Financial Assistance Conditionality and Effective Judicial Protection: *Chrysostomides*

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*, Judgment of the Court (Grand Chamber) of 16 December 2020, EU:C:2020:1028

1. Introduction

The ECJ judgment in *Chrysostomides* is the last in the series of cases that started with *Mallis* and *Ledra* and concerned the conditionality measures that coupled the financial assistance received by Cyprus from the European Stability Mechanism (ESM) in 2013. The background to the case consists of a complex web of facts and decisions taken at multiple levels of authority in the crucial days of the Cyprus financial crisis that risked the country's bankruptcy. The case includes appeals from both sides of the dispute. Although the General Court (GC) dismissed the case *inter alia* finding for the Council, the Council appealed the first instance judgments, on the ground that the GC erred in law when finding that the applicants' actions for damages directed against the Eurogroup were admissible. In its cross-appeal, the Council also asked the ECJ to set aside those parts of the judgments in which the GC dismissed its pleas of inadmissibility insofar as they related to the actions directed against Council Decision 2013/236, which replicated parts of the conditionality found in the Memorandum of Understanding (MoU) signed between Cyprus and the ESM. The applicants at first instance also appealed, asking the Court to set aside the two first instance judgments. The GC had dismissed their claims for non-contractual liability against the EU, the Council, the Commission, the European Central Bank (ECB) and the Eurogroup regarding the conditionality measures that coupled the financial assistance received by Cyprus from the ESM.

The judgment is significant for a number of reasons. First, it marks the conclusion of the attempts by several depositors and shareholders of the Cypriot banks to challenge before EU Courts the haircut of deposits and the resolution of Cyprus' biggest bank in the run-up to the financial assistance provided to the country by the ESM. Second –and perhaps most importantly–, the case afforded an opportunity to the ECJ for the first time to clarify whether the Eurogroup is an "institution" within the meaning of Article 340(2) TFEU whose actions may trigger the non-contractual liability of the Union. In the words of Advocate General Pitruzzella: "The present cases are unquestionably of constitutional significance. They afford the Court an opportunity to clarify the legal nature of the Euro Group, a body that certainly has considerable political influence, but is at the same time the body within the European constitutional and institutional framework that has perhaps aroused the most debate and is the least easy to circumscribe." Third, and relatedly to the previous point, it sheds light on the judicial avenues available to litigants to challenge the conditionality attached to bailout programmes before the EU Courts, including in the case of "prior actions" which were implemented by the recipient country prior to the formal conclusion of the MoU.

In our analysis, we will first focus on the reasoning behind the ECJ's findings regarding the legal nature of the Eurogroup. We will then explore the broader implications of these findings for the accountability of the Eurogroup as one of the main actors in the Economic and Monetary Union (EMU) and, finally, we will look at the justiciability of the actions of the other EU institutions (viz., the Council, Commission, and ECB) in the context of the financial

assistance programme for Cyprus and in the EMU more generally. It will be argued that the ECJ could have instead concluded that the Eurogroup is an "institution" within the meaning of Article 340(2) TFEU. The ECJ's ruling on the admissibility of the case has legal ramifications beyond the contours of the *Chrysostomides* case. The theoretical possibility to hold the other EU institutions involved in financial assistance programmes accountable for their actions does not always suffice to guarantee the effective judicial protection of aggrieved individuals. The added clarity provided by the ECJ regarding the acts or conduct of the other EU institutions that may be admissibly challenged before the CJEU under Article 340 TFEU is nevertheless to be welcomed.

2. Factual and Legal Background

An impressive body of literature already provides an insight into the legal and the factual background of cases that concerned the Cyprus bail-in and preceded *Chrysostomides*. As such, we will not set out all the relevant details, but we will instead note the different elements of financial assistance conditionality which the applicants claimed originated from the EU. The joined cases concern two actions for damages under Article 340 TFEU brought by 51 natural and legal persons against the Council, the Commission, the ECB, and the Eurogroup for their decisions, actions and conduct before, during, and after the agreement of a financial assistance facility package of €9 billion granted to Cyprus by the ESM in 2013. A prerequisite of this agreement was the restructuring of the Cypriot banking sector. In March 2013, the Eurogroup and Cyprus reached a political agreement on the terms of the draft MoU which was the premise for the financial assistance to be given to Cyprus. In a statement issued on 16 March 2013, the Eurogroup welcomed this agreement and referred to the commitment of the Cypriot authorities to take additional measures through the use of domestic resources in order to limit the extent of financial assistance needed.

A key characteristic of the agreement was that the restructuring of the banking sector should not come through the programme money but through the contributions made by the shareholders, bondholders and uninsured depositors of the two largest banks in Cyprus, namely the Bank of Cyprus and Laiki Bank. The debts of the two banks arising from the Emergency Liquidity Assistance (ELA) provided by the Central Bank of Cyprus were also to be repaid. On 22 March 2013 the Cyprus Parliament adopted a law introducing a bank resolution framework, which granted resolution powers to the Central Bank of Cyprus and the Minister of Finance. Utilizing these resolution powers, the Cyprus authorities adopted four Decrees that are immediately relevant to the case at hand: Decrees 96 and 97 respectively provided for the sale of certain operations of Bank of Cyprus and Laiki in Greece; Decree 103 on the bail-in of Bank of Cyprus; and Decree 104 on the sale of certain operations of Laiki. Upon the adoption of these four Decrees, the Commission, the ECB, and the International Monetary Fund (IMF) resumed the discussions with the Cyprus authorities, which had been briefly interrupted when the Cyprus Parliament rejected a proposed levy on bank deposits on 19 March 2013.

In a statement issued on 25 March 2013, the Eurogroup announced that it had reached an agreement with the Cyprus authorities on the key elements of a macroeconomic adjustment programme. On 25 April 2013, the Council of the EU adopted Decision 2013/236 addressed to Cyprus on specific measures to restore financial stability and sustainable growth, and on 26 April 2013, the Commission, acting on behalf of the ESM, and Cyprus representatives signed the MoU containing the terms of ESM assistance of €9 billion. In addition, Cyprus agreed a programme of around €1 billion with the IMF.

The applicants in *Chrysostomides* were depositors or shareholders of Bank of Cyprus and Laiki Bank at the time when the harmful Decrees were given effect. As a result of the measures set out in the Decrees, the value of the applicants' deposits, shares and bonds suffered a substantial reduction. For example, on the basis of Decree 104, certain assets and liabilities of Laiki Bank, including all deposits of less than 100,000 euros, were transferred to the Bank of Cyprus while deposits of more than 100,000 euros remained with Laiki pending its liquidation. Decree 103 (as amended) *inter alia* provided for the reduction of the nominal value of each ordinary share in the Bank of Cyprus from one euro to one cent.

The legal background to the case is comprised of the laws governing the Eurogroup, the ESM, the role of the Commission and the ECB in the ESM, the role of the Council in macroeconomic adjustment programmes, and Cypriot law governing the restructuring of the banking sector in the run-up to the financial assistance package granted to Cyprus in 2013. At the heart of the case lies the question: "who is responsible for the harmful measures?" The applicants' main argument boils down to this: the Cyprus authorities issued the harmful Decrees that caused the alleged damage, but the Decrees originated from actions of the defendants either taken separately or seen together as a "continuum". The applicants claimed that the defendants were liable for obliging Cyprus to adopt the harmful measures as a prerequisite for receiving financial assistance that was indispensable for avoiding bankruptcy; approving the adoption of those measures; and promoting or making permanent the implementation of the measures. This conduct, they argued, took place through the adoption of certain contested acts, which included the Eurogroup Statement of 25 March 2013; the Eurogroup Agreement of 25 March 2013, according to which the financial assistance facility would be granted to Cyprus only if the latter adopted the harmful measures; the decision of the Governing Council of the ECB of 21 March 2013 to demand payment of ELA on 26 March 2013 unless a rescue package was agreed; the ECB decisions to continue the granting of ELA; the negotiation and conclusion, by the Commission, of the MoU of 26 April 2013; and other acts by which the defendants endorsed and approved the harmful measures, namely the Eurogroup statements of 12 April, 13 May and 13 September 2013, the Commission's findings that the measures adopted by the Cypriot authorities complied with conditionality, Decision 2013/236, and the approval by the Commission and the ECB of the payment of various tranches of financial assistance to Cyprus. The applicants' key substantive argument was that the contested acts were adopted without considering the interests of the depositors or shareholders of the banks, leading to the losses that they suffered.

The question of responsibility for the harmful measures implicitly appeared in the previous Cyprus bail-in cases, namely *Mallis* and *Ledra*. The present case, however, is the only one that makes such an elaborate attempt to draw a connection between the EU institutions' measures or conduct and the consequences of the bail-in as ordered by the national Decrees. Moreover, both of the previous cases constituted challenges against the actions of the Commission and the ECB. By way of contrast, the *Chrysostomides* case is the only one that additionally contests under Article 340 TFEU the actions of the Council in the context of financial assistance to Cyprus. It is worth noting that only the GC extensively looked into the substance of the case, while both the Advocate General Opinion and the ECJ (mainly) focused on admissibility.

3. The judgment of the General Court

As regards its jurisdiction to hear the case, the GC clarified that the term "institution" used in Article 340(2) TFEU does not refer only to the EU institutions listed in Article 13(1) TEU but

it also covers “all other bodies established by the Treaty and intended to contribute to achieving the EU’s objectives”. It further reiterated that, following the ECJ judgment in *Ledra*, the EU Courts have jurisdiction to hear an action under Article 340 TFEU for actions of the Commission and the ECB in the framework of the ESM.

The two key jurisdiction questions raised by the case are as follows. The first question concerns the attribution of the harmful measures: were the harmful measures actually attributable to Cyprus or to the defendants in whole or in part? The second question asks more broadly whether certain acts and conduct of the defendants could give rise to non-contractual liability of the Union. In order to establish its jurisdiction to hear the case, the GC examined each of these questions, starting with the potential attributability of the harmful measures to the defendants. It then proceeded to examine each of the contested acts of the defendants, starting with the Eurogroup statement of 25 March 2013. Before looking into the statement, however, the GC had to determine whether the Eurogroup was an “institution” of the EU within the meaning of Article 340(2) TFEU, which was an essential condition for the application of Article 340 TFEU and was contested by the defendants.

The GC noted that the definition of an “institution” under Article 340(2) TFEU is not the same as that under Article 263(1) TFEU. Under Article 263 TFEU, “the relevant criterion relates to the power of the defendant entity to adopt acts intended to produce legal effects vis-a-vis third parties”. The corresponding criteria under Article 340 TFEU are whether the EU entity was established by the Treaties and whether it is intended to contribute to the achievement of the EU’s objectives. Although the case of *Mallis* had already established that the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the EU within the meaning of Article 263 TFEU, the same finding could not be automatically transposed to the current, Article 340 TFEU case.

In turn, the GC succinctly established the admissibility of Article 340 TFEU claims against the Eurogroup. Article 137 TFEU and Protocol No 14 on the Eurogroup provide for the existence, the composition, the procedural rules, and the functions of the Eurogroup. Therefore, the Eurogroup is an EU entity established by the Treaties. The questions discussed in the Eurogroup concern, under Article 119(2) TFEU, the activities of the EU for the purposes of the objectives set out in Article 3 TEU, which include the establishment of an economic and monetary union whose currency is the euro (Art. 3(4) TEU). It follows that the Eurogroup is “a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union”. “The acts and conduct of the Eurogroup in the exercise of its powers under EU law are therefore attributable to the European Union” and “[a]ny contrary solution would 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.”

Having established that the Eurogroup was an EU entity whose acts could be challenged under Article 340 TFEU, the GC proceeded to examine whether the harmful measures could be attributed to either the Eurogroup statement of 25 March 2013 or the alleged Eurogroup Agreement of 25 March 2013. It swiftly dismissed the argument relating to the Eurogroup statement.

That statement gave, according to the GC, in a very generic way an account of certain measures agreed at a political level with Cyprus. The Eurogroup did not take any definitive decision with regard to the granting of financial assistance to Cyprus or the conditions which the latter should satisfy to benefit from such assistance. Following its finding in the earlier case of *Mallis*, the GC reiterated that the impugned Eurogroup statement was of a purely informative nature that informed the public of the existence of certain policy agreements and expressed the Eurogroup's opinion on the likelihood of the grant of financial assistance by the ESM. According to the GC, this held true "despite the existence of statements in [the Eurogroup Statement's] annex which could be regarded as categorical". As a result, the GC concluded that the Eurogroup did not require Cyprus to adopt the harmful measures through the statement.

The GC found that the Eurogroup did not require Cyprus to adopt the harmful measures through its Agreement of 23 March 2013 either. The applicants had argued that the impugned Eurogroup statement drew attention to an agreement concluded on the same day, according to which the Eurogroup members agreed that a financial assistance facility would be granted to Cyprus only if the latter adopted the harmful measures, without any possibility for negotiation. The GC accepted the existence of the said agreement, and noted that "the members of the ESM Board of Governors and the ministers gathered within the Eurogroup are, in principle, and in any event in the present case, the same natural persons. It follows that it is, in practice, impossible to determine a priori whether an 'informal' agreement, such as the agreement on conditionality, was concluded by those natural persons as representatives of the [Member States whose currency is the euro] within the Euro Group or as members of the ESM Board of Governors."

Although the GC recognizes the impossibility of distinguishing the two bodies, it uses a rather formalistic argument to conclude that the agreement on conditionality was concluded by the Eurozone finance ministers as members of the ESM Board of Governors, and not as members of the Eurogroup. It states that the financial assistance facility was granted by the ESM, in accordance with the rules and procedures provided for by the ESM Treaty, and not by the Eurogroup, and that it must therefore be considered that the agreement on conditionality was concluded by the Eurozone ministers as members of the ESM Board of Governors and not as members of the Eurogroup. Since the Eurogroup is not, according to the ESM Treaty, a body with the power to perform tasks on behalf of the ESM, there are no grounds for granting the Eurozone finance ministers meeting as members of the Eurogroup "the power to anticipate or to determine the decisions adopted by the ESM Board of Governors, since that power can be granted to them only as members of that board, even if the agreements relating to the conditions for granting [the financial assistance facility] are decided in the context of a Euro Group meeting".

The GC proceeded to examine the other acts of the defendants and whether the harmful measures could be attributed to them, starting from the decision of the Governing Council of the ECB of 21 March 2013 to demand payment of the ELA on 26 March 2013 unless a rescue package was agreed.

According to the judgment, the press release of the ECB refers to the existence of a decision – rather than a mere declaration of intent – by the Governing Council opposing the maintenance of the level of ELA that was provided at the time by the Central Bank of Cyprus. Even so, the decision itself was only expressing an obligation of results, as the ECB made no reference at all to the harmful measures but merely rendered a possible extension to the reimbursement of ELA subject to the conclusion of an EU/IMF programme ensuring the solvency of the banks concerned. Hence, it could not be deduced from the press release that the ECB required the adoption of the harmful measures.

As regards the applicants' argument that the contested acts of the defendants, which postdated the adoption of the harmful Decrees, were part of a "continuum", whereby each of those acts and conduct was a necessary link in the chain of conditionality and the defendants' refusal to adopt one of those acts would have meant the failure of the harmful measures, the GC examined whether Cyprus could have repealed the harmful Decrees or ceased to implement the harmful measures without infringing certain of the defendants' acts. If Cyprus had not been able to do this, it would have meant that the defendants had obliged it to maintain or continue to implement those measures, and that this maintenance and continued implementation would have led to the alleged harm to the applicants. The GC found that only one of those acts, namely Council Decision 2013/236, included provisions that required Cyprus to maintain or continue to implement one of the harmful measures, namely the conversion of uninsured deposits in Bank of Cyprus into shares (Art. 2(6)(b)) and was thus capable of involving one or more of the illegalities invoked by the applicants. Cyprus had no margin of discretion to revoke the said measure. As such, the maintenance or continued implementation by Cyprus of this harmful measure was, at least in part, attributable to the Union, and the Court had jurisdiction to hear the action for damages insofar as it related to that measure.

The GC then answered the second question regarding the delimitation of its jurisdiction, namely if, irrespective of whether the adoption of the harmful measures or, possibly, their maintenance or continued implementation is attributable to the defendants, certain acts or conduct of the defendants connected with the grant of financial assistance to Cyprus incurred liability on behalf of the EU. It found that it had jurisdiction to hear the case, and that the latter was admissible, insofar as it related to five acts and way of conduct of the EU institutions: the obligation to maintain or implement the conversion to shares of uninsured deposits in Bank of Cyprus under Article 2(6)(b) of Decision 2013/236; the signing by the Commission of the MoU of 26 April 2013; the monitoring by the Commission and the ECB of the application of the harmful measures under Article 13(7) of the ESM Treaty; the alleged communication of precise assurances by the defendants, notably the Eurogroup, that the harmful measures would not be adopted; and the ECB decisions concerning ELA.

The GC proceeded to examine the substance of the applicants' claims on the basis of the three conditions that must be cumulatively satisfied for a successful claim under Article 340 TFEU: the unlawfulness of the conduct alleged against the EU institution, actual harm suffered, and the existence of a causal link between the institution's conduct and the alleged damage.

Regarding the first criterion, the applicants had argued that the defendants had acted in flagrant and serious violation of three rules of EU law: the right to property, the principle of protection of legitimate expectations, and the principle of equal treatment. However, the GC found that none of these rules were violated and hence that none of the defendants had acted unlawfully. Since the first condition of non-contractual liability was not satisfied, the case as a whole was dismissed on the merits.

4. Opinion of Advocate General Pitruzzella

The Advocate General's Opinion focused, at the request of the ECJ, on the two appeals brought by the Council, supported by the Commission, against the judgments of the GC, insofar as these dismissed the objections of inadmissibility raised by the Council regarding the actions for damages brought against the Eurogroup. Advocate General Pitruzzella agreed with the GC that the concept of "institution" within the meaning of Article 340(2) TFEU is broader than that referred to in Article 13(1) TEU, such that it covers all other EU bodies which are established by the Treaties and are intended to contribute to the achievement of the EU's objectives. In order to determine whether or not the Eurogroup may be classified as an "institution" for the purposes of non-contractual liability, it was necessary to understand the legal nature of that body and its place within the EMU institutional framework.

The Advocate General noted the asymmetrical constitutional architecture of EMU and how, in his opinion, "the coordination of the economic policies of the Member States takes place in a sphere that necessarily involves three distinct operational levels: a national level, an EU level and an intergovernmental level". He argued that "[t]he strong interrelationship between measures adopted at EU level and those adopted at intergovernmental level has engendered forms of cooperation … that, being at the boundary between those two levels, might be described as the 'semi-intergovernmental' method." This is "intergovernmental cooperation … that … takes places outside the legal and institutional framework of the European Union, yet it has strong links and interdependencies with both the law and the institutional framework of the European Union". Consequently, "it can become somewhat difficult to draw a clear boundary between actions undertaken at intergovernmental level and actions taken at EU level".

According to the Advocate General, the Eurogroup was established as "an instrument of intergovernmental coordination between true national level and Community level" and is characterized by its informal nature. The reason for introducing this informality is to be found in the two-fold requirement that underlies its creation:

> "On the one hand, the requirement of informality is responsive to concerns relating to the relations between Member States of the euro area and other Member States and to the intention not to diminish the powers of the ECOFIN Council, which is the fulcrum of the European Union's decision-making in the field of economic coordination. That is why it was decided that the Euro Group, as an informal body, should have no decision-making powers of its own… On the other hand, the requirement of informality is responsive to the concern to ensure the ECB's independence… Informality therefore became a precondition of the dialogue between authorities responsible for monetary policy and authorities responsible for the economic policy of EMU."

The Advocate General highlighted that the Eurogroup exerts considerable, yet purely political, influence at all levels of EMU governance. The Eurogroup has no competences of its own, nor the power to penalize any failure on the part of the participants to implement the agreed policy objectives. The agreements reached within the Eurogroup must necessarily be implemented by means of acts adopted in other fora, such as acts of the EU, the Member States, or intergovernmental bodies outside the EU legal framework, such as the ESM.

According to the Advocate General, "it is unquestionable that the Euro Group was first created as an intergovernmental body outside the institutional and legal framework of the European Union". According to the argument, "the Euro Group was in fact instituted by means of an act outside the system of sources of EU law, by a body, the European Council, which, at the time when the Euro Group was created, was outside the institutional framework of the European Union". As such, the Advocate General sought to interpret the relevant EU primary law provisions in order to ascertain whether the Treaty of Lisbon merely recognized the Eurogroup or whether it sought to alter its legal nature. More specifically, he employed a textual, systematic, historical, and teleological interpretation of primary EU law, taking into account the role of the Eurogroup within the particular constitutional architecture of EMU.

First, he noted that "…from a *literal* point of view … both Article 137 TFEU and the terms of Protocol No 14 maintained the description of the body as a 'group' — rather than reclassifying it as a 'council' or 'committee' — and, most importantly, expressly refer to meetings of 'the Ministers of the Member States whose currency is the euro' being conducted 'informally'". He argued that "the express reference to the ministers of the Member States indicates that, when they take part in meetings of the Euro Group, the participants are acting in their national capacity as ministers". He further argued that that reading was supported by the next sentence of Article 1 of Protocol No 14, which states that the meetings are to discuss "questions related to the *specific responsibilities they share* with regard to the single currency". "That wording makes it clear that the responsibilities addressed in the meetings are responsibilities which remain with the individual ministers, by reason of their national powers, rather than responsibilities which are transferred to the forum in which they are meeting...".

Second, from a *schematic* point of view, the wording used in Article 137 TFEU and Protocol No 14 is "very plainly different", according to the Advocate General, from that used in other Treaty provisions. The Advocate General distinguished between the wording used in relation to the Eurogroup and that used for the composition of the Council in Article 16(2) TEU, according to which "the Council shall *consist* of a *representative* of each Member State at ministerial level" (his emphasis). He argued that "[t]he provision concerning the Council thus refers not to ministers acting in their national capacity, but to the Council as an EU institution consisting of the representatives within that body of each Member State." Furthermore, the wording used in Article 137 TFEU and Protocol No 14 is also "plainly different" from that used in, for example, Articles 136(2) and Article 138(3) TFEU, which stipulate that "only *members of the Council representing Member States* whose currency is the euro shall take part in the vote" (his emphasis), as well as other provisions from EU primary and secondary law.

Third, from a *historic* viewpoint, the Advocate General argued that a perusal of the acts of the Convention on the Future of Europe revealed no intention of including the Eurogroup

within the EU institutional framework, but rather indicia to the contrary. In this connection, he drew attention to a rejected Commission proposal to establish an "Ecofin Council for the euro area" that would have brought together only the Ministers of Finance of the Member States of the Euro area and had decision-making powers in the spheres of common interest to those Member States; and the accepted "French-German contribution on Economic Governance", which led to the recognition of the Eurogroup in Protocol No 14.

Fourth, from a *teleological* viewpoint, the Advocate General argued that it was apparent from the analysis of its origins and function within the constitutional architecture of EMU that the reference to the Eurogroup in Article 137 TFEU and Protocol No 14 was intended as a formal recognition of a pre-existing entity outside the EU institutional framework. By means of that recognition, so the argument goes, the EU institutions (viz., the Commission and the ECB) were also empowered, formally, by provisions of primary law, to participate in that assembly. "Moreover, without any autonomous decision-making body for the Member States of the euro area having been created, that recognition made it possible, while meeting the requirements of the other Member States, to preserve undiminished the Council's fundamental role in the field of economic coordination." In his opinion, "[e]xternality to the legal framework of the European Union allows the Euro Group to maintain informality". "The Euro Group operates … as a coordination mechanism, as a 'bridge' between the different levels in which EMU governance takes place, namely the national level, the EU level … and the intergovernmental level…". The conclusion that the Eurogroup is external to the EU institutional framework was not called into question by the fact that that body is mentioned in various provisions of secondary EU law. "Those provisions do not, in fact, define any conferral of specific powers on the Euro Group, but enable it to receive information and to conduct informed discussions...".

The Advocate General concluded that:

> "...[T]he Euro Group must be considered the embodiment of a particular form of intergovernmentalism that is present within the constitutional architecture of EMU. Created as a purely intergovernmental body within the complex EMU framework for the coordination of Member States' economic policies, it provides a bridge between the State sphere and the EU sphere. The Treaty of Lisbon recognised the existence of the Euro Group outside the EU legal framework and formalised the involvement of the Commission and the ECB in its work. It did not, however, intend to alter its legal nature, which is closely linked to its function as a bridge between the Member States and the European Union."

As such, the EU Courts had no jurisdiction to hear actions for damages brought against the Eurogroup under Article 340(2) TFEU, in respect of possible losses caused by allegedly harmful actions taken by it. The GC judgments were vitiated by an error of law and therefore should be set aside insofar as they held that the EU Courts had jurisdiction to hear actions for damages brought against the Eurogroup.

The conclusion regarding the legal nature of the Eurogroup did not undermine, said the Advocate General, the full application of the principle of effective judicial protection, nor did it contradict the notion of a Union based on the rule of law. "Indeed, individuals are ensured

judicial protection by the fact that they can bring an action in non-contractual liability against institutions which adopt acts and conduct giving effect to and developing on the conclusions of the Euro Group." As also stated earlier in his Opinion, "political agreements reached within the Euro Group, in the absence of any formal powers, will be crystallised and given effect by means of acts and activities of other bodies either within the European Union or outside its legal framework". Provided that the conditions for non-contractual liability are fulfilled, the EU can still be held liable for actions with which the Council or the Commission implemented a decision of the Eurogroup. In this connection, the Advocate General pointed out that the applicants at first instance were able to bring proceedings against the Council seeking compensation in respect of the adoption of Decision 2013/236 and against the Commission and the ECB in respect of their monitoring of the implementation of the macroeconomic adjustment programme pursuant to the same Decision. They also brought proceedings, in accordance with the principles set out in *Ledra*, against the Commission and the ECB seeking compensation for losses suffered as a result of allegedly unlawful conduct linked to the negotiation and signing of the MoU. The Advocate General added that:

> "Alongside such remedies, an action for damages brought against the Euro Group would add very little. Even if such an action were admissible in accordance with [Article 340(2) TFEU], its purpose would in any event be to impute to the European Union any harmful conduct allegedly adopted by the Euro Group. It is clear that the Euro Group does not have legal personality and that the European Union and the ECB alone possess legal personality. Consequently, any harm caused by the conduct of the Euro Group would be imputed to the European Union. The outcome does not change if the European Union may ... be called upon to answer for the conduct of the Council or the Commission in implementing decisions of the Euro Group."

Last, as regards the Commission's participation in Eurogroup meetings, the Advocate General underlined, by reference to the *Pringle* judgment, that the Commission promotes the general interest of the Union. "Accordingly, when the Commission participates in meetings of the Euro Group, it must not contribute, through its conduct, to an infringement of the EU rules." The Advocate General emphasized, by reference to the *Ledra* judgment, that even when acting outside the EU framework, the EU institutions must scrupulously observe EU law, including the EU Charter of Fundamental Rights. "The Commission's mandatory participation in Euro Group meetings, at which it retains its role as guardian of the Treaties, as provided for by Article 17(1) TEU, and the functions which it fulfils at those meetings enable it to check that the conduct of the Euro Group's activities is consistent with EU law and, in particular, the Charter." Hence, in "exceptional circumstances", the harmful consequences resulting from the Commission's failure to check the consistency of a Eurogroup's decision with EU law may be attributed to the Commission. That increases, in the opinion of the Advocate General, the effectiveness of the judicial protection which individuals are guaranteed.

5. The judgment of the European Court of Justice

The ECJ agreed with both the GC and the Advocate General that the term "institution" within

the meaning of Article 340(2) TFEU encompasses all the EU bodies, offices and agencies that have been established by or under the Treaties and are intended to contribute to the achievement of the EU's objectives. However, it sided with the Advocate General, in that it held that the GC erred in law in holding that the Eurogroup was an EU body established by the Treaties and that an Article 340 TFEU action could be brought against it. The Council's appeals were upheld and the judgments under appeal were set aside inasmuch as they dismissed the pleas of inadmissibility raised by the Council regarding the actions of the applicants at first instance directed against the Eurogroup.

The ECJ first noted that the Eurogroup was formally established by the resolution of the European Council of 13 December 1997. It agreed with the Advocate General that the Eurogroup was created as an intergovernmental body outside the institutional framework of the EU. Although Article 137 TFEU and Protocol No 14 formalized the existence of the Eurogroup and the participation of the Commission and the ECB at its meetings, they did not alter its intergovernmental nature. Second, as both the resolution of the European Council and Article 1 of Protocol No 14 expressly state, and as the ECJ held in *Mallis*, the Eurogroup is characterized by its informality. This informality can be explained, according to the ECJ, by the purpose pursued by the Eurogroup's creation of endowing EMU with an instrument of intergovernmental coordination but without affecting the role of the Council, which is the fulcrum of the EU's decision-making process in economic matters, or the independence of the ECB. Third, the Eurogroup does not have, said the ECJ, any competence of its own in the EU legal order, as Article 1 of Protocol No 14 states that its meetings are to take place, when necessary, to discuss questions related to the specific responsibilities that the ministers owe solely on account of their competence at national level.

This conclusion is not called into question, said the ECJ, by the arguments of the applicants at first instance regarding infringement of Article 47 of the EU Charter of Fundamental Rights (Right to an effective remedy and to a fair trial). Given that the Eurogroup has neither competences of its own in the EU legal order nor the power to punish a failure to comply with the political agreements concluded within it, those agreements are given concrete expression and implemented by means, in particular, of acts and action of the EU institutions. Individuals may thus bring before the EU judicature an action to establish the non-contractual liability of the EU against the Council, the Commission and the ECB in respect of the acts or conduct that those EU institutions adopt following such political agreements. The ECJ pointed in that regard to the actions brought by the applicants at first instance against the Council in respect of measures specified in Council Decision 2013/236, as well as against the Commission and the ECB on account of their alleged unlawful conduct at the time of the negotiation and signing of the MoU. Drawing on *Ledra*, the ECJ added that the Commission retains, in the context of its participation in the activities of the Eurogroup, its role of guardian of the Treaties, such that any failure on its part to check that the political agreements concluded within the Eurogroup are in conformity with EU law is capable to result in non-contractual liability of the EU under Article 340(2) TFEU.

The effects of the ECJ's findings regarding the Eurogroup rippled through the remainder of the judgment. In their own appeals, the applicants at first instance had complained that the GC erred in holding that "the agreement on conditionality" was concluded by the finance ministers as members of the ESM's Board of Governors, and not as members of the Eurogroup.

However, even if that had been true, the ground of appeal would not have succeeded in any event, because the Eurogroup is *not* an EU body established by the Treaties whose acts and conduct are capable of giving rise to non-contractual liability of the EU. Furthermore, by their second, third and fourth grounds of appeal, the appellants had argued that the various acts and actions of the defendants were a "continuum", in which each of them was a necessary condition for the maintenance or continued implementation of the harmful measures by Cyprus. Insofar as the arguments set out by the appellants related to the Eurogroup statements of 12 April, 13 May and 13 September 2013, they were swiftly rejected by the ECJ as ineffective, for the same reasons stated above. The same fate awaited the fifth ground of appeal put forward by the appellants in respect of the content of the annex to the Eurogroup statement of 25 March 2013. The remaining grounds of appeal, pleading an infringement of the right to property, the principle of the protection of legitimate expectations and the principle of equal treatment, respectively, largely reproduced arguments that were set out before the GC and were equally dismissed by the ECJ.

Having dismissed the appeals by the applicants at first instance in their entirety, the ECJ decided to give itself final judgment in the matter. It upheld the Council's pleas of inadmissibility insofar as they related to the actions of the applicants at first instance directed against the Eurogroup. It also found that Council Decision 2013/236 did not deprive the Cypriot authorities of a significant margin of discretion for the purpose of defining the specific rules for the conversion of the uninsured deposits in Bank of Cyprus into shares. Contrary to the finding of the GC, the ECJ held that the harm allegedly suffered by the appellants on account of that conversion could not have resulted from the relevant provision of the Council Decision (Art. 2(6)(b)) but from the implementing measures adopted by Cyprus. Consequently, the pleas of inadmissibility raised by the Council in its cross-appeals were upheld, such that the actions of the appellants directed against Decision 2013/136 were dismissed as inadmissible.

6. Commentary

It would not be an exaggeration to say that the most notable part of the judgment concerns the admissibility of the case and especially the question of the justiciability of actions of the Eurogroup. In this regard, the judgment provides the Eurogroup with full immunity against actions for damages under Article 340 TFEU. Unlike the Advocate General's Opinion, the text of the judgment falls short of explicitly declaring that the Eurogroup falls outside the EU legal order. Yet it implies as much by stating that the formalization of the Eurogroup in EU primary law "did not alter its intergovernmental nature in the slightest". In the subsequent parts of this section, we will offer three comments about the findings of the Court regarding the Eurogroup and effective judicial protection of individuals in the context of financial assistance packages. The first concerns the rationale behind the Court's findings about the legal nature of the Eurogroup. The second concerns the wider implications of these findings regarding the accountability of the Eurogroup as one of the main actors in the EMU. The third goes beyond the justiciability of the Eurogroup's actions, by commenting on the approach of the ECJ towards the role of EU institutions (Council, Commission, and ECB) and the justiciability of their actions in the decisions about the restructuring of the Cypriot banking sector and in the EMU more generally.

6.1. *The Eurogroup's immunity from EU judicial accountability mechanisms*

As we saw in Section 5, the ECJ relied on three arguments in finding that the Eurogroup is not an EU entity established by the Treaties for the purpose of an Article 340 TFEU action: that the Eurogroup was created outside the Treaties, that it is an informal body, and that it lacks EU competence to act.

With regard to the first argument, the premise of the Court's argument is in the origins of the Eurogroup outside the institutional framework of the EU. The ECJ noted that the Eurogroup was formally established by the resolution of the European Council of 13 December 1997. It further held that the subsequent recognition of the Eurogroup in Article 137 TFEU and Protocol No 14 which is annexed to the Treaties did not change the Eurogroup's intergovernmental nature. Yet the Court did not explain why the recognition of the Eurogroup by the Treaties would not bring such a change to the nature of the group. If the recognition of the Eurogroup in the Treaties did not bring it within the EU legal order, what purpose did it serve beyond formalizing the existence of the Eurogroup? And why would the Treaties formalize the existence of a group that is both "informal" and outside the EU legal order?

The Court does not provide any explanation for the finding that Article 137 TFEU and Protocol No 14 did not alter the Eurogroup's intergovernmental nature in the slightest. Instead, it switches gears and notes that it has previously held in an Article 263 TFEU action in *Mallis* that the Eurogroup cannot be equated with a configuration of the Council. The only possible explanation could be gleaned from the Court's reference to various parts from the Advocate General Opinion, which is however situated at an earlier point in the Court's ruling. The Court refers selectively to the arguments provided by the Advocate General as to why, in his opinion, the Treaty of Lisbon merely recognized the Eurogroup but did not seek to alter its legal nature.

The most controversial parts from the Advocate General's Opinion are not cited by the ECJ at this juncture. For example, the Advocate General had argued, from a *schematic* point of view, that the wording used in Article 137 TFEU and Protocol No 14 is "very plainly different" from that used for the composition of the Council in Article 16(2) TEU, according to which "[t]he Council shall *consist* of a *representative* of each Member State at ministerial level", or from that used in Articles 136(2) and 138(3) TFEU, which stipulate that "only *members of the Council representing Member States* whose currency is the euro shall take part in the vote". According to the argument, the finance ministers are exercising their own national powers in the Eurogroup and are not acting as members of an EU body. The wording used in the aforementioned Treaty provisions is indeed different but, in reality, there would be no reason for the drafters of the Treaty of Lisbon to use similar wording in either Article 137 TFEU or Protocol No 14. Unless the Eurogroup is meeting in an inclusive format, thereby also comprising the Ministers of Finance from non-Euro area Member States, it only consists of the Ministers of Finance from Euro area Member States (first sentence of Art. 1), such that no distinction or further specification of that is needed. Even more so, the very webpage dedicated to the Eurogroup refers to "Eurogroup members" when introducing the finance ministers.

The Advocate General had further argued, from a *historic* viewpoint, that "a perusal of the acts of the Convention on the Future of Europe ... reveals no intention of including the Euro Group within the EU institutional framework, but rather indicia to the contrary".

In this connection, he drew attention to a rejected Commission proposal to establish an "Ecofin Council for the euro area" that would bring together only the Ministers of Finance of Euro area Member States and have decision-making powers in the spheres of common interest to those States; and the accepted "French-German contribution on Economic Governance", which led to the recognition of the Eurogroup in Protocol No 14. However, the fact that the Eurogroup is not a Council configuration does not in and of itself mean that it is situated outside the EU legal order. Furthermore, neither of these two documents mentions that, in their authors' thinking, the Eurogroup is (or should be) outside the formal confines of the EU Treaties.

Instead, the Court is drawing specifically on the *literal* and *teleological* interpretation that was provided by the Advocate General. These references to his Opinion could be said to provide an explanation for the Court's conclusion that Article 137 TFEU and Protocol No 14 did not alter the Eurogroup's intergovernmental nature. It will be recalled that the Advocate General noted from a literal point of view that both Article 137 TFEU and Protocol No 14 maintained the description of the body as a "group" rather than reclassifying it as a "council" or "committee" and that they refer to meetings of the Ministers being conducted "informally". He argued that the express reference to the Ministers of the Member States indicates that, when they take part in the Eurogroup meetings, they are acting in their national capacity as ministers, and that this was supported by the subsequent wording of this provision, which states that the meetings are to discuss "questions related to the *specific responsibilities they share* with regard to the single currency". "That wording makes it clear that the responsibilities addressed in the meetings are responsibilities which remain with the individual ministers, by reason of their national powers, rather than responsibilities which are transferred to the forum in which they are meeting...". In our view, this interpretation is not straightforward in textual terms, namely it does not follow from the wording of the aforementioned provisions that the participants are acting in their national capacity as ministers. The ministers are to meet "to discuss questions related to the specific responsibilities they share with regard to the single currency" (second sentence of Art. 1) because their economic policies are "a matter of common concern" (Art. 121(1) TFEU). They shall conduct these with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 TEU (Art. 120 TFEU).

Furthermore, it will be recalled that the Advocate General noted, from a teleological viewpoint, that it is apparent from the analysis of the origins and function of the Eurogroup within the constitutional architecture of EMU that the reference to it in Article 137 TFEU and Protocol No 14 is intended as a formal recognition of a pre-existing entity outside the EU institutional framework.

In his view, this recognition also empowered the Commission and the ECB to participate in the operations of the Eurogroup; it became compulsory for the Commission to participate and it became compulsory to invite the ECB. Without any autonomous decision-making body for the Euro area Member States having been created, that recognition made it possible, while meeting the requirements of the other Member States, to preserve undiminished the Council's fundamental role in the field of economic coordination. Yet, whatever the origins and function of the Eurogroup may have originally been, they do not seem to warrant the conclusion that, following the entry into force of the Lisbon Treaty, the Eurogroup remains an entity situated *outside* the EU institutional framework. It is instructive that the very webpage of the Eurogroup refers to Article 137 TFEU and Protocol No 14 as the "legal base" of the Eurogroup.

It is our understanding that the Treaty of Lisbon does not refer to any other body that is situated outside the EU institutional framework, other than national parliaments, to the same extent as it refers to the Eurogroup. Even national parliaments are in a way brought into the legal framework of the Union and are expected to contribute actively to its good functioning (Art. 12 TEU and Protocol No 1). One might draw an analogy between the legal framework governing the Eurogroup and Article 136(3) TEU and argue that the latter also recognizes the existence of a body that is outside the EU legal order, namely the ESM, as the permanent financial assistance facility of the Eurozone. Article 136(3) TFEU provides that the Eurozone Member States "may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole". In doing so, it confirms the existence of a national competence. However, Article 136(3) TEU does not mention the ESM. Nor does it mention who will be sitting in the decision-making bodies of the ESM, or how the ESM Members will meet. In fact, Article 136(3) TFEU does not even mention a "body". It only refers to a "stability mechanism". By way of contrast, Article 137 TFEU provides the legal basis for the Eurogroup meetings, while Protocol No 14 sets out the practical arrangements for those meetings. If anything, these nuances preclude equating the Lisbon Treaty provisions on the Eurogroup with the one on the ESM, or indeed the legal nature of the Eurogroup with the intergovernmental nature of the ESM.

The second argument provided by the Court focuses on the Eurogroup's informality. The rationale of the judgment here is that informality is necessary to ensure that the Eurogroup does not affect the role of the Council, which is the formal decision-maker in economic matters, or the independence of the ECB. However, it is not clear from the judgment why the informal nature of the Eurogroup means that the latter is not an EU entity established by the Treaties for the purposes of the EU's non-contractual liability. This is more especially so since the Court does not explicitly refer to the passage from the Advocate General's Opinion which links the Eurogroup's externality to the EU legal framework to its informality. As such, we cannot be sure whether the Court endorses the Advocate General's Opinion that externality allows the Eurogroup to maintain informality and thus to operate "as a forum for political discussion in which complex interests may be reconciled and compromises reached between the Member States whose currency is the euro."

In any event, it could be questioned whether externality from the EU legal order is a necessary precondition for informality.

Even if we were to accept that the Eurogroup is simply a coordination mechanism between the finance ministers of the Eurozone, it is still unclear why externality is necessary for a forum in which Eurozone Member States discuss complex interests and attempt to find compromises, as the Advocate General claims. Complex cases are reconciled and compromises are reached between Member States also in Council, without mandating externality or informality. In reality, insofar as the relevant Treaty provisions which confer powers on the Council in this area remain unchanged, formally recognizing the Eurogroup by means of the Lisbon Treaty would not affect the role of the Council as the fulcrum of the EU's decision-making process in economic matters. It is perfectly possible to recognize the existence of an entity *within* the EU institutional framework which would not (and indeed does not) encroach on the powers of the Council.

It is also unclear why the informal nature of the Eurogroup is necessary to preserve the ECB's independence. The single paragraph devoted to this aspect of the judgment by the ECJ does not provide any further clarity on this point than the Advocate General's Opinion. The Eurogroup would undertake to respect the ECB's independence, just like any other EU institution, body, office, or agency (Art. 130 TFEU). It is not explained why the ECB's interaction with other formal EU institutions (such as the Council and the European Parliament) does not affect its independence. Taken to its logical conclusion, this argument would mean that further fiscal integration (possibly accompanied by the creation of a European finance ministry of sorts) would endanger the ECB's independence. Yet the relevant literature regards the lack of a counterpart in economic policy at the EU level (i.e. the "institutional loneliness" of the ECB) as a danger to the ECB's independence.

The Court's third argument is that the Eurogroup does not have any competence of its own in the EU legal order, as Article 1 of Protocol No 14 merely states that its meetings are to take place, when necessary, to discuss questions related to the specific responsibilities that the ministers share with regard to the single currency – responsibilities which, in the Court's assessment, they owe solely on account of their competence at national level. On this point, the Court seems to be endorsing the argument of the Advocate General that the participants in the Eurogroup are acting in their national capacity as ministers, and that the responsibilities addressed in the meetings are responsibilities which remain with the individual ministers, by reason of their national powers, rather than responsibilities which are transferred to the forum in which they are meeting.

However, it is simply not true that the Eurogroup has no powers of its own in the EU legal order. According to "two-pack" legislation (Regulation 473/2013), the Euro area Member States shall submit annually to the Commission and to the Eurogroup a draft budgetary plan for the forthcoming year (Art. 6(1)). This is *prior* to the budget being approved by the respective national parliament. The Commission shall adopt an opinion on the draft budgetary plan (Art. 7(1)), and the Eurogroup shall discuss opinions of the Commission on the draft budgetary plans and the budgetary situation and prospects in the Euro area as a whole on the basis of the overall assessment made by the Commission (Art. 7(5)). The Euro area Member States shall further report *ex ante* on their public debt issuance plans to the Eurogroup and the Commission (Art. 8(1)).

Furthermore, the Eurogroup forms part of the accountability mechanisms in the Banking Union.

More specifically, the Single Supervisory Mechanism (SSM) Regulation provides that the ECB shall submit on an annual basis a report to the Eurogroup on the execution of the tasks conferred on it by this Regulation (Art. 20(2)). The Chair of the Supervisory Board of the ECB shall present that report to the Eurogroup in the presence of representatives from non-Euro area Member States participating in the Banking Union – a structure described in the literature as the "Eurogroup+" (Art. 20(3)). Moreover, the Chair of the Supervisory Board of the ECB may, at the request of the Eurogroup, be heard on the execution of its supervisory tasks (Art. 20(4)) and the ECB shall reply orally or in writing to questions put to it by the Eurogroup (Art. 20(6)). This bears the question of whether secondary EU law may confer powers or tasks to non-EU bodies, especially to the point of involving those bodies in the accountability mechanisms in the Banking Union. It may be that the Court interprets the word "competence" in a very narrow manner that excludes what we described here as powers related to draft budgetary plans or holding the ECB accountable in the SSM. Unless this is the case, it is clear that the finance ministers of the Euro area are given tasks in EU law, as was also acknowledged by the Advocate General in his Opinion.

6.2. *The wider implications of the judgment on the legal character of the Eurogroup*

We saw in Section 3 that the earlier judgment in *Mallis* had already established that actions for annulment under Article 263 TFEU against the Eurogroup are inadmissible. Following *Chrysostomides*, the CJEU cannot hear a claim for compensation that is directed against the EU and based on the unlawfulness of an act or conduct of the Eurogroup. As such, the combined effect of the Court's case law in this area is to exempt the Eurogroup from two key mechanisms of judicial accountability established in the Treaties.

As a result of the Court's judgments in *Mallis* and *Chrysostomides*, the role of the Eurogroup under the EU Treaties falls to be distinguished from the role of the Board of Governors under the ESM Treaty. Commenting on *Mallis*, Craig had already pointed out these "twin legal realities", these being respectively the Eurogroup's power under the ESM and under the EU Treaties, "each of which is treated as hermetically sealed insofar as legal accountability is concerned." According to the ECJ, the Eurogroup does not have the power under the EU Treaties to adopt the harmful measures. Instead, it is the ESM's Board of Governors which, according to Article 13 ESM Treaty, has the power to approve the conditions attached to the financial assistance granted to a Euro area Member State.

The above argument of the Court is largely formalistic. It masks the centrality of the Eurogroup to, and its relative autonomy within, the EU decision-making process in this area. The literature has identified a mismatch between the *de jure* and *de facto* role of the Eurogroup. To borrow from Craig's critique of the *Mallis* ruling, this argument is "predicated on a formalistic view of the Eurogroup and its place within the EU institutional architecture, which bears little relation to reality". This reality was glimpsed in both the *Mallis* and *Chrysostomides* cases. Not only did the Eurogroup broker the agreement on a financial assistance programme for Cyprus, but its statement of 25 March 2013 was determinative of the conditions on which financial assistance would be granted. The impugned Eurogroup statement did not merely express the finance ministers' opinion on the likelihood of the grant of financial assistance by the ESM. It was those same persons that would later be called upon as members of the ESM Board of Governors to decide on the grant of financial assistance to Cyprus.

It would have been possible for the Court to rule that the Eurogroup is an "institution" for the purposes of Article 340(2) TFEU and that it adopted the impugned measures in the exercise of the powers assigned to it by EU law, but that one of the conditions for the EU's non-contractual liability was not fulfilled. For example, it could be the case that the conduct alleged against the Eurogroup was not unlawful. It could be the case that the applicants at first instance did not incur damages or losses. It could have further perhaps been concluded that there was no causal link between the conduct of the Eurogroup and the damage complained of by the applicants. Instead, the Court's conclusion that the Eurogroup was not an EU body established by the Treaties and that therefore it could not be regarded as an "institution" for the purposes of the EU's non-contractual liability obviated the need to examine the relevant substantive issues raised by the applicants. A different argument would have been –following the ECJ's formalistic logic– that the impugned measures were not adopted by the Eurogroup in the exercise of its powers under EU law, as demanded by the CJEU's test for establishing the EU's non-contractual liability for the actions of an "institution" within the meaning of Article 340(2) TFEU.

The Court's conclusion has legal consequences beyond the contours of the *Chrysostomides* case and of the Cyprus bail-in as such. The finding that the intergovernmental nature of the Eurogroup makes it immune to judicial accountability mechanisms in the Treaties sits rather uncomfortably with the fact that other intergovernmental bodies that are not mentioned in the Treaties wield significant power in the EMU. Within the EMU constitutional architecture, the body with the closest legal status to the Eurogroup is arguably the Euro Summit, which mirrors the Eurogroup at the level of the Heads of State or Government. The Euro Summit, however, was formalized not by the EU Treaties but by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), which is an intergovernmental agreement concluded outside the framework of EU law. According to Article 12 TSCG, "The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings." There could be instances in which litigants wish to bring an action against acts or conduct of the Euro Summit. The Euro Summit is not established *by* the EU Treaties, therefore the possibility of it triggering the non-contractual liability of the EU would seem out of the question. However, it could be argued that the Euro Summit is established *under* the EU Treaties, as the much broader formulation used by the ECJ for defining "institutions" within the meaning of Article 340(2) TFEU would seem to allow. It has been argued in the relevant literature that, notwithstanding the fact that the Euro Summit was formalized by the TSCG, "[i]t is indeed possible to read later European Council conclusions as endorsing the provisions in the TSCG, and as mandating the Euro Summit to adopt more formal rules of procedure." If this reasoning were to be accepted by the CJEU, the Euro Summit could be considered an EU entity established by or under the Treaties for the purposes of non-contractual liability – an outcome, however, which, following *Chrysostomides*, seems rather unlikely.

The finding that the Eurogroup is not subject to any judicial avenues of accountability might have been easier to digest in the early days of its operation than it is now in light of the differences between its *de jure* and *de facto* roles, as mentioned above, and in light of its new powers in the Banking Union as highlighted in Section 6.1. This leaves us with the question of

whether there are any avenues for the Eurogroup to be held judicially accountable for its actions at all. Since the ECJ judgment practically equates the Eurogroup with the ESM Board of Governors, are there any ways for the members of the Eurogroup to be held accountable for their actions in the ESM? After all, the Eurogroup may be "changing the nameplate and reconvening as the Board of Governors of the ESM … [b]ut it is still the same 19 finance ministers of the euro area around the same table". The ESM Treaty gives a role to the CJEU only when an ESM Member contests the internal resolution of disputes (with another ESM Member or the ESM itself) on the interpretation and application of the ESM Treaty or the compatibility of ESM decisions with the ESM Treaty. Such disputes should be submitted as preliminary reference requests to the ECJ. On the basis of the ESM Treaty, private litigants have no standing to challenge the decisions of the ESM organs. Furthermore, since the ESM Treaty clearly falls outside the scope of EU law, none of these provisions allows the CJEU to hold the finance ministers accountable for their decisions in the context of the ESM in any way similar to what is provided by Articles 263 and 340 TFEU.

It was hoped that the revision of the ESM Treaty would have increased the accountability of the ESM, including its legal accountability, by bringing the ESM within the EU legal order. In 2017, the Commission brought forward a proposal for a Regulation on the establishment of the European Monetary Fund (EMF), within the EU's legal framework, that would take over the role of the ESM. The proposal did not include specific provisions on the accountability of the Eurogroup as such, but it required that the decisions of the Eurogroup acting as the Board of Governors of the EMF be approved by the Council of the EU acting by qualified majority (Art. 3). This would have allowed a legal challenge under Articles 263, 267 or 340 TFEU against the Council for decisions taken by the EMF. The proposal further included provisions on the accountability of the EMF to the European Parliament and the Council (Art. 5) and to national parliaments (Art. 6). It was, however, superseded by plans for reform which maintain the ESM outside the scope of EU law. The Agreement Amending the ESM Treaty was signed in January and February 2021 and is currently awaiting ratification by the parliaments of the Eurozone Member States. Although the revised ESM Treaty enhances the role of the Eurogroup as the ESM Board of Governors by granting it the power to decide to grant a backstop facility to the Single Resolution Board, it maintains the same limited role for the CJEU as the current ESM Treaty.

6.3. *The ECJ's position on financial assistance conditionality: an epilogue*

Beyond the significance of the case regarding the legal status of the Eurogroup, the judgment is also notable for adding to the body of litigation contesting the financial assistance packages granted to Member States during the financial crisis. It signals the epilogue to the Cyprus bail-in litigation before the EU Courts thus going to the heart of the question whether the applicants were ensured effective judicial protection.

According to the ECJ, the finding that the Eurogroup is not an EU entity established by the Treaties is not detrimental to the effective judicial protection of individuals in the context of financial assistance conditionality cases.

The ECJ explicitly disagreed with the position of the GC that the Eurogroup should be subject to judicial scrutiny *inter alia* because of considerations relating to a "Union based on the rule of law" and specifically the requirement of observance of the principle of effective judicial protection. The judgment seems to be premised on the rationale that the Eurogroup does not have any competence of its own in the EU and cannot punish a failure to comply with the political agreements concluded in its meetings. Given this lack of powers, the Eurogroup agreements are given concrete expression and are implemented by acts and actions of the EU institutions. As such, individuals may bring before the EU Courts an action to establish non-contractual liability of the EU against the Council, the Commission, and the ECB in respect of the acts or conduct that they adopt following such political agreements. In addition, individuals may rely on the *Ledra* principle, so that any failure on the part of the Commission to check that the political agreements concluded within the Eurogroup are in conformity with EU law may result in non-contractual liability of the EU being invoked under Article 340(2) TFEU.

We saw that the applicants in *Chrysostomides* attempted to establish liability for the three EU institutions mentioned above. Hence, the judgment itself makes for a good case study of the possibility of ensuring effective judicial protection through this avenue as an alternative to holding the Eurogroup judicially accountable thus not jeopardizing the rule of law, as suggested by the ECJ. The commentary below will focus on the arguments of the ECJ regarding the potential liability of the Council, the Commission and the ECB under Article 340 TFEU. It explores the added value of the judgment to the precedents established by *Mallis* and *Ledra* when it comes to the effective judicial protection of individuals that wish to contest financial assistance conditionality.

Starting from the potential liability of the Council, *Chrysostomides* is the first case in which applicants attempted to challenge under Article 340 TFEU the actions of the Council in the context of the Cyprus financial assistance programme. We saw that the GC held that an Article 340 TFEU claim was admissible against the Council regarding specific measures that were adopted under the three-year macroeconomic adjustment programme expressly specified in Decision 2013/236 and implemented by Cyprus. The ECJ agreed with the GC's finding that Article 2(6)(b) of the Decision impliedly required the Cyprus authorities to maintain or continue to implement the conversion of uninsured deposits in the Bank of Cyprus into shares. This is notable for two reasons. First, this is, to our knowledge, the first time that the ECJ confirms the possibility to contest the actions of the Council regarding the establishment of a macroeconomic adjustment programme coupling financial assistance by the ESM. *Mallis* and *Ledra* concerned the actions of the Commission and the ECB thus not giving the opportunity to the ECJ to rule on this point.

Second, the ECJ made a significant clarification regarding the link between the conduct of the Council and financial assistance conditionality measures, namely that, in principle, such measures can be attributed to the Council regardless of the fact that the corresponding Council Decision (in this case, Decision 2013/236) *postdated* the adoption of the harmful measures. As such, the ECJ recognized that the intergovernmental and the EU spheres of action are related in the context of conditionality attached to financial assistance granted to a Eurozone Member State.

The significance of this clarification may be, perhaps, more important in the context of the Cyprus bail-in crisis than in future cases whereby applicants may seek to contest financial assistance conditionality measures under Article 340 TFEU. This is because the "two-pack" Regulation, which was adopted after the Cyprus bail-in, aimed to codify the link between MoUs signed outside the EU legal order and the actions of EU institutions by enshrining in EU law "[f]ull consistency between the Union multilateral surveillance framework established by the TFEU and the possible policy conditions attached to financial assistance." Having said that, and notwithstanding the fact that Council Decision 2013/236 was not a "two-pack" Decision adopted under Article 7 of Regulation 472/2013, we assume that the same judicial finding would apply in the case of "prior actions" whose maintenance or continued implementation was required by such "two-pack" Decisions.

Even though the ECJ agreed with the above part of the GC's findings, it found – contrary to the GC – that there was a margin of discretion for Cyprus regarding the adoption of these measures. Article 2(6)(b) of Decision 2013/236 "merely requires, in general terms, that the Cypriot authorities maintain or continue to implement the conversion, without defining in any way the specific rules for that operation". Accordingly, the measures were adopted at the discretion of the Cyprus authorities and could not be traced back to the Council. In this sense, the judgment indicates a problem that applicants are very likely to face when attempting to contest the actions of the Council in the context of a financial assistance programme: the terms of the measures are often vague, such that the national authorities concerned have a margin of discretion for the purpose of laying down the impugned rules. It is also not a given that all the measures that were negotiated and agreed by the Eurogroup or those included in an MoU will necessarily be repeated in a Council Decision. The EU Courts may or may not be able to read any terms that are not (fully) replicated into the relevant Council Decision. For example, in *Chrysostomides*, only some of the harmful measures were mentioned in the Council Decision, and specifically in Recitals 5 and 9 and Article 2(6)(b) and (d). From these references, the GC had already found that Recitals 5 and 9 only gave a generic description of the attempts to restructure the financial sector so they did not give any specific details about the content of the measures, and that Article 2(6)(d) allowed a wide margin of discretion to Cyprus to act. The window that was opened by the GC in terms of an avenue that citizens could use to challenge the bailout terms was subsequently closed by the finding of the ECJ that the last remaining provision, Article 2(6)(b), also allowed discretion to Cyprus, and thus that the claim against the Council was inadmissible in its entirety.

The current state of affairs is that Council Decisions coupling financial assistance can be worded in a very generic manner such that they would prevent liability for the Council, without it having any effect on the content of the corresponding MoU agreed with the ESM organs within the ESM legal order.

This is all the more so given that there is no secondary legislation prescribing the form or the detailed content of the Council Decisions, or the extent to which they allow discretion to the Member State requesting assistance. It could be argued that Article 7 of the "two-pack" Regulation mentioned above fulfils this role. However, it merely states that "the Council, acting on a recommendation from the Commission, shall, by a decision addressed to the Member State concerned, approve the main policy requirements which the ESM ... plans to include in the conditionality for its financial support, to the extent that the content of those measures falls within the competence of the Union as laid down by the Treaties" (Art. 7(12)). It does not stipulate how to define the details of the "main policy requirements" that the Council shall approve, or how to circumscribe the Member States' discretion to implement such requirements, even if the Eurogroup statement might have been more prescriptive than the Council Decision. In this regard, the potential to challenge the Council Decisions as an alternative to challenging the Eurogroup's actions remains, for the time being, theoretical.

The ECJ's approach towards the potential liability of the Commission under Article 340 TFEU is more familiar than that towards the potential liability of the Council, since the Commission's liability was the central subject of the *Ledra* case. It will be recalled that, according to *Pringle*, in its participation in the ESM, the Commission is obliged under Article 17(1) TEU to "promote the general interest of the Union" and "oversee the application of Union law". As such, the Commission has the task, when participating in the ESM, to ensure that the financial assistance programmes are consistent with EU law. In *Ledra*, the ECJ found that the fact that the ESM is outside the EU legal order does not prevent the CJEU from examining an Article 340 TFEU claim against the Commission and the ECB for their allegedly unlawful conduct during the adoption of a financial assistance programme.

In *Chrysostomides*, the ECJ reiterates the *Ledra* principle that an Article 340 TFEU action can be brought against the Commission on the basis of the latter's alleged unlawful conduct at the time of the negotiation and signing of an MoU which gives concrete expression to the macroeconomic adjustment programme. The signing by the Commission of the MoU and the monitoring by the Commission and the ECB of the application of harmful measures under Article 13(7) ESM Treaty were both considered by the GC as conduct that could result in potential liability for the institutions, subject to the substantive test of Article 340 TFEU. At the same time, the ECJ seems to *expand* the *Ledra* principle in the context of the Commission's participation in the activities of the Eurogroup, seemingly beyond a financial assistance perspective, in that the Commission is presumed to retain its role of guardian of the Treaties as regards *all* the activities of the Eurogroup. As the ECJ states, "[i]t follows that any failure on [the Commission's] part to check that the political agreements concluded within the Euro Group are in conformity with EU law is liable to result in non-contractual liability of the European Union being invoked under [Article 340(2) TFEU]." Since the Commission can be held liable for the conformity of the political agreements concluded within the Eurogroup, so the argument of the ECJ goes, the finding that the Eurogroup is not an EU body whose acts may be challenged before the CJEU under Article 340 TFEU does not infringe the principle of the Union being based on the rule of law.

The reasoning behind the expansion of the Commission's obligation to act as a guardian of the Treaties in the context of the Eurogroup's political agreements is not entirely clear. In essence, the ECJ transposes the rationale of *Ledra*, which concerned the role of the Commission in the ESM (specifically in signing the MoU on behalf of the ESM), to the role of

the Commission in the political agreements concluded by the Eurogroup more generally speaking. This makes legal sense, since, following *Chrysostomides*, both the Eurogroup and the ESM Board of Governors are outside the EU legal and institutional framework. Yet, the role of the Commission in the ESM is not the same as its role in the Eurogroup. The Commission is responsible for negotiating and signing the MoU on behalf of the ESM. It does not have the power to make decisions on its own and its decisions bind only the ESM, but it plays a significant role in the ESM, as it is the body responsible – together with the ECB – for the preparatory work before the ESM takes a decision to grant financial assistance, and for signing the MoU on behalf of the ESM. By way of contrast, according to Protocol No 14, the Commission shall merely "take part in the meetings" of the Eurogroup.

The power of the Commission to react to a political agreement that does not conform with EU law is also different in the two contexts. According to the *Ledra* principle, the Commission "should refrain from signing [an MoU] whose consistency with EU law it doubts." This would stop an MoU from materializing in the first place. But what is the equivalent duty of the Commission with regard to the political agreements concluded within the Eurogroup? The Commission seemingly has no power to stop a political agreement of the Eurogroup. Besides the common theme that, following *Chrysostomides*, both the Eurogroup and the ESM operate outside the EU legal order, there is not much more in the judgment to ground the Commission's liability for its actions in the Eurogroup. The principle (that the Commission is potentially liable for any failure on its part to check that the political agreements concluded within the Eurogroup are in conformity with EU law) is clear. Its application remains uncertain. A second-order consequence of the judicial holding in *Chrysostomides* that the Eurogroup is not an EU entity is that the Commission has no judicial forum before which to sue the Eurogroup in case of disagreement between the two institutions.

If this obligation were taken to mean that it suffices for the Commission to check the conformity of a political agreement prior to it being concluded within the Eurogroup, it would clearly not amount to effective judicial protection. It may be that the ECJ is only referring to the power of the Commission to check the conformity of an agreement *after* this has taken place, and to refrain from adopting measures that implement these agreements. However, as demonstrated above with respect to the Council, such implementing measures may not exist at all or they may not include the impugned terms that litigants wish to challenge. Moreover, the implementing measures may have been taken by the Commission in its role under the ESM, and not under EU law. In *Chrysostomides,* the applicants attempted to contest *inter alia* the Commission's and the ECB's actions during the negotiation and conclusion of the MoU, including "the 'Commission's findings that the measures adopted by the Cypriot authorities complied with conditionality'" and "the approval, by the Commission and the ECB, of the payment of various tranches of the [financial assistance facility] to the Republic of Cyprus". Arguably, these could be considered as implementing what started as a political agreement in the Eurogroup. However, according to both the GC and the ECJ, these were activities of the two institutions under the ESM Treaty, committing only the ESM and thus not falling within the purview of the CJEU.

The above considerations shed doubts on the argument of the ECJ and the Advocate General in *Chrysostomides* that contesting the Commission's actions under Article 340 TFEU is a viable alternative to contesting the actions of the Eurogroup. We have seen that, in the opinion of the Advocate General, "[a]longside such remedies, an action for damages brought

against the Euro Group would add very little. Even if such an action was admissible in accordance with [Article 340(2) TFEU], its purpose would in any event be to impute to the European Union any harmful conduct allegedly adopted by the Euro Group. … The outcome does not change if the European Union may … be called upon to answer for the conduct of the Council or the Commission in implementing decisions of the Euro Group." However, this argument cannot be reconciled with the logic behind Article 340 TFEU: it is the EU which will be held responsible for damages for all actions brought under Article 340 TFEU where the conditions for liability are fulfilled. The Advocate General's argument would mean that it becomes redundant to identify which of the EU institutions, bodies and agencies was responsible for the original breach (with the exception of the ECB which falls under Art. 340(3) TFEU), because at the end of the day the EU would take the ultimate responsibility. It may be the case that the ultimate bearer of responsibility would not change, but the importance of attributing liability where it belongs is vital in a Union built on the rule of law. If an action cannot be attributed to its original source so that the relevant actors can address their wrongful behaviour (and perhaps be sanctioned for it), there is a risk that they will repeat it.

What is more, this argument seems to contradict the remainder of the Advocate General Opinion, where it is rightly claimed that "...in order to determine whether an infringement of the rights of individuals ... may or may not be imputed to an EU institution under [Article 340(2) TFEU], it is essential to define precisely the conduct that may be imputed to the institution which was a substantial cause of the infringement. It is, therefore, necessary to consider the chain of events and determine whether, if the institution in question had decided to act differently, the infringement in question would not have materialised." In any event, it is clear, in our opinion, that legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted, as argued by Advocate General Jacobs in *UPA*.

Moving now to the ECJ's arguments on the potential liability of the ECB in the context of financial assistance conditionality, we see a much clearer position by the ECJ than in *Ledra*, where the same Court implied but did not clearly state the extent of the ECB's participation and its potential for triggering non-contractual liability in the same context. In *Chrysostomides*, the GC found that the monitoring by the ECB of the application of harmful measures under Article 13(7) ESM Treaty and the adoption of ECB decisions to authorise ELA for a significant period of time could in principle result in non-contractual liability. Although a discussion on the ECB's role in ELA falls outside the scope of this annotation, it is worth noting that this is the first judgment by the EU Courts that explores this area of EMU. The GC's findings were not overruled by the ECJ on appeal and so these ECB actions are, for the time being, examples of when the ECB can in principle be held liable in the context of financial assistance conditionality under Article 340(3) TFEU.

On the substance of the case, the GC found that the first condition for establishing non-contractual liability was not satisfied and thus dismissed the claims against the ECB.

Nevertheless, the clarity provided by the judgment regarding the admissibility of Article 340 TFEU actions against the ECB should be seen in the light of the more recent *Steinhoff* judgment, where the GC clarified and expanded the duty of the ECB to respect the rights of the EU Charter of Fundamental Rights not only in its role under the ESM but also in its consultative function (Art. 127(4) TFEU). Together, the two judgments shed more light on the obligations of the ECB and the potential liability that these may result to.

7. Conclusion

The ECJ judgment in *Chrysostomides* concludes the attempts by litigants to challenge the conditions attached to financial assistance packages before the EU Courts. The ECJ ruled that the Eurogroup is not an EU entity established by the Treaties, such that its actions could not trigger the EU's non-contractual liability under Article 340(2) TFEU. The Eurogroup's immunity from judicial accountability therefore now carries the stamp of the ECJ, with potential implications stretching beyond the contours of financial assistance programmes. We have argued that the ECJ's reasoning regarding why the Eurogroup is not an "institution" within the meaning of Article 340(2) TFEU is unconvincing. It is not adequately explained in the judgment why the Treaty of Lisbon did not render the Eurogroup an EU entity established by the Treaties for the purposes of non-contractual liability. Moreover, it is not immediately apparent why the informality of the Eurogroup necessitates equating it to a body that is not established by the Treaties, while the Eurogroup *de facto* has more powers of its own within the EU legal order than what it appears at first sight. These judicial findings do not match the various high-level reports, blueprints and roadmaps on EMU reform produced by the EU institutions, as well as the extensive academic research previously undertaken in this area, none of which had ever proposed repatriating the Eurogroup into the framework of EU law.

It seems somewhat peculiar that the EU's future, including its response to the ongoing pandemic, is being crafted in fora (Eurogroup, Euro Summit) residing outside the EU's legal and institutional order, which, so the argument goes, have no powers of their own in the EU legal order. For instance, in the last 18 months, we saw the Eurogroup taking a leading role in the EU's response towards the ongoing pandemic. In our opinion, the better course of action would have been to recognize the Eurogroup as an EU entity established by the Treaties and intended to contribute to the achievement of the EU's objectives, and to examine the actions for damages brought by the applicants on their merits. At the end of the day, considerations about the rule of law as set out by the GC should have been in the forefront of approaching the issue of the liability of the EU for the actions of the Eurogroup. This would not only be in line with more liberal developments in the case law (*Steinhoff*), but it would also plug an important hole in the EU's system of remedies and procedures.

We should nevertheless emphasize that the ECJ held for the first time that "prior actions" carried out before an MoU is signed by the recipient country concerned may trigger the non-contractual liability of the Union, provided that the relevant Union institution (in this case, the Council) had required the maintenance or continued implementation of the harmful measures and that the national authorities concerned had no margin of discretion to escape that requirement. The ECJ further held that the *Ledra* principle applies, such that any failure on the part of the Commission to check that the political agreements concluded within the Eurogroup are in conformity with EU law is capable to result in non-contractual liability of the Union. At

the same time, we should be cautious about adhering to a “complete system of remedies and procedures” narrative in the context of financial assistance programmes, as the possibility to challenge the actions of other EU institutions (in lieu of those of the Eurogroup) does not always suffice to ensure the effective judicial protection of individuals. It is for this reason, too, that the Eurogroup “should be subject to legal liability in its own right, thereby ensuring a central tenet of the rule of law”.

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