European Law Open (2024), **3**, 402–417
doi:10.1017/elo.2024.25

DIALOGUE AND DEBATE: SYMPOSIUM ON NEW INTERDISCIPLINARY PERSPECTIVES IN EU LAW

The multiple meanings of EU law: using sociological interpretivism to make sense of the Eurozone crisis

Nicholas Haagensen

Center of Excellence for International Courts, Faculty of Law, Postdoctoral research fellow at iCourts, University of Copenhagen, Copenhagen, Denmark
Email: nicholas.haagensen@jur.ku.dk

(Received 7 July 2023; revised 2 July 2024; accepted 18 July 2024)

Abstract

In following the interdisciplinary spirit of this symposium, I emphasise the usefulness of the sociological approach of interpretivism, together with qualitative methods, by examining how EU legal actors perceived the Eurozone crisis and how they enabled policy solutions: financial assistance and policy conditionality. This case constitutes a legal conundrum because of how these solutions encompass and connect different forms of law – EU law, international law and private financial law – and how EU lawyers seek to protect the EU legal order from this hybrid arrangement by drawing the arrangement as closely as they can to the EU legal order. This in turn creates issues of accountability as the imposition of policy conditionality engenders litigation by EU citizens who were directly affected therein, raising the question of whether establishing liability for damages is possible in such a hybrid arrangement. Using interviews with legal actors and observations of court proceedings, I foreground the multiple meanings of EU law and explain how such an approach can expand our understanding of not only what EU law means to its practitioners, but also how these meanings give insight into the potential paths of EU law's development. To interrogate these multiple meanings, I examine the crisis policy solutions as well as a set of court cases – *Ledra Advertising, Mallis* and *Chrysostomides* – that sought to hold the EU accountable for losses suffered because of these policies. Using these methods can partially overcome the opaqueness of judicial proceedings at the EU level, as well as give insight into the development of the legal arrangements being contested in court. A novel methodological element is the descriptive analysis of observations of court proceedings in *Chrysostomides*, where I demonstrate how the interactions between the lawyers and the judges shed light on how legal actors establish legal validity as a collective project.

Keywords: Sociological interpretivism; EU law; Eurozone crisis; qualitative methods

1. Introduction

Given the multiple crises that have befallen the European Union (EU) in recent years, approaches to studying the development of EU law and how it tracks and serves European society are urgently needed. Using interpretive approaches from sociology can be helpful in this endeavour, as they enable the scholar to reveal the social processes at play in legal case-making activities. Firstly, this can aid the scholar in understanding the socio-economic and political issues that form the content of these cases and how EU law shapes these issues. Secondly, interpretive approaches can reveal the multiple meanings of EU law. While a judgement can become the authoritative legal meaning of a specific rule, alternative legal meanings engendered by a case can be just as significant in terms of how they articulate the issues. This matters because it can aid the scholar in capturing a more

comprehensive view of how EU law could develop in ways that serve the needs of European society, even if these ways were not realised in the specific case at hand. More importantly, by examining these meanings from the perspective of the legal practitioners involved – ie what the situation and EU law mean to them – I believe we develop a deeper understanding of our object of study: the evolving nature of EU law. Using the Eurozone crisis, and the court cases related to the Cypriot banking crisis,[1] is helpful here because it not only raises significant questions about EU law, but it elicits strong beliefs about what is at stake and what should be done. This is made especially critical by the ambiguity as to where exactly the financial mechanisms and the policy conditionality should be anchored, namely in international law, EU law or private financial law, and we see this empirically by the number of mechanisms created – the European Financial Stability Mechanism (EFSM) in EU law, the European Financial Stability Facility (EFSF) in private law, and the European Stability Mechanism (ESM) in international law. While the EFSM is anchored fully in EU law, it was simply too small to alleviate the crisis because of the limits of the EU budget,[2] and thus the EFSF and ESM were created outside the Union but were nevertheless pulled into the EU's orbit by the normative force of EU law. The legal dimension of the Eurozone crisis is instructive here for illustrating the various meanings of EU law because by their very creation between private financial law, international law and EU law, the Eurozone crisis mechanisms of financial assistance and policy conditionality weave a web of multiple meanings through their attachments to different paradigms of law as perceived by EU legal practitioners: the constitutionalising paradigm of EU law, the political realism of international law, and the instrumentalism of private financial law. The EU lawyers react to this by attempting to draw the hybrid arrangement closer to the EU legal order through various legal avenues to protect EU law. However, this creates an issue when affected parties – EU citizens affected by policy conditionality – use litigation before the Court of Justice of the EU (CJEU) to attain accountability for their losses. This in turn engenders more possible meanings regarding the scope of EU law to protect EU citizens from arrangements that are claimed to be external to the EU.

There is a considerable amount of legal scholarship on the Eurozone crisis, from the emergence of a large corpus of 'euro-crisis law',[3] which has had implications for the rule of law[4] and legal certainty,[5] to questions of increased institutional variation in the EU,[6] constitutional balance,[7] and constitutional mutation.[8] In terms of the Cyprus banking crisis, there have been multiple articles analysing the judgements of *Ledra Advertising*,[9] *Mallis*[10] and

[1]Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701; Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB),* ECLI:EU:C:2016:702; Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Council v K. Chrysostomides & Co. and Others*, ECLI:EU:C:2020:1028.

[2]A Merino, 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance' 49 (2012) Common Market Law Review 1613–45.

[3]T Beukers, B de Witte, and C Kilpatrick, *Constitutional change through euro-crisis law: Taking stock, new perspectives and looking ahead,* in T Beukers, B de Witte, and C Kilpatrick (eds) *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 1–24.

[4]C Kilpatrick, 'On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts' 35 (2) (2015) Oxford Journal of Legal Studies 325–53.

[5]P T Tridimas, 'Indeterminacy and Legal Uncertainty in EU Law' in J Mendes (ed), *EU Executive Discretion and the Limits of the Law* (Oxford University Press 2019) 40–63.

[6]B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' 11 (3) (2015) European Constitutional Law Review 434–57.

[7]M Dawson and F de Witte, 'Constitutional balance in the EU after the Euro-crisis' 76 (5) (2013) Modern Law Review 817–44.

[8]G Martinico, 'EU Crisis and Constitutional Mutations: A Review Article' 165 (2014) Revista de Estudios Políticos 247–80.

[9]P Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework' 13 (2017) European Constitutional Law Review 369–82.

[10]R Repasi, 'Court of Justice. Judicial protection against austerity measures in the euro area: Ledra Advertising and Mallis' 54 (4) (2017) Common Market Law Review 1123–55.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

Chrysostomides,[11] and, in connection with these cases, considerations of the Eurogroup's de facto power wielded during the crisis.[12] These are significant contributions that help us understand the emergence of novel types of legal arrangements, their implications for the EU, as well as the impact of the court cases. And indeed, much of this scholarship illustrates the multiple meanings of EU law and its possibilities. However, this scholarship is not so clear on the meanings that the legal practitioners themselves give to the role of EU law in dealing with such an urgent and critical situation like the Eurozone crisis.

If we look at the political science literature, scholars have remained at the macro level, seeking to explain the origin of ideas related to the crisis response, for example, neoliberal and ordo-liberal notions of efficient markets and government intervention;[13] the changing modes of power afforded to Member States and EU institutions;[14] and their implications for politics and societies[15] as well as European integration.[16] Elsewhere historical institutionalist scholarship has emphasised notions of 'rule layering' and 'rule overlap' to explain the final institutional outcomes of the crisis,[17] and the 'copying' of institutional characteristics from the European Investment Bank and the European Monetary Institute as templates for the formation of the financial assistance mechanisms.[18] In terms of the Cypriot banking crisis, Jones et al. point out how the 'failing forward' approach of the EU and Member States to deal with it led to incomplete policy responses, for example, pressuring Cyprus to bail-in its banks reflected a reversal on a comprehensive banking union and a lack of solidarity.[19] Finally, while Haagensen has examined the role of legal actors in creating the financial mechanisms during the Eurozone crisis and in turn how they valorise their expertise vis-à-vis the politics of the crisis,[20] there is almost no scholarship on how the legal practitioners have perceived the multiple meanings of these events, court cases and legal arrangements and how these meanings shape their strategies. If the role of law in the Eurozone crisis has been so significant, especially on critical normative questions such as enabling the imposition of severe conditionality without setting limits, then I argue that we can learn much about how EU law is developing by looking at how legal practitioners have given meaning to these solutions in the context of EU law and its ongoing development.

However, in interviewing the EU lawyers and economic policy advisors involved,[21] it is important to not simply ask questions and observe practices; the scholar must also use a set of

[11]A Karatzia and M Markakis, 'Financial assistance conditionality and effective judicial protection: Chrysostomides' 59 (2022) Common Market Law Review 501–42.

[12]P Craig, 'The Eurogroup, power and accountability' 23 (3–4) (2017) European Law Journal 234–49.

[13]M Blyth, *Austerity. The History of a Dangerous Idea* (Oxford University Press 2013); A Crespy and P Vanheuverzwijn, 'What "Brussels" means by structural reforms: empty signifier or constructive ambiguity?' 17 (1) (2019) Comparative European Politics 92–111.

[14]M B Carstensen and V A Schmidt, 'Power and changing modes of governance in the euro crisis' 31 (4) (2018) Governance 609–24.

[15]A Afonso, S Zartaloudis and Y Papadopoulos, 'How party linkages shape austerity politics: clientelism and fiscal adjustment in Greece and Portugal during the eurozone crisis' 22 (3) (2015) Journal of European Public Policy 315–34.

[16]B de Witte (n 6); P A Hall, 'The Economics and Politics of the Euro Crisis' 21 (4) (2017) German Politics; D Ioannou, P Leblond, A Niemann, 'European Integration and The Crisis: Practice and Theory European Integration and The Crisis: Practice and Theory' 22 (2) (2015) Journal of European Public Policy 155–76.

[17]M Moschella, 'Negotiating Greece. Layering, insulation, and the design of adjustment programs in the Eurozone' 23 (5) (2016) Review of International Political Economy 799–824.

[18]A Verdun, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis' 22 (2) (2015) Journal of European Public Policy 219–37.

[19]E Jones, R D Kelemen and S Meunier, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration' 49 (7) (2016) Comparative Political Studies 1010–34.

[20]N Haagensen, 'Legal Strategies at the Governance Precipice: Transnational Lawyers in the European Union's Sovereign Debt Crisis (2010–2012)' 49 (2024) Law and Social Inquiry 1715–1746.

[21]The qualitative data used in this piece is drawn from N Haagensen, *European Legal Networks in Crisis: The Legal Construction of Economic Policy* (PhD thesis Copenhagen Business School 2020).

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

concepts to organise the various social processes we are interested in. Specifically, how the actors perceive their context as well as how their interpretations and actions shape it. To understand how these social processes play out, I draw on the following three conceptual elements: *knowledge construction, strategies and stakes,* and *the invocation of meaning*.[22] These three conceptual elements can be used to analyse the perceptions and practices of the actors in terms of how they assign meaning to their actions, their context as well as to the development of EU law. To demonstrate this approach, I will examine the emergence and adjudication of the court cases related to the Cypriot banking crisis.

These cases raise significant institutional and constitutional issues.[23] Institutionally, it speaks to the question of the evolving institutional structure of the Economic and Monetary Union (EMU) in terms of the creation of the ESM as well as the evolution of the Eurogroup's role in becoming the centre of de facto decision-making power during the Eurozone crisis.[24] Moreover, these cases touch on constitutional issues related to the 'system of legal remedies and procedures'[25] envisioned by the CJEU in its well-known *Les Verts* judgement from 1986.[26] With regard to the Cypriot bank bail-in, the specific legal issues touch on whether the imposition of policy conditionality for financial assistance is justiciable,[27] and where the source of political authority to engage in such action stems from in the EU's economic governance structure. At the same time, I also look at how alternative legal meanings are engendered by the perceptions and practices of the legal actors involved in the emergence and proceedings of these cases. In this way, I look at the experiences of the legal actors involved in constructing the policy conditionality arrangement as well as the experiences of the legal actors who had to argue over liability for it in court.

2. Sociological tools for understanding legal actors and practices

With the sociological approach of interpretivism presented here, I aim to understand and explain 'meaningful social action'.[28] This means, firstly, examining how actors give meaning to their actions; secondly, understanding their motives;[29] and thirdly, examining the social processes, such as interactions,[30] that inform their interpretations of the social context.[31] In the following, I draw loosely on the ideas of Max Weber,[32] in terms of how ideas and values inform social action; Pierre Bourdieu,[33] with regard to how the actors' interests and context shape their strategies of action;

[22]These concepts build on an approach that I developed in previous research, see N Haagensen, 'Judicially-backed Mutation: Practices at the Legal Frontiers of the Eurozone Crisis' in M R Madsen, F Nicola, and A Vauchez (eds) *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge: Cambridge University Press 2022) 286–313.

[23]T P Tridimas (n 5).

[24]P Craig (n 11).

[25]Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166, para 23.

[26]R Repasi (n 10).

[27]A Karatzia, 'An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States' in M. Szabo, P. L. Lancos, & R. Varga (eds), *Hungarian Yearbook of International Law and European Law* (Eleven International Publishing 2016) 573–90.

[28]M Fulbrook, 'Max Weber's 'Interpretive Sociology': A Comparison of Conception and Practice' 29 (1) (1978) The British Journal of Sociology 71–82.

[29]M Weber called this *Verstehen*, which here means interpretive understanding.

[30]G H Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* (University of Chicago Press [1934] 2015).

[31]E Goffman, *The Presentation of Self in Everyday Life* (New York: Random House 1959).

[32]M Weber, *Economy and Society: An Outline of Interpretive Sociology* G Roth & C Wittich (eds) (University of California Press 1978).

[33]Although Bourdieu is not considered an interpretivist, some of his ideas have a clear interpretivist dimension, specifically about how he views actors as interpreting their context in terms of the position they occupy in that social space, which he calls fields, and their particular disposition, which he calls habitus, see P Bourdieu and L Wacquant, *An Invitation to Reflexive Sociology* (The University of Chicago Press 1992).

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

and Erving Goffman,[34] in terms of how they perform their practices and identities in specific social arenas such as the court. These conceptual ideas overlap in various ways, so I have simply organised them under the thematic headings: knowledge construction, strategies and stakes, and the invocation of meaning. This allows me to connect the conceptual ideas to the themes I wish to elicit from the empirical case.

A. Knowledge construction

The first element entails examining the intersection of EU law and the policy area in question to ascertain the degree of legal knowledge construction. In this case, we are looking at an economic policy context, in which novel legal arrangements are crafted with a view to enable and legitimate the authority to impose policy conditionality.[35] By doing this, we can further understand how EU law develops in terms of how it encapsulates a social or economic issue 'within a legal idea or concept . . . '.[36] In this process of encapsulation, novel legal knowledge is produced. A key point here is that this fabrication of legal knowledge often occurs at the frontiers of the discipline,[37] ie in an area previously untouched by EU legal concepts. This can have significant consequences for existing areas of law, as it engenders new meanings about the relationship between the new legal arrangements and the old. Methodologically, a key point is capturing the process of rendering a socio-economic issue in legal terms. In order to understand this process, we can look at practices – which are considered performances[38] – and, by studying them in the context of EU law, we can analyse how these expert performances have effects.[39] In the context of the Eurozone crisis, one of the effects produced by the legal practices is the multiple legal meanings around how power is exercised in the EU, especially when power has been exercised in such an explicit fashion; namely, powerful countries and institutions imposing conditions on weaker countries. In sum, the aim is to understand how legal actors' practices and perspectives are brought to bear on the socio-economic issues of the crisis, with a particular focus on the resulting legal knowledge and diverse meanings engendered therein.

B. Strategies and stakes

Having identified the new legal arrangements to be analysed, the next step is to ascertain the strategies – or logics – that the legal practitioners use when constructing, elaborating or attacking a legal arrangement. A useful notion for this comes from Bourdieu, which he calls the 'sense of the game',[40] and which points to a practical sense that is socially constructed and that helps the legal actors navigate their social environment in a competent manner.[41] A key point here is understanding what is at stake for each actor given their position in their social context. By understanding this, we get a better idea of how their position informs their strategies. In the case below, I will make explicit the strategies of (1) the EU lawyers in terms of how they are involved in negotiating and creating legislation as well as defending these arrangements in court; (2) the Court

[34]E Goffman (n 31).

[35]In this case, whether such authority is actually legitimated needs to be examined empirically.

[36]T C Halliday and B G Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency' 112 (4) (2007) American Journal of Sociology 1135–202, at 1142.

[37]Y Dezalay and M R Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' 8 (2012) Annual Review of Law and Social Science 433–52.

[38]E Goffman (n 31).

[39]E Adler and V Pouliot, 'International Practices' 3 (1) (2011) International Theory 1–36, at 6.

[40]P Bourdieu & L Wacquant (n 33).

[41]Generally, the sense of the game is connected to an actor's dispositions or what Bourdieu calls *habitus*. I have refrained from discussing and using habitus here, as it goes beyond the aims of this piece.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

of Justice and the General Court in terms of how each court adjudicates;[42] and (3) the economic policy advisors in terms of how they orient themselves toward the judgements of the Court.

C. The invocation of meaning

Once it has been established how new legal knowledge is fabricated vis-à-vis the policy domain and which strategies are used by the legal actors to do it, the scholar can untangle the different meanings that are invoked by the actors themselves in their struggles to define the authoritative meaning of the legal arrangements. In an interpretivist approach, the scholar considers social objects to be multivalent, ie they can have multiple meanings to different actors and are therefore open to multiple interpretations.[43] We can make the multivalence of social objects visible by juxtaposing the diverse perceptions of the actors involved based on the knowledge they deploy to interpret these objects. In other words, meaning can be invoked in multiple ways. A central part of the analysis in this approach entails capturing how a new legal arrangement, as well as the changing context, can transform the meaning of existing legal norms and rules, and in turn gives legal actors the opportunity to frame and define both the meanings of new legal arrangements *and* how these change the meaning of existing legal frameworks. This becomes explicit in court cases that arise because of the changing legal and social landscape, in which defining valid law occurs through a process of contestation between different legal actors attempting to articulate the authoritative meaning of the legal situation. Moreover, in terms of the effects produced by legal practices, these cases engender multiple representations of the legitimating properties of law in rationalising powerful authorities, including how EU law may fall short in legitimating those who wield or have gained power. This final point is normative and quite significant in terms of helping us understand the bigger picture, which goes beyond any single legal actor's perspective: that is, on the one hand understanding the trajectory of EU law's development, while on the other, reflecting over how it falls short in serving and protecting European citizens.

In sum, by taking point of departure in the initial creation of a legal instrument, examining this process and the strategies and stakes involved, and then subsequently analysing the struggle of defining the authoritative meaning of the legal instrument as well as any changes to existing law, we are able to capture the social processes of meaning creation implicated in the development of EU law.

3. Qualitative methods: juxtaposing and triangulating

To capture how a group of actors' perspectives and practices become meaningful in terms of their social context, I will use qualitative methods. This will give us insight into how the practices of the legal actors make the law meaningful as well as what is at stake for the actors in constructing and defining valid law.

When doing interpretivist research,[44] interviews can play a key role in elucidating the practices of the legal actors, for example, *how* they drafted or negotiated a legal text. More importantly for this paper, interviews give insight into what is meaningful to the legal actors, as well as what is at stake for them ideologically, professionally, and organisationally. We are interested in understanding the subjective meanings in an interpretive approach and, while interviews can be used for deductive approaches – eg process tracing – that seek to confirm or disconfirm

[42]In this piece, both courts will generally be considered as uniform entities given the lack of dissenting opinions in their judgements.

[43]In sociology, this key idea was consolidated by Alfred Schütz, see A Schütz, *The Phenomenology of the Social World*, trans. G Walsh and F Lehnert. Evanston (Northwestern University Press 1967).

[44]V Pouliot, 'Practice Tracing' in A Bennett and J Checkel (eds) *Process Tracing. From Metaphor to Analytic Tool* (Cambridge University Press 2014) 237–59.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

predictions using interviews,[45] I use interviews to elicit the subjective views of the EU legal and policy actors in an inductive way. A first consideration is that interviews entail a certain amount of bias given their subjective anchoring. For example, interviewees may overstate or understate their involvement in a particular event. To balance this bias, the scholar can interview multiple actors who were involved in the same events, as well as actors who have different positions and attributes, eg legal actors acting for the EU on the one side, and legal actors acting for applicants on the other, as is the case in this piece. Or economic policy actors who represent a different set of considerations to legal ones. To increase the confidence in interview claims, the researcher can use at least two interview sources where possible to verify them.[46] However, when doing interpretivist research, the scholar is not necessarily trying to establish an objective reflection of reality, but rather examining how meaning is assigned to the practices and social context of the actors and how this can shape social outcomes.[47] In this way, multiple meanings of the same event are welcomed and add to the set of possible paths that development can take.

The next source of qualitative data are documents, including policy documents produced by the EU institutions, court judgements and legal doctrine in the form of scholarship. Analysing documents enables one to triangulate what the interviewees said and thereby establish the legal issues on which the perspectives of the lawyers diverge or converge with official statements, court judgements and the views of scholars. The latter point becomes of particular interest when we get an indication of how the views of scholars penetrate the court, as will be shown in the analysis.

The final source of qualitative data is observation, which can give insight into the process of producing social objects, such as a judgement. One may assert that the judgment itself offers a robust reflection of the process that produced it, as well as reflecting the valid legal meaning that the judgement construes. However, the final judgement can conceal the alternative perspectives that arose during the process of argumentation that produced it. In other words, '[a]lthough all fields of practice currently produce many accounts [eg judgements] of their activities, it is *in* the field that the actual *production* of accounts [eg judgements] can be studied'.[48] Indeed, throughout the production process, various alternative perspectives of the legal meanings of events and actions have been proffered, not simply in terms of the concrete conflict at the heart of a judgement, but also the discussions between the judges and lawyers during the oral hearings. In this way, observations of these events can offer insight into alternative understandings and thereby alternative visions of social issues and indeed social reality. This is especially significant if we want to assess EU law vis-à-vis the broader needs of European society and the issues confronting it.

4. The analytical narrative: from creation to litigation

In the following, I will show how an interpretivist approach, together with the relevant qualitative methods, can shed light on the development of EU law in economic governance by examining the Cypriot bank bail-in cases. First, we need to examine the legal arrangement created to enable assistance in exchange for policy conditionality, as this forms a large part of the case, after which I look at the court cases that are engendered by the imposition of conditionality terms on Cyprus.

[45]See A Bennett and J Checkel, 'Process Tracing. From Philosophical Roots to Best Practices' in A Bennett and J Checkel (eds) *Process Tracing. From Metaphor to Analytic Tool* (Cambridge University Press 2014) 3–38.

[46]See P H J Davies, 'Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of the Intelligence and Security Services' 21 (1) (2001) Politics 73–80; and N Eftimiades, *Chinese Intelligence Operations* (London: Frank Cass 1994).

[47]The qualitative interview data I use in this piece come from interviews—23 interviews in total—conducted with EU lawyers and economic policy advisors I did during my PhD research, see N Haagensen (n 21).

[48]B Czarniawska, *Shadowing and Other Techniques for Doing Fieldwork in Modern Societies* (Copenhagen Business School 2007), at 9.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

A. Constructing novel legal arrangements

Given the urgency of the crisis, the limits of the EU budget and the existing EU legal set-up,[49] it was decided early on to construct the initial funding mechanism – the European Financial Stability Facility (EFSF)[50] – outside the EU legal framework.[51] The EFSF was constructed as a special purpose vehicle, ie a private financial entity established through private law in Luxembourg. This was because '[. . .] Luxembourg offers all this flexibility in [the] creation of financial entity that other member states would have offered less',[52] but the governing law and jurisdiction of the EFSF would be English law. Not only is this clearly outside EU law, but it is anchoring the EFSF in a very different domain of law, namely, private financial law, and accordingly required specialist expertise. Thus, the global law firm Clifford Chance was hired to create the EFSF. While the EU lawyers did not particularly like this setup, the economic policy advisors believed the EFSF did the job it was supposed to do: to sell debt to investors.[53] However, already with the EFSF, the EU lawyers were finding ways to bring it into the EU's orbit through various consistency clauses,[54] which laid out the relationship to the EU legal order.

Once it was realised that there were many flaws with the EFSF – it was overly complicated and increased the national debt of the member state creditors[55] – the political bargain for a more robust mechanism arrived in the form of Chancellor Merkel and President Sarkozy agreeing on the ESM, which the EU lawyers would try to draw even closer to the EU legal order.

The ESM has multiple connections to the EU, for example, the ESM Board of Governors are the same individuals who comprise the Eurogroup. Moreover, the policy conditionality attached to financial assistance issued by the ESM is documented in both a Memorandum of Understanding (MoU) addressed to the Member State requesting assistance, *and* documented in EU law as a Council Decision,[56] which has its basis in Article 136(1) TFEU and became consolidated in the Two-Pack regulation.[57] This was not without controversy, and several EU legal scholars did not believe that Article 136(1) could be justified 'in the light of its wording and scope'.[58] However, from the perspective of the EU lawyers involved in the creation of the ESM and the policy conditionality modality, it was highly significant to anchor conditionality in EU law in some form. This was because, as a lawyer from the Council stated, they wanted ' . . . to avoid that EU law is deconstructed by using an intergovernmental method . . . ',[59] while a Commission legal advisor added that 'the concern of union law, of protecting Union law, I had it day one, from the first moment . . . '.[60] In other words, the EU lawyers were concerned that EU legal competence in economic policy would be undermined by an external system. However, there were also concerns about how these different types of law shaped the power dynamics between the member states. Multiple respondents, including an economic policy actor, indicated that there was a clear lack of solidarity during the intergovernmental negotiations, with the creditor countries making

[49]A Merino (n 2).

[50]The first iteration of the central mechanism – the European Financial Stability Facility (EFSF) – was simply a funding instrument based on private international law, while the second iteration – the ESM – was based on international law.

[51]L Gocaj and S Meunier, 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis' 35 (3) (2013) Journal of European Integration, 239–53. See also L v Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda Publishing 2019).

[52]Interview with ECB lawyer, 10 July 2018 (over phone).

[53]Interview with ECFIN policy advisor in Brussels, 12 July 2018 (in person).

[54]A Merino (n 2) 1635.

[55]Interview with ECFIN legal advisor in Brussels, 18 June 2018 (in person).

[56]A Merino (n 2) 1637.

[57]The 'Two-Pack' comprises Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21.05.2013; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21.05.2013.

[58]K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Kindle Edition) (Cambridge University Press 2014) at 171.

[59]Interview with Council lawyer in Brussels, 4 September 2018 (in person).

[60]Interview with ECFIN Legal Advisor (n 55).

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

increasingly severe demands on the weaker debtor countries.[61] From the EU perspective, this type of power politics through economic force was not appropriate since, in their view, the Union was there to mediate the relations between the member states. Referring to the setup of the international law arrangement of the ESM, a Commission lawyer explained it more directly: 'We don't want these guys in Luxembourg [location of the ESM] – pure technocrats – controlled by the Bundestag and no one else, with the rich member states having the power – we prefer the community method, which in the long term we consider more fit'.[62] In this way, the meaning of what the EU legal order represents compared to the ESM is made clearer, as well as the significance of the stakes, ie these are not just different solutions – using international law or using EU law – they are different legal paradigms underpinned by different norms.

These interpretations shaped the strategies that the EU legal actors involved in negotiating the ESM as well as the Two-Pack legislation used to protect EU law. Thus, according to them, this was the reason for pushing the idea of having the MoU mirrored in EU law as a Council Decision. By enshrining anything related to conditionality in EU law, the EU's economic policy prerogatives are protected as established in the Economic and Monetary Union chapters of the TFEU.[63] At the same time, part of the stakes of protecting EU law is protecting the EU legal actors' professional project - ie protecting the jurisdiction and content of their work.

At this point, the meaning of these legal arrangements is not settled at the moment of creation. What is especially significant is the question of accountability. If the EU lawyers had been concerned about protecting EU law and wanting to bring the ESM into the orbit of EU law, and in the case of policy conditionality under EU law, then how would the EU lawyers deal with questions of accountability? Who is responsible for any damages suffered by the implementation of policy conditionality? To explore the meaning of these questions, the next step is to look at the court cases in which these arrangements are discussed, contested and their legal meaning articulated by various legal actors.

B. Policy conditionality before the courts

When Cyprus requested financial assistance, the key objective was to recapitalise two of its largest banks, which had experienced massive losses following the Greek debt restructuring in 2012.[64] The Cypriot authorities reached out to the President of the Eurogroup and requested financial assistance from the ESM in 2012, with a macro-economic adjustment programme being agreed between Cyprus and the Eurogroup, together with the confirmation of the European Commission, the ECB and the IMF in 2013. The Eurogroup put out a statement on 25 March 2013 'welcoming' the plans to restructure the financial sector.[65] The MoU was signed a month later by the Commission on behalf of the ESM, after the ESM Board of Governors – the same persons comprising the Eurogroup – granted financial support.[66]

This governance arrangement for enabling policy conditionality is complex and entails multiple entities: the Eurogroup, the ESM Board of Governors, the Commission, the ECB, and of course the Member State requesting assistance, which in this case was Cyprus. Each entity has been delegated a role based on the legal documents, ie the ESM Treaty and the EU regulations comprising the Two-Pack. Nevertheless, this complex process gives rise to ambiguity regarding the source of authority to decide the terms of conditionality. This ambiguity in turn gives rise to

[61]Interview with ECFIN Policy Advisor (n 53).

[62]Interview with Commission lawyer in Brussels, 25 May 2018 (in person).

[63]Interview with ECFIN Legal Advisor (n 55).

[64]See page 3, IMF Country Report No. 13/156, June 2013, 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement', International Monetary Fund, Washington, D.C.

[65]Case T-289/13 *Ledra Advertising Ltd v European Commission and European Central Bank (ECB)* ECLI:EU:T:2014:981, para 15.

[66]*Ledra Advertising* (n 65).

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

different legal theories, and thus strategies, for those affected to establish some form of accountability through litigation.[67]

The first case, *Ledra Advertising*,[68] entailed the applicants showing that it was the Commission and the ECB who were responsible for their losses in the bank bail-in. The strategy sought to attribute authorship of the disputed passage of the MoU (paragraphs 1.23 to 1.27) to the Commission and the ECB and seek compensation in the amount of the applicant's losses and sought the passage's annulment. The General Court, however, found that the Commission and the ECB could not be attributed such authorship or responsibility, and referred to the *Pringle*[69] case as specifying the Commission's and the ECB's lack of power to decide under the ESM framework.[70] The applicants appealed the ruling, but the Court of Justice confirmed the Commission's and ECB's lack of power to make decisions within the ESM framework.[71] However, the Court then stated that while this may prevent an action of annulment from being brought, the Court considered that unlawful conduct linked to the adoption of an MoU *could* be brought against the Commission and the ECB in terms of compensation for damages under non-contractual liability under Article 340 TFEU.[72] Therefore, when acting under the ESM framework, the Commission is bound by EU law and the Charter of Fundamental rights, and must ensure an MoU's consistency with these laws at all times

For the EU lawyers, this was an unexpected move, as a lawyer from the Commission noted:

> The surprising thing about the *Ledra Advertising* judgement of the Court of Justice is that it accepted, as a starting point, the possibility of liability, whereas before in the General Court below, the line had prevailed that we argued that it was all inadmissible because the Commission only ever acted on behalf of the Euroarea states.[73]

Notable here is how the Commission lawyer admits that, despite their attempts at keeping as much as possible within the EU legal order as noted above, when it came to the possibility of liability for EU institutions in the implementation of conditionality, the EU lawyers were at pains to defend the Commission against liability. While it is perhaps an occupational imperative of a lawyer in the EU institutions' legal services to defend against liability claims such as these, the situation nevertheless illustrates a critical point in legally rationalising power: in order to claim and exercise legitimate authority, there must also be the possibility of liability. Another Commission lawyer stated:

> . . . it was Grand Chamber and you could see that the President, Koen Lenaerts, wanted to make a point clearly . . . 'well sorry you are the Commission, you have to respect the Charter no matter what, even if you negotiate an MoU as a member of the Troika etc., you're bound by EU law'.[74]

This point was re-iterated: ' . . . we are all sure that this was mainly Koen Lenearts, the President's view, that the constitutional system of the Union would be incomplete if there was no possibility to seek damages against the Union itself for such action'.[75] And an ECB lawyer

[67]I will only touch on the *Mallis* case indirectly as it did not stand out as meaningfully for the legal practitioners as *Ledra* and *Chrysostomides*.

[68]*Ledra Advertising* (n 65).

[69]Case C-370/12 *Thomas Pringle v. Government of Ireland and Others* ECLI:EU:C:2012:756.

[70]*Ledra Advertising*, para 45 (n 65)

[71]*Ledra Advertising* (Appeal) (n 1), para 52–3.

[72]*Ledra Advertising* (Appeal) (n 1), para 55.

[73]Interview with Commission lawyer in Brussels, 28 August 2018 (in person).

[74]Interview with Commission lawyer (n 62).

[75]Interview with Commission lawyer (n 73)

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

suggested that the Court was in fact adding an 'additional level of integration'.[76] The lawyers are interpreting the actions of the Court in a way that gives meaning to the EU legal order as a constitutional order, and singling out the entrepreneurial role played by the President, Koen Lenaerts, in asserting this constitutional point.[77] This foregrounds the stakes for the Court and the judges: trying to constitutionalise a highly complex governance arrangement during a period of contentious politics. Moreover, there is an intimation to past decisions of the Court whereby it has 'constitutionalised' parts of the Union in a way that has driven integration.[78] The Court's strategy in this case is arguably shaped by the stakes of being an apex Court in a supranational governance structure, where the idea of a 'constitutional court' has been transformed from its traditional position at the national level and become a strategy of constitutionlisation by the Court,[79] and which is part of legitimising the EU legal order. In this case, the Court asserts that the EU legal order travels with the Commission, thus the Court has 'constitutionalised' parts of the ESM that overlap with the EU legal order, namely through the Commission, which takes a key role in the ESM framework. In this way, the Court is drawing the ESM into the orbit of its constitutional logic. However, we must also be aware of the pressures that have been brought to bear on the Court *prior* to the 2016 *Ledra Advertising* judgement.[80] In the *Pringle* judgement in 2012, the Court had followed the Commission's argument that the Charter did not preclude the Member States from creating the ESM, because measures adopted by the ESM fell outside the scope of the Charter.[81] However, in a 2014 article,[82] Michael Schwarz pointed out that the ESM lacked legitimacy by being outside the scope of the Charter, while Daniel Sarmiento in a 2013 article stated that it was surprising the Charter had not been brought to bear on the role of the EU institutions in agreements such as the ESM as well as the MoUs attached to the assistance programmes.[83] In this way, while we gain insight into what the EU lawyers believe to be the reason why the Court asserted the Commission's responsibility regarding the Charter, it is important to be aware of the contextual pressures that are also brought to bear on the Court externally.

Finally, in following up with the economic policy advisors from the Commission, it became clear that *Ledra Advertising* was taken seriously. For example, an advisor who worked on conditionality programmes explained to me that after *Ledra Advertising*, the Commission became more formalistic with how they ensured a programme's conformity with EU law. He explained that, as Commission officials, they are of course aware that they cannot agree to terms that are not in line with EU law, however, after *Ledra Advertising* they became more diligent in demonstrating their consideration of EU law when negotiating the terms of conditionality.[84] In other words, the strategy for the economic advisors was risk mitigation in terms of what *Ledra Advertising* meant for policy conditionality programmes.

In the *Mallis* case the applicants sought an action for annulment, under Article 263 TFEU, of the Eurogroup statement of 25 March 2013, which was similarly imputed to the Commission and the ECB, and which was unsuccessful. According to the applicants in *Mallis*, the General Court failed to examine how the Eurogroup was simply an instrument through which the Commission

[76]Interview with ECB lawyer, 10 July 2018 (over phone).

[77]Thank you to an anonymous reviewer for pointing this out.

[78]J H H Weiler, 'The Transformation of Europe' 100 (8) (1991) The Yale Law Journal 2403–83; A Stone Sweet, *The Judicial Construction of Europe* (Kindle Edition) (Oxford University Press 2004).

[79]For more on the notion of strategy in terms of judicial activity, see A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Kindle Edition) (Cambridge University Press 2015).

[80]Thank you to anonymous reviewer for pointing this out.

[81]Case C-370/12 *Pringle* para 180–81 (n 69).

[82]M Schwarz, 'A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation' 51 (2) (2014) Common Market Law Review 389–423.

[83]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 (5) (2013) Common Market Law Review 1267–1304.

[84]Interview with economic policy advisor European Commission in Brussels, 18 July 2018 (in person).

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

and the ECB could decide on Cyprus assistance programmes.[85] However, the Court pointed out that:

[T]he fact that the Commission and the ECB participate in the meetings of the Eurogroup does not alter the nature of the latter's statements and cannot result in the statement at issue being considered to be the expression of a decision-making power of those two EU institutions.[86]

In the *Chrysostomides* case,[87] the applicants went for an action for damages caused by an EU institution, and the ECB, under Article 268 and the second and third paragraphs of Article 340 TFEU regarding non-contractual liability of the Union. The strategy of the applicant's lawyer was to elaborate a 'continuum' to link all the contested acts and insert all the EU institutions involved and the EU itself in such a way that responsibility for the act had to be seen as emanating from the EU. In other words, the aim was to link all the defendants into a continuum that connects them to the EU so that in the end, the EU's non-contractual liability could be triggered. This strategy impressed an ECB lawyer: 'it was the best, I think that the theory was the strongest, the elaboration of the arguments were, you know, they came up with all possible arguments you could make ... '.[88] To that end, the list of defendants includes: the Council, the Commission, the ECB, the Eurogroup, and the European Union itself.[89]

A key question that came up in this case was whether the Eurogroup could be considered an institution or body of the EU within the meaning of Article 340 TFEU. The Eurogroup is recognised as a meeting of ministers as per Article 137 TFEU and further under Protocol 14 as an informal forum, but not as a formal institution of the EU within the meaning of Article 13 TEU. Thus, the General Court is making a very specific examination of the status of the Eurogroup within the EU governance system regarding the area of non-contractual liability. In establishing its jurisdiction to undertake such an endeavour, however, the General Court draws on its case-law,[90] enabling it to broaden the meaning of an 'institution' in terms of the scope of Article 340, and further asserts that 'measures taken by those bodies in the exercise of the powers assigned to them by EU law are attributable to the EU ... '.[91]

The General Court is thus enabling a legal differentiation between actions for annulment – Article 263 TFEU – and actions for damages in terms of Union liability – Article 340 TFEU.[92] The General Court then defines the Eurogroup as a body of the Union because the Treaties provide for its existence, its activities, and how these activities contribute to Union objectives in Article 137 TFEU and Protocol No 14. The General Court concludes: 'The acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union'.[93]

The meaning of this is made very clear when the General Court points out the constitutional issue that a contrary interpretation

[W]ould clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability.[94]

Here again we see the strategy of constitutionalisation being used by the General Court, as it essentially brings the Eurogroup under the Court's jurisdiction in terms of non-contractual

[85] *Ledra Advertising* (Appeal) (n 1) para 41.
[86] *Ledra Advertising* (Appeal) (n 1) para 57.
[87] Case T-680/13 *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others* ECLI:EU:T:2018:486
[88] Interview with ECB lawyer (n 76).
[89] *Chrysostomides* (n 87).
[90] See Case C-370/89, *SGEEM and Etroy v EIB*, EU:C:1992:482, para 16.
[91] *Chrysostomides* (n 87) para 82.
[92] *Chrysostomides* (n 87) para 109.
[93] *Chrysostomides* (n 87) para 113.
[94] *Chrysostomides* (n 87) para 114.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

liability. This strategy of constitutionalisation however can often go beyond the expectations of EU lawyers, as a Council lawyer expressed to me: 'we were shocked'.[95]

Furthermore, multiple meanings can interact in surprising ways. The same Council lawyer pointed out to me similarities between the General Court's *Chrysostomides* judgement, which is from 2018, and Professor Paul Craig's article *The Eurogroup, power and accountability* from 2017.[96] Craig's paper is an analysis of the Eurogroup with a particular focus on the *Ledra Advertising* and *Mallis* judgements. He concludes his article by stating that the Eurogroup 'should be subject to legal liability in its own right, thereby ensuring a central tenet of the rule of law'.[97] This does indeed resonate with the General Court's assertion that if the Eurogroup could not trigger the non-contractual liability of the EU, it would 'clash with the principle of the Union based on the rule of law'. On this note, the same Council lawyer explained that he believed that 'this is the kind of article which I think penetrates quite a lot into the minds of the judges sometimes … '.[98] Not only because of the similarities and his belief that academic work 'creates lines of thought, it creates streams' that are 'very important to have a look into it', but also because he appreciates what Craig is arguing: 'I think it's very good, that's why articles are also written, there must be a practical end on these things. It's very legitimate … it is the narrative we have to deconstruct when we go to the Court of Justice'.[99] Here we see how academic streams of thought penetrate the world of practice, and become meaningful resources for the practitioners: on the one hand a possible form of inspiration for the judges (albeit unverified), and on the other, an argument for the lawyers to deconstruct in order to win their appeal, which in this case was the issue of the Eurogroup triggering the non-contractual liability of the EU. In sum, when EU law scholars such as Craig produce scholarship on EU case-law and legal arrangements, EU officials and lawyers can draw on it or deconstruct it, thereby demonstrating how scholarship serves as an epistemological resource for EU institutions. In other instances, scholarship from prestigious legal academics can be a key source of legitimisation, for example, Craig's analysis of the controversial *Pringle* judgement.[100] In this way, scholarship serves as a key resource in terms of its content—as inspiration or to understand a line of argument—*and* in terms of its normative position—defending a style of legal reasoning in a controversial case.[101]

Having analysed interview and document data, in the next part of the analysis, I will show how observing a public hearing before the Court can add further nuance about the development of EU law.

C. Observing law in action

On 25 February 2020 I had the opportunity to observe the interactions of the lawyers and judges during the hearing for *Chrysostomides* in the Grand Chamber of the Court of Justice.[102] In the proceedings, the lawyers were given the opportunity to plead their arguments after which they were questioned by multiple judges. In what follows, I present three excerpts from my observations of the *Chrysostomides* hearing: the questioning of the Council lawyer by the judges,

[95]Interview with Council lawyer (n 59).

[96]Craig (n 12).

[97]Craig (n 12) at 249.

[98]Interview with Council lawyer (n 59).

[99]Ibid.

[100]See P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', 20 (1) (2013) Maastricht Journal of European and Comparative Law 3–11. See also T Beukers and B de Witte, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle' 50 (3) (2013) Common Market Law Review 805–48.

[101]For more on how scholars legitimise EU arrangements, see S Lee Mudge and A Vauchez, 'Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics' 118 (2) (2012) American Journal of Sociology 449–92.

[102]The following empirics come from the notes I took during the hearing. These are not transcripts and cannot be seen as word-for-word representations of the hearing. Nevertheless, based on the original notes as well as from memory, I re-wrote the notes in a way that demonstrates the dialogue format between a judge and a lawyer.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

the character of the applicant's lawyer's argument, and the overall contrast in tone between the applicant's lawyer and the EU lawyers. By analysing these elements, I aim to show how the interactions between the lawyers and the judges engender multiple meanings around the legal issues in question, as well as how tone is captured in each argument – dry and technical from the EU lawyers, and urgent and emotive from the applicant's lawyer – and what this means for the salience of EU law.

Following the Council lawyers' presentation, one of the judges focused on how the Council's argument sought to define the Eurogroup in terms of the Treaties. According to the judge, the Council lawyer seemed to deny any value to Protocol 14, to which Article 137 refers, but that this Protocol is annexed to the Treaties and constitutes the recognition of the Eurogroup in primary law. The Council lawyer had given value to other legal elements such as case-law and statutes, indicating that those have more value than provisions – ie Article 137 and Protocol 14 – which are part of the Treaties. The Council lawyer replies that the existence of Protocol 14 had a singular reasoning: to recognise the right of Eurozone ministers to meet informally and also to not meet formally. Discussions had taken place to formalise this, but it was decided against so as not to entrench the distinction between Eurozone and non-Eurozone Member States, thereby ensuring coherence in the EU system. Subsequently, the following exchange occurred:

> Judge: Can you indicate your position regarding the arguments of the applicants, since the General Court cannot take the *Mallis* case-law regarding the different provision in terms of recognising the autonomous remedy of Art 263.
>
> Council lawyer: We refer to the Commission's didactic point about examining the steps for checking whether, first, it is a Union body; and second, looking at its behaviour, the admissibility of which depends on the behaviour attributed to the body. Both steps apply to both Articles 263 and 340; both steps have to be followed in line with the *Mallis* judgement. In *Mallis*, the Court of Justice recognised the Eurogroup as not being an EU body.
>
> Judge: But still on the issue of effective judicial protection, what happens in the absence of a responsibility to engage liability to ensure effective judicial protection?
>
> Council: Effective judicial protection is guaranteed in alternative ways.
>
> Judge: How do you respond to the point that the alternative remedies were checked by the appellants [applicants], does the Eurogroup benefit from immunity?
>
> Council: That question was answered: the right to effective judicial protection cannot change attribution of power as laid down in the Treaties. The Court has recognised this in the case law on Article 47 of the Charter.
>
> Judge: Based on what the Council said, an action for damages would follow if member state ministers [were] found guilty.
>
> Council: Any damage caused by national ministers in the Eurogroup derives from national law and so cannot engage the liability of the EU, so it is up to the national legal systems to decide if the Eurogroup ministers have standing before national courts. It is not up to the Council because it requires national interpretation and is beyond the Court of Justice's jurisdiction.
>
> Judge: the Eurogroup adopted declaration of 25 March 2013, if reasoned in categories of non-contractual liability, could the general categories as defined in Article 340 (para 2) apply to member states' political declaration, and as such, be a basis of actions that caused damages?
>
> Council: in line with the *Mallis* judgement, conditions must be laid down, first, how to define an EU body, and second, the type of behaviour. Conditions need to be fulfilled to establish a

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

body as a body of the EU. The Eurogroup statement is a political declaration, so the decisive point of damages lies elsewhere.

The above interaction demonstrates how the judge's probing unfolds the Council's legal argument further and more clearly fleshes out what is at stake and could be at stake, for example, that effective judicial protection is perhaps insufficient at the national level; or how Article 340 could be applied to a political declaration. This speaks to the conceptual utility of empirical observations: we get to see how the discussions between the judges and the lawyers produce multiple possible perspectives on the issue, which can be the impetus for further reflection over the social and political reality in question. For example, the judge asks whether the Eurogroup benefits from immunity, which raises questions about how we understand the concept of immunity at the intergovernmental level or in terms of 'informality', as well as questions about whether the social benefits or objectives of the Eurogroup's assumed immunity somehow outweigh the value of imposing non-contractual liability.

These reflections, as well as the above exchange between the Council lawyer and judge, can be abstract and technical, which contrasts with the urgency with which the applicant's lawyer pleaded his argument. For example, when talking about the 'indiscriminate confiscation of deposits by EU action', he forcefully asserts: 'The EU cannot do this!' The normative force of this hits home when he explains the case in terms of property rights violations, effective judicial protection and the principle of equal treatment.

This adds an emotive dimension to the otherwise solemn proceedings and invokes a sense of injustice for people who have been treated unfairly. Following this presentation, the lawyer from the Commission presents their arguments, and reminds the Court that they were told to only focus on one point: is the Eurogroup an EU body? The implication is that the applicant's lawyer has gone beyond the scope of the legal question in passionately re-elaborating the position of the applicants. This engenders a stark contrast: on the one hand, there is a dry, technical debate between the judges and the Council and Commission lawyers regarding the Eurogroup's status vis-à-vis the EU, and on the other, an impassioned appeal to the judges to consider the injustice of how the depositors have been treated. The meaning being produced here is that EU law is not simply a technical way of articulating how power is constituted at the supranational level but can also be a way to articulate injustice emotively. Observing this in the Grand Chamber adds a tangibility to EU law in that it demonstrates how legal practices can shape our perception of the multiple meanings of EU law; it can at once be abstract and technical but also passionate and urgent.

In sum, these interactions offer insight into how the judges seek to explore the boundaries of EU law and its multiple meanings by posing questions to the lawyers for clarification, which can push the discussion further and generate fresh perspectives on the issue. The judges – including the President of the Court – question the Council lawyer extensively to further understand the political power which the Eurogroup was seen, and acknowledged by judges, to exercise, as well as what this means for the legal reality of European economic governance. A lot of the argumentation centred on clarifying a boundary between a political reality where the Eurogroup is seen to exercise power, and a legal reality, construed by the Treaties, where the Eurogroup is not legally conferred any power, and as the Commission and Council lawyers assert, legally it must be informal according to the Treaties. A related point was therefore how to deal with a political entity – such as the Eurogroup – whose statements can cause damages, and what this means for the EU legal order's commitment to effective judicial protection. What should the Court of Justice do if national avenues for judicial protection are not effective? Especially when, as is the case here, the applicants had apparently tried other avenues to no avail. The point is that in this case the forum of the Court offered insight into how political entities *could* become legally constructed, especially in the reflections over whether there are significant gaps in the EU legal order that the judges could decide to fill or not. In this way, we get insight into judicial proceedings that we do not necessarily grasp by reading the judgement.

https://doi.org/10.1017/elo.2024.25 Published online by Cambridge University Press

5. Conclusion

In this piece, I have demonstrated how an interpretivist approach, which draws on interviews, documents and observations, can give insight into the multivalence of EU law and the stakes for those involved in producing and elaborating it. Using the conceptual tools of knowledge construction, strategies and stakes, and the invocation of meaning, I showed how the social process from the construction to elaboration of EU law entails grappling with not only the emergence of new meanings of existing EU legal arrangements but also confronting how these meanings can shape the actions of EU legal practitioners. Furthermore, these diverse meanings about EU law give us insight into how it is developing as well as how it could develop. In the analysis we see how the EU lawyers of especially the Commission are interested in protecting EU law and attempt to draw the hybrid arrangements of the Eurozone crisis policy response closer to the EU legal order. However, the picture becomes complicated when EU citizens attempt to attach liability to the EU – the Commission, the Council, the ECB, the Eurogroup, and the Union itself – through litigation. While the actions of the EU lawyers serve to protect EU law, just as the Court also reminds the Commission that the Charter will follow it outside the Union, the protection of EU citizens is not realised in this case. This in turn engenders more possible meanings regarding the scope of EU law to protect EU citizens from arrangements that are claimed to be external to the EU. In this way, this case matters for grasping how we understand the ways that EU law serves European society and more importantly how it falls short. In this case, it raises the question of whether there is still a gap in the Union framework regarding effective judicial protection that exists now because of not only the hybrid arrangement between the ESM and the EU – in which liability can become invisible – but also the de facto power of the Eurogroup, which became manifest during the crisis. It is in this way that interdisciplinary approaches to EU law can aid scholars in grasping how EU law is developing but also the diverse possibilities this development holds. Finally, in terms of limitations, the interpretivist approach has a primary focus on subjective perspectives, which make it hard to generalise about broader processes. Similarly, it lacks focus on the elements that structure the social processes and interactions and can be 'blind to power'.[103] These limitations can be dealt with by comparing interpretive studies with broader analyses of legal and political developments and structures, which can then give scholars the possibility to examine the potential connections between the subjective micro-worlds of actors and the macro level of legal and political institutions and global developments.

Data availability statement. The data that support the findings of this study are not available to the public as they are interviews carried out based on anonymity and confidentiality for the respondents.

Acknowledgements. I would like to thank Shai Dothan, Juan Antonio Mayoral Diaz-Asensio and Sabine Anita Mair for inviting me to contribute to this symposium, as well as the excellent comments from the anonymous reviewers.

Funding statement. This research was supported through funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie Grant Agreement No 722826.

Competing interests. The author has no conflicting interests to declare.

[103]I Tavory, 'Interactionism: Meaning and Self as Process' in S Abrutyn (ed) *Handbook of Contemporary Sociological Theory* (Springer 2016) 85–98, at 97.

Cite this article: N Haagensen, 'The multiple meanings of EU law: using sociological interpretivism to make sense of the Eurozone crisis' (2024) *European Law Open* **3**, 402–417. https://doi.org/10.1017/elo.2024.25