018
[82] Ibid (n 31)

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then approved by the EU Parliament after obtaining guarantees that the EU Commission, instead of the EU MSs, would be the main runners of the EMS[84]. On March 2011, all 27 EU MSs signed the two-line amendment which states that:

> The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.[85]

Namely, the above alteration simply amends the treaties of the EU in order to permit the prospect of establishing a permanent mechanism[86]. Obviously, the ultimate purpose of this TFEU amendment was to give legal legitimacy to the ESM[87]. Thus, in February 2012, a distinct Eurozone-only treaty, named the Treaty Establishing the European Stability Mechanism, was signed by all 17 Eurozone MSs for the creation of an intergovernmental organisation, the ESM, and its functions[88]. The ESM was finally entered into force in July 2012 as the successor of the EFSF and EFSM[89]. It is now located in Luxembourg and is directed by the board of governors and a managing director who is elected every five years by the governors[90]. Each ESM MS appoints one director and alternate to represent the country in the board of governors[91] and when an ESM MS is in financial difficulty or threat, it can apply for an ESM bailout which will be reviewed by the board of governors[92]. When an ESM MS applying for a bailout, Troika (European Commission, ECB and IMF) will investigate and evaluate all the appropriate economic stability issues in order to reach a conclusion as to which of the 5 different types of financial support programmes should be provided (the five different types: Stability support loan within a macro-economic adjustment programme/Sovereign Bailout Loan; Bank recapitalisation

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83 European Council, 'Conclusions, 16-17 December 2010' (2010) EUCO 30/10
84 'Parliament approves Treaty change to allow stability mechanism' (*News European Parliament*, 23 March 2011) <http://www.europarl.europa.eu/news/en/press-room/20110322IPR16114/parliament-approves-treaty-change-to-allow-stability-mechanism> accessed 15 July 2018
85 Article 136 of the Treaty on the Functioning of the European Union
86 Ibid (n 83)
87 Leigh Phillips, 'EU leaders agree to tweak treaty, keep bail-out fund unchanged' (*EUobserver*, 17 December 2010) <https://euobserver.com/economic/31535> accessed 17 July 2018
88 European Council, 'Conclusions, 24/25 March 2011' (2011) EUCO 10/1/11 REV 1

89 Tony Paterson, 'Don't expect Britain to back a new EU treaty, Cameron tells Merkel' (*Independent*, 22 May 2010) <https://www.independent.co.uk/news/world/europe/dont-expect-britain-to-back-a-new-eu-treaty-cameron-tells-merkel-1979950.html> accessed 17 July 2018
90 Ibid (n 88)
91 'How we operate on European Stability Mechanism' (*European Stability Mechanism*, 2018) <https://www.esm.europa.eu/about-us/how-we-work> accessed 16 July 2018
92 Ibid

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programme; Precautionary financial assistance; Primary Market Support Facility; and Secondary Market Support Facility)[93]. ESM bailout is finally provided after the MS in concern singing a Memorandum of Understanding (MoU), an outlined plan for the reforms or financial consolidation that are required to be implemented so as to reinstate the financial stability[94].

2.5. Conclusion

In brief, the EU treaties set out the whole EU framework, namely the EU law, the functions of the EU institutions and how the EU MSs should operate. EU treaties can be amended in order to adapt modern challenges into the EU framework. The European debt crisis is one of the most recent and controversial challenges that the EU treaties and the EU in general has to face. As a result, new financial support mechanisms have been introduced after inevitably amending the TFEU. However, the legality and the efficiency of these amendments and mechanisms have been widely questioned as many controversies have been notified within the amendment procedure.

3. CHAPTER 2: CYPRUS HAIRCUT AND THE RELEVANT CASES OF THE CJEU

3.1. Introduction

Cyprus financial debt crisis and more particularly, Cyprus bailout programme is undoubtedly one of the most controversial cases that have been occurred during the EU economic crisis. The Cyprus case is extremely interesting and important for the examination of the EU financial crisis as it clearly illustrates the complexities of the EU financial assistance mechanisms and the EU's inappropriate performance. As it was mentioned above, in the context of unpresented political and economic chaos, a contentious economic adjustment programme in Cyprus was arranged between the Cypriot government, the ECM, the IMF and the European Commission. This chapter provides a short outline of the framework of the Cyprus financial crisis by summarising the facts from 2008, the year that the European financial crisis seemed to emergence, until the unpreceded bank accounts haircut. It then discusses the cases of Mallis and Ledra, the first two cases that brought to the CJEU by Cypriot depositors in an attempt to challenge the legality of the particular bailout. A commentary on the two judgments is given at the end of the chapter as it is unarguably essential to review the two verdicts

[93] Ibid
[94] Ibid

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before challenging the EU financial mechanisms.

3.2. The background of the Cyprus bailout

The financial crisis in the EU has been emerged after 2007-2008, when the subprime mortgage crisis of the United States resulted to a domino effect of destructive consequences in the international economy. The small tax haven island of Cyprus could not have escaped of course by this global wave of financial crisis. Economic recession in Cyprus began in 2009 when the economy fell by 1.67%[95] with large reductions especially in the sectors of shipping and tourism which in turn caused the grow of unemployment[96]. During 2010 and 2012, financial development in Cyprus has been slow and it was therefore impossible for Cyprus economy to reach the pre-2009 financial levels[97]. The non-performing loans increased to 6.1% in 2011 adding extra pressure on Cyprus banks while in the meantime, the prices of commercial property dropped by around 30%[98]. The main reason which led Cyprus to the aforementioned financial crisis was the inability of that small island to control the huge amount of money that were deposited in banks of Cyprus because of its low tax system[99]. Explicitly, 'Cypriot banks [became] too big for Cyprus to save'[100].

The low tax system of Cyprus has attracted Russian oligarchs who transferred their money in bank accounts in Cyprus in order to evade the high taxes imposed in their country[101]. The Cypriot bank accounts have then been inflated by money from Russian which obviously was much more than the government could afford and deal with[102]. More particularly, the assets of banks of Cyprus became about eight times the Gross Domestic Product (GDP) of Cyprus[103]. At that point, Cyprus banks assumed that the best option they had was to invest a large amount of this money in Greece as they

[95] 'Cyprus: Economic Growth, Cyprus GDP growth rate' (*TheGlobalEconomy.com*, 25 February 2013) <http://www.theglobaleconomy.com/Cyprus/indicator-NY.GDP.MKTP.KD.ZG/> accessed 20 July 2018
[96] 'Cyprus Unemployment rate' (*index mundi*, 9 July 2017) <https://www.indexmundi.com/cyprus/unemployment_rate.html> accessed 18 July 2018
[97] Ibid (n 95)
[98] 'Bank nonperforming loans to total gross loans (%)' (*The World Bank,* 14 April 2013*)* <https://data.worldbank.org/indicator/FB.AST.NPER.ZS> accessed 19 July 2018
[99] Matthew O'brien, 'Everything You Need to Know About the Cyprus Bank Disaster' (*The Atlantic*, 18 March 2013) <https://www.theatlantic.com/business/archive/2013/03/everything-you-need-to- know-about-the-cyprus-bank-disaster/274096/> accessed 5 July 2018
[100] Ibid
[101] Ibid
[102] Ibid
[103] Ibid

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believed that they could have obtained a competitive benefit from there[104]. The fact that Greece's economy was 12 times larger than the Cyprus's economy and that Cyprus is ethnically Greek were the main reasons that have been considered beneficial for the aforementioned decision[105]. However, this movement caused the exact opposite effect from what it was expected as the banks of Cyprus have directly suffered from the financial disaster that occurred in Greece[106]. Only in 2012, two of the largest banks in Cyprus, the Bank of Cyprus and the Cyprus Popular (also known as Laiki Bank), lost the overall amount of €3.5 billion on Greek bonds which was over 10% of Cyprus's GDP[107]. Hence, banks of Cyprus needed urgently money[108]. At that moment, if the ECB had not accepted the 'emergency liquidity assistance' (ELA) of the National Central Bank of Cyprus, the Cyprus banking system would had fallen down much sooner[109]. The Central Bank of Cyprus entrained the Eurozone group of central banks in 2008[110]. Each Eurogroup member should comply with the financial policies of the ECB and each national central bank can grant money to a euro bank after accepting any collateral and gaining the approval of the ECB[111]. In that essence, the banks of Cyprus borrowed money by the National Central Bank and so they relied on its financing to stay alive[112].

In summer 2012, the Government of Cyprus was unable to support its banking system because of the heavy exposure of Cypriot banks to the Greek dept and it therefore had to ask for a bailout from the EFSF or the ESM[113]. Subsequently, Troika representatives came in Cyprus to examine the economic problems of the island and to offer the terms for the Cyprus bailout[114]. The Cyprus Government refused the terms given by Troika and in the next months, it continued having discussions with Troika for the possibility of any changes to the given terms[115]. However, it was

[104] Ibid
[105] Ibid
[106] Ibid
[107] Ibid
[108] Ibid (n 99)
[109] Ibid
[110] Ibid
[111] Ibid
[112] Ibid
[113] 'Cyprus asks EU for financial bailout – Europe' (*Al Jazeera*,26 June 2012) <http://www.aljazeera.com/news/europe/2012/06/201262517189248721.html> accessed 19 July 2018
[114] 'Shiarly: troika will be here very soon' (*Cyprus Mail*, 2 November 2012)<https://web.archive.org/web/20121102084708/http://www.cyprus-mail.com/cyprus/shiarly-troika-will-be-here-very-soon/20121102> accessed 18 July 2018
[115] Elias Hazou, 'Troika leaves no stone unturned' (*CyprusMail*, 14 September 2012) <https://web.archive.org/web/20120914093932/http://www.cyprus-mail.com/ecofin/troika-leaves-no-stone-unturned/20120914> accessed 18 July 2018

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noticed that the then Social Left-Wing Government of Cyprus detained the dialogue with the EU[116]. The opposition and some journalists pointed out that the president of

Cyprus delayed the discussions for a potential bailout because any harmful solution would negatively affect his campaign for the forthcoming presidential elections on February 2013[117]. With regard to this, Medley Global Advisors claimed that this extensive postponement of the discussions with Troika along with 'the intransigence of communist President Demetris Christofias and the outsized presence of Russian savers in Cypriot banks have all given rise to speculation that the government will either be allowed to default or face haircuts on sovereign or bank bonds or even deposits'75[118]. In the process of negotiations with Troika, Angela Merkel played a fundamental rule too[119]. She declared that 'Cyprus should not expect special treatment over its bailout deal' because the mutual rules of the EU should be equally followed and applied[120]. Previously, German media had decried the Cyprus status stating that the island is a popular tax haven especially for rich Russians[121]. Therefore, it was completely expected that Merkel would not be willing to assist the Cyprus banks and at the same time to bailout the Russian oligarchs in a year of presidential elections in Germany[122].

On 25 March 2013, an agreement was finally concluded between the Government of Cyprus and the Eurogroup stating the essential measures that were needed to restore the viability of the banking system in Cyprus[123]. Essentially, the Government agreed with the Eurogroup statement which was supported by the ECB, the IMF and the EC[124]. In order for the above agreement to be implemented,

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116 'Q&A: Cyprus deal' (*BBC*, 28 March 2013)<http://www.bbc.co.uk/news/business-21922110> accessed 17 July 2018

117 Athanasios Orphanides, 'What Happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe' (ISSN 1359-9151-232, 2014) <http://www.lse.ac.uk/fmg/dp/specialPapers/PDF/SP232-Final.pdf>accessed 5 July 2018

118 Medley Global Advisors, 'EU Walking on Eggshells' (17 January 2013)

119 'Merkel Can't Contain Anger over Cyprus' (*Spiegel*, 22 March 2013) <http://www.spiegel.de/international/germany/chancellor-merkel-angry-with-cyprus-as-euro-crisis-intensifies-a-890453.html> accessed 16 July 2018

120 'Angela Merkel: no special treatment for Cyprus' (*The Telegraph*, 10 January 2013)<http://www.telegraph.co.uk/finance/financialcrisis/9792143/Angela-Merkel-no-special-treatment-for-Cyprus.html> accessed 16 July 2018

121 Ibid

122 Ibid (n 99)

123 European Commission, 'The Economic Adjustment Programme for Cyprus' (2013) Occasional Papers 149ISSN 1725-3209 <http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp149_en.pdf> accessed 12 July 2018

124 Ibid

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Cyprus and Troika 2 agreed the final terms of a MoU, the well known bailout[125]. Particularly, it was decided that Cyprus would gain a loan of €10 billions and that the financial sector would be restructured by dissolving the second-largest bank, the Laiki Bank and also by recapitalizing the largest bank, the Bank of Cyprus[126]. Furthermore, they agreed to implement privatization and organisational alterations which would reinstate competitiveness and macroeconomic imbalances; to do financial consolidation which would help to drop the island's budget deficit; and to apply the anti-money laundering system in the country's financial institutions[127]. The Economic Adjustment Programme was officially authorised by the Cypriot House of Representatives on 30 April 2013 and more precisely, it included the following measures:

> All insured deposits at Cyprus Popular Bank, together with Cypriot and UK assets were moved to Bank of Cyprus. Uninsured deposits, together with the remaining assets and the foreign subsidiaries remained in the legacy part of Cyprus Popular Bank, which is to be liquidated over time. Simultaneously, uninsured deposits at the Bank of Cyprus were subject to an immediate bail-in of 37.5%, implying a deposit-to-share swap. Another 22.5% of the uninsured deposits were frozen with the view to ensuring that all capital needs of the institution will be entirely covered by the own contributions of large depositors. Should the bank turn out to be over-capitalised, i.e. have its Core Tier 1 over 9%, due to this measure, the excess will be unfrozen and returned to the depositors.[128]

3.3. The cases of *Mallis* and *Ledra*

The Cyprus haircut has reasonably caused the anger of Cypriots and especially of those depositors of the Laiki bank who woke up one day to find out that their deposits have been raided by an agreement between their government and the EU[129]. Moreover, in the aftermath of the bank accounts haircut, many other catastrophic results have been appeared like depression, suicides and unemployment[130]. Undoubtedly, banking system in Cyprus was in an urgent need of reform but bank

[125] Ernst&Young, 'Cyprus and Troika reach agreement on the final terms to implement the Cyprus-Eurogroup agreement' (3 April 2013) <http://www.ey.com/Publication/vwLUAssets/Tax-and-Legal-Newsletter-April-3-Eng-Cyprus/$FILE/Tax-and-Legal-Newsletter-April-3-Eng-Cyprus.pdf> accessed 12 July 2018
[126] Ibid
[127] Ibid (n 125)
[128] Ibid (n 123) 42
[129] Ibid (n 99)
[130] Ibid

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accounts haircut was an unfair and inappropriate form of bailout. This section discusses the two cases that brought to the CJEU, the *Mallis* and *Ledras*, by some affected from the haircut depositors, in an attempt to challenge the terms of the particular MoU and the accountability of EU institutions and the Eurogroup in regard to the Cyprus bailout.

3.3.1. *Mallis* Case

In *Mallis v European Commission*, the claimants based on Article 263 TFEU to demand the cancellation of the Eurogroup statement of 25 March 2013 which declared the reforming of the banking system in Cyprus and with which the Cyprus Government agreed[131]. In fact, the claimants supported that the contested agreement was ultra vires and in violation with the right of property as it is set out in Article 1 and Article 14 of Protocol 1 of the European Convention of Human Rights and approved by the Charter[132]. In the stage before the General Court, the claimants sustained that the national measures commanding the bank accounts haircut were, in essence, establishing the decision of the Eurogroup[133]. Yet the claimants did not turn against the Eurogroup, but in opposition to the ECB and the Commission, claiming that the real authors of the controversial statement were these two EU institutions[134].

The General Court considered the admissibility of the *Mallis* case by examining whether the statement could be attributed to the ECB and the Commission[135]. The court decided that the contested statement could no be considered as one that could be attributed to the two institutions because according to the ESM Treaty and case law (*Pringle*) they do not have the authority to make their own decision when operating under ESM, and their actions are only compulsory for the ESM[136]. Furthermore, it argued that the ECB and the Commission have a distinct structure from the Eurogroup and so they cannot impose any authorised powers or instructions over the Eurogroup[137]. For giving a complete examination, the General Court also inspected whether legal effects have been produced by the Eurogroup statement that could permit a challenge according to Article 263

[131] Stéphanie Laulhé Shaelou and Anastasia Karatzia, 'Some preliminary thoughts on the Cyprus bail-in litigation: a commentary on Mallis and Ledra' [2018] ELRev 249, 252
[132] Ibid
[133] Ibid
[134] Ibid
[135] Ibid
[136] *Mallis v Commission (T-327/13) EU:T:2014:909* at [46]–[50]
[137] Ibid at [41]–[43]

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TFEU[138]. It held that the Eurogroup is not a decision-making body and so it is not authorised to establish legally binding measures[139]. Namely, instead of being legally binding, the contested statement of the Eurogroup was just defining policy measures that were not conclusive or compulsory for the granting of economic aid to Cyprus or for the conditions of such aid[140]. Hence, the General Court dismissed the *Mallis* case as inadmissible[141].

On appeal, the CJEU rejected the claimants' argument that the General Court had not given sufficient reasoning for dismissing the claim and confirmed the finding of the General Court[142]. The CJEU repeated that the Eurogroup is not able to take legally binding measures as it is just an informal political entity for discussions; 'it is neither an agent of the Commission or the ECB, nor controlled by them despite the participation of the latter two in the Eurogroup meetings in accordance with art.1 of Protocol 14 on the Eurogroup'[143]. Moreover, according to the CJEU, the Eurogroup cannot be considered as a formation of the Council of Ministers that would permit its categorization as an office, agency or body of the EU under Article 263 TFEU[144]. Regarding the participation of the ECB and the Commission in the ESM, the CJEU did not accept the claimants' argument that the General Court had not adequately taken into account the general framework of the adoption of the Eurogroup statement[145]. The CJEU came to this decision in two ways. Firstly, it based on the famous reasoning of Pringle case: according to the ESM Treaty, the ECB and the Commission are not able to make decisions of their own and their decisions are binding only for the ESM[146]. Under the ESM Treaty, the position of the ECB and the Commission in the Eurogroup cannot be broader than the position of the EU institutions[147]. Secondly, the CJEU examined the responsibilities of the ECB and the Commission according to the ESM Treaty and it concluded that the involvement of the two institutions in the Eurogroup meetings does not signify that the statement of the Eurogroup expressed the recommendations and the commands of the two institutions[148]. It was argued again that the statement itself was only informative and that it was not legally obligatory on the Cyprus

[138] Ibid (n 131)
[139] Ibid
[140] Ibid (n 136) at [51] – [60]
[141] Ibid (n 131)
[142] Ibid
[143] *Mallis v Commission (C-105/15 P) EU:C:2016:702* at [44]
[144] Ibid at [61]
[145] Ibid (n 131) 253
[146] Ibid
[147] Ibid (n 143) at [61]
[148] Ibid (n 131) 253

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authorities to establish the particular measures[149]. Regarding the Eurogroup, *Mallis* case 'constitutes the first and (currently) only legal challenge under Article 263 TFEU against a Eurogroup decision'[150].

3.3.2. *Ledra* Case

Contrary to *Mallis*, the claimants in *Ledra* questioned the implementation of the 2013 MoU agreed between the Cyprus Government and the ESM[151]. In that case, the claimants based their arguments on both Article 340 TFEU and on Article 263 TFEU by claiming that the ECB and the Commission were the actual authors of the bank accounts haircut, which was set in paragraphs 1.23 - 1.27 of the 2013 MoU[152]. Based on the above arguments, the claimants requested the withdrawal of the relevant paragraphs of the MoU and they also asked for compensation under Article 340 TFEU for the money they lost due to the deposits haircut[153]. They supported their view by claiming that the disputed paragraphs violated Article 17 of the Charter and Article 1 of the Eurpean Convention of Human Rights[154].

The General Court swiftly dismissed the annulment of the paragraphs of the MoU by finding the challenge under Article 263 inadmissible due to 'the fact that a MoU signed by a Member State and the ESM falls outside the EU legal order and thus is not a reviewable act'[155]. The judgment of the General Court, however, focuses mainly on the claim for compensation under Article 340 TFEU by explaining that the particular claim can be considered in two ways[156]. Firstly, it can be contended that the endorsement of the MoU was an implementation of the ECB and the Commission through the ESM but because this explanation was based on the illegality of specific MoU provisions, the General Court dismissed this reading on admissibility grounds by relying on *Pringle* case[157]. In *Pringle*, it was claimed that the ESM was illegal because it exceeded the TFEU powers and went beyond the exclusive competence of the EU monetary policy[158]. The CJEU dismissed the particular claim by stating that the discussions, adoption and establishment of a MoU are not incorporated in the 'implementation of EU law' and therefore, the Charter does not apply to the interventions of the

[149] Ibid (n 143) at [54]-[59]
[150] Ibid (n 131) 253
[151] *Ledra (C-8/15 P) EU:C:2016:701*
[152] Ibid at [49]
[153] Ibid
[154] *Ledra (T-289/13) EU:T:2014:981* at [35]
[155] Ibid at [56]–[60]
[156] Ibid (n 131) 253
[157] Ibid (n 154) at [47]
[158] *Pringle v Government of Ireland* (2012) C-370/12

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ESM[159]. Back to *Ledras* case, the claimants' argument can also be considered as a breach of Commission's alleged obligation to ensure the compliance of the MoU with the EU law[160]. This interpretation of the claim was not found inadmissible by the General Court but it was dismissed due to the absence of a casual link between the harm suffered by the claimants and the conduct of the Commission[161]. The casual link between the loss caused by the haircut and the Commission's inaction could not be established since the bank accounts haircut took place before the signing the 2013 MoU[162].

On appeal, the CJEU approached the case in a different way from the General Court[163]. Its approach was based on the function and responsibilities of the Commission and -to a lower degree- the ECB in the process of consultation and implementation of a MoU agreed between a borrowing MS and the ESM[164]. The most important aspect of the CJEU judgment is undoubtedly the Court's ruling that the performance of the two institutions when operating under the ESM can be brought before the Courts of the EU on the ground of Article 340 TFEU[165].

Particularly, the CJEU made a distinction between the permissibility of a claim under Article 263 TFEU and the permissibility of a claim under Article 340 TFEU[166]. In regard to the former, the CJEU reaffirmed what was previously ruled in Pringle, Mallis and by the General Court in Ledra, namely that an action for annulment within the MoU cannot be requested under Article 263 TFEU[167]. However, the CJEU stated that an allegation for damages under Article 340 TFEU for an allegedly illegal action executed by the ECB and the Commission during the implementation of the MoU should not be considered inadmissible because of the fact that the ESM is not within the EU legal order[168]. Not only was this ruling the first time that the CJEU proceeded to examine the performance of an EU institution under the ESM, but it was also the first time that it declared the Chapter

[159] Ibid
[160] Ibid (n 154) at [48] – [55]
[161] Ibid
[162] Ibid
[163] Ibid (n 131) 253
[164] Ibid
[165] Ibid
[166] Ibid
[167] Ibid 254
[168] Ibid (n 131) 254

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applicability to the EU institutions when their conduct is not within the EU legal order[169]. This founding answered one of the main issues that were remained wide open in *Pringle*[170]. Indeed, in the determining decision of Pringle, the Court did not clarify the applicability of EU law to the institutions of the EU when these operate under the umbrella of the ESM, although Advocate General Kokott was persistently trying to verify such applicability and draw all the outcomes from it[171]. The *Ledra* decision settled this uncertainty by giving a clear answer to the issue: 'because they are EU institutions, the Commission and the ECB remain bound by EU law, and by the Charter, under any circumstances (even when stepping in as agents of the European Stability Mechanism)', and may hence be found liable when their conduct under the ESM fail to conform with EU regulations and principles[172]. According to Dermine, this Court's decision 'should be seen as a positive evolution, as it contributes to filling the legal vacuum in which the EU institutions had been operating in the field of financial assistance since the eruption of the Eurocrisis'[173].

Overturning the General Court, the CJEU investigated whether the Commission's performance satisfies the three requisites for a verdict of non-contractual liability under Article 340 (2) TFEU: 'the unlawfulness of the conduct of the EU institution; the existence of damages; and the existence of a causal link between the conduct of the institution and the alleged harm'[174]. The CJEU finally dismissed the claim for compensation, after submitting that the first requisite of the test was not fulfilled[175]. Thus, the CJEU seems to allow the possibility of damages against an action found to fall outside the EU legal order but concerning EU institutions within the EU' s non-contractual liability[176]. Namely, the CJEU submitted that the General Court has 'erred in law' in its reading and appliance of the Treaty clauses giving rise to EU liability within its institutions based on Articles 268 and 340 TFEU, 'thereby upholding the appeals, setting aside the orders under appeal and proceeding to give

[169] S. Peers, 'Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework' (2013) 9
EUConst 38
[170] P. Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EUConst 263
[171] Opinion of Advocate General Kokott in Case C-370/12, 26 October 2012, *Pringle* v *Ireland,* para. 176
[172] Paul Dermine, 'The end of impunity? The legal duties of "borrowed" EU institutions under the European stability mechanism framework' [2017] ECLRev 369, 377
[173] Ibid
[174] Ibid (n 131) 254
[175] Ibid
[176] Ibid (n 151) at [55]

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final judgment itself in matters of compensation for the damage allegedly suffered by the appellants'[177].

3.4. Commentary of the Judgments

Recently, an effort has been made in the academic literature to interpret the precise role of the CJEU in regard to the financial assistance programmes, and up to what extent the Court is ready to discuss complaints from individuals regarding measures adopted for the receiving of MSs of economic aid from the ESM[178]. In the context of the Cyprus bail-in, the cases of *Mallis* and *Ledra* bring the latest clarifications regarding the Court's role on financial affairs[179].

On the subject of Article 263 TFEU, the cases illustrate that this way of judicial review has until now 'led to a dead end for individuals' as it cannot be utilised to challenge the decisions of the Eurogroup or the measures that are comprised the 2013 MoU[180]. In addition, it seems that Article 263 TFEU cannot be utilised per se as a way to challenge alleged breaches of EU institutions under the ESM[181]. In terms of Article 340 TFEU, it can be argued that it has been seen as an alternative path leading to a similar conclusion[182]. Put together, these elucidations made by the CJEU in the aforementioned cases have given insight in the accountability of EU actors (i.e. Eurogroup) and institutions (i.e. Commission and ECB) in the framework of financial assistance programmes[183].

More precisely, one of the main obstacles in the endeavour to challenge the bailout of Cyprus under an Article 263 TFEU action is the complexity of demonstrating the presence of a reviewable act and so passing the test of admissibility[184]. Normally, a measure that is established by an EU Institution and is designed to be legally binding for the claimant's legal position can be the matter of an annulment action[185]. However, as it was explained above, the claimants in Mallis and Ledra failed this test when it was applied by the Court for both the 2013 MoU and the Eurogroup statement[186].

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177 Ibid at [63]
178 A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective (OUP, 2015)*
179 Ibid (n 131) 254
180 Ibid
181 Ibid
182 Ibid
183 A. Poulou, 'The Liability of the EU in the ESM framework' (2017) 24 MJECL 127
184 Ibid (n 131) 254
185 *IBM v Commission* (60/81) EU:C:1981:264; [1981] 3 C.M.L.R. 635
186 Ibid (n 131) 255

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At that point, it is noteworthy the Opinion of Wathelet, Advocate General (AG) in *Mallis*, who provided an alternative way to challenge the Cyprus haircut under Article 263 TFEU[187]. AG Wathelet stated that the Council Decisions applied to MSs under the excessive deficit procedure can be reviewed by the CJEU[188] and then he continued by declaring that some of the measures of the 2013 MoU -involving the bank accounts haircut- were reproduced in a Council Decision[189]. The particular Council Decision can be considered as the connecting link between the EU law and the ESM, namely, although a MoU is not an EU act, the Council Decision can bring some of the MoU conditions under the EU legal order[190]. Interestingly, the AG mentioned the purpose of Regulation 472/2013 (the Two-Pack Regulation) which is, '[to enshrine in Union law] full consistency between the TFEU multilateral surveillance framework and he possible policy conditions attached to financial assistance'[191]. In accordance with Article 7(2) of the Regulation, the Commission has the responsibility to ensure that the MoUs it signs for the ESM are completely compatible with the macroeconomic adjustment programme confirmed by the Council[192].

The significance of the AG's argument, that involves the first reference to Regulation 472/2013 in a CJEU case, is that in essence an individual can actually challenge those measures of a MoU if those have been repeated in the Council Decisions[193]. Nonetheless, although it can be assumed that the Council Decision comprises a reviewable act within Article 263 TFEU, there is another major obstacle which a non-privileged applicant who intents to challenge the Council Decision before the CJEU will have to face: the legal standing test. Due to the broad discretion of MSs to choose the way to diminish the country's excessive deficit, 'which is the objective of the Council Decisions, it will be a strenuous task for any individual to prove that she was directly and individually concerned by the Council Decisions'[194].

[187] Ibid 256
[188] Ibid
[189] Council Decision 2013/236 addressed to Cyprus on specific measures to restore financial stability and sustainable growth [2013] OJ L141/32.
[190] Opinion of AG Wathelet in *Mallis (C-105/15 P) EU:C:2016:702* at [89]
[191] Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, Recital 3
[192] Ibid
[193] C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 325
[194] TFEU art 126; TFEU art 136; *ADEDY v Council (T-541/10) EU:T:2012:626* at [76]–[88]

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Relied on the argument demonstrated above, AG Wathelet provided an alternative way to individuals who desire to challenge the Cyprus bank account haircut; one that begins with the state's courts. His first point is that the Council Decision converted the bank accounts haircut into a legally binding compulsion for the Government of Cyprus, which could point out that Cyprus was establishing EU law when applying the haircut[195]. Council Decisions are EU law devices and therefore MSs are establishing EU law every time operating according under the grounds of these Decisions. Thus, the AG indicated that when MoU conditions reproduced in Council Decisions, MSs are under the duty on the ground of Article 19(1) TEU 'to provide remedies sufficient to ensure effective legal protection'. This allows MS courts 'to refer to the European Court preliminary reference questions on the validity of the Council Decisions and therefore the validity of the macroeconomic adjustment programme at issue'[196]. In case of Cyprus bailout, it could be agreed that the timeline of the bailout does not help itself to this rationale of the line of proceedings as the resolution measures realising the haircut were implemented on 29 March 2013 while the establishment of the Council Decision took place on 25 April 2013[197]. However, it is doubted as to whether the CJEU would disregard such formalistic argument. As already noted, the General Court in *Ledra* held that there was no casual link between the actions of the Commission and the haircut because the later materialised before the agreement of the MoU. The CJEU though, did not support this argument but it did not disprove it either[198].

Beyond the alternative route of national courts that, at some point, has already been operated in Cyprus for the bailout, another avenue for individuals to contest the bank accounts haircut has existed by the CJEU in *Ledra*, explicitly, a challenge to the lawfulness of the conduct of the ECB and the Commission when acting according to the ESM Treaty[199]. As it has already mentioned above, the CJEU in *Ledra* 'made a distinction between challenging the actions of the two EU institutions under art.263 and under art.340 TFEU' and it overturned the reasoning of the General Court that the EU Courts cannot review a MoU[200]. The most significance aspect of the CJEU ruling in *Ledra* is the allegation that even though a MoU falls out the legal order of the EU, this 'does not imply the end of

[195] Ibid (n 190) at [134]
[196] Ibid at [91]–[98]
[197] Ibid (n 131) 257
[198] Ibid (n 131) 257
[199] Ibid 258
[200] Ibid

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the road for actions under art.340 that challenge the conduct of the ECB and the Commission when acting under the ESM'[201].

While the CJEU in *Ledras* eventually came to the same ending as the General Court - the rejection of both the annulment and damages claims – it did so using a different direction[202]. Its decision is undoubtedly relied on a basis that the General Court dismissed as a general rule, namely that 'EU institutions have a performance obligation as to the compatibility of MoU with EU law, and may be found liable if a specific MoU fails to be compatible, despite their lack of formal authorship thereof'[203]. On that point, Dermine made an interesting declaration stating that 'the difference between the two approaches may not be as significant as the Court of Justice made it sound by setting aside the General Court's orders, perhaps in order to maximise the resonance of its own ruling'[204]. However, it remains that these approaches relied on contrary legal basis, 'and reflect strongly divergent views on the duties of EU institutions when borrowed by a distinct international organisation'[205].

3.5. Conclusion

Regarding the Cyprus bailout, the Economist Richard D. Wolff made an interesting comment which absolutely represents the reality of Cyprus in 2013:

> This is blackmail. This is basically the officials of the banks and the political leaders going to the mass of people and saying to them, 'This awful deal that makes you, who have nothing to do with the crisis and didn't get any bailout, pay the costs of the crisis and the bailout. You must do this, because if you don't, we will do even more damage to you and your economy. So give us your deposits, give us your money, pay more taxes, suffer fewer social programs, because if you don't, we will impose even worse on you'.[206]

[201] Ibid
[202] Ibid (n 172) 376
[203] Ibid
[204] Ibid
[205] Ibid
[206] John Theodore, Jonathan Theodore, *Download Cyprus and the Financial Crisis: The Controversial Bailout* (Palgrave Macmillan 2015)

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Indeed, the bank accounts haircut of Cyprus was an awful deal which has fairly caught the world's attention as until then, such bailout programmes were regarded inconceivable[207]. In the aftermath of this controversial and unfair bailout, some of the suffered depositors brought an action before the national Courts and the EU Courts challenging the legality of the bank accounts haircut. The most famous judgments came from the cases of *Mallis* and *Ledras* that have been discussed above. Unfortunately, even though the bank accounts haircut was based on uncertain legal alterations of EU law producing controversies and ambiguities within the EU legal system, the claims of the harmed depositors have been unsuccessful. The CJEU found the claims in *Mallis* and *Ledra* inadmissible under Articles 263 and 340 TFEU, while at the same time, it provided alternative ways through which the Cyprus bailout can be challenged. However, even by using the alternative ways for challenging the haircut, many other procedural barriers can be found by the Courts to block the avenue for litigants during the Court proceedings. Actually, it can be argued here that compensating the suffered depositors is upon the willingness of the EU Courts and the EU in general and not upon the claims and which Articles of the treaties are used for the claims.

4. CHAPTER 3: CHALLENGING THE EU MECHANISM

4.1. Introduction

After providing essential information regarding the relevant EU law and the mechanisms that have been introduced in order to financially assist the MSs; and also after giving all the relevant facts of the bank accounts haircut in Cyprus and discussing the judgments in Mallis and Ledras, it is time to focus on the legal controversies that took place under the EU 'rescue' mechanisms. The legal weaknesses and ambiguities that emerged from the EU bailout programmes can be better understood and justified now, that all the necessary and relevant information have been provided in the previous chapters. It has been already explained what was the normal flow of legal actions in the EU and so this chapter focuses on how this normal operation of the EU had been changed in order to adapt mechanisms which were convenient and effective only for the EU as an organisation and not for its MSs. Namely, this chapter presents the political and legal crisis that has been noticed in the EU due to the 'rescue' mechanisms. More precisely, it mentions the unconstitutional constitutional amendments that took place in EU legal system in order to incorporate the financial assistance

[207] 'Shock in Cyprus as bailout brings bank account haircut [update]' (*ekathimerini.com*, 16 March 2013) <http://www.ekathimerini.com/149355/article/ekathimerini/business/shock-in-cyprus-as-bailout-brings-bank-account-haircut-update>accessed 5 November 2017

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mechanisms; it comments the autonomy of the EU (and of EU law); it claims that the creation of these new institutional bodies is outside the EU structure; and it finally suggests ways which could strengthen the EU without violating the EU policies.

4.2. Unconstitutional Constitutional Amendments

As it was mentioned in the first chapter, the revision procedure for EU law is stated in Article 48 TEU which in essence, lays down two procedures: an 'ordinary revision Procedure' and a 'simplified revision procedure'[208]. These two processes differentiate 'not only in formal requirements, but also with regard to what can be changed and how it can be changed'[209]. The simplified procedure is utilised to alter all or some of the provisions of Part Three of the TFEU that are connected to principles and related actions of the EU[210]. This includes, among other things, the four freedoms and the internal market, security and justice, social policy, and monetary and economic policy[211]. Although, it negatively leaves out the general principles of the EU: institutional and financial matters, non-discrimination and citizenship and external action[212]. Additionally, the simplified revision procedure might not be utilised to augment the EU competences. In contrary, the ordinary revision procedure might be utilised to alter all primary law and also to increase (or to decrease) the EU competences[213].

Hence, Article 48 TEU obviously designates formal conditions for any Treaty revision[214]. Nonetheless, it is worth questioning here whether it also imposes substantive constraints of Treaty amendability[215]. Prima facie, this is not the case as Article 48 appears to put procedural limits only[216]. Although, 'the questions as to whether a particular amendment can or cannot be brought about by using the simplified revision procedure may, as a practical matter, turn out to be a substantive one'[217]. This point is illustrated in the recent case of *Pringle*.

[208] Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 Wake Forest LR 913, 942-43
[209] Reijer Passchier and Maarten Stremler, 'Unconstitutional constitutional amendments in European Union law: considering the existence of substantive constraints on treaty revision' [2016] C.J.I.C.L. 338, 351
[210] Ibid (n 209)
[211] Ibid
[212] Ibid
[213] Ibid 352
[214] Ibid
[215] Ibid
[216] Ibid
[217] Ibid

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The CJEU in Pringle was asked to examine the soundness of a Treaty revision materialised utilizing the simplified revision procedure[218]. This claim refers to the amendment that was discussed above regarding the addition of a provision for a stability mechanism in Article 136 TFEU[219]. Ten intervening MSs supported that the CJEU 'has no power under Article 267 TFEU to assess the validity of provisions of the Treaties' because 'the consequence of reviewing the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions would (…) be to preclude amendments to the Treaties'[220]. The Court, on the other hand, had an opposite view[221]. Firstly, it declared that the alteration was 'an act of the institutions' within Article 267 TFEU, as it regarded a decision of the European Council[222]. This finding of the Court indicates that the CJEU has authority upon the matter[223]. The Court then continued to prove whether the procedural provisions of the simplified procedure were applied, and verified that this also constitutes an evaluation that the amendment does not add to the EU competences and regards only Part Three of the TFEU[224]. The latter specification includes the ruling that the Treaty amendment 'does not entail any amendment of provisions of another part of the Treaties on which the European Union is founded[225].

Advocate General Kokott argued that the content of the Treaty amendment cannot be examined by referring to the provisions of Part Three, especially because the change purposes to amend parts of Part Three[226]. Thus, alterations using the simplified procedure have to be assessed under the rules of primary law implemented elsewhere[227]. Precisely, he mentioned that 'a formal amendment of Part Three of the TFEU must not have as a consequence a substantive amendment of primary law which may not be amended by means of the simplified revision procedure'[228]. This could entail that the European Council is impeded from changing the context of Part Three of the TFEU in a way that is

[218] Ibid
[219] Ibid
[220] Ibid (n 158) Opinion of AG Kokott, para 19
[221] Ibid (n 209) 352
[222] Ibid (n 209) 352
[223] Ibid
[224] Ibid
[225] Ibid (n 158) para 32
[226] Ibid para 23
[227] Ibid
[228] Ibid para 28

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not compatible with rules of primary law excluding Part Three[229]. In any other way, the European Council could revise all the Treaties' provisions by utilising the simplified procedure[230].

Another interesting and fundamental question here is whether substantive limits exist regarding the ordinary revision procedure. Article 48 TEU stays textually unspecified on the matter[231]. For example, it does not supply a kind of eternity clause like the constitutional documents of the American, the German and the French do[232]. Moreover, it does not clearly indicate that 'the spirit' of the Treaties should not be revised, as, for instance, the Constitution of Norwegian does[233]. Thus, as it was correctly claimed by Passchier and Stremler, 'it appears, at least from a strictly formal (or legalistic) point of view, that the procedure may be used to amend all primary law as well as to increase or to reduce the competences of the Union' and 'if there are any substantive constraints on Treaty amendability, they do not follow immediately from the text of the Treaties'[234].

In general, the existing standards in the literature regarding the objective and nature of EU primary law-making might well provide details for the process, but they cannot be considered as the ideal or most wanted viewpoints for the realism of the situation in practice[235]. There is no doubt that the debate should be resituated in order to realise what is actually going on with primary law-making and what this might disclose and/or specify about the objective and nature of the powers within Article 48 TEU and the distribution of liabilities for primary law-making functionary upon such results[236].

There is no (or exceptionally constrained) verification to imply that the MSs are limited in applying 'their substantive primary law-making powers by "supra-constitutional" or more general legal limits' that derive from the EU legal order[237]. Even so, this does not suggest that the MSs are essentially the non-qualified 'masters of the Treaties' in reality[238]. Initially, although they should obey the

229 Ibid (n 209) 353
230 Ibid
231 Ibid
232 Ibid
233 Ibid (n 209) 253
234 Ibid
235 Katy Sowery, 'The nature and scope of the primary law-making powers of the European Union: the Member States as the "masters of the treaties?' 2018 ELRev 205, 223
236 Ibid
237 Ibid
238 Ibid

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procedures of Article 48 TEU, this does not require qualifying their formal powers; the MSs preserve the capability to eventually amend the existing procedures[239]. In addition, the MSs should contest practical, political and other non-legal constraints to primary law-making within the EU structure[240]. Although the MSs might not constrain their *legal authority* in formal words, their functional capacity to exercise their primary law-making powers can be restrained in many ways, not only by the necessity to attain a positive political consensus within the MSs[241]. The interplays among diverse constitutional actors in the EU, like the MSs and the Courts, might therefore generate an environment where amendments of primary law within the formal political procedure turn out to be very difficult[242]. At that point, Sowery has rightly stated that 'the consequence for the balance of powers may be to elevate the Court to the position of, if not the ultimate primary law-maker within the Union, then at least an actor that shares a substantial role with the MSs in that process' and as a result, 'the position of the MSs as the "masters of the Treaties" can be understood to encompass a legal authority that is largely unconstrained, but a functional primary law-making ability that is often considerably mitigated'[243].

4.3. The EU autonomy – How essential are the EU law essentials for the EU?

It is undoubtedly remarkable here that the EU Courts and the EU in general, determine the essential features of EU law and then apply them as a vehicle to defend only its own jurisdiction[244]. After the controversial cases that have been recently occurred due to the existence of the EU 'rescue' mechanisms, it is worth questioning 'what systemic role do conferral, supremacy, direct effect and the institutional set-up of the EU play apart from a subservient one with regard to the exclusive competences of the Court'[245]; and then, it is also questionable whether 'this constitute a "Union identity" akin to the national identity referred to in Article 4(2) TEU meant to protect the MSs from incursions by the EU into especially sovereignty-sensitive areas' or whether this can 'be compared to the "eternity" clause in German constitutional law and can thus reverberate on Treaty change'[246].

[239] Ibid
[240] Ibid (n 235)
[241] Ibid (n 235)
[242] Ibid
[243] Ibid
[244] Marcus Klamert, 'The autonomy of the EU (and of EU law): through the kaleidoscope' (2017) 42 ELRev 815, 827
[245] Ibid
[246] BVerfGE, German Federal Constitutional Court's decision *Lisbon Treaty (2 BvE 2/08 et al.) 123, 267* at 252

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As it has already explained, the EU Treaties can only be altered by virtue of what the amendment procedure now indicates in Article 48 TEU[247]. However, this is along the lines of case law according to which the Treaty's procedural rules are not depended by the EU institutions or the MSs[248]. Therefore, when it comes to Treaty amendment, it is only on the disposal of the Treaty[249]. In *Pringle*, the CJEU reviewed the 'constitutionality of constitutional change' without imposing constraints to the content of Treaty amendment itself[250]. This indicates that anything in the EU Treaties could be amended, containing doctrines like direct effect and supremacy[251]. Therefore, Article 48 TEU clearly permits a reduction of EU competence, which undoubtedly would contain the competences of the CJEU[252]. Thus, a legal EU identity that would be protected from amendment under the ordinary revision procedure does not appear to subsist[253].

It is well argued here 'that autonomy is no less colourful than the legal order that has spawned it, and that the concept is engrained in EU law since the very beginning'[254]. Despite the clear fact that EU autonomy is incredibly instrumental in ruling important cases not only, it is hard to reach any certain conclusions on its operation and how it functions in comparison with other legal doctrines[255]. This can be of course considered 'disheartening from a methodological and legal certainty perspective'. The EU equals autonomy with doctrines like effectiveness and loyalty that have been used by the EU Courts to similarly great effect[256]. Hence, 'the future operation of autonomy is [...] likely to remain as hard to fathom as has been the case with loyalty and effectiveness, compounding the opaque reliance of the Court on general principles in shaping EU law'[257].

4.4. The formation of new institutional structures outside the framework of the EU and Legal Discipline

[247] *Defrenne v Société anonyme belge de navigation aérienne Sabena* (43/75) EU:C:1976:56; [1976] 2 C.M.L.R. 98
[248] *Parliament v Council* (Delegation of legislative power) (C-133/06) EU:C:2008:257; [2008] 2 C.M.L.R. 54 at [54]
[249] Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 294–296
[250] De Witte and Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*' (2013) 50 CMLRev 805, 827
[251] Ibid (n 244)
[252] N. Lavranos, 'Protecting European Law from International Law' (2010) 15 EFARev 265
[253] Ibid (n 244)
[254] Ibid 829
[255] Ibid
[256] Ibid
[257] Ibid 830

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A vital characteristic of the institutional reaction to the crisis of the Eurozone was the significant dependence on the formation of new institutional structures which are considered out of the EU structure[258]. The ESM paradigmatically represents this movement[259]. As it was explained in the previous chapters, in an attempt to investigate the legality of such innovation, the CJEU gave an incomplete ruling in the famous case of *Pringle*[260]. Later on, the *Ledra* case gave the perfect chance to the CJEU to resolve the matter. *Ledra* 'sent a strong and welcome signal'[261]. As such, the direct impact of the Ledra's ruling is confined to the action of the ESM and the action of the EU agents which are related with the ESM[262].

By considering the framework of the Eurocrisis and the facts of the aforementioned cases, it is obvious that fundamental rights do not gain the appropriate importance they legally deserve[263]. This can be justified by the inefficient policy methods used by decision-makers, which appear unable to internalise concerns regarding fundamental rights; and also 'the lack of openness of the governance process towards the very actors that are most likely to strive for their preservation (parliaments, social partners and the civil society)'[264]. As a result, fundamental rights are not received actual political consideration, and until now, they have deemed unsuccessful to operate as efficient guiding principles and credible boundaries for the initiatives of policy makers under the new EU mechanisms for financial support[265]. This is predominantly true for economic and social rights that have never accomplished to contest, or at least soften, 'the overarching neo-liberal narrative of fiscal consolidation and budgetary discipline which has driven policy reforms since the eruption of the Eurocrisis'[266].

This distressing trend has just been rising since 2010 and has extended to all significant aspects of EU financial governance such as the ESM, the budgetary surveillance under Regulation No. 473/2013, European Semester, etc[267]. It has upraised outrage and alertness[268]. An optimistic view says that the

[258] Ibid (n 172) 381
[259] Ibid
[260] Ibid
[261] Ibid
[262] Ibid
[263] O. De Schutter and P. Dermine, 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union' (CRIDHO Working Paper 2016/2)
[264] Ibid (n 172) 381
[265] Ibid
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EU, faced with increasing pressure, appears in the end to 'have got a sense of both the significance and the pervasiveness of the problem, and now looks willing to address it' by launching several initiatives so as to 'bring citizens, and their rights, back to the heart of socio-economic decision-making'[269]. Indeed, *Ledra* can be seen as the first contribution of the Courts to this emerging tendency en route for a general rebalancing of the EU socio-economic governance[270], but still, many legal ambiguities and controversies regarding the EU financial mechanisms remain harmful for the EU citizens and their fundamental rights.

It is true that *Ledra* activates legal accountability and set the foundation for a rights-based and law-based approach regarding the financial governance in Europe[271]. Per se, it is relevant for all international players contributed in that governance practice, beyond the sole ESM and its related institutions[272]. It is suggested that 'they all have to take stock of the signal sent by the Court, revise their working methods and policy-making processes and make sure they live up to their legal commitment under EU law'[273]. A matter that *Ledra* could not clearly introduce is what that commitment actually involves, particularly in the ground of fundamental rights. In consequence, it is now hoped and expected that the Courts will base on *Ledra* in upcoming rulings to give additional substantive directions[274].

4.5. Conclusion – Ways which could strengthen the EU without violating the EU policies

Interestingly, at the start of the EU financial crisis, the main priority of the EU was to strengthen the financial governance of the Economic and Monetary Union which was absolutely reasonable in the beginning[275]. At the same time, however, problems regarding democratic legitimacy and EU governance have not been taken into account in the same way[276]. 'Weakness of the EU executive; the polyarchic nature of the EU institutions and its corollary, a lack of clear political leadership; competition between the EU institutions and the MSs; and slowness and unpredictability of the

[268] Ibid (n 172) 381
[269] Ibid
[270] Ibid 382
[271] Ibid
[272] Ibid
[273] Ibid
[274] Ibid
[275] Thierry Chpin, 'Euro zone, legitimacy and democracy: how do we solve the European democratic problem?' (European issues Policy Paper NO 387, 2016)
[276] Ibid (n 275)

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negotiations between MSs' were the main problems that occurred during the Eurozone crisis[277]. Namely, the Eurozone crisis raises problems in terms of leadership, efficacy and coherence[278]. Consequently, it is strongly recommended that the reform of the EU should contain a relocation of powers and an institutional restructure which will enable the EU to address two main problems: 'the creation of clearer, more legitimate and more accountable political leadership; and the strengthening of democratic legitimacy of EU decisions by national parliaments and the EU parliament' so as Europeans to be able to embrace, both democratically and politically, the subject matters that they have in common[279]. Of course, literature can be improved here by the inclusion of more modifications and recommendations for reforms of EU governance. Hence, it is suggested more detailed analysis and further research on the particular topic.

5. CONCLUSION

The unprecedented bank accounts haircut of Cyprus that emerged as a form of financial bailout by the EU has reasonably attracted the world's attention and it will forever be a remarkable point in history. The harmful consequences that the Cyprus bailout programme caused to the Cypriots along with its legal implications should educate the civilization and more importantly, they should educate the politicians and the specialists from the financial sector so as not to repeat the same mistakes again.

This thesis starts by giving essential information regarding the relevant to the financial sector EU law and the amendments that have been implemented in order to financially assist the MSs. It then provides a timeline summary of the Cyprus financial crisis and discusses the judgments of Mallis and Ledras. As it can be noticed, this outline eventually reaches an analysis regarding the legal controversies that took place under the EU 'rescue' mechanisms and which illustrate that it is possible for the EU to modify its legal structure and governance in order to legalise provisions that would normally be considered unauthorised. Take for instance the emergency financial mechanisms (EFSM, EFSF and ESM) implemented with their distinct legal personality out of the framework of EU primary law making in order to permit the Troika to enforce austerity measures on MSs in need of

[277] Ibid
[278] Cf. T. Chopin, 'Europe and the need to decide: Is European political leadership possible?' (Schuman Report on Europe, Sringer, 2011)
[279] Ibid (n 275)

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financial support[280]. This exercise can be named 'executive managerialism[281], emergency politics[282], or exceptionalism[283]'. It also 'marks the contours of an informal, undeclared European state of emergency in which the executive institutions (both intergovernmental and supranational) are empowered at the expense of legislative and judicial institutions' while 'legal as well as social norms are suspended to the benefit of political or technocratic discretion'[284]. Therefore, 'if not rolled back or contained, the result is a disintegrated European legal order in which some authority structures are imbued with permanent traits of authoritarianism'[285].

By taking everything into consideration, this thesis makes an empirical contribution by analysing the CJEU cases, discussing the legal controversies of the EU 'rescue' measures and providing a theoretical contribution by suggesting ways which could strengthen the EU without violating the EU policies and of course, without repeating harmful bailouts[286].

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