ESM conditionality in court: two Advocate Generals on 14 Cypriot appeal cases pending in Luxembourg

Smits, R.

Publication date
2016

Document Version
Final published version

ESM conditionality in court: two Advocate Generals on 14 Cypriot appeal cases pending in Luxembourg

April 22, 2016

Yesterday, a challenge of conditionality did not find favour in the European Court. 'Conditionality' is another term for a 'macro-economic adjustment programme' that EU Member States have to accept when they receive financial assistance to face down financial stability threats. Greece, Ireland, Portugal, and Cyprus have seen far-reaching policy prescription imposed upon them by (formally: 'agreed with') the troika of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), also known as 'the institutions'. Yesterday's development concerns the delivery of Opinions by Advocates General (AGs) in a number of cases on the Cyprus 'bail-out'[1]. The AGs opined on the feasibility of challenging the authors of this conditionality in court. The availability of judicial protection is important as the policy conditions are often deeply incisive and may affect human rights. The AGs scrutiny of the opposability of conditionality shows the importance of targeting the correct authors and basing oneself on the proper legal acts, while highlighting the divide between EU law and public international law, as well as exploring the bridges between these separate legal orders in the area of economic policy.

Decisions of the General Court appealed

Parties affected by the Cypriot bank restructuring measures (2012) that suffered losses on their investments above € 100,000 (the threshold of guaranteed deposits in the EU) in Cypriot banks summoned the European Commission and the ECB before the EU's General Court. The plaintiffs attacked a detailed statement of the Euro Group, the informal meeting of Ministers of Finance of the Euro Area, and the Memorandum of Understanding (MoU) agreed between Cyprus and the European Stability Mechanism (ESM). Both documents specified in detail how the bank restructuring affecting them was to take place. The General Court denied their claims, as they addressed the Commission and the ECB. The latter were *not* the author of the contested statement issued by the Euro Group nor was the MoU attributable to them, in spite of their contribution to its negotiation. On appeal before the Court of Justice of the European Union (CJEU), numerous

grounds were invoked, in one group of cases apparently so incoherently drafted that AG Wahl was at pains to brew acceptable appeal grounds from them. Although quite different in their way of expression, both advisors to the EU's top court agreed that the appeals should be dismissed[2].

EU law versus ESM law: separate legal orders ….

Yesterday's Opinions are very relevant for the distinction between the EU's legal order from the crisis fighting instruments adopted alongside the EU itself, notably the ESM. The ESM is a separate international organisation created by the Euro Area Member States and governed by their finance ministers. They are the very members of the informal Euro Group whose statement the claimants attacked in court. The ESM operates with the assistance of two EU institutions, the Commission and the ECB, which were called to answer for the bail-in prescriptions put into effect by Cyprus as part of the conditionality. So, although formally operating under public international law, EU institutions and bodies are prominently active in the ESM. Nevertheless, both AGs found that the Court should not side with the plaintiffs. They consider the ESM as separate from the EU legal order, as the Court has established before in the *Pringle* case[3]: "the fact that one or more institutions of the Union may play a certain role within the ESM legal framework does not alter the nature of the acts of the ESM. Those acts are extraneous to the EU legal order: they are decided by ESM's own institutions and bind only the ESM" (Point 53 of AG Wahl's Opinion). And: "the fact that international agreements entered into by the ESM and one of its Members (*in casu*, the Republic of Cyprus) are negotiated by the Commission and ECB, and signed by the Commission on behalf of the ESM, cannot alter the real legal nature of those agreements: they are acts of the ESM" (Point 58). Even though the ESM Treaty requires that an MoU be "fully consistent with the measures of economic policy coordination provided for in the TFEU" (Article 13(3)), AG Wahl finds that "there is no obligation as to the result for the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities [the ESM, RS] and any EU rule which may apply to the situation" (Point 80). The Commission is to respect EU rules, including the Charter of Fundamental Rights of the European Union but, in the eyes of the AG, not "*required* to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework" (Point 86). The ESM operates in the area where Member States are free to exercise their competences in the field of economic policy which, contrary to monetary policy – an exclusive EU competence[4] –, they have retained. Plaintiffs should have addressed their claims against the ESM itself or "against the Member States which are ultimately responsible for [the alleged] violations" and brought proceedings before national courts invoking "the Court's case-law regarding State liability for breaches of EU law" (Points 103-104). AG Wahl seems to see a confusion between principals and agents as the procedural mistake the claimants have made.

…. with bridges between

His learned fellow, AG Wathelet, tries even harder to come to the rescue of the claimants by noting that the conditionality has also been laid down in EU legal acts. The economic adjustments (budget cuts, structural measures) are enshrined in MoUs and, also, in acts adopted under the Excessive Deficit Procedure (EDP), the TFEU mechanism for the enforcement of sustainable budgets which forms part of the Stability and Growth Pact (SGP). Since the strengthening of economic governance in the wake of the crisis, EU Regulation 472/2013 provides for the adoption of an economic adjustment programme by a Member State seeking financial assistance. The Commission is to ensure that the MoU it signs with the Member State on behalf of the ESM "is fully consistent with the macroeconomic adjustment programme approved by the Council" pursuant to this

regulation[5]. AG Wathelet extensively studies the interrelations between the MoU ("ESM law") and the economic policy prescriptions adopted under Article 126 TFEU (EDP) and, for Cyprus, subsequently under Regulation 472/2013 ("EU law" proper). He correctly notes that "(…) any measures contained in an MoU adopted under the ESM have also been contained, in varying degrees of detail, in a Council Decision adopted under the FEU Treaty by the Council, a procedure perhaps dictated by the fear that the MoU is not legally binding" (Point 85). He refers to the case law of the Greek Council of State on MoUs which it found not to be a legally binding instruments. AG Wathelet finds that "the Council decisions thus addressed to a Member State support the view that national measures adopted pursuant to commitments entered into by a Member State vis-à-vis the ESM constitute an implementation of EU law even though the MoU does not constitute an act of EU law, provided, however, that those measures are reproduced in the Council decision adopted after the MoU has been signed". He even finds that "given that (…) the ESM Treaty provides that the measures contained in the MoU must 'be fully consistent' with EU law, and in so far as those measures are reproduced in Council decisions, Member States are required by the second subparagraph of Article 19(1) TEU to provide 'remedies sufficient to ensure effective legal protection' enabling the courts of the Member State to refer to the Court of Justice questions for a preliminary ruling on the validity of those decisions and, consequently, the validity of the macroeconomic adjustment programme at issue" (Point 91). His remarks comes close to the issue of precedence of EU law over State law, a core issue in assessing the constitutionality of conditionality through the prism of national or EU law. The AG repeats so further down (Point 98): "national courts must be able to refer to the Court of Justice for a preliminary ruling questions on the validity of implementing decisions and the compatibility of macroeconomic adjustment programmes with the FEU Treaty, the general principles of EU law and the Charter."

His 'helping hand' is insufficient to carry the claimants over the hurdle of judicial review on appeal: their grounds are inadequate, they appeal against the wrong actor and against the wrong legal acts. The Commission and the ECB cannot be considered the authors of the Euro Group statement specifying the details of the Cypriot bank restructuring. That statement does not produce legal effects vis-à-vis third parties such that they can challenge them before the Court. Had the claimants sought to attack the EU legal acts which mirror the MoU commitments (notably, Implementing Decisions 2013/236 and 2013/436 which AG Wathelet, in Point 134, qualifies as "convert[ing] the Republic of Cyprus's commitment to impose a levy on bank deposits into a legally binding obligation. However, those provisions are not the subject of the current appeals."), they might have stood a chance in court.

Conclusion

The Opinions do not prejudge the outcome of the cases. Also, other cases on the Cyprus bail-out are pending. These two different but very instructive Opinions provide a wealth of information on issues that affect the daily lives of citizens in the affected States, and on the legal qualification of entities that are, rightly or wrongly, often perceived as mighty and unanswerable for their actions. AG Wathelet's efforts at equating the Euro Group with the Ecofin Council, which can be brought before the Court for its actions, and his acknowledgement "that the Euro Group clearly carries considerable political weight and that the Member States feel bound by the agreements concluded within that forum" (Point 132)[6] must give the claimants the reassurance that, even if their claims are dismissed, they have been heard.

Professor René Smits, Chair of Law of the Economic and Monetary Union at the Amsterdam Centre for European Law and Governance, University of Amsterdam

Professor Smits is also an Alternate Member of the ECB's Administrative Board of Review, the independent body of review of prudential supervisory decisions of the ECB.

[1] To quote from footnote 11 to AG Wathelet's Opinion: "The term 'bail out' describes a rescue operation in which the onus is placed on external investors or the taxpayer. The term 'bail in', on the other hand, refers to a rescue operation in which the bank's creditors are obliged to agree to have a portion of their debt written off."

[2] Opinion of Advocate General Wathelet, delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P (Konstantinos Mallis and Elli Konstantinou Malli (C-105/15 P), Tameio Pronoias Prosopikou Trapezis Kyprou (C-106/15 P), Petros Chatzithoma and Elenitsa Chatzithoma (C-107/15 P), Lella Chatziioannou (C-108/15 P), Marinos Nikolaou (C-109/15 P) v European Commission, European Central Bank);

Opinion of Advocate General Wahl, delivered on 21 April 2016 in Joined Cases C-8/15 P, C-9/15 P and C-10/15 P (Ledra Advertising Ltd (C8/15 P), Andreas Eleftheriou (C9/15 P), Eleni Eleftheriou (C9/15 P), Lilia Papachristofi (C9/15 P), Christos Theophilou (C10/15 P), Eleni Theophilou (C10/15 P) v European Commission, European Central Bank).

[3] Case C-370/12, EU:C:2012:756.

[4] For the Member States whose currency is the euro: Article 3(1)(c) TFEU.

[5] Article 7 Regulation 472/2013, Official Journal L 140/1, 27 May 2013.

[6] AG Wathelet's continues: "However, this is not sufficient to support the view that the contested statement produced binding legal effects with respect to third parties within the meaning of the Court's case-law."

Author : acelg

Case law, Euro & Finance, Institutions, Member States No comments

, Conditionality, ESM; CJEU; Economic Policy