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Informality, conditionality and property rights in European economic governance: Case note to CJEU *Council v K Chrysostomides & Co and Others*

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BACKGROUND

As the Eurozone crisis which started in 2009 revealed the flaws in the legal framework of EU economic governance, an informal intergovernmental approach emerged in Europe to deal with the emergency.[2] Notably, the European Stability Mechanism (ESM) was created by international agreement to overcome the limitations imposed by the European Union (EU) no-bailout clause,[3] while the Treaty on the Functioning of the European Union (TFEU) was amended to explicitly permit the granting of financial assistance to preserve the stability of the euro area subject to strict conditionality.[4] At the same time, the Euro Group – the highly informal meeting of the finance ministers of European countries plus the EU Commission and generally the European Central Bank (ECB) – emerged as a key player in the management of the crisis, becoming the forum where several austerity measures were discussed among finance ministers of countries whose currency is the euro. Yet, various contentious aspects of that approach – lack of accountability, opacity, and the problem of strict conditionality – attracted more than one criticism in particular in what concerns the possibility of exerting legal control over the decided measures. Famously, when the Republic of Ireland requested financial assistance, the Irish Supreme Court asked whether the amendments made to the Treaties with regard to the ESM were lawful. Even if in *Pringle* the Court of Justice of the EU (CJEU)

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2 On these developments, see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (Cambridge University Press 2014).
3 TFEU, art 125.
4 European Council Decision 2011/199/EU of 25 March 2011 amending article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

answered the question in the affirmative,[5] the conditions imposed on countries in consideration for financial aid remained controversial. Private individuals and companies brought actions lamenting that the measures aimed at solving the crisis violated their property rights. The case of *Chrysostomides*, considered in this brief note, is a recent and notable example of such judicial challenges against the backdrop of the principle of conditionality and of the increased informality of EU economic governance.

The case takes its roots in the debt crisis which affected Cyprus and, even before that, Greece. When Greece entered into financial difficulties and the International Monetary Fund, the EU Commission and the European Central Bank (the 'Troika') were involved, a haircut on Greek government bonds was decided. Despite being harshly criticised as a blatant violation of the sanctity of contracts and of the property rights of investors, that intervention was deemed lawful by no less than the European Court of Human Rights.[6] The solution nonetheless shifted the economic losses onto international investors, possibly transferring instability from one country to another – or, more correctly, aggravating the existing instability of some countries – and thus made new extraordinary measures necessary. This was particularly the case of Cypriot banks which happened to hold large amounts of Greek government debt. As the crisis spread from the private to the public sector, Cyprus presented a request of assistance to the President of the Euro Group, who confirmed that the ESM would intervene to offer assistance in exchange for reforms to be agreed in a memorandum of understanding (MoU) signed by Cyprus and the Commission on behalf of the ESM. It should be noted in this regard that the composition of the Euro Group and of the ESM's Board of Governors are largely and for most practical purposes the same. The agreed measures included the restructuring of the two main banks of the Mediterranean island in line with the new principle of bail-in, which now required shareholders, bondholders and uninsured depositors of distressed banks to bear the costs of bank resolution. The intervention in the Cypriot banking sector thus translated into economic losses to be borne by some individuals who, in an attempt to recover part of the money lost, brought action against the EU. Is the EU liable for those losses? The question was addressed initially by the General Court of the CJEU in two decisions of 13 July 2018, *K Chrysostomides & Co and Others v Council and Others*, T-680/13, and *Bourdouvali and*

5 C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECLI:EU:C:2012:756 (CJEU).

6 ECtHR, *Mamatas and Others v Greece*, App nos 63066/14, 64297/14 and 66106/14, judgment of 21 July 2016.

Others v Council and Others, T-786/14 and, after those judgments were appealed, by the Grand Chamber of the CJEU in Joined Cases C-597 & 598/18 P, C-603 & 604/18 P, *Council v K Chrysostomides & Co and Others*, decided on 16 December 2020.

THE DECISION

To introduce the judgment, one needs to take into account the case law of the CJEU attempting to extend the reach of EU law in consideration of the fact that the ESM developed outside of the EU legal framework. In the *Ledra Advertising* case, the CJEU did so by recognising, building upon *Pringle*,[7] that even when it signed an MoU – which remains outside the scope of EU law – the Commission as the 'guardian of the Treaties' is bound by the respect of fundamental rights as sanctioned in the Charter – including the right to property – and should therefore refrain from participating in an act which might infringe those rights.[8] The decision is important since it endeavoured to extend the reach of EU fundamental rights, yet the court built upon a long tradition in the interpretation of the limitations to the right to property, recognising that such right is not absolute and that proportionate limitations to it, taken in the public interest, are in fact justified. Thus, the court ruled that the MoU – as a non-EU act – could be annulled, but accepted that an unlawful conduct by the Commission or the ECB[9] while signing the MoU may give rise to non-contractual liability by the EU, therefore opening the gate to challenges based on this ground.

In *Chrysostomides* the question was therefore addressed whether the EU has non-contractual liability towards private individuals who suffered losses because of the restructuring of the Cypriot banking sector due to decisions taken in particular by the Euro Group. In order to establish this, two fundamental issues – among others which due to space constraints cannot be considered here – had to be addressed: whether the Euro Group is an EU institution in the first place and whether it engaged in an unlawful conduct consisting in a sufficiently serious breach of a rule of law intended to confer rights on individuals.

7 On that occasion, the CJEU noted that it is apparent from art 13(4) of the ESM Treaty that 'the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination' provided for in the EU Treaties, para 112.

8 C-8/15 to C-10/15 P *Ledra Advertising* [2016] ECLI:EU:C:2016:701 (CJEU), para 59.

9 On this, see T-107/17 *Steinhoff* [2019] ECLI:EU:T:2019:353 (General Court).

In the first instance, the General Court held that the Euro Group does qualify as an EU institution.[10] This is because the Group is explicitly mentioned in article 137 TFEU and Protocol 14 but also because, reasoning in terms of effective judicial protection:

> [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.[11]

Nonetheless, the substantive point concerning the violation of the right to property did not yield better results for the applicants in the first instance in *Chrysostomides* than it did in *Ledra Advertising*.

On appeal, and following the opinion of Advocate General (AG) Pitruzzella,[12] the CJEU overruled the judgment by the General Court and held that the Euro Group is in fact intended as a merely informal meeting, serving the function of a bridge between the EU and the national level. If an EU institution in the sense of article 340 TFEU must have been established by the Treaties and be intended to contribute to the achievement of the EU's objectives, then the Euro Group cannot qualify as such because, even if it is referred to by the Treaties, it was not also established by them.[13] What is more, as also emphasised by the AG, legislative history shows that the EU never intended to formalise the Group, as it rather decided to maintain it as an informal coordination forum.[14] The CJEU therefore built upon its precedent in *Mallis*, when it already held 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 within the meaning of Article 263 TFEU'[15] and denied on that occasion that the mere statement in which the Euro Group indicated that it had reached an agreement with Cyprus on the key elements of a macro-economic adjustment programme could be annulled.

In what concerns the substantive argument as to the violation of property rights by actions of the Council, the Commission and

10 T-680/13 K. *Chrysostomides & Co and Others v Council and Others* [2018] ECLI:EU:T:2018:486 (General Court), para 113.

11 Ibid 114.

12 For a critical analysis of the Opinion, see Menelaos Markakis and Anastasia Karatzia, 'The Eurogroup and effective judicial protection in the EU: Chrysostomides' (*EU Law Live* 15 June 2020)

13 C-597 & 598/18 P, C-603 & 604/18 *P Council v K Chrysostomides & Co and Others* [2020] ECLI:EU:C:2020:1028 (CJEU), para 90.

14 Ibid, Opinion of AG Pitruzzella, para 100.

15 C-105/15 P to C-109/15 *P Konstantinos Mallis* [2016] ECLI:EU:C:2016:702 (CJEU), para 61.

the ECB, the CJEU confirmed that no violation had taken place, reiterating its case law on the fact that property is not absolute and limitations to it are allowed within limits, explicitly referring in this regard to its previous decision in *Ledra Advertising*. In that circumstance, the justification for the restrictions was found to be the need to achieve financial stability – which is now developing as an overarching objective in the EU legal order.[16] A further ground of appeal concerned alleged discrimination, as the appellants lamented that they had been subject to a more detrimental treatment than other creditors and even other depositors within the same bank – ie those whose deposits did not exceed the secured threshold of €100,000. The argument was nonetheless dismissed by the court, which found that the situations were objectively different, thus justifying a diversified legal treatment.[17]

SIGNIFICANCE

Besides its immediate relevance in providing a straightforward answer to the question about the legal nature of the Euro Group, the case is significant in the context of the relationship between law, power and economics in times of crisis. In a broad sense, the case concerns the possibility of exerting legal control on the increasingly informal and intergovernmental approach to European economic governance and the margins for private individuals to challenge decisions which, while being aimed at restoring financial stability, might encroach upon their rights even of a constitutionalised nature.

If the intergovernmental approach to the resolution of the euro crisis sparked criticisms and legal controversy, the informality and opacity of the Euro Group offered particular reasons for concerns, since it appeared that some countries and actors might use that informality to impose controversial reforms on indebted countries. While officially the Group is meant as a forum for finance ministers to meet 'to discuss questions related to the specific responsibilities they share with regard to the single currency',[18] in practice – as put by Varoufakis in his provocative account of what happened behind closed doors in the days of the Greek crisis – 'a reasonable and impartial spectator might easily have concluded that the purpose of the Eurogroup is for the ministers to approve and legitimise decisions that have already been taken by the

16 See Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Kluwer 2017).

17 *Chrysostomides* (n 13 above) paras 191–208.

18 TFEU Protocol (No 14) on the Euro Group, art 1.

[Troika]'.[19] The Cypriot case, in which the solution of bail-in was first tested, became notorious in this regard.[20]

In this context, the formalisation of the Euro Group could extend judicial protection because sufficiently serious breaches of EU law could at least trigger the EU's non-contractual liability. Yet *Chrysostomides* adopts a rather conservative approach to the issue: instead of seeing the Euro Group as an EU institution, it understands it as a mere bridge between the supranational and the national level – 'an instrument of intergovernmental coordination'[21] which does not therefore risk intruding in the competences of the Council and in the independence of the ECB. To do so, the court emphasises that Protocol 14 requires the Euro Group to meet *informally* – although critics may doubt whether meeting informally is the same as not being a formal institution all the more considering that Article 2 of the Protocol then regulates the election of the President of the Euro Group. In doing so, the judgment safeguards the largely political nature of the process leading to the decisions by the Group, but at the risk of having a possibly negative impact on judicial protection at the EU level. Yet, the principle expressed in *Ledra Advertising*, which binds the Commission to the respect of fundamental rights, remains applicable and highly relevant: as explained by the AG and confirmed by the CJEU,[22] individuals who suffered a damage are not deprived of protection as they can bring their actions against the Commission or the ECB. Even in that case, however, it can be wondered whether the crucial recognition of the principle that EU institutions must act in a way that is consistent with EU law is sufficient in light of the reluctance of courts to find an actual violation of law in the context of measures intended to safeguard financial stability: as *Chrysostomides* again shows after *Ledra Advertising*, decisions might remain permeated by economic considerations which seem to play an increasingly explicit role in the interpretation of legal rights.

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19 Yanis Varoufakis, *Adults in the Room: My Battle with Europe's Deep Establishment* (Bodley Head 2017) 232.

20 Guy Verhofstadt, the leader of the liberal group (ALDE), said that the EU approach to the Cypriot crisis 'gives the impression that Europe is failing – what's failing is the bad inter-governmental system we have today', 'MEPs angry at EU's Olli Rehn over treatment of Cyprus' (*BBC News* 17 April 2013).

21 *Chrysostomides* (n 13 above) para 88.

22 This is because 'agreements are given concrete expression and are 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 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' (ibid para 93).