Council of the European Union

Brussels, 21 September 2018

SGS18/07677

TO THE PRESIDENT AND THE MEMBERS
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

APPEAL

lodged by the Council of the European Union pursuant to Article 56
of the Statute of the Court of Justice,

COUNCIL OF THE EUROPEAN UNION,
represented by Alberto DE GREGORIO, Evgenia CHATZIIOAKEIMIDOU and Ivan GUROV**,** members of the Council Legal Service, as Agents, having agreed that service may be effected on them via e-Curia or, failing that, on fax No +32.2.281.5656 and, where necessary, at the following address: Council of the European Union, Registry of the Legal Service, for the attention of Alberto DE GREGORIO, Evgenia CHATZIIOAKEIMIDOU and Ivan GUROV, rue de la Loi, 175, 1048 Brussels,

Appellant, Defendant at first instance,

Appeal against the judgment of the General Court of the European Union (Fourth Chamber, Extended Composition) of 13 July 2018 in Case T-680/13, *Dr. K. Chrysostomides & Co. v. Council of the European Union*, notified to the Council on 13 July 2018, ("the contested judgment"), seeking to have that judgment set aside in part only,

the other parties in the proceedings before the General Court being:

Dr. K. CHRYSOSTOMIDES & Co. LLC, established in Nicosia (Cyprus), and other applicants, represented by P. Tridimas, Barrister

Respondents, Applicants at first instance,

and

EUROPEAN COMMISSION, represented initially by B. Smulders, J.-P. Keppenne and M. Konstantinidis, and subsequently by J.-P. Keppenne, M. Konstantinidis and L. Flynn, acting as Agents,

EUROPEAN CENTRAL BANK (ECB), represented initially by N. Lenihan and F. Athanasiou, subsequently by P. Papapaschalis and P. Senkovic and finally by M. Szablewska and K. Laurinavičius, acting as Agents, and by H.-G. Kamann, avocat,

EURO GROUP, represented by the Council of the European Union, represented by A. de Gregorio Merino, E. Dumitriu-Segnana, E. Chatziioakeimidou and E. Moro, acting as Agents,

EUROPEAN UNION, represented by the European Commission, represented initially by B. Smulders, J.-P. Keppenne and M. Konstantinidis, and subsequently by J.-P. Keppenne, M. Konstantinidis and L. Flynn, acting as Agents,

Defendants at first instance,

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I. INTRODUCTION

1. The legal and factual background to this appeal is set out in detail in paragraphs 1-46 of the contested judgment.

2. In summary, several individuals and companies that in 2012 were depositors in Cyprus Popular Bank (Laïki) and the Trapeza Kyprou Dimosia Etaireia (Bank of Cyprus or BoC) (the applicants at first instance) brought actions for non-contractual liability before the General Court of the European Union in order to be compensated for losses they claim to have suffered as a result of measures, which were taken in order to address the financial difficulties experienced by these banks.

3. Since these measures were part of a macroeconomic adjustment programme, set out in the form of a memorandum of understanding, negotiated by the Commission together with the European Central Bank (ECB) and the International Monetary Fund (IMF), on the one hand, and by the Cypriot authorities, on the other, these actions were directed against the Council of the European Union, the European Commission, the European Central Bank, the Euro Group and the European Union.

4. In the contested judgment, the General Court recognised that the adoption of a memorandum of understanding pursuant to the ESM Treaty corresponds to an objective of public interest of the Union, namely that of ensuring the stability of the banking system of the euro area as a whole (paragraph 255 of the contested judgment) and concluded that the applicants at first instance have not succeeded in demonstrating an infringement of the right to property, of the principle of protection of legitimate expectations, or of the principle of equal treatment and rejected the claims for compensation.

5. The Council agrees entirely with this conclusion and the present appeal does not seek to overturn it.

6. However, in the same judgment, the General Court departed from, or at least strongly qualified the previously-settled case-law, which holds that the Euro Group cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union[1].

7. To that effect, the General Court proceeded with establishing a distinction between the notion of "institution" for the purposes of the second paragraph of Article 340 TFEU and the *"[institutions], bodies, offices or agencies of the Union"* referred to in the first paragraph of Article 263 TFEU (paragraph 111) and, by noting *that "Article 137 TFEU and Protocol No 14, of 26 October 2012, on the Euro Group (OJ 2012 C 326, p. 283), annexed to the TFEU, make provision, inter alia, for the existence, the composition, the procedural rules and the functions of the Euro Group"*, it concluded that *"the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union"* and that *"[t]he acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union"* (paragraph 113).

8. In line with its submissions at first instance, the Council considers that this reasoning is not legally correct and does not correspond neither to the Treaties not to the spirit and the letter of the case-law of the Court of Justice on this matter.

9. For these reasons, by the present appeal, the Council seeks to set aside the parts of the contested judgment where the General Court has concluded that acts of the Euro Group may entail the non-contractual liability of the Union.

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[1] Judgment of 20 September 2016, *Mallis and Others v Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 61.

II. ADMISSIBILITY

10. According to Article 56 of the Statute of the Court of Justice, *"[a]n appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility. Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions"*.

11. The Council submitted on 14 July 2017 a plea of inadmissibility, by which it asked the General Court to declare inadmissible the application insofar as it was directed against the Euro Group. By considering that the Euro Group may engage the non-contractual liability of the Union, the General Court has dismissed this plea of inadmissibility.

12. The Council is entitled to bring the present appeal in order to request the Court of Justice to set aside the contested judgment in its part which dismisses this plea of the Council in respect of the Euro Group.

III. IN LAW

A. Preliminary remarks

i) *The origins and the nature of the references to the Euro Group in the Treaties*

13. As a preliminary remark, the Council wishes to recall the background of Article 137 TFEU and of Protocol No 14 to the Treaties.

14. The Euro Group was set up by the European Council in 1997. On this occasion, while recognising that *"[t]he 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 European Council took care to underline that *"[b]y virtue of the Treaty, the ECOFIN Council is the centre for the coordination of the Member States' economic policies and is empowered to act in the relevant areas. In particular, the ECOFIN Council is the only body empowered to formulate and adopt the broad economic policy guidelines which constitute the main instrument of economic coordination"* and that *"[t]he defining position of the ECOFIN Council at the centre of the economic coordination and decision-making process affirms the unity and cohesion of the Community"*[2].

15. A joint French-German contribution on Economic Governance addressed to the European Convention, in equally unambiguous terms recalled that "*the Euro Group is the primary forum for the informal coordination in the euro area but only the ECOFIN Council is able to take formal decisions"* and hence proposed to *"**recognise** the Euro Group in a Protocol to the Treaty to preserve its vital role for guidance of the euro area"* (emphasis added)[3].

16. Within the European Convention for the Constitutional Treaty, institutional issues of Economic Governance were discussed in Working Group IV. The mandate was given to explore *"whether to formalise the Eurogroup. This would imply giving the group a proper legal base setting out both the competence and appropriate procedures allowing it to take formal decisions which currently fall to the Council."* [4] Discussion showed that a majority did not intend to formalise the Eurogroup[5]. In the final report,

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[2] Luxembourg European Council of 12 and 13 December 1997, Presidency Conclusions, point 44.

[3] French-German contribution on Economic Governance, Secretariat of the European Convention, 22 December 2002, CONV 470/02 CONTRIB 180 (Annex A.1)

[4] Mandate of the Working Group on Economic Governance, CONV 76/02, point 12, page 4 (Annex A.2)

[5] Summary of the meeting held on 17 July 2, CONV 218/02, point 3, pages 2 et sq. (Annex A.3)

the Working Group stated *"that no measures should be taken which would prevent the possibility of informal discussions amongst finance ministers of the Eurogroup, the ECB and the Commission. Whilst recognising the need to maintain the Eurogroup as an informal forum for discussion, a number of members of the group consider that decisions related exclusively to the Eurozone should be taken by the ECOFIN Council, bringing together the participating Member States only, and that the Treaty should be amended accordingly"*[6].

17. It is against this background and on the basis of the above preceding acts and preparatory works that the Euro Group was recognised as such in the Treaty of Lisbon.

B. Substance

i) The reasoning of the General Court

18. In the contested judgment, the General Court correctly recalled that *"the term 'institution' used in the second paragraph of Article 340 TFEU covers not only the institutions of the Union listed in Article 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"* (paragraph 106).

19. However, it then further proceeded to develop this thesis by stating that *"in the light of the different and complementary purposes of [the action for non-contractual liability and the action for annulment], it cannot be considered that the content of the concept of 'institution' for the purposes of the second paragraph of Article 340 TFEU is necessarily restricted to institutions, bodies, offices or agencies of the Union referred to in the first paragraph of Article 263 TFEU"* (paragraph 111).

[6] Final report of Working Group VI on Economic Governance, CONV 357/02, section V, page 7 et sq. (Annex A.4)

20. On this basis, the General Court qualified the findings of the Court of Justice in paragraph 61 of the judgment in *Mallis and Others v Commission and ECB*, from which it is apparent that the Euro Group cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union by clarifying that *"the Court took care to point out that the Euro Group could not be classified as a body, office or agency of the EU 'within the meaning of Article 263 TFEU'"*. Accordingly, the General Court rejected the arguments of the Council and of the Commission that since *"the Euro Group is not a configuration of the Council or a body, office or agency of the Union, it cannot incur the non-contractual liability of the latter"* (paragraphs 107 - 108).

21. In the view of the General Court, *"for the purposes of the second paragraph of Article 340 TFEU, it is necessary to determine whether the EU entity responsible for the act or conduct complained of was established by the Treaties and is intended to contribute to the achievement of the Union's objectives"* (paragraph 112).

ii) *The General Court has misinterpreted the relevant case-law*

22. However, the case-law quoted by the General Court in support of this thesis does not offer any ground for the reasoning that it applies to the Euro Group.

23. It is necessary to point out that the authority, on which the General Court relies here[7] concerned an action for non-contractual liability, directed against the European Ombudsman. In this regard, the judgment takes care to specify that *"[t]he Ombudsman is clearly a body established by the Treaty, **which conferred on him the powers set out in Article [228(1) TFEU]**. Furthermore, by the present action, the applicant is seeking to obtain compensation for damage allegedly sustained as a result of negligence on the part of the Ombudsman in the performance of the duties assigned to him by the Treaty"* (emphasis added)[8].

[7] Judgment of 10 April 2002, *Lamberts v Ombudsman*, T-209/00, EU:T:2002:94.

[8] Paragraphs 50 - 51 of the judgment in *Lamberts.*

24. A further examination of the case-law relied on by the General Court in *Lamberts* reveals an even more complex and nuanced picture: the judgment in *SGEEM and Etroy v EIB*[9] concerned the European Investment Bank, a Union body with a distinct legal personality specifically bestowed upon it by the Treaty. This element was duly noted by the Court in *Mills v EIB*[10], which is quoted by the Court in support of its reasoning in *SGEEM and Etroy*.

25. More generally, none of the judgments in this string provides any ground to consider that the mere mention by the Treaty of a particular discussion forum would transform the latter into an "institution" in the sense of Article 340 TFEU. To the contrary, on each instance, the Court is careful to recall the existence of a legal personality of the body concerned or, at the least, the conferral of powers by the Treaty on this body, before concluding that an action for non-contractual liability would be admissible against it.

26. Two cumulative conditions can be distinguished from this case-law: other than the institutions explicitly mentioned in Article 13 TEU, Article 340(2) TFEU also encompasses *"all other Community bodies (1) established by the Treaty and (2) intended to contribute to achievement of the Community's objectives*"[11].

27. The Euro Group does not fulfil the first of these two cumulative criteria.

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9 Judgment of 2 December 1992, *SGEEM and Etroy v EIB*, C-370/89, EU:C:1992:482.

10 Judgment of 15 June 1976, *Mills v EIB*, 110/75, EU:C:1976:88, paragraph 14.

11 Judgment of 10 April 2002, *Lamberts v Ombudsman*, Case T-209/00, EU:T:2002:94, paragraph 49, confirmed in judgment of 23 mars 2004, *Ombudsman v Lamberts*, C-234/02 P, EU:C:2004:174, paragraph 49.

28. The General Court simply affirmed that the Euro Group is a *"body of the Union formally established by the Treaties"*, without explaining what elements lead to that conclusion. Such explanation is necessary, since it is far from evident that a gathering of Ministers from Member States, which is specifically designated as "informal" and whose only function is to *"discuss questions related to the specific responsibilities they share with regard to the single currency"* could be considered as an "institution" even in the widest possible meaning and making allowance for the broad interpretation of this notion for the purposes of the application of Article 340 TFEU.

29. In this respect, the General Court has not addressed the arguments, submitted by the Council in its plea of inadmissibility, points 13 to 20, which recalled that the Euro Group is neither a Council configuration in the sense of Article 16(6) TEU nor it could replace the decision making of the Council, even in matters that relate specifically to the euro area.

30. It should also be pointed out that Article 137 TFEU and Protocol No 14 on the Euro Group are recognitive in the sense that they acknowledge the right of Member States to meet informally and are not constitutive provisions in the sense that they establish the Euro Group. This is compounded by the absence from these texts of any wording suggesting otherwise, such as "*is set up*", "*is established*" or "*conferred certain power*"[12]. In addition, the Euro Group is not addressee of any of the obligations laid down in Protocol No 14, but rather the "*Minister of the Member States*" as well as the Commission and the ECB.

[12] By way of contrast:

- the Economic and Financial Committee (intended to promote coordination of economic policies of Member States) under Article 134(1) TFEU "is hereby set up".
- European Investment Bank – a Union body which can incur non-contractual liability as recognises in the *SGEEM* judgment – "is established by Article 308 TFEU" as recognized in Article 1 of Protocol No 5 on the EIB.
- The European Ombudsman – a Union body as recognised in the *Lamberts* judgment – is established by Article 228(1) TFEU"A European Ombudsman … shall be empowered" and further laid out in the Statute on the Ombudsman.

31. As explained above, in points 14 to 16, all the preparatory works of the Constitutional Treaty and of the Treaty of Lisbon evidence that the Euro Group was never set up nor established by the Treaties but merely recognised by them and this forum was established instead by the European Council. Moreover, it is evident that the intention of the authors of the Treaties was to preserve the Council's role as an institution endowed with any powers this respect.

32. Accordingly, the General Court failed to identify any "powers" conferred on the Euro Group by the Treaties (unlike in the case concerning the European Ombudsman)[13] and certainly has not noted that the Euro Group possesses a distinct legal personality (in contrast with the situation of the EIB).

33. In paragraph 113 of the contested judgment, the General Court simply states that *"Article 137 TFEU and Protocol No 14, of 26 October 2012, on the Euro Group (OJ 2012 C 326, p. 283), annexed to the TFEU, make provision, inter alia, for the existence, the composition, the procedural rules and the functions of the Euro Group. In that last regard, Article 1 of that protocol provides that the Euro Group is to meet 'to discuss questions related to the specific responsibilities [the ministers composing it] share with regard to the single currency'".*

34. The General Court does not, however, explain which part of these provisions attribute any "powers" on the Euro Group, in the sense of the judicial precedents on which it has chosen to rely. It is therefore unclear how the laying down of provisions on the existence and the procedural rules of a meeting, which is specifically designated as informal, could be analysed as the conferral of powers on it by the Treaties.

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[13] *"measures taken by those bodies in the exercise of the powers assigned to them by Community law are attributable to the Community"* (judgment of 10 April 2002, *Lamberts v Ombudsman*, Case T-209/00, EU:T:2002:94, paragraph 49).

35. It is true that in paragraphs 119 et seq. of the contested judgment, the General Court considers that "*it cannot be considered that the expression of such an opinion by the Euro Group is beyond the competences granted to it by EU law. Consequently, it is capable of incurring the liability of the Union.*"

36. However, the Treaties do not confer any power to the Euro Group and inferring the contrary by way of hypothesis, as the General Court seems to do here, is in direct violation of the principle of conferral, set out in Article 5(2) TEU.

iii) *The erroneous interpretation of the case-law makes the criteria inoperative*

37. While it is clear that the informal meetings of the Ministers of the euro zone Member States do contribute to the achievement of the Union's objectives, it is important to recall that Article 119(2) TFEU and Article 3 TEU mentioned in paragraph 113 of the contested judgment do not mention the Euro Group as a body. Rather, Article 119 TFEU is addressed to the Union and the Member States and national ministers.

38. The Court has also recognised that Union's objectives could also be furthered by entities that are not established by the Treaties[14], without subjecting these entities to the non-contractual liability regime of the Union.

39. This criterion, on its own, is therefore insufficient for the purpose of ascertaining any nexus with Article 340 TFEU.

[14] Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 164.

40. Moreover, even if - and in contrast with the previous case-law on which the General Court relies here - one were to accept the omission of the requirements for an establishment by the Treaties and for the conferral of powers or of legal personality in favour only of the *"intention to contribute to the achievement of the Union's objectives"*, the General Court should still have explained how such a contribution is possible in the absence of any powers or prerogatives conferred on the Euro Group.

41. Instead, by essentially proceeding to the unsubstantiated conclusion that "*the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union"*, the General Court has simplified the criteria established in this respect by the previous case-law to the point at which they would be inoperative.

42. If such approach is to be accepted, there would be no justification why other deliberative instances, preparatory committees or even the General Secretariat of the Council could not be named as separate defendants in actions under Article 340 TFEU, since they are equally mentioned specifically in the Treaties and - if one is to follow the General Court's logic - could then be considered as Union bodies "established" by the Treaties and, in the broader meaning of the term (which seems to be the one preferred by the General Court), are also *"intended to contribute to the achievement of the Union's objectives"*.

iv) *The Euro Group is not in a "loophole" with regard to judicial control*

43. The General Court is concerned by the situation which would result in *"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"* (paragraph 114 of the contested judgment).

44. There are, however, a number of elements that point at the existence of an effective judicial protection of individuals and entities potentially affected by the measures at stake, without this leading necessarily to render the Euro Group subject to judicial control.

45. First, the Commission may be held accountable in respect of the legality of acts of the ESM, in respect of which it has exercised powers. This reasoning was specifically used by the Court of Justice in *Ledra*[15]*.* This has allowed to avoid the acknowledgment of any "loophole" while, at the same time, respecting the principle of conferral of powers[16]. This point was noted extensively by the General Court in the contested judgment (paragraphs 200 to 208) but it failed to draw the appropriate conclusions in respect of the Euro Group.

46. Second, as acknowledged by the General Court in paragraph 238 of the contested judgment, *"an action for damages under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU must be appraised with regard to the entire system for the judicial protection of the individual and its admissibility may thus, in some cases, be subject to the prior exhaustion of national remedies that are available for obtaining annulment of a decision of a national authority, provided that those remedies under domestic law effectively ensure protection for the individuals concerned in that they are capable of resulting in compensation for the damage alleged".*

47. The possibility to appeal to national judicial systems in respect of measures that are partially or wholly attributable to national authorities (such as the measures contested by the applicants) is a further way of assuring that at the point of their application, any conclusions or declarations by the Euro Group, would still be subject to legal scrutiny through the concrete acts and forms of their implementation.

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15 Judgment of 20 September 2016*, Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 56 to 60.

16 In particular, paragraph 56 of the judgment in *Ledra*.

48. Third, it also needs to be recalled that, as the General Court underlines it itself, the maintenance or the continued implementation of the harmful measures discussed in the contested judgment were not attributable to the statements by the Euro Group (paragraph 171) and only partially attributable to Council Decision 2013/236 (paragraph 181). Accordingly, the General Court concluded that it had jurisdiction to rule on the latter (paragraph 192). The Court then disposes of an additional resort of judicial control, i.e. the one in the Council acts which precede and prefigure the content of the ESM conditionality, in accordance with secondary law (see Article 7 of Regulation 472/2013).

49. As stated by Advocate General Wathelet in his Opinion in *Mallis*, the lack of direct action against the Euro Group would be at odds with the principle of effective judicial protection "*only if the Euro Group had in the Treaty been given the power to adopt acts producing binding legal effects with respect to third parties, which it has not, the Euro Group being a forum for discussion, not a decision-making body*"[17].

50. This reasoning is fully applicable in the context of the action for non-contractual damages.

51. One of the basic tenets for the existence of an actionable damage against a defendant are the corresponding powers through which this defendant has caused the damage. Failure to identify such powers belonging to a particular body or - as in this case - a forum for discussion - cannot be analysed as a legal loophole in the liability regime of the Union, contrary to what suggests the General Court in paragraph 114 of the contested judgment, but rather as an application of this same regime.

[17] Opinion of AG Wathelet in Joined Cases C-105/15 P to C-109/15 P, *Mallis a.O.*, EU:C:2016:294, paragraph 66.

IV. CONCLUSION

52. The Council requests the Court, for the reasons set out above:

- to set aside the parts of the contested judgments in which the General Court dismisses the plea of inadmissibility raised by the Council in respect of the Euro Group; and

- and to order the respondents to pay the costs of the appeal.

Alberto DE GREGORIO Evgenia CHATZIIOAKEIMIDOU Ivan GUROV

Council Agents