'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis'

Pablo Martín Rodríguez*

The principle of legal certainty and legitimate expectations as a legal tool for individuals in EU law – the mixed nature of EU emergency law: the 'conferral principle' limitation and the ways to expand executive powers in the EU response to the crisis (*Pringle*, *ESMA*, *BPP*, *OMT*) – the existence of legal certainty failures in that response: unpredictable and disjointed legislation and adjudication – arguments blurring legal certainty as the standard of review for EU emergency law: conditionality, international law and indirect legislation – the self-restraint attitude of the European Court of Justice and the risks of leaving litigation under the sole remit of national courts: normalising emergency powers and EU law autonomy at stake

The financial and economic crisis unfolding since 2008 has had a huge impact on European states and societies and has justified a monumental and controversial legal response by the European Union and its member states. The critical rearrangement that this reaction has produced in the organisation and exercise of public power in Europe, as well as the devastating consequences in the living conditions of European citizens, has probably and with just cause been the main topic of consideration in recent legal and political science literature. The present article aims to contribute to this extensive debate by bringing attention to the potential role that legal certainty and individuals' expectations may play in this

*Associate Professor in Public International Law and International Relations of the University of Granada (pamartin@ugr.es). I thank D. Sarmiento, M. López Escudero and the EuConst editorial board and the anonymous reviewer for their insightful comments on this contribution. I should also like to thank Bridgit McQue for helping me put these thoughts in comprehensible English. Of course all errors remain mine. This research has been done within the framework of the Project DER2014-57213 funded by the Spanish Ministry of Economy and Competitiveness.

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context. It is in three sections. In the first, we seek to connect legal certainty with the prevailing theoretical approaches adopted thus far by the doctrine, trying to illuminate its potential. In the second, it is submitted that emergency law is an appropriate framework within which to address this complex EU response to the crisis; and that legal certainty and legitimate expectations have an important say in that framework. The third section analyses why legal certainty and legitimate expectations are experiencing some difficulties in operating successfully in EU law. Finally, there are some concluding remarks.

The potential of a legal certainty and legitimate expectations approach to the EU response to the crisis: focusing on individuals' tools

The EU response to the crisis (or crises[1]) has been reflected in legal writing.[2] This has mainly opted for *fundamental* approaches, pointing to core issues in the EU legal, political and institutional setting and leading both to decisive critical conclusions and to the examination of the essential challenges which the EU currently faces. These scholars have, rightly, put the emphasis on the departure from those fundamental principles which underpin the legality and legitimacy of the EU multilevel system of governance. They point also to the appearance of severe democratic and accountability loopholes; the hidden mutation of European constitutional law; the degradation of basic legal values such as the rule of law; and the infringement of fundamental rights, among others. These theoretical frameworks might, however, inadvertently lead to the wrong impression that this legal debate stops at the 'eminent principles' level. If so, that would overshadow the repercussions that, at the final stage of the legal chain, this EU response has over all sorts of individuals' rights and the legal remedies available to European citizens. Among these legal tools, legal certainty occupies a privileged position, because it represents a bridge between the individual and many of these prominent principles. In particular, concerning the rule of law, the Council of Europe's *Venice Commission* has identified legal certainty as one of its six major components.[3]

This is especially the case in EU law, where legal certainty is a general principle that binds EU institutions and member states when implementing EU law.[4]

[1] See J.E. Fossum and A. Menéndez (eds.), The European Union in Crises or the European Union as Crises?, ARENA Report No 2/14, ARENA 2014.

[2] *See* the extensive bibliography analysed by T. Beukers, 'Legal Writing(s) on the Eurozone Crisis', *EUI Working Papers*, Law 2015/11, p. 19-39.

[3] *See* Venice Commission, *Report on the Rule of Law*, CDL-AD (2011) 003 rev, p. 10-11.

[4] ECJ 24 October 2013, Case C-151/12, *Commission* v *Spain*, para. 28; ECJ 17 November 1993, Case C-71/92, *Commission* v *Spain*, para. 25; ECJ 1 July 2014, Case C-573/12, *Ålands Vindkraft*, paras. 125-128.

As is well known, this general principle requires 'that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law'.[5] According to the European Court of Justice case law, it also provides individuals with at least these weapons:[6]

(a) as a condition to the validity and/or enforceability of legal norms, individuals can bring an action seeking to strike down a rule not complying with some formal requirements such as clarity, precision[7] or official publication;[8]

(b) as protecting predictability, the legal certainty principle may not prevail over a substantive legal choice, but it may prevent its subjective application on grounds such as being retroactive[9] or against individuals' legitimate expectations. These might be created by previous legislation[10] and also by non-legally binding positions taken by public authorities.[11] In cases (a) and (b), this individual right might even lead to a right to compensation;[12]

(c) as part of the legal system, legal certainty operates not only in relation to direct rules but also to indirect legislation, entitling individuals to claim against a prejudicial application, even at the interpretative level;[13]

(d) legal certainty also relates to the right to an effective judicial remedy and to a fair trial, since it requires a prior clear determination of the competent court[14] or may preclude legislative changes which either curtail the period within

[5] ECJ 12 February 2015, Case C-48/14, *Parliament* v *Council*, para. 45.

[6] *See* P. Martín Rodríguez, 'The Principle of Legal Certainty and the Limits to the Application of EU Law', *Cahiers de droit européen* (2016), forthcoming.

[7] ECJ 5 May 2011, Joined Cases C-201/10 and C-202/10, *Ze Fu Fleischhandel*, paras. 35 and 52.

[8] ECJ 11 December 2007, Case C-161/06, *Skoma-Lux*, paras. 32-34; ECJ 10 March 2009, Case C-405/06, *Heinrich*, paras. 42-46; and especially ECJ 12 July 2012, Case C-146/11, *AS Pimix, in liquidation*, para. 36.

[9] ECJ 17 July 2014, Case C-472/12, *Panasonic Italia SpA*, paras. 57-58.

[10] ECJ 28 April 1988, Case 120/86, *Mulder* v *Minister van Landbouw en Visserij*; ECJ 11 December 1990, Case C-189/89, *Spagl*.

[11] *See*, e.g., ECJ 13 December 2013, Case C-226/11, *Expedia*, para. 28; ECJ 11 July 2013, Case C-439/11 P, *Ziegler*, paras. 59-60. An exhaustive review of the ECJ case law on legitimate expectations can be seen in C. Jiménez Piernas and F.J. Pascual Vives, 'La tutela judicial del principio de protección de la confianza legítima en el Derecho de la Unión Europea', in *Riesgo regulatorio en las energías renovables Regulatory risk in renewable energies* (Aranzadi 2015) p. 73.

[12] ECJ 19 May 1992, Cases C-104/89 and C-37/90, *Mulder* v *Council and Commission*, para. 19 and ECJ 27 January 2000, Cases C-104/89 and C-37/90, in *Mulder* v *Council and Commission II*.

[13] ECJ 14 July 1994, Case C-91/92, *Faccini Dori*, para. 27; ECJ 8 October 1987, Case 80/86, *Kolpinghuis*, paras. 13-14; ECJ 28 June 2012, Case C-7/11, *Fabio Caronna*, paras. 52-56; and ECJ 16 June 2005, Case C-105/03, *Maria Pupino*, paras. 44-45.

[14] *See* ECJ 4 September 2014, Case C-157/13, *Nickel & Goeldner Spedition*, para. 38; Opinion Jääskinen 23 April 2015, Case C-69/14, *Târşia*, points 34-46.

which a legal action can be brought[15] or interfere in pending judicial proceedings.[16]

Consequently, if a degradation of the rule of law and other fundamental principles is present in the EU legal response to the crisis, as some authors have convincingly claimed,[17] an approach focused on the general principles of legal certainty and legitimate expectations may prove rather useful in order to explore the individual's dimension.[18] However, legal certainty concerns seem to have played a very modest role so far. In my opinion, this may be traced to the legal framework where this response has, without serious objection, been anchored: the so-called emergency law.

Emergency law as a 'mandatory' legal framework

It is generally accepted that the EU faced an economic emergency, particularly in 2012 when the entire Eurozone was at risk. The events of spring 2015, when the *Grexit* became a *too real* possibility, proves that this risk has not been completely banished. It is submitted here that emergency law is the appropriate analytical framework for dealing with the EU response to this crisis for two main reasons. First, the economic and financial crisis has put the EU and its member states in a situation of *necessity*, i.e. the affirmation of the occurrence of a threatening situation for which no adequate legal means of reaction was foreseen, justifying then the articulation of a legal response through unorthodox but necessary means. This is the key trigger of emergency law.[19] Secondly, even if the current academic

[15] ECJ 12 December 2013, Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation*, paras. 44-49; ECJ 18 December 2014, Case C-640/13, *Commission* v *UK*, paras. 38-40.

[16] The ECJ has so far not ruled on this question (ECJ 6 September 2011, Case C-108/10, *Ivana Scattolon*, para. 84), but there is clear case law of the ECtHR based on Art. 6.1 ECHR (ECtHR 15 April 2014, *Stefanetti and others* v *Italy*, paras. 38-44).

[17] *See* A. von Bogdandy, M. Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done', 51 *CMLR* (2014) p. 59; C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies* (2015) p. 325; M. López Escudero, 'La nueva gobernanza económica de la Unión Europea: ¿una auténtica unión económica en formación?', 50 *Revista de Derecho Comunitario Europeo* (2015) p. 428-433.

[18] In particular, because these general principles cover all sorts of rights and legitimate expectations (not only fundamental rights) and protect all kinds of 'individuals' (not only human beings but also companies, financial entities, trade unions, NGOs, etc).

[19] As Judge Gros once said: 'Dire qu'un pouvoir est nécessaire, qu'il découle logiquement d'une certaine situation, est l'aveu de l'inexistence d'une justification juridique. Nécessité n'a pas de loi, dit-on; c'est en effet qu'on sort du droit lorsqu'on invoque la nécessité' (Op. diss. Gros, CIJ 21 juin 1971, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie*

revival of interest in emergency law is largely driven by the post-9/11 securitised governments' agenda defying constitutional values in liberal democracies,[20] economic emergencies are not strange to this analytical framework. Since the constitutional confrontation in economic emergencies is usually formulated and/or perceived in less dramatic terms,[21] they can easily be instrumental in different purposes, economic, political or other.[22] Thus, the emergency law framework dealing with the notion of necessity is still very useful for approaching critically this phenomenon in legal and constitutional terms, especially in legal systems built on the rule of law and normative Constitutions such as that of the EU and those of EU member states (Articles 5 and 7 TEU).[23]

In an emergency context, the law accepts the 'bending' of the ordinary legislative process and the setting aside of individual rights if they are in conflict with the general interest. This overriding general interest is defined by executives endowed with expanded powers, while parliaments and judiciaries seem to show a generous leniency, at least during the emergency. It is a sort of a *légalité élargie,* both procedural and substantive, reflecting badly on the incisiveness of judicial scrutiny and democratic accountability.

This legal framework undoubtedly impacts on legal certainty and individual normative expectations, but it does not deprive them of any effect. For instance: (a) the activation of emergency law apparently alters radically every individual right or legitimate expectation based on previous legislation, but legal certainty may yet attract some limits as to the admissible derogations; and (b) increased executive powers rearrange the position of the individual *vis-à-vis* the exercise of public authority, suggesting the need to reassess whether individual guarantees (grounded in legal certainty) against the emergency legislation are still operational and respected. However, the analysis of these two aspects in EU law requires prior consideration of some specific features of EU emergency law that have been highlighted by the financial and sovereign debt crisis.

(Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, Rec. 1971, p. 339, para. 30).

[20] *See* V.V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press 2008).

[21] B. Meyler, 'Economic Emergency and the Rule of Law', 56 *DePaul Law Review* (2006-2007), p. 539.

[22] W.E. Scheuerman, 'The Economic State of Emergency', 21 *Cardozo Law Review* (1999-2000), p. 1869.

[23] *See* critically, including the current Schmittian fascination, in C. Joerges, 'Europe's economic constitution in crisis and the emergence of a new constitutional constellation', in Fossum and Menéndez *supra* n. 1, p. 279 at p. 310). On other constitutional frameworks, *see* V.V. Ramraj, 'Emergency Powers and Constitutional Theory', 41 *Hong Kong Law Journal* (2011-2012), p. 165.

EU emergency law: between the constitutional and international approaches

Constitutional and international law adopt different approaches towards emergencies; and EU emergency law does not fit within either, which is not without its consequences. National constitutions' regulation of emergencies is, even inside the EU,[24] too motley to allow us to deduce any categorial legal classification going beyond merely taxonomic purposes. What is constitutionally relevant to emergencies is the appearance of a threat to the very preservation of the 'body politic' that cannot be overcome by ordinary means, demanding instead a temporary adaptation that makes possible a swift and effective response capable of guaranteeing the continuance of the political system and a return to its regular functioning. Any analysis of this extreme situation is thus entirely dependent on an appropriate understanding of a concrete political system as a cultural, historical, legal, sociological and political phenomenon (similarities and differences might be taxonomic but not properly categorial). So, in constitutional terms, it is not about requiring a legal basis for reacting to the emergency (which implicitly derives from the preservation of the 'body politic'), but about managing the reaction, with the understanding that this reaction itself might turn into a threat for that preservation (ending in a constitutional mutation).[25] The real issues are thus whether the legislative, the executive or a certain combination of both should rule this reaction *ex ante*; whether there are any uncrossable constitutional limits thereto; and what is the appropriate role for the judiciary before, during and after emergency law obtains.

In contrast, international law treats national emergencies as an excuse for non-compliance. This, sometimes described as a sovereign powers' recovery, is the purpose of the escape, safeguard, derogation or flexibility clauses contained in most treaties. It is a more limited perspective, for it intends that international commitments (and, accordingly, normative expectations based thereon) do not hinder whatever steps the state needs to take to overcome the emergency, albeit under the discipline of the treaty itself. The international law approach presents two relevant differences from the constitutional one. First, the kind of emergency situation loses all importance compared to the legal basis issue. International law shows no obstacle in admitting minor emergencies (economic or other) or accepting different legal effects therefrom, provided that this flexible treaty regime has previously been agreed on.[26] Secondly, whereas the internal

[24] *See* a review of those different regulations in V. Faggiani, 'Los estados de excepción. Perspectiva desde el Derecho Constitucional Europeo', 17 *Revista de Derecho Constitucional Europeo* (2012), p. 181.

[25] *See* J. Ferejohn and P. Pasquino, 'The law of the exception: A typology of emergency powers', 2 *I·CON* (2004) p. 210.

[26] That is the reason that human rights treaties and constitutional emergency clauses coincide in restricting the space for emergency (*see*, on human rights treaties, J. Oráa Oráa, *Human Rights in*

reallocation of powers is mostly irrelevant for international law, the limits laid down in a treaty assume greater importance, since emergency clauses do not aim at preserving the state but the treaty. Substantive limits appear in the form of non-derogatable treaty obligations or the application of principles, such as proportionality. Procedural guarantees aim at braking unilateral state action, pointing to the management and ultimate dominion of the conventional flexibility.[27]

EU emergency law, for its part, shows a mixed situation between international and constitutional approaches. The EU Treaties contain several provisions in order to deal with potentially unexpected circumstances, entitling EU institutions to deal with them by extraordinary means (e.g. Articles 66, 78.3, 122 or 146 TFEU). These few clauses envisage, so to speak, 'restricted emergencies' and, in a very modest way, they follow a constitutional approach, where the Council's prevalent position should be noticed. Contrarily, and rather naturally, the general EU law approach to emergencies has been (and still is) international in spirit, allowing a member state to escape from its EU obligations in certain extraordinary circumstances, but under close control by EU institutions. Although some of these clauses became obsolete and disappeared,[28] they still pervade the Treaties (paradigmatically Article 347 TFEU) and secondary legislation. The intense institutional control (and particularly the position of the European Court of Justice as the ultimate guarantor of respect for procedural and substantive limits) should not be confused with a constitutional approach. The fundamental idea here is that these more frequent emergency clauses do not endow EU institutions with more powers but, quite differently, they enable a Member State to escape from its EU commitments. This is the reason that, in EU law, finding a legal basis for the emergency measures and respecting the procedure and limits of the existing clauses become the crucial points.

States of Emergency in International Law (Clarendon Press 1992) and D. McGoldrick, 'The interface between public emergency powers and international law', 2 *I·CON* (2004) p. 380). Beyond those treaties, any parallel assessment is, in my opinion, incorrect, particularly with regard to economic emergencies in constitutions and international economic treaties (*see infra* n. 28).

[27] On the technical prolongations and variety of treaty escape clauses, *in extenso* P. Martín Rodríguez, *Flexibilidad y tratados internacionales Flexibility and international treaties* (Tecnos 2003) or C. Binder, 'Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited', 25 *Leiden Journal of International Law* (2012) p. 909.

[28] *See* for this historical perspective, the classic works of P. Gori, *Les clauses de sauvegarde dans les traités C.E.C.A. et C.E.E.* (UGA 1967); T. Müller-Heidelberg, *Schutzklauseln im Europäischen Gemeinschaftsrecht* (Stiftung Europa-Kolleg 1970); M.A. Lejeune, *Un droit des temps de crises: les clauses de sauvegarde de la CEE* (Bruylant 1975); A. Accolti-Gil, 'Il sistema normativo del Trattato CEE per la tutela degli interessi nazionali dopo la fine del periodo transitorio', 17 *Rivista di Diritto Europeo* (1977) p. 111 and p. 239; and A. Weber, *Schutznormen und Wirtschaftsintegration* (Nomos Verlaggesellschaft 1982).

However, the financial and sovereign debt crises have gone far beyond a national emergency, threatening the whole Eurozone and therefore the EU (an existential emergency). This has thrown the mixed nature of EU emergency law and its legal limitations into sharp relief. The single recovery of sovereign powers by a member state by itself could hardly be a solution capable of assuring the conservation of the common project. At the same time, the EU clearly lacks a comprehensive constitutional approach, the development of which involves institutional expanded powers and which seems extremely difficult in a system based on the principle of conferral. An example may illustrate this conundrum. Regarding the European banks' rescue, the EU could neither have prevented a member state from going 'Icelandic' (or compelled it not to do so) nor have articulated a proper bank aids' saving scheme with European funds; instead, the EU had to proceed to channel the concerted member states' action through the 'emergency clauses' allowing for state aids that are deemed compatible with the internal market; that is, to permit member states to derogate from their obligations following the specific procedure set forth in the Treaties.[29]

The hidden rise of the EU emergency law dimension throughout the crisis

The EU has reacted with a formidable redefinition of the rules governing the European Monetary Union on both private and public branches, affecting core parts of the internal market as well.[30] The noteworthy fact is that, except for the slight modification of Article 136 TFEU (unnecessary according to the *Pringle* ruling),[31] this legal redefinition has been done 'without touching the Treaties'. However, this has not prevented EU law from allowing a significant increase of powers, both within the EU executive agencies and institutions and within the member states' executives. This is a widely shared conclusion that has been endorsed by the European Court of Justice, without sufficiently emphasising the exceptional nature of those powers from an EU constitutional law point of view or attending to their problematic consequences for legal certainty. Four cases will be briefly reviewed with two purposes: (1) highlighting the emergence of these expanded powers; and (2) showing its repercussions on legal certainty and individuals' expectations.

(1) Naturally, the *Pringle* ruling stands out in this context. This judgment saved member states' competence to conclude the Treaty on the European Stability Mechanism, without finding any conflicting relation between financial assistance and EU excessive deficit rules. At the same time, the Court held that conditionality

[29] *See*, recently, Opinion Wahl, 16 February 2016, Case C-526/14, *Kotnik*, para. 79.

[30] The private limb, i.e. the banking union, is not addressed here, *see* the recent comprehensive work of L.M. Hinojosa-Martínez and J.M. Beneyto (eds.), *European Banking Union. The New Regime* (Kluwer 2015).

[31] ECJ 27 November 2012, Case C-370/12, *Pringle*.

or an adjustment programme is not coordinating economic policies, but that they are the premises on which the compatibility of financial assistance and the bailout prohibition (in Article 125 TFEU) can be assessed in relation to the aim (pertaining to this coordinating competence) of guaranteeing the financial stability of the Eurozone as a whole.[32] Indeed, this controversial recourse to international law instruments[33] and the indeterminacy of the EU's competence to coordinate member states' economic policies have both proved to be the most useful legal tools in reacting to the crisis. From the perspective taken here, *Pringle* is important in three aspects. First, it approves what was probably the only solution for the conundrum of the legal basis of emergency law. Using an international law instrument solved the lack of EU competence and gave a legal ground for a concerted reaction encapsulating a rather imaginative solution for the emergency. (The state in receipt of financial assistance is in fact greatly deprived of the power to define its own economic policy instead of being allowed to recover its sovereign powers through getting rid of EU commitments). Secondly, it recognises the consequent emergence of executives' expanded powers: (a) within the member states, by deciding outside EU law when assistance is needed for safeguarding the financial stability of the Eurozone as a whole (the Cypriot bailout is usually pointed to as a debatable case meeting this condition) and what economic coordination entails in that case; and (b) within the EU institutions, by endorsing that their heavy involvement in the process does not run against the institutional balance, because they are not entrusted with powers but only with 'tasks'[34]. Thirdly and finally, by considering that this is a somehow ordinary non-EU law matter where the Charter does not apply and, correlatively, not the EU law general principle of legal certainty either, the European Court of Justice impairs both the identification of the substantive limits to this response and any questioning of its legal articulation.[35]

[32] Judgment in *Pringle*, paras. 111, 135, 136, 142.

[33] *See* e.g. M. Schwarz, 'A Memorandum of Misunderstanding. The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation', 51 *CMLR* (2014) p. 389 or A. Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in M. Adams et al., (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) p. 41. I agree, however, with those who stress its usefulness (B. De Witte, 'Using International Law in the Euro Crisis. Causes and Consequences', *Arena Working Paper*, 2013, no. 4). *See*, very critically, M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *CMLR* (2011) p. 1777.

[34] The General Court has applied this case law in several orders dismissing annulment actions regarding the Cypriot 'bailing-in' (GC 14 October 2014, Case T-327/13, *Mallis & Malli*, para. 48 and 16 October 2014, Case T-289/13, *Ledra Advertising*, para. 45). Both cases are now pending before the ECJ (Cases C-105/15 P and C-8/15 P).

[35] *See* these arguments developed in P. Martín Rodríguez, 'Legal Certainty After the Crisis: The Limits of European Legal Imagination', in J. Schmidt et al. (eds.), *EU law after the financial crisis* (Intersentia 2016) p. 269.

(2) The *ESMA* judgment has opened a new avenue for European agencies' regulatory powers.[36] The European Court of Justice has widened to EU agencies the so far relatively undifferentiated possibilities of Articles 290 and 291 TFEU, in what can be seen as a reformulation of the *Meroni-Romano* doctrine under the new rules of the Lisbon Treaty. The European legislature thus enjoys a rather wide discretion to entrust agencies, through secondary law, with extensive regulatory powers (no matter how normative or executive they are). The result is general and/or individual binding decisions, provided that they are subject to 'conditions and criteria limiting their discretion' and that there is some technical knowledge involved in it.[37] However, legal doctrine has pointed out that legal certainty concerns arise as to the official publication of those decisions[38] and as to its judicial control.[39] But, more importantly from an emergency law perspective, the European Court of Justice has approved the use of an ordinary legal basis such as Article 114 TFEU for lifting implementation powers from the national level to the EU level, that is, for the replacement of national decision making with EU level decision making, as the Advocate General correctly puts it.[40] This is, admittedly, an exceptional situation, but anyway granting exceptional powers does not invariably require amending EU primary law or using the flexibility clause.

(3) The *Banco Privado Português* case dealt with the stronger role that the Commission has exercised regarding the controversial banking state aids based on letter (b) of Article 107.3 TFEU ('serious disturbance in the economy of a member state').[41] Here, the Commission has not engaged in its usual 'negative'

[36] Especially if read with *Biocides*, where the ECJ has recognised that the EU legislature enjoys wide discretion when it decides to confer on the Commission a delegated power or an implementing power, confining judicial review to manifest errors of assessment (ECJ 18 March 2014, Case C-427/12, *Commission* v *Parliament and Council (Biocides)*).

[37] ECJ 22 January 2014, Case C-270/12, *United Kingdom* v *Parliament and Council (ESMA)*, paras. 41, 77-86. *See* an approving reading of this case law in H. Marjosola, 'Bridging the Constitutional Gap in EU Executive Rule-Making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities Markets Authority', 10 *EuConst* (2014) p. 500.

[38] C.F. Bergström, 'Shaping the new system for delegation of powers to EU agencies: *United Kingdom v. European Parliament and Council (Short selling)*', 52 *CMLR* (2015) p. 241.

[39] Connecting this judgment with the *Telefónica* ruling, M. Costa, 'The EU's Financial Supervisory Authorities: Mind the Accountability Gap', <eulawanalysis.blogspot.com.es>, visited 29 June 2016.

[40] Opinion Jääskinen, 12 September 2013, Case C-270/12, *United Kingdom* v *Parliament and Council (ESMA)*, points 50-53. In this case, the Advocate General argued that resort to Art. 352 TFEU was necessary (paras. 54-58).

[41] This power has gone in parallel with the Council's power to derogate based on exceptional circumstances (Art. 108.2 TFEU), also generously admitted by the ECJ in four identical judgments with regard to agricultural land state aids (*see* e.g., ECJ 4 December 2013, Case 111/10, *Commission* v *Council*).

use of power, banning a particular state aid because of its incompatibility with the internal market. Rather, it has acted in a rather positive managerial way, by setting conditions for its compatibility, linked to the future fulfilment of certain economic requirements.[42] The European Court of Justice has implicitly assumed that this managerial power naturally remains within the Commission, which additionally enjoys a wide discretion.[43] But above all the European Court of Justice has not considered that this expanded power may have an impact on individuals' legitimate expectations, which are based on the very fact that public authorities abide by the law. Turning what is legally a conditional decision into a merely provisional one (a new type without further qualification of subsequent Commission's competences[44]) blurs the obligatory effects of that decision for the State and shifts the consequences of the State infringement to third parties (other than the very bank involved). This ignores their legitimate expectations that the State will abide by this EU managerial law.[45] Although the legal context involved in the banking state aids of the *Kotnik* case differs from *Banco Privado Português* (it does not concern a state aid recovery but the binding legal effects and validity of the conditions set forth in the Commission Banking Communication), the recent Opinion of Advocate General Wahl represents a substantially diverse approach within the European Court of Justice, maybe one which initiates a trend.[46]

[42] *See* J.A Pérez Rivarés, 'El control de las ayudas de Estado como mecanismo de coordinación y su interrelación con otros instrumentos de integración positiva en la Unión Europea', in A. Olesti Rayo (ed.), *Crisis y Coordinación de las políticas económicas en la Unión Europea Crisis and economic policies' coordination in the European Union* (Marcial Pons 2013), p. 167, and the contributions of C. Quigley, 'State Aid and the Financial Crisis' and T. Ackerman, 'State Aid for Banks in the Financial Crisis: The Commission's New and Stronger Role', in W.-G. Ringe and P. Huber (eds.), *Legal Challenges in the Global Financial Crisis. Bail-outs, the Euro and Regulation* (Hart Publishing 2014), p. 131 and p. 149, respectively.

[43] ECJ 5 March 2015, Case C-667/13, *Banco Privado Português*, paras. 65-74. The ECJ did not justify this expanded power *by* the exceptional character of the situation.

[44] Thus far provisional decisions of the Commission concerned the formal opening of an investigation not preventing the final decision and trumping any legitimate expectations of the beneficiary and the consequent obligations on the part of national courts (*see* ECJ 21 November 2013, Case C-284/12, *Deutsche Lufthansa*, paras. 24-45). But even in this context, the extension of judicial protection against these provisional acts stands out (ECJ 13 October 2011, Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post*, paras. 50-60).

[45] The Portuguese Government would never oppose the recovery of this *ex post* unlawful aid, which means that some money will go, at the expense of the rest of BPP's creditors, to the Portuguese Treasury, even though no actual public disbursement ever took place (the state aid being a guarantee underwriting a loan).

[46] This preliminary referral, made by the Slovenian Constitutional Court, concerns the requirement of burden-sharing set forth in the Banking Communication to allow states granting aid to restructure banks in distress. In his Opinion (*supra* n. 29), Advocate General Wahl clarifies the allocation of competences between Commission (assessing compatibility with the internal market),

(4) The *OMT* judgment, however, replicated the former picture. The European Court of Justice avoids any emergency feeling: the threat of a break-up of the Euro area seems unimportant for the reasoning of the Court, a selective State bonds purchase in the secondary market is as regular as any other means laid down in the Treaties for the European Central Bank to pursue the monetary policy aim of maintenance of price stability and no meaningful institutional connection with the ESM design or implementation is founded. The Court felt then no need to check the respect of the institutional balance, as Cruz's Opinion rightly did,[47] but it underlined instead the broad discretion that the European Central Bank enjoys as to the fulfilment of the principle of proportionality and paid only lip service to the obligation to state reasons.[48] The link between legal certainty and the obligation to state reasons must be recalled here, as the proper fulfilment of this obligation is crucial to avoid arbitrariness and in assessing misuse of powers. This is especially so when the involvement of the European Central Bank in financial assistance implementation remains unrestricted (for example, in a case of rejecting state bonds as collateral in Emergency Liquidity Assistance requests unless a financial programme is being undergone or agreed). Additionally, the legal effects of European Central Bank press-releases remain uncertain, since it could be argued that, if they are liable to be declared void, they should also be capable of grounding legitimate expectations, which have been recently denied by the General Court in the *Accorinti* case.[49]

It is suggested that some conclusions may be drawn from the somewhat cursory review just made. Even if EU emergency law has faced the limits derived from its mixed nature, it has shown a certain capacity to host expanded powers activated under extraordinary circumstances. Concerning its judicial scrutiny of this response, the European Court of Justice has given rather deferential treatment to the European executives (including member states' governments), which is not at all odd in the context of an emergency. Probably a more straightforward and openly constitutional approach by the Court would have been beneficial, in order

Council (legislating) and member states (aid activating and granting) under Art. 107(3)(b) TFEU. Consequently, the Banking Communication law binds the Commission but it cannot bind, *de iure* or *de facto*, state members nor exhaust the scope of that provision or contradict EU primary law. This conclusion has been endorsed by the ECJ: 8 March 2016, Case C-341/14 P, *Greece* v *Commission*, paras. 70-72. Furthermore, the excellent Opinion Wahl sets a delicate but legally solid balance in all the complex issues that are dealt with in this article: relationship between this emergency clause and European Monetary Union regulation (including the stability of the Euro area) and EU secondary law, identification and assessment of the standard of review (legitimate expectations and fundamental rights) or the necessary deferential comity to be observed towards national/constitutional courts.

[47] Opinion Cruz 14 January 2015, Case C-62/14, *Gauweiler (OMT)*, points 140-151.

[48] ECJ 16 June 2015, Case C-62/14, *Gauweiler (OMT)*, paras. 68-75.

[49] GC 7 October 2015, Case T-79/13, *Accorinti and Others* v *ECB*, paras. 73-84.

to acknowledge the exceptional nature of the power and better to identify its constitutional limits. Anyway, the appearance of those powers, their exercise (or how they are legally articulated) has not been without effect on individuals' rights and guarantees that derive from the general principles of legal certainty and legitimate expectations. It is submitted that these have been too neglected by the Court. Exploring this impact further gains relevance because the legal challenge to those measures will mostly rely on individuals (and not institutions or member states) claiming that their rights have been breached.

Exploring the absent component in EU emergency law: legal certainty and legitimate expectations

Exploring this legal certainty dimension in EU emergency law is possibly the most pressing issue, since the European Court of Justice might turn out to be a *rara avis* inside the European judicial scene. Most constitutional and supreme courts have done it (i.e., explored this dimension) and, when dealing with executives' expanded powers, they have ruled on the infringement of constitutional limitations, procedural (e.g. the Italian Constitutional Court) or substantive (notoriously the Portuguese Constitutional Court), even if affording governments a remarkable margin of appreciation (conspicuously the Spanish Constitutional Court).[50] The Court of Justice of the European Free Trade Association did nothing different about the Icelandic management of the banking collapse (*Icesave* saga);[51] and the same path was followed both by the European Court of Human Rights in the *Koufaki* and *Da Conceiçao Mateus* cases[52] and by the European Committee of Social Rights in several cases on Greek pension cuts.[53] Four kinds of legal certainty and individuals' normative expectations concerns will be reviewed in this section.

(a) *Predictability in legislation* is probably the weakest point of the EU legal response. It should be recalled that legal certainty requires individuals to be

[50] *See*, for example, a review of this question in relation to Greece, Spain, Ireland and Italy in S. Coutts et al., 'Legal manifestations of the emergency in national Euro crisis law', *EUI Working Papers,* Law 2015-14.

[51] EFTA Court 28 January 2013, E-16/11, *ESA* v *Iceland* (*Icesave*). *See* M.E. Méndez-Pinedo, 'The Icesave Saga: Iceland Wins Battle Before the EFTA Court, *Michigan Journal of International Law Emerging Scholarship Project* (2013); R. Helgadóttir, 'Economic Crises and Emergency Powers In Europe', 2 *Harvard Business Law Review Online* (2012) p. 130.

[52] ECtHR 7 May 2013, Cases Nos. 57665/12, 57657/12, *Koufaki and Adedy* v *Greece*, para. 49; ECtHR 8 October 2013, Cases Nos. 62235/12, 57725/12, *Da Conceiçao Mateus and Santos Januário* v *Portugal*, para. 30.

[53] ECSR, Decision 7 December 2012 (publicity on 22 April 2013), Complaint No. 76/2012, *IKA-ETAM* v *Greece*, para. 80, <wcd.coe.int/ViewDoc.jsp?id=2019205&Site=CM>, visited 29 June 2016.

able to ascertain *unequivocally* what their rights and obligations are.[54] Conversely, finding these rights and obligations is not an easy task since they seem to be scattered throughout different sources whose legal nature (international, European or national law) and legal effects (direct, indirect or none at all) are anything but clear. This is a major instance of legal certainty failure hardly compatible with the European Court of Justice case law.[55]

Beyond the most disturbing cases of financial assistance,[56] the functioning of EU economic governance still raises legal certainty concerns as to its legal articulation. The extraordinary flexibility of the competence of coordinating member states' economic policies has seemingly enabled the European Semester to be turned into a legal 'chewing gum'. Its intricacy, reiteration and technicalities in procedures, diversification in obligations, decision-making anomalies and acts with ambiguous legal effects, not to mention the patchy regulatory framework, make it difficult to swallow.[57] The introduction of coercive fines or deposits in the macroeconomic imbalance procedure (in addition to the existing ones in the excessive deficit procedure) should probably change our assessment of the legal effects of previous stages and of the possibilities of contesting them judicially.[58]

Memoranda of Understanding will be dealt with later; but, focusing now on Council decisions, their legal effects might prove to be indecipherable. The General Court has settled in *ADEDY* that Council Decision 2010/486 is not of direct concern to individuals, in a disconcerting way. More than justified on the wording of the Decision, what could be inferred from the General Court's reasoning is that Council Decision 2010/486 is actually a directive.[59] If so, European Court of Justice case law should then apply to State discretion's scope in attaining the obligatory result sought by the directive (meaning the Council decision); or in being directly actionable by individuals against wrongful transposition on the grounds of infringing legal certainty or legitimate expectations. Moreover, if an adjustment programme is not part of economic

[54] ECJ 3 June 2008, Case C-308/06, *Intertanko*, para. 69.

[55] Covering not only EU legislation but also member states' when implementing it (e.g., ECJ 19 December 2013, Case C-281/11, *Commission* v *Poland*, para. 137).

[56] Kilpatrick, *supra* n. 17, p. 333-344; López Escudero, *supra* n. 17, p. 428.

[57] Especially if we consider that the general doctrinal assumption that the legal bases of this indeterminate competence have been exhausted goes *pari passu* with the sound fear that they (the Macroeconomic Imbalance Procedure or the Excessive Deficit Procedure) are incapable of guaranteeing the right outcome (*see*, among many others, López Escudero, *supra* n. 17, *passim*, especially p. 428-433 or P. Leino, J. Salminen, 'Going "Belt and Braces" – Domestic Effects of Euro-Crisis Law', *EUI Working Papers*, Law 2015/15, p. 3-19.

[58] *See* F. Costamagna, 'The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy', in M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) p. 359-377.

[59] GC Order 27 November 2012, Case T-541/10, *ADEDY* v *Council*, para. 70.

policy coordination or of EU law, but turns out to be binding because included in a Council decision, it would be arguable that we are here in an *Oleificio Borelli* reversed situation, opening the court doors.[60] Last but not least, legal certainty and legitimate expectations seem to be the proper legal approach to deal with the ongoing re-evaluation of the adequacy of national economic programmes that are translated into modified Council implementing decisions[61].

(b) The uncertain nature and effects of European Monetary Union legal acts reflects on an *unpredictable judicial 'volet'* making the determination of the right court in which to bring an action and the ascertainment of its chances of success very hazardous. Contending that litigation against those acts should be entirely brought in national courts does not give a complete answer, because it does not solve the question of what the legal framework is for ruling on them and how the preliminary reference should influence those national proceedings.[62] This issue is more important if we bear in mind that legal certainty standards in EU law and in national laws may well differ from each other (the scope of legitimate expectations is paradigmatic in this regard). So the determination of which standard applies, or prevails in case of conflict between them, retains its significance and so does the question of which court is competent.[63] The national-biased way in which the European Court of Justice has solved the question that the *OMT* preliminary reference concerned a press release and not a legal act illustrates this point. Instead of making the press release and the preparatory European Central Bank decision fit within the judicial review under Article 263 TFEU (as the Advocate General did[64]), the European Court of Justice has conceded to the national judicial remedy system the power to decide what is challengeable in EU law, in a supposedly win-win answer for the European Central Bank and the German Constitutional Court, the *Bundesverfassungsgericht*: the European Central Bank's preparatory decisions are safe unless the German Constitutional Court engages in preventive judicial protection.[65] So, it is up to other national judicial systems to provide them with this interesting tool.

[60] ECJ 3 December 1992, Case C-97/91, *Oleificio Borelli*.

[61] The measures enshrined in economic programmes are subject to economic and financial predictions, with the proviso that, in case they are not fulfilled, new measures and/or amendments will be needed. So a significant degree of uncertainty that might be linked to national implementing laws (including budgetary ones) is introduced.

[62] *See* S. Bardutzky, E. Fahey, 'Who Got to Adjudicate the EU's Financial Crisis and Why? Judicial Review of the Legal Instruments of the Eurozone', in Adams et al. (eds.), *supra* n. 58, p. 341-358, at. p. 370.

[63] The issue of legal certainty double standards is not exclusive to this topic (*see* Martín Rodríguez, *supra* n. 6, section D) but here the question becomes more complicated because it is uncertain whether or not the State is implementing EU law.

[64] *Supra* n. 47, points 70-91.

[65] *Supra* n. 48, paras. 27-29.

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(c) A third type of legal certainty and individual rights' concerns come from what can be named the *legally disjointed character of the EU legal response*. The formal disconnection between the international law response (e.g. a Memorandum of Understanding) and EU emergency law clauses is not without legal consequences. This may be illustrated by Spain's Deferred Tax Assets scheme applied to the banking sector. This 'non-formal investigation' originated in a Spanish MEP's complaint.[66] Deferred Tax Assets' qualification as state aids was really not very controversial, but there was no formal Commission decision affirming Deferred Tax Assets' compatibility with the internal market. However, the Commission could hardly argue that it never knew about them, since Deferred Tax Assets were agreed in the Memorandum of Understanding.[67] So, if the content of the Memorandum of Understanding (despite the EU institutional involvement) remains outside EU law, it can never qualify as a legal defence. EU law should apply unaffected. Thus, Deferred Tax Assets should be declared unlawful aids and the recovery should follow unless it conflicts with EU general principles, including legal certainty and legitimate expectations. The very agreement laid down in the Memorandum of Understanding would apparently make a sound case on behalf of the Deferred Tax Assets' beneficiaries, but the extremely small role that the European Court of Justice has granted legitimate expectations as to the prevention of the actual recovery would make any real chance of success disappear. Hence, the peculiar way in which this question has been resolved.[68]

(d) Finally, the issue of fundamental rights' standards is a critical one concerning the EU response to the crisis which has been extensively and very well analysed.[69] This response may be formulated in some cases as a material infringement of fundamental rights. It is, however, especially relevant to call attention to the fact that, dealing with social and economic rights, legal certainty

[66] 'Italy and Spain defend bank tax credits to Brussels', *Financial Times*, 4 May 2015, <www.ft.com>, accessed 22 May 2015.

[67] The Spanish Deferred Tax Assets scheme applied to the banking system, amounting to some €30 billion, *see Financial Assistance Programme for the Recapitalisation of Financial Institutions in Spain*, Fifth Review, Winter 2014, p. 15-16.

[68] *El País*, 19 October 2015. Spain will introduce in the 2016 budget law a regulation whereby banks may still benefit from Deferred Tax Assets paying a fee (around €400 million). This solution has satisfied the Commission, which has closed the non-formal investigation. Spanish banks will use this possibility, as the fee is lower that the costs incurred if they were to seek that recapitalisation in the market. The problem remains: what would happen if an action against this system were tried in the Spanish courts?

[69] *See* e.g. C. Kilpatrick and B. De Witte (eds.), *'Social rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges', EUI Working Papers*, Law 2014/05; and A. Fischer-Lescano, *Human Rights in Times of Austerity Policy* (Nomos 2014), also available at www.etuc.org (which is the version used here), p. 7-31, visited 29 June 2016.

and legitimate expectations play a crucial role in assessing whether a restriction thereof amounts to a disproportionate burden on individuals, as some Constitutional Courts and international human rights bodies have contended. For example, we know that the introduction of cuts in public wages and pensions, sometimes retroactively,[70] has been a commonplace in adjustment programmes. When individuals (neither institutions nor consenting States) contest those cuts, legitimate expectations may not question those measures as such, but they are still relevant. If the cuts are deemed permanent, retroactive, discriminatory or cumulative, legitimate expectations (alone or in connection with other fundamental rights) could prevent them from being applied or require a transitional period and/or regulation. The Portuguese Constitutional Court is extraordinarily illustrative in relation to both aspects: (a) the legal consequences that should be deduced from the international law nature of the EU response; and (b) the crucial role that legitimate expectations and fundamental rights play in the validity assessment of those measures. This was clearly stated in its landmark judgments 353/2012 of 5 July 2012 and 187/2013 of 30 April 2013.[71] The European Committee of Social Rights has been no less illustrative when 'ruling' on Greek pension cuts, finally holding: 'as has been done by the Court as concerns the Convention, that any decisions made in respect of pension entitlements *must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits*. The Committee concludes that the restrictive measures at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, *have been introduced in a manner that does not respect the legitimate expectation of pensioners that adjustments to their social security entitlements will be implemented in a manner that takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy effective access to social protection and social security*'.[72]

Nothing different should be inferred from the European Court of Human Rights case law which has established that legitimate expectations are pertinent and protected under Article 1 ECHR Protocol No. 1 (protection of property),[73] which is fully operational for pensions reductions.[74] So, even if the European

[70] This was the case of the Spanish Royal Decree-Law 20/2012. After several proceedings in lower courts, the Supreme Court by Order of 2 April 2014 decided to refer to the Constitutional Court a reference for the review of constitutionality precisely based on the infringement of the constitutional prohibition of retroactive laws restricting individual rights. The Constitutional Court ruling is still pending.

[71] *See* several contributions dealing with Portugal in Kilpatrick and De Witte (eds.), *supra* n. 69 p. 67-94.

[72] European Committee of Social Rights in *IKA-ETAM* v *Greece*, para. 80, emphasis added.

[73] ECtHR 23 September 2014, Case No. 46154/11, *Valle Pierimpiè* v *Italy*, para. 38.

[74] ECtHR in *Stefanetti and others* v *Italy*, paras. 48-52.

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Court of Human Rights afforded the State remarkable leeway (including when the measure sought to decrease public expenditure), this interference is not without limits since it cannot impose an excessive burden on the individual. In relation to its restraint, the Strasbourg Court considered the temporary duration and the extent of the cuts: 'in the light of the exceptional and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies, the applicants had not borne a disproportionate and excessive burden'.[75] Thus, the proportionate or disproportionate character of the burden borne by individuals is to be assessed on a case-by-case basis; and here legitimate expectations are key.

The problematic issue revisited: why are legitimate expectations and legal certainty working so ineffectively in EU law?

If the hypothesis contended here is correct and legal certainty or legitimate expectations are relevant in assessing the EU response to the crisis, the question of its so far very modest role should be addressed. As has been mentioned, legal certainty and legitimate expectations have succeeded in other judicial contexts such as some Constitutional Courts or the European Committee of Social Rights, but the European Court of Justice appears still to remain rather impervious to them. Furthermore, it may be surprising that so few significant cases (around a dozen) have so far reached the Court, bearing in mind this frankly impressive legal package.

Two factors may explain this situation: (a) a substantive dimension, concerning the identification of the standard of review of EU emergency measures; and (b) a judicial dimension, regarding the difficulties of individuals in accessing the European Court of Justice. Each of these factors poses different technical problems, but to a certain extent the legal issues involved in both coincide. I shall consider the substantive dimension now.

In constitutional and conventional settings, the identification of the standard of review is quite straightforward: the Constitution or the international treaty is the benchmark against which emergency measures' legality must be appraised. Thus, the issue is referred to the respect of the legal requirements laid down in the constitution or in the flexibility clause and how broad should be the discretion allowed to governments by courts in the form of judicial self-restraint.[76] Consequently, that framework defines the scope of legal certainty as a ground for review. This picture is of course familiar to EU emergency law to a great extent and

[75] ECtHR *Da Conceiçao Mateus and Santos Januário* v *Portugal*, paras. 26-29.

[76] I cannot expand on the issue of judicial control tools used by international courts and their impact, *see* Martín Rodríguez, *supra* n. 27, p. 138-232, especially at p. 147-152 and 224-232.

we have considered it in previous sections when contrasting some measures with EU primary law (such as cases regarding state aids and agencies' regulatory powers). However, the peculiarities of the EU response have introduced a unique problem that seems to affect the legal benchmark definition, be it by pointing to somewhere else (mainly member states' constitutions) or by simply ruling out the application of EU law. I should like to describe them briefly in the following as 'the four traps' and argue that they should not displace EU primary law as the benchmark for legality.

The conferral trap of conditionality

Conditionality seems to pose an insurmountable trap in terms of EU competence, directly affecting the standard of review. If the substantive conditions set out were always to be within the scope of EU competences, the need for conditionality would be very small, since the EU could always achieve the same result (the fulfilment of the condition) by exercising its powers. On the contrary, if the substantive conditions fall outside EU competence, when the member states concerned are honouring them, they are not implementing EU law. Hence, the apparently ineluctable consequence of excluding EU law as the standard of review.[77] This reasoning underlies the rejection by the European Court of Justice of several preliminary references.[78] The General Court is supposed to give a brand new answer to this question in the pending *Sotiropoulou* case, which is related to an action for damages brought against some Council decisions addressed to Greece (concerning some measures in the social security and pension system), on the grounds of breaking the principles of conferral and subsidiarity.[79]

Without taking away from the theoretical importance of conditionality, this trap is not intractable. We should distinguish between two different points. First, the legal basis enabling the EU to resort to conditionality may be found without much ado. It is explicitly mentioned in the Treaty (Articles 122.2, 136.3 and 143.2 TFEU) and it would be implicitly compulsory by virtue of Articles 123 and 125 TFEU in cases of external financial assistance using EU institutions, as

[77] A similar problem is posed by financial penalties or deposits within the economic policies' coordinating competence, since both are intended to enforce EU law (R. Bieber and F. Majone, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?', 51 *CMLR* (2014) p. 1062, especially at p. 1065-1068 for economic policy coordination).

[78] Those cases, related to wage cuts for Romanian policemen and Portuguese public employees, were considered purely internal or at least cases where the member state was not implementing EU law. *See* e.g., ECJ 14 December 2011, Case C-434/11, *Corpul Național al Polițiștilor*, paras. 14-15; ECJ 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte*, paras. 10-12; ECJ 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Fidelidade Mundial*, paras. 18-20; ECJ 21 October 2014, Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*, paras. 13-15.

[79] GC, T-531/14, *Sotiropoulou*, pending, OJ C 351, 6.10.2014.

interpreted by the European Court of Justice in *Pringle* and *OMT*. It is thus not a 'conferral' but a 'competence/task exercising' issue, where the principles of subsidiarity and proportionality will have to be carefully assessed in the light of the need to respect the national identity clause in Article 4.3 TFEU. This is, of course, a fairly complex and delicate issue that cannot be solved by the (rather debatable) consensual origin of the conditions set out. Maybe the European Court of Justice should endorse the practical solution sometimes adopted: when the implementation of a concrete condition is subjected to specific constitutional procedures, member states are not compelled to set aside those procedures, any further difficulty being dealt with in terms of the loyal cooperation principle. This would avoid direct confrontation with constitutional orders and deal in a less complicated way with the extreme variety of those conditions in terms of concreteness (subsidiarity) and/or constitutional impact (national identity clause).[80]

But, secondly and more importantly, and even without surmounting this conferral trap, the European Court of Justice should engage in the substantive assessment of the conditions in respect of EU primary law, in particular fundamental rights and the general principle of legal certainty. The European Court of Justice should strike down any measure encroaching on them without considering whether it is agreed on or indirectly compulsory by conditionality. The conferral trap is not inescapable for establishing the legality standard of review. International courts facing a somewhat similar problem have drawn a useful distinction between the scope of their jurisdiction (ultimately, Article 37 of the Treaty on the European Stability Mechanism, and Article 8 of the Fiscal Compact) and the law applicable in exercising it.[81] This solution can easily be imported into the EU legal system if the European Court of Justice is unable to state openly that EU law cannot impose conditions in violation of fundamental rights, no matter what the circumstances may be.

The international law trap

This issue has been almost invariably understood in conferral terms and has provoked all sorts of technical legal problems because its international law

[80] Just to give some examples included in national adjustment programmes: Portugal agreed to reduce the number of municipalities (Point 26 of the Memorandum of Understanding, *see* 'The Economic Adjustment Programme for Portugal', *Occasional Papers 79* (June 2011) p. 48); Ireland to introduce a domestic water-charge system (Art. 1 of Council Implementing Decision 2013/372/EU); and Cyprus agreed to set a fee for students and pensioners in receipt of public transportation cards (Art. 2.8 (a) of Council Decision 2013/236/EU).

[81] On its inception in World Trade Organisation law, *see in extenso* X. Fernández Pons, *La OMC y el Derecho Internacional The WTO and international law* (Marcial Pons 2006) p. 111-193). On subsequent nuanced International Court of Justice case law, *see* P. Martín Rodríguez, 'Sistema, fragmentación y contencioso internacional', 60 *Revista Española de Derecho Internacional* (2008) p. 481-486.

'parentage' is, as C. Kilpatrick has insightfully analysed, fairly promiscuous.[82] Of course, *Pringle* is around: this is an international law matter which member states can put in place outside EU law as long as they abide by the latter. After the Two-Pack, however, this solution may no longer be applicable.[83] The conferral connection is confinable to the legal basis issue. The EU has no competence to put in place or set in motion a permanent stability mechanism, but there the conferral limitation ends. So, if member states' implementation is completely outside the EU framework, *Pringle*'s *ratio decidendi* must fully apply as a legal barrier protecting the integrity of the EU legal system. However, when the states involve EU institutions or use EU law for its implementation, they are integrating by reference those legal instruments and institutional tasks in the EU legal system[84] and consequently EU primary law must apply as the standard of review. This integration by reference is more visible when no conferral issue is at stake. Unlike in the *Ledra Advertising* case, in *Florescu* the European Court of Justice has been straightforwardly asked about the validity and interpretation of certain provisions enshrined in the Memorandum of Understanding agreed between the Commission and Romania in 2009.[85]

It is hard to see the problem for the European Court of Justice in testing the validity of a Council decision implementing an adjustment programme or a Memorandum of Understanding referred to therein, whether this obtains under the European Financial Stabilisation Mechanism, the European Financial Stability Facility or the European Stability Mechanism umbrella or within a balance of payments programme.[86] How is it possible for EU institutions to perform any

[82] C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *EuConst* (2014) p. 398-406.

[83] De Witte and Beukers contend that member states may exercise this still not pre-empted shared competence through *inter se* agreements that are not to be confused with international agreements under Art. 3.2 TFEU (B. De Witte and T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*', 50 *CMLR* (2013) p. 801-837). However, Regulation 472/2013/EU sets out that, when an adjustment programme is in place, the Excessive Deficit Procedure and the Macroeconomic Imbalance Procedure remain suspended. Moreover, the provision envisaging the involvement of the International Monetary Fund in the loan agreements and the following adjustment programmes makes it difficult to assess that this issue remains purely *inter se* (see, by analogy, ECJ 26 November 2014, Case C-66/13, *Green Network*, para. 38).

[84] Integration by reference is a well-known international legislative technique (*see* P. Andrés Sáenz de Santa María, 'La incorporación por referencia en el Derecho de los Tratados', 37 *Revista Española de Derecho Internacional* (1985) p. 7-39) and used in EU law with regard to the Charter.

[85] *See* ECJ, Case C-258/14, *Florescu and others*, pending. The reasoning followed in the General Court Order in *Ledra Advertising* (*supra* n. 34) exemplifies all these traps.

[86] The most problematic issue is caused by the bailouts of the European Financial Stability Facility, especially before the adoption of the national economic programmes where the EU law connection emerged, as Kilpatrick rightly points out (*supra* n. 82, p. 412-413). On the extremely

'tasks' without abiding by the Charter or EU general principles?[87] This case law appears inconsistent and should be reversed. Holding that an adjustment programme is not an instrument for coordinating economic policies deserves the same fate.

Thus, as far as the legality benchmark is concerned, international law when integrated by reference into the EU legal system (and the Two-Pack should play in this direction) is nothing more than a trap. Surmounting it would additionally offer a useful tool to deal with the 'disjointed nature' of the EU legal response. It is worth noting that the content of the economic and political conditionality package is quite similar whether it is enshrined in Memoranda of Understanding, in Council decisions under the umbrella of an adjustment programme or in Council recommendations for correcting excessive deficits.

The indirect legislation trap

With regard to the determination of the standard of review, the question of indirect legislation is probably easy to answer and difficult to apply. At the same time, it assumes most importance in relation to legal certainty and individuals' expectations, because it necessarily raises the question of double (EU and national law) standards.[88] The principle that EU legal acts (indirect as they might be) fall within the scope of EU primary law, including fundamental rights and legal certainty requirements, raises no doubts. That member states, when implementing this indirect legislation must abide by it, should not, either. A simple comparison of the reading of the EU legal norms involved in *ADEDY* and *Åkerberg Fransson* unambiguously proves how wrong a different conclusion would be. The question here is where to locate any infringement. As we have learned from the Area of Freedom, Security and Justice (particularly the old 'third pillars' acts), the European Court of Justice shows a somewhat contradictory two-fold trend: it feels inclined to reinforce the effectiveness of these indirect instruments but, at the same time, it usually places the burden of complying with fundamental rights and general principles on the implementing national law, refusing to admit that EU legislation has something to do with it.[89] This is something to be expected here,

complex mixed legal regime under which the European Financial Stability Facility operated, *see* A. Michailidou, 'Crisis and change in Greece. What price democracy?', in Fossum and Menéndez (eds.), *supra* n. 1, p. 254-255.

[87] This is a widely shared opinion about the doctrine. *See* e.g. S. Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework', 9 *EuConst* (2013) p. 52-53 or Kilpatrick, *supra* n. 82, p. 405-406.

[88] Martín Rodríguez, *supra* n. 6, section D.

[89] *See* E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant', 38 *ELRev* (2013) p. 79.

because indirect legislation in this field frequently incorporates safeguards, reminding us that the implementation of a measure must be in conformity with concrete acts of EU social law or a specific fundamental right (Article 28 of the Charter is invariably mentioned) or must be aware of its social impact on the most vulnerable groups.[90]

However, as already mentioned, predictability in legislation is seriously lacking in this context and a decisive jurisdictional step to clarify this area is more than needed. Through a material assessment, the legal effects of Council acts (decisions, implementing decisions or recommendations that can lead to penalties if not followed) must be unambiguously defined, so that individuals may unequivocally ascertain their rights and obligations and take steps accordingly. Clarification of the hierarchically subordinate position of this extensive executive legal package in relation to any EU legislative act must also be introduced. Finally, the European Court of Justice should invariably keep in mind legal certainty requirements in order, for two reasons. First, to reinforce individuals' legal defences by hardening a prejudicial interpretation and/or application of national law based on indirect legislation. Secondly, to soften its strict approach towards the emergence of legitimate expectations in the position taken by EU institutions, either in preparatory stages or in instruments with debatable legal effects, such as Memoranda of Understanding. [91]

The Charter trap

It is not necessary to stress the influence of the three previous traps in blurring the centrality of the Charter as the legality benchmark in relation to fundamental rights. *Pringle* unequivocally asserts it. However, it should be kept in mind that, in so far as legal certainty is concerned and despite some relevant connections with the Charter (mostly Article 41, only applicable to EU institutions and bodies), the principle of legal certainty as such remains external to the Charter. Consequently, the operation of this EU general principle as a ground for review does not depend on the applicability of the Charter.[92] In addition, the Charter bears additional

[90] *See* this social awareness, for example, with regard to Latvian financial assistance, in S. Dahan, 'The EU/IMF Financial Stabilisation Process in Latvia and Its Implications for Labour Law and Social Policy', 41 *Industrial Law Journal* (2012) p. 305.

[91] Memoranda of Understanding raise rather complicated legal questions in international law and not necessarily the same in EU law, on which I will not expand here (*see* Kilpatrick, *supra* n. 82, p. 408-413). However, it should be noticed that to admit that Memoranda of Understanding are unable to create rights and obligations *per se* would not automatically de-activate legitimate expectations (*see* Fischer-Lescano, *supra* n. 69, p. 32-35). The question of direct and individual concern should apply only for the admissibility of annulment actions to the General Court and, as such, not in relation to the assessment of the legal effects, the emergence of legitimate expectations or respect for EU primary law and fundamental rights.

[92] Martín Rodríguez, *supra* n. 6, section C.

difficulties with regard to the rights most directly affected in this particular field. Except for Articles 17 (property rights), 25 (protection of the elderly) and 41 (right to a good administration), most of them are placed in Title IV on Solidarity, where the Charter clearly loses its force due to paragraphs 5 and 6 of Article 52[93] and relies on an already weakened EU social policy secondary law.[94] This makes a claim for breaching these Charter fundamental rights rather cumbersome, especially when considering the ultimately functional approach to fundamental rights adopted by the European Court of Justice and expressed in *Siragusa* with shocking frankness.[95]

The judicial remedies dimension: the difficulties of accessing a reluctant Luxembourg court

This disputable standard of review of emergency measures acquires a different meaning when connected with the EU law judicial remedies system, because this legality review relies exclusively on national courts used as filters when it is based on the infringement of individuals' rights and expectations.

As mentioned, governments and executive EU institutions are not prone to challenge new expanded powers given to them, so litigation coming from these privileged or semi-privileged plaintiffs is not to be expected.[96] For individuals, in contrast, this is mainly about their rights being overridden. Thus, legal certainty (including the protection of individuals' expectations and rights) acts mainly as a shield seeking to protect them from unlawful measures and to compensate them for the damage caused. In this regard, the possibilities of individuals getting to the European Court of Justice are, as is well known, remarkably restricted and they have so far proved unsuccessful. Let us briefly review direct actions and preliminary references.

Concerning actions for annulment, the European Court of Justice has confined the application of the Lisbon Treaty's new rules to an irrelevant

[93] ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale*, para. 45. Here, the ECJ alludes explicitly to these paragraphs and sticks to the wording of Art. 27 Charter, in order to deprive it of direct effect.

[94] *See* C. Barnard and S. Deakin, 'Social Policy and Labor Market Regulation', in *The Oxford Handbook of The European Union* (Oxford University Press 2014), p. 542-553.

[95] ECJ 6 March 2014, Case C-206/13, *Siragusa*, paras. 30-31.

[96] A question that I will not address here is to what extent the European Parliament has refused to play a more decisive role in sustaining legal certainty requirements and respect for the Charter in a trade-off of a handful of modest competences in economic supervision. It seems clear that an action brought by the European Parliament against a Council decision for infringing the Charter would offer the ECJ a more solid ground for making a decisive move in this respect. Due to the non-legislative character of most of these measures, national parliaments are not placed, either, in a position easily to challenge them according to the new rules of the Treaty of Lisbon.

occurrence.[97] It has excluded legislative acts in *Inuit Tapiriit Kanatami*[98] and has conditioned paragraph 4 of Article 263 TFEU to a complete absence of any implementing national decision, irrespective of the margin of appreciation left to national authorities, in *Telefónica* and *T & L Sugars and Sidul Açúcares*.[99] So, it is no surprise that all cases brought have failed to meet the direct concern requisite; and, although the non-legislative character of most of these acts is clear, by no means would they pass either the test of individual concern or that of the absence of implementing measures.[100]

Actions for damages may offer a slightly better option. Unlike the *Accorinti* case, *Sotiropoulou* will apparently compel the General Court to present a fuller argument, although its odds of success in getting compensation are very low.[101] The interest still lies in whether or not the General Court will engage in a substantive assessment of the violation of EU primary law (Articles 1, 25 and 38 of the Charter and the principles of conferral and subsidiarity) before dismissing the damages claim. Or, alternatively, whether it will reject subsidiarity and conferral principles as rules intended to confer rights on individuals; and/or rely on the clear lack of direct causation to dismiss the plea avoiding any substantive assessment. The latter option, even if rather prejudicial to individuals fighting in national courts, would open an appeal to the Court of Justice that this time should be tried (unlike what happened in *ADEDY*).

The scant room for direct actions remits the bulk of the legality litigation to national courts. The consequences of this are far-reaching, in particular taking into account the blurring effect of the four traps mentioned. The fact that not many preliminary references have been sent to the European Court of Justice is not difficult to explain. The tremendous complexity of this legal labyrinth discourages lower courts from engaging in an arduous analysis capable of delivering a solid question, it being ultimately easier to place the case within the national legal framework and disregard any argument based on EU law.[102] If the European Court of Justice persists in showing no disposition to help lower national courts in this matter, this trend is expected to continue, although the *Florescu* case

[97] *See* C. Martínez Capdevila, 'El *ius standi* de los particulares frente a los "actos reglamentarios que no incluyen medidas de ejecución" (art. 263 TFUE) en la jurisprudencia del TJUE: un análisis crítico', 52 *Revista Española de Derecho Europeo* (2014), p. 177-187.

[98] ECJ 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami*, paras. 57-60.

[99] ECJ 19 December 2013, Case C-274/12 P, *Telefónica,* paras. 27-31; ECJ 28 April 2015, Case C-456/13 P, *T & L Sugars Ltd and Sidul Açúcares*, paras. 40-42.

[100] *See*, in addition to the *ADEDY* case mentioned *supra* n. 59, ECJ Order 15 November 2012, Case C-102/12 P, *Städter* and Order 29 April 2015, Case C-64/14 P, *von Storch*. *See also* GC Order 25 June 2014, Case T-224/12, *Accorinti and Others* v *ECB*.

[101] *See* corresponding main text *supra* n. 49 (*Accorinti and Others* v *ECB*) and n. 79 (*Sotiropoulou*).

[102] Kilpatrick, *supra* n. 82, p. 418-420.

(mentioned above) gives the Court a new chance. Supreme and constitutional courts for their part have mostly taken a concomitant path, giving proof of their reluctance to admit any EU factor influencing the final decision because of the sensitive constitutional issues at stake, let alone through a preliminary reference, the result of which would tie their hands. Not only is this understandable (and applauded by some authors), but no doubt is partially justified by the retractile position that the European Court of Justice manifests. So, Constitutional Courts must rule in terms of strict constitutionality arguments with (currently justified) no concern about any European dimension whatsoever.[103] The result which we are now witnessing, however, is the complete disappearance of the EU law legality benchmark. Among the serious consequences of this disappearance, two in particular deserve careful attention: (a) if it is exclusively judged within the national framework, this entire EU response becomes legally unchallengeable to a substantial extent, be it in its legal articulation at the EU level or in those substantive limits that are not present in national laws; and (b) a serious risk to the autonomy of EU law and the central position of the European Court of Justice is legally grounded. These risks are by no means past. The compensatable nature of infringements of socio-economic rights runs parallel to national courts as the proper litigation channel. Thus, it defers in time the solution to a period when the emergency is not so compelling, incidentally explaining the common trait of courts' backlash in emergency law.

Concluding remarks

The 'legal certainty and legitimate expectations' approach discussed in preceding paragraphs explores a somewhat neglected dimension of the EU legal reaction to the crisis. This allows us to focus on the individual's dimension, which will channel most of the future litigation on this response, since its challenge by states or EU institutions is not (and has not been) likely or frequent.

This aspect has been analysed using the theoretical framework of EU emergency law, whose international and constitutional mixed nature has legally conditioned this response and has, by the same token, demanded the reassessment of the position of legal certainty within it.

With regard to the first point (its mixed nature), EU law has demonstrated a certain capacity to absorb expanded powers within the EU institutions without

[103] Constitutional Courts have no reason to be sympathetic to exceptional constitutional measures unless they have to bring into their deliberation EU based arguments, as the Estonian Supreme Court did in its judgment of 12 July 2012 on the Treaty on the European Stability Mechanism, declaring that the economic and financial sustainability of the Eurozone also belongs to the constitutional values of Estonia: <www.riigikohus.ee/?id=1347>, visited 29 June 2016.

requiring the amendment of EU primary law (*ESMA*, *Banco Privado Português* or *OMT*). At the same time, the legal limits stemming from the principle of conferral have necessitated the articulation of a substantial part of this response, using international law and consequently diverting this task and those expanded powers towards member states' executives (*Pringle*). In dealing with this legal response, the European Court of Justice has avoided a genuinely constitutional emergency law approach that, acknowledging the necessity for those exceptional powers, would have made possible a better identification of its constitutional foundations and limitations. Moreover, such an approach would have laid the ghost of the normalisation of those exceptional powers, which have to a considerable extent slipped into the apparently ordinary functioning of the EU in general and the European Monetary Union in particular.

With regard to the second issue, it has been argued that legal certainty and individual legitimate expectations should operate as substantive limits to this response, since the emergence of an expanded power rearranges the position of the individual *vis-à-vis* the exercise of public authority. But, more importantly, it has been contended that, in the current situation, serious concerns have arisen as to its proper place, such as those related to predictability in legislation and to its correlative judicial aspect, the consequences of its legally disjointed (or compartmentalised) character and its repercussions on fundamental rights.

Indeed, this substantive limit is blurred, if not missing altogether, in the European Court of Justice case law, because of four arguments the compelling force of which is rather debatable (the four traps) and facilitated by an EU judicial remedies system that substantially restricts individual access to the EU courts. As a consequence, the bulk of the litigation on this response has been driven towards national courts, particularly Constitutional Courts. The European Court of Justice, being aware of the political delicacy of the issue and the fragile foundations for a 'constitutional' approach to EU emergency law, has opted for remitting substantive judicial review to member states' constitutional courts, whose institutional and legal positions are more deeply rooted. This result might be considered a rational choice, but it implies the absolute disappearance of EU primary law as a legality benchmark and places this litigation exclusively within the national legal framework.

This has, of course, far-reaching consequences. In the first place, the national legal framework is (and to a certain extent it must legally be) oblivious to the serious weaknesses in the EU law level, leaving this entire emergency response unchallenged. The impressive rhetorical power of this category interferes with the basic legal processes of adjudication and legislation, resulting in an enlarged judicial self-restraint and hasty decision-making delegations. This hides the political choices available and impairs the possibility of differentiating between the points at which 'emergency' begins and finishes. It consequently makes easier

the perpetuation of the emergency powers by restraining the room for political (i.e. democratic) debate. This normalisation of emergency powers points to the EU constitutional arrangements themselves, threatening in the long term an undesirable constitutional transformation.

On the other hand, the risk to the autonomy of EU law and to the European Court of Justice's central position remains. The problem does not lie in the application of constitutions' catalogues of fundamental rights or of national standards of legal certainty (the coexistence of both national and EU standards in these fields is actually part of the system). The real risk hides elsewhere: giving that task to Constitutional Courts, only, facilitates a passage to a more dangerous version of the conferral trap, that is, the *ultra vires* act.[104]

In addition, refusing to exercise any substantial control over member states' reaction and EU institutions' involvement therein is a powerful message to all European political and legal actors, because the entire system relies on the free will of every single State and, within the State, of any actors: governments, parliaments and constitutional courts. No less powerful is the message for European citizens, because this case law makes the distance between a legal decision and its subjective acceptability longer, reducing the legitimacy of the EU and weakening the position of the European Court of Justice with it.[105] It would be naïve to think that this space is not going to be occupied by other courts, be they constitutional or international, using the most powerful argument at their disposal: the protection of fundamental rights or basic principles rooted in the rule of law, such as legal certainty or legitimate expectations. The identification and application of these limits are an essential part of a constitutional legal system, unequivocally underpinned by Articles 2, 4 and 6 TEU. Without it, therefore, no serious claim of autonomy can be made.

For those reasons, the European Court of Justice should reconsider this choice and engage in the difficult, but not unfeasible, task of overcoming the four traps and construing a communicative framework which is flexible enough to affirm the centrality of both EU primary law and the Charter whilst preserving enough room for Constitutional Courts to apply constitutional rules. Furthermore, this is an undoubtedly cooperative enterprise and the European Court of Justice should reconsider its 'communication policy'. The lack of institutional empathy towards

[104] Putting it in simple terms, a Constitutional Court quashing a member state's implementing measure because it encroaches upon proportionality or legitimate expectations does not affect the autonomy of EU law, since the system could without much difficulty incorporate that decision; but it would strike at the heart of EU law if the relevant Constitutional Court were to state that establishing that condition is an *ultra vires* act.

[105] I cannot expand on this dimension of legal certainty as subjective acceptability brought up by Nordic doctrine, especially by the works of Juha Raitio and Elina Paunio (*see* Martín Rodríguez, *supra* n. 6, section A).

Constitutional Courts or the European Court of Human Rights distilled in recent key pronouncements (from *Melloni* to *OMT* and Opinion 2/13) indicates a hostile pluralist environment that will not ensure any spontaneous common approach, making constitutional pluralism look as if it had never been anything but a charming scientific construct.[106] There appear currently to be some positive signs suggesting that the European Court of Justice might be disposed to reconsider this issue in the near future, such as avoiding answering preliminary references by order (*Florescu*) or assigning some appeals to the Grand Chamber (*Mallis & Malli* or *Ledra Advertising*). Wahl's Opinion in *Kotnik* seems to point in the same, and better, direction, too. This is in itself a positive development, although the concrete outcome of this reconsideration is still awaited.

[106] On the consequences of a confrontational instead of a cooperative environment, *see* L.F.M. Besselink, 'The Parameters of Constitutional Conflict after *Melloni*', 39 *ELRev*. (2014) p. 531; D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', 50 *CMLR* (2013) p. 1267.