



## THE COURT OF JUSTICE'S SELF-RESTRAINT OF REVIEWING FINANCIAL ASSISTANCE CONDITIONALITY IN THE *CHRYSOSTOMIDES* CASE

ISABEL STAUDINGER\*

**ABSTRACT:** In the *Chrysostomides* case (joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028), the Court of Justice (ECJ) confirmed its previous finding that the Eurogroup has only an informal and intergovernmental nature. Building on the cases *Ledra* and *Mallis*, the ECJ finally denied the respective possibilities of EU legal protection against acts and conduct of the Eurogroup. Moreover, the ECJ denied the binding nature of art. 2(6)(b) of Council Decision (EU) 2013/236, a decision with which the conditionality of the macro-economic adjustment programme had been brought under the auspices of EU law. As a consequence, the Eurogroup's acts and conduct as well as conditionality measures cannot be reviewed on the EU level.

**KEYWORDS:** financial assistance conditionality – Eurogroup – accountability – action for damages – Economic and Monetary Union – Cyprus.

### I. INTRODUCTION

In December 2020, the Court of Justice (ECJ) delivered a long-awaited judgment in the case *Chrysostomides*<sup>1</sup> where it once more addressed the Cypriot measures adopted in the course of the European sovereign debt crisis of the last decade.<sup>2</sup>

Several idiosyncrasies of the Cypriot banking sector<sup>3</sup> have led to the crisis: *a*) the Cypriot banking sector was considerably large compared to the economy (the domestic sector

\* Postdoctoral Researcher, Department of Public Law, Public International and European Law, University of Salzburg; Postdoctoral Researcher for the European Constitutional Court Network research project, isabel.staudinger@sbg.ac.at. I am thankful to the anonymous reviewer and to András Jakab, Lando Kirchmair and Rainer Palmstorfer for their valuable comments and suggestions. All remaining errors are my own.

<sup>1</sup> Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028.

<sup>2</sup> See, eg, P Demetriades, *A Diary of the Euro Crisis in Cyprus* (Palgrave Macmillan 2017).

<sup>3</sup> For more details on the Cypriot banking sector, see S Clerides, 'The Collapse of the Cypriot Banking System: A Bird's Eye View' (2014) *Cyprus Economic Policy Review* 3.



was over six times the gross domestic product (GDP);<sup>4</sup> *b*) the two largest lenders, Bank of Cyprus and Laiki (covering two thirds of the banking sector and four times GDP) invested in high risk and eventually non-performing loans: Greek government bonds.<sup>5</sup> Thus the Greek haircut spread contagion to the Cypriot banking sector, as the two banks lost nearly 80 percent of the capital base, which caused the necessity of external resources.<sup>6</sup> Financial assistance provided by the European Stability Mechanism (ESM) was made conditional on the compliance with certain adjustment measures.<sup>7</sup>

Two questions were most central for the case: 1) Does the Eurogroup form a body of EU law in sense of art. 340(2) TFEU? 2) Did art. 2(6)(b) of Council Decision (EU) 2013/236<sup>8</sup> impose specific measures on Cyprus to restore financial stability and sustainable growth, without any margin of discretion? When dealing with appeals and cross-appeals relating to several actions for damages in the cases *Chrysostomides* and *Bourdouvali*,<sup>9</sup> the ECJ in *Chrysostomides* revoked the General Court (GC)'s finding to qualify the Eurogroup as an EU body. Both the Advocate General (AG) Pitruzzella and the ECJ upheld the informal and intergovernmental nature of the Eurogroup. Besides, Council Decision (EU) 2013/236 supposedly only set a target, but left the specific means open for Cyprus' discretion. The ECJ's findings (section III) must be discussed against the background of limited accountability of the EU institutions and bodies in the governance of the euro area crisis (section II) and the implications which can be drawn for legal protection against conditionality measures (section IV).

## II. BACKGROUND: THE EU COURTS AND THE EURO CRISIS

Two Cypriot cases have become synonyms for the answers to the most pertinent questions on the EU institutions' accountability for their role in the financial crisis: *Ledra* and

<sup>4</sup> Cf P Demetriades, 'Political economy of a euro area banking crisis' (2017) Cambridge Journal of Economics 1249, 1252.

<sup>5</sup> S Clerides, 'The Collapse of the Cypriot Banking System' cit. 25 ff.

<sup>6</sup> P Demetriades, 'Political economy of a euro area banking crisis' cit. 1252. See also, S Clerides, 'The Collapse of the Cypriot Banking System' cit. 31.

<sup>7</sup> On the development, see M Ioannidis, 'Financial Assistance Conditionality After "Two Pack"' (2014) HJIL 61, 64 ff.

<sup>8</sup> Decision 236/2013/EU of the Council of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth.

<sup>9</sup> Case T-680/13 *Chrysostomides, K. & Co. and Others v Council and Others* ECLI:EU:T:2018:486; case T-786/14, *Bourdouvali and Others v Council and Others* ECLI:EU:T:2018:487. Both these cases have also been mentioned by U Forsthoff and N Lauer, 'Policy Conditionality Attached to ESM Financial Assistance' in F Amtentbrink and C Herrmann (eds) with R Repasi (ass), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 878, 890 ff. In both cases, appeals have been brought by the Council on 21 September 2018, joined cases C-597 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028.

*Mallis*.<sup>10</sup> In both cases, the ECJ denied legal protection under art. 263(4) TFEU (non-privileged action for annulment) and respectively art. 340(2) TFEU (action for damages).

## II.1. *LEDRA*: APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

On 20 September 2016, the *Ledra* case<sup>11</sup> brought insights on the Union's non-contractual liability. The ECJ found that the EU institutions must abide by the Charter of Fundamental Rights of the EU (the Charter), even when acting outside the scope of EU law.<sup>12</sup> The fact that the Commission's actions within the Treaty Establishing the European Stability Mechanism (TESM) fall outside of the EU legal order would, however, exclude the possibility of bringing an action for annulment.<sup>13</sup> The ECJ explained that claiming damages would not *per se* be excluded:

"However, whilst such a finding [that ESM acts do not form part of the Union legal order] is liable to have an effect in relation to the conditions governing the admissibility of an action for annulment that may be brought on the basis of Article 263 TFEU, it cannot prevent unlawful conduct linked, as the case may be, to the adoption of a memorandum of understanding on behalf of the ESM from being raised against the Commission and the ECB [European Central Bank] in an action for compensation under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU".<sup>14</sup>

Subsequently, the ECJ assessed whether the conditions for the EU's non-contractual liability were fulfilled, "the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of".<sup>15</sup> For the fulfilment of the first condition, "a sufficiently

<sup>10</sup> See e.g., A Poulou, 'The Liability of the EU in the ESM framework' (2017) *Maastricht Journal of European and Comparative Law* 127; R Repasi, 'Judicial protection against austerity measures in the euro area: *Ledra* and *Mallis*' (2017) *CMLRev* 1123; M Markakis and P Dermine, 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*' (2018) *CMLRev* 651; F Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?' (2018) *European Papers* www.europeanpapers.eu 530. Recently, M Markakis, *Accountability in the Economic and Monetary Union* (Oxford University Press 2020) 209 ff.

<sup>11</sup> Joined cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

<sup>12</sup> *Ledra Advertising v Commission and ECB* cit. paras 66 ff. See also, Case C-370/12 *Pringle* ECLI:EU:C:2012:756 paras 163 ff.

<sup>13</sup> *Ledra Advertising v Commission and ECB* cit. para. 54.

<sup>14</sup> *Ibid.* para. 55.

<sup>15</sup> *Ibid.* para. 64, referring to case C-611/12 P, *Giordano v Commission* ECLI:EU:C:2014:2282 para. 35 and the case-law cited. See also, M Ruffert, 'Art. 340 AEUV [Haftung von Union und Mitgliedstaaten]' in C Callies and M Ruffert (eds), *EUV/AEUV* (CH Beck 2016) para. 7 and the case law cited.

serious breach of a rule of law intended to confer rights on individuals must be established".<sup>16</sup> Those were alleged restrictions to the right to property (art. 17 of the Charter) imposed by the Memorandum of Understanding (MoU) of 26 April 2013 detailing the conversion of "uninsured bank deposits in Bank of Cyprus into class A shares with full voting and dividend rights",<sup>17</sup> as well as the temporary freezing of another part of these uninsured deposits and related measures,<sup>18</sup> and weighed them against the objective of ensuring the stability of the banking system in the euro area.<sup>19</sup> Eventually, the ECJ did not find a "disproportionate and intolerable interference impairing the very substance of the appellants' right to property",<sup>20</sup> and, therefore, dismissed the claim for damages caused by the Commission.

## II.2. *MALLIS*: NO ACTION FOR ANNULMENT OF A EUROGROUP STATEMENT

On the same day, the ECJ proclaimed its judgment in the *Mallis* case,<sup>21</sup> where non-privileged actions for annulment based on art. 263(4) TFEU<sup>22</sup> were brought against a statement of the Eurogroup but eventually dismissed by the ECJ.<sup>23</sup> The ECJ acknowledged that while the TESM entrusted the Commission and the ECB with certain tasks, such as negotiating and signing the MoU on behalf of the ESM (art. 13(3) and (4) TESM), these Articles did not confer any decision-making powers on the institutions.<sup>24</sup> Also, the ECJ argued that the Eurogroup "statement, of a purely informative nature, was intended to inform the general public of the existence of a political agreement between the Eurogroup and the Cypriot authorities reflecting a common intention to pursue the negotiations in accordance with the statement's terms".<sup>25</sup>

It should be noted not only that the term "informally" is used in the wording of Protocol No 14 on the Eurogroup, annexed to the TFEU Treaty, but also that the Eurogroup

<sup>16</sup> *Ledra Advertising v Commission and ECB* cit. para. 65, referring, *inter alia*, to case C-352/98 P, *Bergaderm and Goupil v Commission* ECLI:EU:C:2000:361, para. 42; case C-220/13 P *Nikolaou v Court of Auditors* ECLI:EU:C:2014:2057, para. 53.

<sup>17</sup> *Ledra Advertising v Commission and ECB* cit. para. 10. On the role of the Charter, C Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Research Paper.

<sup>18</sup> Cf *Ledra Advertising v Commission and ECB* cit. para. 73.

<sup>19</sup> *Ibid.* 74.

<sup>20</sup> *Ibid.*

<sup>21</sup> Joined cases C-105/15 P to C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702.

<sup>22</sup> See P Craig and G de Búrca, *EU Law. Texts, Cases, and Materials* (Oxford University Press 2015) 515 ff.

<sup>23</sup> *Mallis and Malli v Commission and ECB* cit. On the case, see A Poulou, 'The Liability of the EU in the ESM framework' cit. 129; R Repasi 'Judicial protection against austerity measures in the euro area' cit.; M Markakis and P Dermine, 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter' cit. 650; F Pennesi 'The Accountability of the European Stability Mechanism and the European Monetary Fund' cit. 517 ff. Recently discussed in F Martucci, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)' in F Amtenbrink and C Herrmann (eds) with R Repasi (ass), *The EU Law of Economic and Monetary Union* cit. 293, 311 ff M Markakis, *Accountability in the Economic and Monetary Union* cit. 209.

<sup>24</sup> *Mallis and Malli v Commission and ECB* cit. paras 53–57.

<sup>25</sup> *Ibid.* para. 59.

is not among the different configurations of the Council of the European Union:<sup>26</sup> “[...] accordingly, [...] the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of art. 263 TFEU”.<sup>27</sup>

### III. THE *CHRYSOSTOMIDES* CASE

In December 2020, the ECJ built on both *Ledra* and *Mallis*, when it revoked the GC's finding to qualify the Eurogroup as an EU body in the case *Chrysostomides*. That question arose in the course of dealing appeals against the GC's judgments on two actions for damages brought against the involved EU institutions in both the cases *Chrysostomides* and *Bourdouvali*.

#### III.1. THE JUDGMENT OF THE GENERAL COURT

Compared to the ECJ, the GC delivered fundamentally different opinions on the legal nature of 1) the Eurogroup and 2) Council Decision (EU) 2013/236. Regarding the former, the GC noted that the Eurogroup did not take any definite decisions with regard to financial assistance, but that the authority for decision-making “came within the competence of the ESM Board of Governors”.<sup>28</sup> The term institution would, however, not only cover those institutions “listed in art. 13(1) TEU, but also all other EU bodies established by the Treaty and intended to contribute to the achievement of the EU's objectives”.<sup>29</sup> On the one hand, the GC acknowledged the ECJ's main finding in the *Mallis* case, where it had argued that the Eurogroup “could not be classified as a body, office or agency of the EU ‘within the meaning of art. 263 TFEU’”.<sup>30</sup> On the other hand, the GC, emphasised that arts 263 and 268 TFEU in conjunction with art. 340(2) TFEU would serve different purposes, the non-contractual liability remedy has been established independently from the other remedies, and thus, a determination of the concept of an EU institution would not necessarily have to be the same for both types of remedies.<sup>31</sup> Then, the GC derived from art. 137 TFEU and Protocol No.14<sup>32</sup> that the Eurogroup:

<sup>26</sup> Enumerated in Decision 937/2009/EU of the Council of 1 December 2009 adopting the Council's Rules of Procedure, Annex I. That list is referred to in art. 16(6) TEU.

<sup>27</sup> *Mallis and Malli v Commission and ECB* cit. para. 61.

<sup>28</sup> *Bourdouvali and Others v Council and Others* cit. para. 112 ff.

<sup>29</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 106; *Bourdouvali and Others v Council and Others* cit. para. 102.

<sup>30</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. paras 107 ff; *Bourdouvali and Others v Council and Others* cit. para. 103. Both judgments are referring to *Mallis and Malli v Commission and ECB* cit. para. 61.

<sup>31</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. paras 109 ff; *Bourdouvali and Others v Council and Others* cit. paras 105 ff and the case law cited.

<sup>32</sup> Protocol (No. 14) on the Euro Group [2016].

“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 Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union.<sup>33</sup> Any 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”.<sup>34</sup>

Concerning the legal nature of Council Decision 2013/236/EU, the GC claimed that it would constitute a Decision in the sense of art. 288(4) TFEU and that it was “mandatory [...] in its entirety”.<sup>35</sup> To that end, the GC examined the wording and substance of the decisions and found that “its provisions are entirely worded in mandatory terms, as is evidenced by the systematic use of the word ‘shall’ in arts 1 and 2”.<sup>36</sup> The Council’s written submissions would demonstrate that “Decision 2013/236 was intended to produce legally binding effects and that the Council is intended to grant it such effects”.<sup>37</sup> Besides,

“according to the Council’s response to the Court’s measures of organisation of procedure, Decision 2013/236 reflects ‘a common practice that has developed since the beginning of the crisis of the euro area, according to which conditionality attached to assistance – that has been agreed intergovernmentally between the beneficiary Member State and the ESM – is coupled with Council Decisions based on art. 136 TFEU’ for the purpose of ‘ensur[ing] the correspondence and consistency between the intergovernmental and Union spheres of action’”.<sup>38</sup>

### III.2. THE JUDGEMENT OF THE ECJ

The ECJ brought together the Council’s appeals and cross-appeals and meticulously assessed them step by step. As abovementioned, two aspects are particularly worth highlighting: first, opposed to the GC, the ECJ found that the Eurogroup is of pure intergovernmental and informal nature and does not fall under the concept of an EU institution within

<sup>33</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 113; *Bourdouvali and Others v Council and Others* cit. para. 109.

<sup>34</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 114; *Bourdouvali and Others v Council and Others* cit. para. 110.

<sup>35</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 186; *Bourdouvali and Others v Council and Others* cit. para. 185.

<sup>36</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 187; *Bourdouvali and Others v Council and Others* cit. para. 186.

<sup>37</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 188; *Bourdouvali and Others v Council and Others* cit. para. 187.

<sup>38</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 190; *Bourdouvali and Others v Council and Others* cit. para. 189.

the meaning of art. 13(1) TEU.<sup>39</sup> The ECJ seized the Opinion of AG Pitruzella who had delivered a detailed analysis of the Eurogroup's legal nature.<sup>40</sup> Besides, it loosely followed the lead of the AG, who perused all the means of legal interpretation.<sup>41</sup> The ECJ began its analysis by noting that the wordings of art. 137 TFEU and Protocol n. 14 would only recognise the right of the Euro area Member States to meet informally.<sup>42</sup> The ECJ referred to the AG's historical interpretation of the Eurogroup as an informal intergovernmental body established outside EU law, serving as a "bridge between the national level and the EU level for the purpose of coordinating the economic policies".<sup>43</sup> The recognition by the Treaties did allegedly not alter the intergovernmental nature of the Eurogroup,<sup>44</sup> hence it "cannot be equated with a configuration of the Council".<sup>45</sup> Publicly announced written statements of the Eurogroup would serve nothing more than making "known the outcome of any informal political agreement reached on questions debated within the Euro Group".<sup>46</sup> However, Pitruzella had ascribed a "semi-intergovernmental method" to the Eurogroup, meaning that it would operate at the crossroads of the EU and the intergovernmental level.<sup>47</sup> The ECJ did not take up the AG's neologism, but highlighted the Eurogroup's informal character, which "can be explained by the purpose pursued by its creation of endowing economic and monetary union with an instrument of intergovernmental coordination but without affecting the role of the Council – which is the fulcrum of the European Union's decision-making process in economic matters – or the independence of the ECB".<sup>48</sup>

Contrary to the GC's findings,<sup>49</sup> the ECJ re-emphasised that the Eurogroup would not have competences of its own.<sup>50</sup> Thus, art. 340(2) TFEU could not be invoked against Eurogroup statements.<sup>51</sup> On the matter that lacking legal protection would threaten the rule of law in the EU,<sup>52</sup> the AG had found that the possibility of claiming compensation from

<sup>39</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. paras 82-97.

<sup>40</sup> Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzella, paras 62 ff.

<sup>41</sup> *Ibid.* paras 95-101.

<sup>42</sup> *Council K. v Chrysostomides & Co. and Others* cit. para. 83.

<sup>43</sup> *Ibid.* para. 84 referring to *Council v K. Chrysostomides & Co. and Others*, opinion of AG Pitruzella, cit. paras 64, 65, 92, 96, 101, 103 and 106.

<sup>44</sup> *Council v Chrysostomides & Co. and Others* cit. para. 87.

<sup>45</sup> *Ibid.* para. 87, referring to *Mallis and Malli v Commission and ECB* cit. para. 61.

<sup>46</sup> *Council v K. Chrysostomides & Co. and Others*, opinion of AG Pitruzella, cit. para. 83.

<sup>47</sup> *Ibid.* para. 51.

<sup>48</sup> *Council v Chrysostomides & Co. and Others* cit. para. 88, referring to *Council v K. Chrysostomides & Co. and Others*, opinion of AG Pitruzella, cit. paras 64, 86.

<sup>49</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 113; *Bourdouvali and Others v Council and Others* cit. para. 109.

<sup>50</sup> *Council v Chrysostomides & Co. and Others* cit. para. 89.

<sup>51</sup> *Ibid.* para. 90.

<sup>52</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 114; *Bourdouvali and Others v Council and Others* cit. para. 110.

the Eurogroup would add only very little to the remedies available to challenge the adoption and implementation of Decision 2013/236/EU of the Council.<sup>53</sup> The ECJ did not specifically address the rule of law argument, but merely argued that “individuals may bring [...] an action to establish non-contractual liability of the European Union against the Council, the Commission and the ECB in respect of the acts or conduct that those EU institutions adopt following such political agreements”.<sup>54</sup>

Concerning the second major aspect of the legal nature of art. 2(6)(b) of Decision (EU) 2013/236, the ECJ denoted that it would merely require: “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, the General Court was wrong in concluding [...] that the Cypriot authorities had no margin of discretion for the purpose of laying down such rules [...]”.<sup>55</sup>

#### IV. IMPLICATIONS FOR LEGAL PROTECTION AGAINST FINANCIAL ASSISTANCE CONDITIONALITY

The ECJ's judgment raises several issues concerning legal protection against reform measures adopted to comply with financial assistance conditionality. First, the exclusion of the Eurogroup as an EU body leads to the fact that only the legality acts and conduct of the Commission, the ECB, and the Council can be challenged on the EU level.<sup>56</sup> While the ECJ found that the Eurogroup does not form a configuration of the Council,<sup>57</sup> its ministerial members<sup>58</sup> are the same Member State representative who are part of the Ecofin Council,<sup>59</sup> the ESM Board of Governors,<sup>60</sup> and, in some cases, also the IMF Board of

<sup>53</sup> *Council v K. Chrysostomides & Co. and Others*, opinion of AG Pitruzzella, cit. paras 114-117.

<sup>54</sup> *Council v Chrysostomides & Co. and Others* cit. para. 93.

<sup>55</sup> *Ibid.* para. 116.

<sup>56</sup> *Ibid.* para. 93.

<sup>57</sup> *Ibid.* para. 87, referring to *Mallis and Malli v Commission and ECB* cit. para. 61.

<sup>58</sup> Art. 137 TFEU and Protocol No. 14, art. 1 mention “ministers”, without any specification. However, the second sentence reveals that the meetings are prepared by “the representatives of the ministers with responsibility for finance of the Member States whose currency is the euro”. U Palm, ‘Artikel 137 EUV [Euro-Gruppe]’ in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2017) para. 6 concluded from case T-327/13, *Mallis and Malli v Commission and ECB* ECLI:EU:T:2014:909 paras 41 ff that the Eurogroup is composed of Euro area finance ministers. In praxis, in 2020, the members of the Eurogroup are Ministers of Finance except from the Spanish minister (Minister for Economic Affairs by name, but financial policies are included in that ministry): Eurogroup, *Members of the Eurogroup* [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>59</sup> Council of the European Union, *Economic and Financial Affairs Council configuration (Ecofin)* [www.consilium.europa.eu](http://www.consilium.europa.eu): “The Ecofin Council is made up of the economics and finance ministers from all member states”. Cf art. 16(2) TEU.

<sup>60</sup> Art. 5(1) TESM: “Each ESM Member shall appoint a Governor and an alternate Governor. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance”; art. 5(2) TESM: “The Board of Governors shall decide either to



Governors.<sup>61</sup> AG Pitruzzella particularly highlighted the personal overlap of the Eurogroup and the ESM Board of Governors.<sup>62</sup> Besides, when deciding on measures to ensure the proper functioning of the Economic and Monetary Union, only the euro area representatives take part in the Council's vote (art. 136(1) TFEU). Decision (EU) 2013/236 was such a measure.

Second, Decision (EU) 2013/236 would only be challengeable if it had legal effects, which the ECJ denied.<sup>63</sup> Actions for annulment under art. 263 TFEU would only be admissible if there were legal effects.<sup>64</sup> Indeed, the wording of art. 2(6)(b) of Decision 2013/236/EU would allow for another means to reach the outcome of "establishing an independent valuation of the assets of Bank of Cyprus and Cyprus Popular Bank and quickly integrating the operations of Cyprus Popular Bank into Bank of Cyprus". In theory, Cyprus could have opted for another solution. However, in practice,<sup>65</sup> it seems questionable why Cyprus should have changed the respective measures after they had been welcomed by the Eurogroup and had been documented in Annex I of the Eurogroup Statement of 25 March 2013.<sup>66</sup> Decision (EU) 2013/236 has then been adopted on 25 April 2013. The MoU of 24 April 2013 negotiated by the Commission, the ECB and the IMF, and Cyprus has also mentioned the conversion of the respective deposits.<sup>67</sup> On 8 May 2013, the ESM Board of Governors decided to approve the disbursement of the first tranche. The Eurogroup then welcomed that decision on 13 May 2013 and even confirmed that "Cyprus has implemented all prior actions as agreed in the MoU preceding the decision by the ESM on the first disbursement".<sup>68</sup> Repasi emphasised that the ESM MoU would not intend to have any legal effects, having the effect of excluding an application of art. 263 TFEU.<sup>69</sup> A remaining problem is that not all elements of the Eurogroup statements are mirrored in Council Decisions and vice versa.<sup>70</sup> Besides, also

be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the Treaty on the European Union and to the TFEU or to elect a Chairperson and a Vice-Chairperson from among its members for a term of two years". See European Stability Mechanism, *Board of Governors* [www.esm.europa.eu](http://www.esm.europa.eu).

<sup>61</sup> See International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors* [www.imf.org](http://www.imf.org).

<sup>62</sup> *Council v K. Chrysostomides & Co. and Others*, opinion of AG Pitruzzella, cit. para. 88.

<sup>63</sup> *Council v Chrysostomides & Co. and Others* cit. para. 116.

<sup>64</sup> M Markakis and P Dermine, 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter' cit. 656 ff.

<sup>65</sup> *Council v Chrysostomides & Co. and Others* cit. paras 25-42: background to the dispute.

<sup>66</sup> Eurogroup, *Eurogroup Statement on Cyprus* (25 March 2013) [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>67</sup> European Commission, 'European Economy. The Economic Adjustment Programme for Cyprus' (May 2013) Occasional Papers [ec.europa.eu](http://ec.europa.eu) 134.

<sup>68</sup> Eurogroup, 'Eurogroup Statement on Cyprus' (13 May 2013) [www.consilium.europa.eu](http://www.consilium.europa.eu) also available from Eurogroup, 'Eurogroup Statement on Cyprus' (13 September 2013) [mof.gov.cy](http://mof.gov.cy).

<sup>69</sup> R Repasi, 'Judicial protection against austerity measures in the euro area' cit. 1139.

<sup>70</sup> Decision 236/2013/EU of the Council of 25 April 2013 consisted of 14 recitals and three articles, of which art. 2 enlisted detailed measures for Cyprus to adopt to gain access to financial assistance. Compared

in other cases, the relationship of the said Council Decisions with the so-called MoU complicated access to and the effectiveness of legal remedies.<sup>71</sup> The ECJ found that ESM acts are not covered by EU law.<sup>72</sup> Opposed to that, in a case from Romania, *Florescu*, the ECJ qualified the MoU as “mandatory” and qualified it as EU law.<sup>73</sup> In that case, the MoU contained the conditions for Medium-Term Financial Assistance, governed by Council Regulation (EU) 332/2002,<sup>74</sup> which is based on art. 143(1) TFEU and, hence, covered by a completely different legal regime applicable to non-euro area Member States. Moreover, the ECJ mentioned – but neither confirmed nor denied – that the

“Council states that Decision 2013/236 reflects a common practice that had developed since the beginning of the euro area crisis, under which conditionality attached to financial assistance granted to an MSCE [Member State whose currency is the euro] is coupled with Council decisions based on art. 136 TFEU, thereby ensuring consistency between the intergovernmental and EU spheres of action”.<sup>75</sup>

Third, the limited reviewability of Council Decision (EU) 2013/236 reopens of holding the Eurogroup responsible under art. 340(2) TFEU. The *rationae personae* of the provision encompasses damages caused by the EU institutions. As mentioned, the term EU institution does not only cover those listed in art. 13(1) TEU, but also all other EU bodies, offices and agencies “established by or under the Treaties and are intended to contribute to the achievement of the European Union’s objectives”.<sup>76</sup> The literature was divided as regards the classification of the Eurogroup as an EU institution.<sup>77</sup> Like the ECJ, Selmayr had argued

to that, Eurogroup, ‘Eurogroup Statement on Cyprus’ (16 March 2013) [www.consilium.europa.eu](http://www.consilium.europa.eu) and Eurogroup, ‘Eurogroup Statement on Cyprus’ cit. are far less detailed and much shorter.

<sup>71</sup> C Kilpatrick, ‘Are Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’ (2014) *European Constitutional Law Review* 393, 405 ff.; M Markakis and P Dermine, ‘Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter’ cit. 651 ff.

<sup>72</sup> *Ledra Advertising v Commission and ECB* cit. para. 55.

<sup>73</sup> Case C-258/14 *Florescu* [2017] ECLI:EU:C:2017:448, para. 41. For a discussion of the case, see, M Markakis and P Dermine, ‘Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter’ cit.

<sup>74</sup> Regulation (EC) 332/2002 of the Council of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balance of payments, as amended by Regulation (EC) 431/2009 of the Council of 18 May 2009.

<sup>75</sup> *Council v Chrysostomides & Co. and Others* cit. para. 102.

<sup>76</sup> *Ibid.* para. 80, referring to case C-370/89, *SGEEM and Etroy v EIB* ECLI:EU:C:1992:482 paras 13–16. See also, M Nettesheim, ‘Art 13 EUV [Organe der EU]’ in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2015) paras 18 ff.; C Calliess, ‘Art 13 EUV [Die Organe der Union]’ in C Calliess and M Ruffert (eds), *EUV/AEU* cit. paras 4 ff.; R Streinz, ‘Art 13 EUV [Institutioneller Rahmen – Unionsorgane]’ in R Streinz (ed), *EUV/AEU* (CH Beck 2018) paras 12 ff.

<sup>77</sup> See C Proctor, ‘Substantive Obligations of Euro Area Member States’, in F Amtenbrink and C Herrmann (eds) with R Repasi (ass), *The EU Law of Economic and Monetary Union* cit. 259; M Markakis *Accountability in the Economic and Monetary Union* cit. 146 ff.

that, at the very “foundation” in 1997, the Eurogroup was merely introduced as the possibility of informal meetings among the Ministers of the Euro area Member States.<sup>78</sup> Until today, the Eurogroup would not replace the Ecofin Council, not even in the case when only the Euro area Member States are entitled to vote in the Council.<sup>79</sup> Even a changed political reality as a consequence of the Euro crisis, where the Eurogroup de facto made the decisions subsequently to be approved by the Council, would not make a difference.<sup>80</sup> Kadelbach called the Eurogroup a special meeting of the parties with a governing and working level.<sup>81</sup> Potacs merely highlighted that the codification of the Eurogroup would put more emphasis on its president.<sup>82</sup> Opposed to that, Palm claimed that although the Eurogroup would neither have the competence to adopt legal acts, nor would it be possible to consider it an organ in the sense of art. 13(1)(2) TEU, nor would the Eurogroup have legal personality, its mere recognition under primary EU law would make it a Union body.<sup>83</sup> Another aspect in favour of extending the personal scope of application of art. 340(2) TFEU to the Eurogroup has been mentioned by the GC: the rule of law.<sup>84</sup> The ECJ has not addressed this aspect in its judgment. In the past, the ECJ, allowed the European Parliament to bring an action for annulment even if back then, the Parliament had not been mentioned in art. 173 EEC Treaty.<sup>85</sup> With that in mind, it would have been possible, to qualify the Eurogroup as an EU body within the meaning of art. 340(2) TFEU. Then, however, the ECJ would have been forced to adapt its findings on the exclusion of art. 263 TFEU in order to avoid the qualification of non-challengeable but binding statements of the Eurogroup as non-acts.

Finally, there are two more options left to be explored and brought before the ECJ. First, questions on the interpretation of the respective Council Decisions could be brought under art. 267 TFEU. In that case, the Member States’ courts could ask the ECJ for a binding interpretation or the validity of conditionality measures in the course of

<sup>78</sup> M Selmayr, ‘Art 137 AEUV [Tagungen der Euro-Gruppe]’ in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) para. 1, referring to: European Council Conclusions of 12-13 December 1997, para. 44: “The Ministers of the States participating in the euro area may meet informally among themselves to discuss issues connected with their shared specific responsibilities for the single currency. The Commission, and the European Central Bank when appropriate, will be invited to take part in the meetings”. See also, U Häde, ‘Art 137 EUV [Euro-Gruppe]’ in C Calliess and M Ruffert (eds), *EUV/AEUV* cit. para. 4.

<sup>79</sup> U Häde, ‘Art 137 EUV [Euro-Gruppe]’ cit. para. 5; M Selmayr, ‘Art 137 AEUV [Tagungen der Euro-Gruppe]’ cit. para. 6.

<sup>80</sup> M Selmayr, ‘Art 137 AEUV [Tagungen der Euro-Gruppe]’ cit. para. 8.

<sup>81</sup> S Kadelbach, ‘Lehren aus der Finanzkrise-Ein Vorschlag zur Reform der politischen Institutionen der Europäischen Union’ (2013) *Europarecht* 489, 497: “paravertragliche Staatenkonferenz mit Leitungs- und Arbeitsebene”.

<sup>82</sup> M Potacs, ‘Artikel 137 AEUV [Tagungen der Euro-Gruppe]’ in U Becker, A Hatje, J Schoo and J Schwarze (eds), *EU-Kommentar* (Nomos 2019) para. 1, referring U Häde, ‘Art 137 EUV [Euro-Gruppe]’ cit. para. 7.

<sup>83</sup> U Palm, ‘Artikel 137 EUV [Euro-Gruppe]’ cit. para. 6.

<sup>84</sup> *Chrysostomides K. & Co. and Others v Council and Others* cit. para. 114; *Bourdouvali and Others v Council and Others* cit. para. 110.

<sup>85</sup> Case C-70/88, *Parliament v Council* ECLI:EU:C:1990:270, paras 24-28.

applying national implementing measures. Second, after the adoption of Regulation (EU) 472/2013<sup>86</sup> the Macroeconomic Adjustment Programme detailed in Council Implementing Decisions.<sup>87</sup> Hence, like Regulation (EU) 472/2013, these decisions are based on art. 136 in combination with art. 121(6) TFEU, which might re-open some questions as regards the legal nature of the decisions' provisions-depending on their respective wording.

## V. CONCLUSIONS

In the *Chrysostomides* case, the ECJ built on its case law (*Ledra* and *Mallis*) and re-confirmed the Eurogroup's informal and intergovernmental nature. As a consequence, the Eurogroup cannot be held accountable for its acts and conducts before the EU courts, since neither an action for annulment (art. 263(4) TFEU), nor an action for damages (art. 340(2) TFEU) can be invoked. Even by challenging the acts and conduct of the Council, the Commission or the ECB, that lacuna cannot not be compensated entirely. While informal discussion forums certainly have their *raison d'être*, in the present circumstances, the Council could trial run its plans in the Eurogroup without facing any consequences and later adopt the least opposed option.

Before, the *Chrysostomides* case, it has regularly been mentioned in the literature that even if MoUs adopted with euro area Member States cannot be contested on the EU level, at least, the validity of the respective Council Decisions repeating the gist of the MoU can be challenged. Now, concerning art. 2(6)(b) of Decision (EU) 2013/236 even that option has been excluded by the ECJ.

<sup>86</sup> Regulation (EU) 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. For a discussion, see M Ioannidis, 'Financial Assistance Conditionality After "Two Pack"' cit.

<sup>87</sup> Implementing Decision 463/2013/EU of the Council of 13 September 2013 on approving the macro-economic adjustment programme for Cyprus and repealing Decision 236/2013/EU.