EUROPEAN COMMISSION

Brussels, 18 December 2018
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Court procedural documents

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

RESPONSE

submitted pursuant to Article 172 of the Rules of Procedure of the Court of Justice by the

European Commission,

Defendant at first instance and now Respondent,

represented by Jean-Paul Keppenne, Principal Legal Adviser, Leo Flynn, Legal Adviser, and Tim Maxian Rusche, Member of its Legal Service, as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e Curia, in

Case C-603/18 P

concerning an Appeal lodged against the Judgment of the General Court (Fourth Chamber, Extended Composition) of 13 July 2018 in Case T-680/13 *Chrysostomides, K. & Co. and others* v *Council and others*, by

Dr. K. Chrysostomides & Co. LLC and others,

Appellants,

the other parties being

Council of the European Union,

Defendant at first instance, and now Respondent,

European Central Bank,

Defendant at first instance, and now Respondent,

Euro Group, represented by the Council of the European Union,

Defendant at first instance, and now Respondent,

European Union, represented by the European Commission,

Defendant at first instance, and now Respondent.

TABLE OF CONTENTS

1. INTRODUCTION

1. Dr. K. Chrysostomides & Co. LLC and 37 other persons (collectively, 'the appellants') appeal against the judgment of the General Court (Fourth Chamber, Extended Composition) of 13 July 2018 in Case T-680/13 *Chrysostomides, K. & Co. and others* v *Council and others* ('the judgment under appeal').[1] The appellants are a subset of the 51 applicants who brought proceedings in Case T-680/13, and for those who have chosen not to appeal the judgment at first instance is definitive.

2. The judgment under appeal concerns an action under Article 268 TFEU seeking compensation for damage allegedly suffered by the appellants as a result of the decision of the Governing Council of the ECB of 21 March 2013 relating to emergency liquidity assistance following a request from the Central Bank of Cyprus, the Eurogroup statements of 25 March, 12 April, 13 May and 13 September 2013 concerning Cyprus, Decision 2013/236,[2] the Memorandum of Understanding of 26 April 2013 on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and the European Stability Mechanism ('MoU'), and other acts and conduct of the Commission, Council, the ECB and the Eurogroup connected with the grant of a financial assistance facility to the Republic of Cyprus ('Cyprus').

3. The judgment under appeal sets out the factual and legal background to that action for damages at paragraphs 1 to 46. For ease of comprehension, the present response uses the short forms and abbreviations employed in the judgment under appeal.

2. THE JUDGMENT UNDER APPEAL

4. In the judgment under appeal the General Court commenced by examining its jurisdiction to hear the action before it, in light of the challenge made by the defendants at first instance, examining in paragraphs 80 to 208 the various claims put forward by the latter.

5. The General Court held that it had jurisdiction to hear the action for damages in so far as it related, firstly, to the alleged approval of the harmful decrees by the

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1 A copy of the judgment under appeal is annexed to the appeal.

2 Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth, OJ 2013 L 141, p. 32.

defendants, secondly, to the obligation to maintain or to implement the conversion of uninsured deposits in BoC into shares as follows from Article 2(6)(b) of Decision 2013/236, thirdly, to the negotiation and signing, by the Commission, of the MoU, fourthly, to the monitoring, by the Commission and the ECB, of the application of the harmful measures under Article 13(7) of the ESM Treaty, fifthly, to the alleged communication of precise assurances, by the defendants, and in particular by the Eurogroup, that the harmful measures would not be adopted and, sixthly, to the decisions adopted by the ECB concerning emergency liquidity assistance ('ELA').

6. By contrast, the General Court held that it did not jurisdiction in relation to a series of other measures and decisions identified by the applicants at first instance, because it could not be concluded that they had required Cyprus to adopt the harmful measures or they could not be attributed to the defendants at first instance.

7. The General Court then examined a series of arguments put forward by the defendants at first instance as to the admissibility of the action before it. It rejected most of those arguments at paragraphs 209 to 244, other than those relating to the harm allegedly suffered by the applicants at first instance as a result of the bail-in of the shareholders and bondholders of Laïki.

8. As regards the five sets of measures and actions for which it had held that it had jurisdiction and for which the action for damages was admissible, the General Court examined the merits of the action at paragraphs 245 to 509. It concluded that the applicants at first instance had made out none of their claims as to various violations of Union law. Since the first condition of non-contractual liability was not satisfied, the General Court dismissed their application for compensation.

3. THE APPEAL

9. In support of their appeal, the appellants make eight pleas. The Commission will set them out and respond to them in the order they appear in the appeal.

3.1. First plea: On whether the Eurogroup statement of 25 March 2013 required Cyprus to adopt the harmful measures and on whether those measures were required by a decision or agreement attributable to the Union

10. By their first plea, the appellants challenge the assessment of the facts made by the General Court in three regards.[3]

11. Under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. Unless it distorts the facts or evidence, the appraisal of those facts and the assessment of that evidence thus do not constitute a point of law that is subject as such to review by the Court on appeal.[4] Where an applicant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to such distortion.[5] Such distortion exists where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.[6]

12. In light of that case-law, it appears that the General Court has not distorted the evidence and that by their first plea the appellants are in reality seeking to obtain a new assessment of the latter, which is outside the jurisdiction of the Court.

13. The appellants first dispute the finding made at paragraph 115 of the judgment under appeal, in which the General Court held that the Eurogroup statement of 25 March 2013 "*gave, in a very generic way, an account of certain measures which were agreed at a political level with the Republic of Cyprus […] and announced or encouraged certain future measures*". They contend that reading that statement and its annex "*shows that it identified the measures to be taken with precision*".

14. None of the elements identified by the appellants as detailed prescriptions appears in the statement of 25 March 2013 itself. They are all contained in the annex to that

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3 Appeal, points 14 to 35.

4 See Case C•501/15 P *EUIPO* v *Cactus* EU:C:2017:750, paragraph 60 and the case-law cited.

5 See Case C•413/08 P *Lafarge* v *Commission* EU:C:2010:346, paragraph 16 and case-law cited.

6 See Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and others* v *Commission* EU:C:2011:368, paragraph 153 and case-law cited.

statement. That distinction is important because when the General Court set out the facts at paragraphs 25 to 27 of the judgment under appeal it clearly distinguished between the statement of 25 March 2013, on the one hand, and its annex, on the other. Thus, when the appellants use the contents of the annex to contest how the General Court at paragraph 115 describes the statement[7] they misread the judgment under appeal.

15. In any event, the appellants fail to note that the annex describes the measures in question as being the "*policy plans*" of the Cypriot authorities, which "*were welcomed by the Eurogroup*". The annex gives a minimal level of detail only regarding measures that the Cypriot authorities had presented to the Eurogroup. It is in no way manifest that the General Court distorted the contents of the file before it, by speaking in paragraph 115 of the judgment under appeal of an account given in a very generic way of certain measures. The first claim should be dismissed.

16. The appellants then challenge the finding at paragraph 116 of the judgment under appeal that the Eurogroup did not take any decision at its meeting of 25 March 2013 with regard to the conditions that Cyprus would have to satisfy to benefit from a financial assistance facility ('FAF'), again alleging a distortion of the clear sense of the evidence.[8] By that claim, they contend that the Eurogroup statement sought to lay down a binding course of action for the Union institutions, the Member States and the ESM, and all of them acted upon it as such. They argue that the Commission and the ECB cannot negotiate different conditionality arrangements with an ESM Member or different assistance amounts from those foreseen by a statement of the Eurogroup, and that the ESM Board of Governors would be in all respects bound by such a statement. On that basis, the appellants also attack paragraph 117 of the judgment under appeal, arguing that the General Court wrongly ruled that the Eurogroup considered that authority to decide on the assistance requested came within the competence of the ESM Board of Governors.

17. However, as the General Court noted at paragraph 9 of the judgment under appeal, Article 13 of the ESM Treaty lays down the procedure for granting stability support

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7 Which builds on the elements quoted in paragraph 26 of the judgment under appeal.

8 Appeal, points 17 to 26.

to ESM Members. As is clear from Article 13(2) of that treaty, it is the ESM Board of Governors that decides to grant, in principle, stability support to the ESM Member concerned, then entrusts the Commission with the task of negotiating an MoU with the ESM Member and in parallel adopts a proposal for a FAF agreement, and finally approves the MoU as negotiated before the Commission may sign the latter on behalf of the ESM. The ESM Board of Governors is the ultimate decision-making authority within the ESM regime, and the ESM Treaty gives no role to the Eurogroup in that process.

18. The appellants counter that membership of the ESM Board of Governors is identical to that of the Eurogroup. However, that characteristic does not transform the one into the other. Unlike the Eurogroup, which Protocol No 14 to the Treaties recognises while limiting its role to meeting informally to discuss various questions, the ESM Board of Governors has an extensive list of decision-making powers under paragraphs 6 and 7 of Article 5 of the ESM Treaty. Each power is linked to a specific procedure for taking decisions, in contrast to the silence in Protocol No 14. The scope of formal powers and the precise means of decision-taking distinguish the ESM Board of Governors from the Eurogroup. Overlap in their membership cannot render the two separate bodies inter-changeable, which is the position that the appellants erroneously assert.

19. The applicants also point to the wording of the Eurogroup statement of 25 March 2013 insofar as it speaks of the ESM "*formally*" adopting the FAF agreement. They claim that, "*formal adoption is not compatible with any authority to change the agreement that was reached in the [Eurogroup]*". However, they offer no support for that claim. Indeed, it would be more pertinent to observe that, in the absence of "*formal adoption*" by the ESM Board of Governors, no legal effects could follow from any prior informal understanding reached in another forum.

20. The appellants' second claim under the first plea should be rejected.

21. By their final claim, the appellants dispute the finding in paragraphs 127 and 132 of the judgment under appeal (that the agreement on conditionality was concluded by the representatives of the euro-area Member States acting as members of the ESM

Board of Governors). They do so on the basis that it is at odds with both the facts before the General Court and the law governing the ESM.[9]

22. As regards the facts, the appellants contend that there is no basis in fact to suggest that the ESM Board of Governors met on 25 March 2013, and to suggest otherwise "*distorts the clear sense of […] the language of the [Eurogroup] statement itself*". However, they do not submit in a sufficiently detailed manner that the General Court's assessment of the statement is at odds with its wording, so as to permit the Court to verify whether the assessment of the statement appears clearly incorrect.[10] They point to nothing in the statement's contents that would be at odds with the finding of the General Court that they criticise.

23. The appellants also argue that the finding distorts the clear sense of the letter of 13 April 2013 from the German Minister of Economy to the German Parliament, which the General Court described and evaluated in paragraphs 120 to 122 of the judgment under appeal. However, the appellants do not explain how the General Court in its finding regarding that letter, at paragraph 127 of the judgment under appeal,[11] construed the letter in a manner manifestly at odds with its wording. Since they have not done so, their claim as to a distortion of evidence must be rejected.

24. The appellants also argue that the finding is at odds with the ESM Treaty since it would grant the ESM Board of Governors power to take decisions outside the authority it has under that treaty, and that it is at odds with the By-Laws and Rules of procedure of the ESM. They also argue that it would affect the powers of the Union institutions under Article 4(4) of the ESM Treaty.

25. The appeal explains none of those claims and so its arguments in that regard are inadmissible. The appellants do not develop their claim that the Board of Governors might act *ultra vires* its powers under the ESM Treaty in a manner that allows the respondents to understand it nor the Court to rule on it. The references in footnote 21 to the appeal to the By-Laws and Rules of Procedure of the ESM similarly is not

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9 Appeal, points 27 to 35.

10 See, by analogy, Case C•260/09 P *Activision Blizzard Germany* v *Commission* EU:C:2011:62, paragraph 52

11 Where the General Court noted that the mention by the Minister in the letter of 13 April 2013 of the Eurogroup was explicable by the fact that the individuals meeting in the Eurogroup are, in principle, the same natural persons as the members of the ESM Board of Governors.

adequate to allow the nature of the alleged error of law to be identified, while the appellants offer no link between the powers of the Commission and the ECB under Article 4(4) of the ESM Treaty and the error of law they allege.

26. The appellants go on to invoke a supposed gap in the right to judicial protection that would result from the finding of the General Court. However, that claim is based on the premise that the gap in question would emerge "*every time that the [Eurogroup] decides to grant financial assistance to a Member State or takes any decision connected with conditionality*". That starting point assumes the end-result for which the appellants wish to argue. Their circular argument does not advance their case.

27. The appeal sees a contradiction between paragraphs 127 and 132 of the judgment under appeal and its paragraph 200, where the General Court held that Eurogroup statements of 12 April and 13 May 2013 could not be seen as being beyond the competences granted to it by Union law. Those two parts of that judgment are not, however, at odds. As paragraph 199 makes clear, Protocol No 14 speaks of the Eurogroup "*discussing questions related to the specific responsibilities [the ministers composing it] share with regard to the single currency*" in terms of Article 119(2) TFEU, and paragraph 200 builds on that finding. The specific responsibilities under economic policy coordination do not extend to providing financial assistance under a permanent mechanism to a Member State, which is the object of paragraphs 127 and 132. The two parts of the judgment under appeal are internally consistent.

28. Finally, the appellants claim that since the agreement on conditionality of 25 March 2013 lies within the institutional framework of Union law and involved the Commission and the ECB, that agreement must be attributable to the Union for the purposes of Article 340(2) TFEU. That claim is predicated on the agreement on conditionality having been taken within the Union law framework rather than within the decision-making architecture laid down by the ESM Treaty. However, it is precisely that latter evaluation that the appellants seek to dispute. They cannot establish the error of law with which they reproach the General Court by presuming the presence of the mistake that they seek to demonstrate. That last claim is an unsupported affirmation. It should be rejected, and with it the first plea as a whole.

3.2. Second plea: On the ECB press release of 21 March 2013

29. By their second plea, the appellants attack the finding by the General Court that the ECB press release of 21 March 2013 as regards current and future provision of ELA to the banks concerned and the decision to which it refers did not require Cyprus to adopt the harmful measures.[12]

30. Since that plea relates to the extent of the competences of the ECB in relation to ELA, the Commission will make no remarks on that part of the appeal. It will however leave to the ECB the task of commenting on the latter's powers in relation to ELA, and showing that the second ground of appeal must be rejected.

3.3. Third plea: On certain other acts that the General Court found were not attributable to the defendant or did not require Cyprus to introduce or maintain the harmful measures of which the appellants complain

31. By their third plea, the appellants dispute findings of the General Court as to four groups of acts[13] ('the four groups of acts in question') adopted after 25 March 2013 by the defendants at first instance.[14] The plea contains two limbs.

32. By its first limb, the appellants claim that the General Court distorted the clear sense of the evidence when at paragraph 158 of the judgment under appeal it rejected their claim at first instance that the four groups of acts in question were part of a 'continuum'.[15] At paragraph 158, the General Court described their claim that each of the four group of acts in question as a "*necessary link in the chain of conditionality*", the absence of any one of which would have meant the failure of the harmful measures, as "*speculative, since the applicants [at first instance] failed to adduce any evidence establishing the truth or even the likelihood thereof*".

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12 Appeal, points 36 to 43. The appellants indicate at points 37 and 38 that they challenge paragraphs 146 and 147 of the judgment under appeal, but those paragraphs do not contain the findings that they challenge. They seem in reality to dispute paragraphs 148 to 151 of the judgment under appeal.

13 The four groups of acts as set out in paragraph 156 of the judgment under appeal are: (i) the negotiation and conclusion of the MoU of 26 April 2013 by the Commission; (ii) 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 FAF to the Republic of Cyprus; (iii) the Eurogroup Statements of 12 April, 13 May and 13 September 2013; and (iv) Decision 2013/236.

14 Appeal, points 44 to 53.

15 Appeal, points 51 to 53.

33. At points 51 and 53 of the appeal, the appellants limit themselves to repeating their contention that the four groups of acts in question constitute a continuum, but they make no effort to show that the General Court distorted specific features in those acts and still less how any such distortion could be seen as evident. As a result, the appeal falls short of the standard needed for the Court to reverse findings of fact made at first instance.

34. At point 52 of the appeal the appellants seek to rebut the analysis of their "continuum" argument in paragraph 158 of the judgment under appeal, by disputing the finding that "*It is not apparent from the documents in the case file that the Republic of Cyprus would have been required to revoke or cease implementing the harmful measures if any one of the subsequent acts […] had not been adopted*". On the one hand, they claim that Cyprus only adopted the harmful measures to comply with the requirements of the defendants at first instance, but they offer nothing to back up that claim. On the other hand, they claim that a failure by Cyprus to revoke the harmful measures if any of the four groups of acts in question had not existed would have entailed a breach of Union law. However, they give no explanation in the third plea as to what breach of Union law would have resulted from such a failure by the Cypriot authorities to revoke the harmful measures in those circumstances. Neither of their arguments can be upheld as a result.

35. The first limb of the third plea must therefore be rejected.

36. By the second limb of their third plea, the appellants dispute the findings of the General Court as regards the first three of the four groups of acts in question. The General Court did not examine those groups of acts based on the appellants' "continuum" argument. Instead, it did so to determine if the harm allegedly suffered by the appellants had resulted from an obligation arising under each group of acts that the defendants at first instance had imposed on Cyprus to maintain or continue to implement the harmful measures adopted by that Member State.[16] In that regard, the appellants challenge three findings of the General Court, at paragraphs 167 and 168, at paragraph 169 and at paragraphs 170 and 171 of the judgment under appeal.

16 See paragraph 159 of the judgment under appeal.

37. The first of the disputed findings is that the acts of the Commission, by which it concluded the MoU and found that the measures adopted by the Cypriot authorities complied with conditionality, were attributable to the ESM only and could not be imputed to the Commission.[17] The appellants assert that in light of *Ledra Advertising*[18] those acts are capable of incurring the liability of the Union under Article 340(2) TFEU and they claim that the first disputed finding contradicts paragraphs 200 to 202 of the judgment under appeal, in which the General Court accepted that the negotiation and conclusion of the MoU by the Commission and its monitoring of the implementation of the harmful measures could incur the liability of the Union.

38. The appellants' claim rests on a misreading of *Ledra Advertising*. The first of the disputed findings in line with paragraph 53 of that judgment, in which the Court recalled that the Commission and the ECB have no decision-making powers under the ESM Treaty and that the activities they pursue within the ESM Treaty commit the ESM alone. By contrast, paragraph 55 of that judgment sets out that unlawful conduct linked to the activities of the Commission and the ECB within the ESM Treaty may be the object of an action for compensation against them, which is in line with the findings of the General Court in paragraphs 201 to 203 of the judgment under appeal. The appellants have not shown any error of law in that regard by the General Court in the judgment under appeal, and the first claim should be dismissed.

39. The second of the disputed findings is that the approval by the Commission and the ECB of the payment of various tranches of the FAF to Cyprus were attributable to the ESM only and could not be imputed to the Commission and the ECB.[19] Here the appellants raise the same arguments that they advanced in respect of the first of the disputed findings. For the reasons set out above in response to that first claim, the second claim should also be dismissed.

40. The last of the disputed findings is that the Eurogroup statements of 12 April, 13 May and 13 September 2013 did not oblige Cyprus to continue or maintain the

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17 Appeal, points 46 to 50.

18 Joined Cases 8/15 P to C-10/15 P *Ledra Advertising* v *Commission and ECB* EU:C:2016:701.

19 Appeal, points 47 to 50.

harmful measures.[20] The appellants allege that the General Court distorted the clear sense of the evidence by finding that the statements did not require Cyprus to maintain or continue to implement the harmful measures. They thereby dispute the detailed evaluation of the content of those statements, in paragraphs 170 and 171 of the judgment under appeal. However, they offer nothing specific to support their view. That final claim should accordingly be dismissed and with it the third plea.

3.4. Fourth plea: On whether Decision 2013/236 required Cyprus to adopt all of the harmful measures

41. By their fourth plea, the appellants argue that Cyprus had to adopt or maintain all of the harmful measures of which they complain due to Decision 2013/236. As a result, the General Court erred in law when it ruled at paragraph 181 of the judgment under appeal that amongst the harmful measures Decision 2013/236 only required the conversion of uninsured deposits in BoC into shares.[21] The appellants specifically contest the holding in paragraph 178 of the judgment under appeal, where the General Court ruled that the harm the appellants considered they had suffered due to the integration of Laïki into BoC did not result from Article 2(6)(b) of Decision 2013/236, but instead resulted from measures adopted by the Cypriot authorities for which they had a wide margin of discretion. The appellants base themselves on the first sentence of Article 2(6) of Decision 2013/236, which provides that Cyprus "*shall continue to thoroughly reform and restructure the banking structure*". Since all the harmful measures are integral to that process of restructuring and reform, that provision renders all of those measures mandatory for Cyprus.

42. In paragraph 172 of the judgment under appeal, the General Court framed the argument of the appellants at first instance regarding Decision 2013/236 as relating only to Article 2(6) of that decision, which the appellants do not contest.[22] It then at paragraph 177 of the judgment under appeal ruled that the only measures and outcomes laid down in Article 2(6) of Decision 2013/236 that were relevant for the harmful measures were those set out in subparagraphs (b) and (d) of that provision,

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20 Appeal, point 53.

21 Appeal, points 54 to 63.

22 The reference at point 55 of the appeal to Article 1(1) of Decision 2013/236 does not alter the scope of the obligations imposed on Cyprus, since that provision refers to its Article 2.

which again the appellants do not contest. The General Court went on, at paragraph 179 of the judgment under appeal, to find that Article 2(6)(d) of Decision 2013/236 did not require Cyprus to maintain or continue to implement the harmful measures. The appellants do not take issue with that finding in that their appeal.

43. As a result, the only portion of the judgment under appeal that is contested in the appeal is the finding in its paragraph 178 that Article 2(6)(b) of Decision 2013/236 in itself did not, insofar as it established that the programme to be concluded with Cyprus would provide for the integration of Laïki into BoC, give rise to the alleged harm for the applicants at first instance. The General Court explained there that Article 2(6)(b) did not set out specific rules that would have to be followed in the integration of Laïki into BoC. That integration process could take place in a number of different ways, and accordingly the process did not in itself have to give rise to the illegalities of which the appellants complained at first instance. The General Court was therefore correct to rule that any harm resulting to the appellants would have been the result of implementing measures adopted by Cyprus to implement that integration, measures over which they had a wide margin of discretion.

44. That interpretation of Article 2(6)(b) of Decision 2013/236 is free of any error of law. The appellants object that all the harmful measures comprise a single construct, which is in turn underpinned by a continuum of which Decision 2013/236 is an integral part.

45. However, as has been shown in the context of the third plea, the appellants' "continuum argument" must be dismissed. It is necessary to examine Decision 2013/236 on its own, and the ordinary meaning of the terms of Article 2(6)(b) thereof shows that the General Court made no error of law in paragraphs 178 and 181 of the judgment under appeal. The appellants point to nothing in the recitals or the other provisions of that decision that could support their claim that the General Court misinterpreted Article 2(6)(b).

46. The fourth plea should therefore be rejected.

3.5. Fifth plea: On the admissibility of the action at first instance insofar as it pertained to the losses suffered by Laïki's shareholders

47. By their fifth ground of appeal, the appellant challenge the finding by the General Court at paragraph 218 of the judgment under appeal that their action for damages

was inadmissible insofar as it pertained to the losses suffered by the shareholders of Laïki.[23] The General Court based ruled at paragraphs 217 and 218 of the judgment under appeal that, even if it had jurisdiction to examine all the acts and conduct impugned by the appellants, their allegations concerning the treatment to which the shareholders of Laïki were subjected were too imprecise for the General Court to be able to assess them. In particular, the General Court held that the harmful decrees[24] did not provide that the shares of Laïki were to be subject to a bail-in.[25] The General Court thus rejected as inadmissible the allegations of the applicants at first instance regarding the shares of Laïki, in light of the first paragraph of Article 21 of the Statute of the Court of Justice and of Article 44(1)(c) of the Rules of Procedure of the General Court of 2 May 1991.[26]

48. The appellants offer three arguments in support of their fifth plea. The Commission will examine the third argument first, and then pass to the other two.

49. By that third argument, the appellants castigate the General Court for failing to see that all the harmful measures of which they complained were interconnected and could not be dissociated.[27] It is a re-visit of their "continuum argument". However, as already shown in the context of the third plea, they have not proven that the General Court erred in law by considering that the "continuum argument" was speculative and unsubstantiated. As a result, the third argument should similarly be rejected in the context of the fifth plea. In any event, the continuum argument does not address the flaw that the General Court had identified when the latter found the application inadmissible due to imprecision in relation to the shares and bonds of Laïki, because the General Court had made that finding independently of whether it had jurisdiction to examine all the impugned Union-level acts and conduct.

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23 Appeal, points 64 to 71.

24 The ''harmful decrees'' are the four decrees published by the Cypriot authorities in connection with the resolution procedures for BoC and Laïki, which the General Court described in paragraphs 30 to 36 of the judgment under appeal.

25 The phrasing of the first sentence of paragraph 218 of the judgment under appeal speaks only of those decrees not providing that ''*the actions of Laïki be subject to a bail-in*''. However, the same sentence in the French-language translation of the judgment under appeal is clearer: ''*Or, il ressort des pièces du dossier et, notamment, des éléments rapportés aux points 30 à 36 ci-dessus, que les décrets dommageables ne prévoient pas que les actions de la Laïki font l'objet d'une quelconque mesure de renflouement interne*'' (emphasis added).

26 Which were the Rules of Procedure applicable when the appellants had lodged the application at first instance.

27 Appeal, point 70.

50. By their first argument,[28] the appellants rely on the contents of the annex to the Eurogroup statement of 25 March 2013 to show that it envisaged what would be in substance a bail-in of the shareholders of Laïki. They contend on that basis that it was excessively formalistic of the General Court to find as it did at paragraph 218 of the judgment under appeal merely because the harmful decrees (and in particular Decree 104/2013) were silent about a bail-in. They also assert that such an approach would enable the circumvention of various rules of Union law, in particular those in Directive 2014/59/EU and in Regulation (EU) No 806/2014.

51. The appellants' claim regarding Union legislation adopted in 2014 is itself unclear. In addition, given the autonomy of the Union legal order, the content of national legislation cannot be used to give meaning of provisions of Union law. Moreover, the harmful decrees were adopted and amended in 2013, before the provisions of Union law to which the appellants point had even been proposed, let alone adopted. The claim regarding circumvention, if it is admissible, should be rejected.

52. While the appellants criticise the General Court for what they see as excessively formalism, they are unable to dispute that the harmful decrees only provide, as regards Laïki, for the transfer of some of its assets and liability to BoC, the granting of 18% of the new capital of BoC to Laïki and the sale of branches of Laïki established in Greece. The harmful decrees are silent as to the treatment of the shares, the bonds and the remaining deposits of Laïki. The General Court made no error in law in ruling, therefore, that the national measures at issue did not foresee a bail-in as regards shareholders of Laïki. A bail-in would have involved a cancellation, in whole or part, of rights or a conversion of one form of claim against Laïki into another form. The harmful decrees take no such step.

53. The first argument should also be rejected.

54. By their second argument, the appellants argue that the ruling on imprecision is at odds with language used in the last sentence of recital 5 of Decision 2013/236 and

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28 Appeal, points 65 to 67.

the terms used by the General Court itself at paragraph 506 of the judgment under appeal, where it speaks of "*bail-in of the banks concerned*".[29]

55. As regards the reference to paragraph 506 of the judgment under appeal, the General Court made clear at paragraph 244 of the same judgment that it would examine the merits only with regard to the parts of the action before it for which the General Court had jurisdiction and that was admissible. As a result, the remainder of the judgment does not deal with aspects found to be inadmissible, and the terms used by the General Court must be read in that light.

56. The appellants also rely on recital 5 to Decision 2013/236, describing the Eurogroup agreement of 25 Mach 2013 as foreseeing that "*the recapitalisation of the two largest banks was to be exclusively generated from within those banks (i.e. from shareholders, bondholders and depositors)*". However, Laïki was not recapitalised; the claims of all holders of shares, bonds and non-transferred deposits stayed intact within that bank while that bank obtained no new capital itself. As a result, given the clear terms of the harmful decrees, the General Court made no error in law in finding that there was an imprecision in the application that left it unable to see how the appellants connected the harmful measures of which they complained with the Union-level acts and conduct they considered unlawful.

57. The second argument should be rejected and with it the fifth plea as a whole.

3.6. Sixth plea: The General Court correctly found no serious breach of the right to property

58. By their sixth ground of appeal, the appellants challenge the findings of the General Court in respect of the alleged breaches of their right to property.[30] They divide that ground into three parts, each of which concerns a different group of the harmful measures they had identified at first instance.

3.6.1. On the first group of harmful measures

59. The General Court commenced its examination of the claim by the applicants at first instance that their right to property was breached by looking at a first group of

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29 Appeal, points 68 and 69.

30 Appeal, points 75 to 134.

harmful measures, which the Court had already examined in *Ledra Advertising*. The General Court rejected their claim that *Ledra Advertising* was not relevant, because the reasoning in paragraphs 74 and 75 of that ruling dealt with "*the inherent legality of [the first group of harmful] measures*" and the evidence invoked by the applicants at first instance related, for the most part, only to questions of the reality of damage and of whether the harmful measures were to be imputed to the defendants at first instance.[31] The General Court went on to examine if the remaining evidence put forward by the applicants at first instance showed that the first group of harmful measures infringed the right to property, and concluded that it did not.[32]

60. The appellants start by disputing how the General Court characterises the links between their claims at first instance regarding the first group of harmful measures and the ruling in *Ledra Advertising*.[33] However, they limit themselves to repeating their argument at first instance that the Court had only been concerned in that case with paragraphs 1.23 to 1.27 of the MoU. They do not explain in what manner the General Court may have erred in law when it held that the Court had dealt with the inherent legality of the first group of harmful measures. As a result, that part of their appeal is not admissible.

61. The appellants then set out two grounds to impugn the finding of the General Court that the restrictions on the right to property were provided by law, made at paragraphs 269 to 285 of the judgment under appeal.[34] On the one hand, the Union had no authority at the relevant time to impose bail-in requirements since it had not yet adopted Directive 2014/59/EU or Regulation (EU) No 806/2014. On the other hand, the Cypriot authorities did not freely adopt the Law of 22 March 2013 (the legislation underpinning the harmful decrees). They also contest a series of findings made by the General Court about various features of the Law of 22 March 2013.

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31 Judgment under appeal, paragraphs 260 to 265.

32 Judgment under appeal, paragraphs 267 to 324.

33 Appeal, points 77 and 78.

34 Appeal, points 79 to 91.

62. The respondents have never claimed that the basis in law for the harmful measures lay in Union law, and the General Court took no stance on that matter. As a result, the first strand of the appellants' argument is ineffective.

63. As for the status of the Law of 22 March 2013, the appellants argue that "*the contents of the Resolution Law had been dictated to Cyprus by the Commission as part of the negotiations leading to the draft MoU of November 2012*" and that it was adopted so soon before the harmful decrees were adopted that it "*hardly meets the requirement that the law must be accessible to interested parties and foreseeable as to its effects*". They allege that as a result the Law of 22 March 2013 fails the test of quality of law.[35]

64. In their application at first instance, the appellants had argued that various features of the Law of 22 March 2013 were unlawful (due to: wide discretion given to the Central Bank of Cyprus ('CBC'); lack of clarity on the availability of and calculation of compensation; no obligation to hear persons affected by the harmful decrees before their adoption).[36] By contrast, in their plea on the right to property they did not argue more generally that Law of 22 March 2013 lacked the quality of law either because the respondents supposedly forced it onto Cyprus or because it was implemented several days after its adoption. The arguments now made in the appeal that the Law of 22 March 2013 fails the test of quality of law for either of those reasons are new and the appellants never put them to the General Court. The appellants may raise them for the first time on appeal and so they are inadmissible.

65. The appellants then return to two features of the Law of 22 March 2013 that they had contested at first instance, namely its provisions on the detailed arrangements for compensation and on the possibility for affected persons to be heard.

66. First, the appellants dispute aspects of paragraph 279 of the judgment under appeal, in which the General Court dealt with their claim that it was impossible to know against whom a party considering it injured by measures adopted under the Law of 22 March 2013 could bring an action for compensation before a Cypriot court.[37]

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35 Appeal, points 83 and 84.

36 Application at first instance, points 131 to 145.

37 Appeal, points 86 and 87.

However, the appellants do not dispute the finding in the last sentence in paragraph 279 of the judgment under appeal that an action for compensation under Cypriot law is always possible against the Resolution Authority in the event of fraud, bad faith or gross negligence. Equally, they do not dispute that the wording of section 26(2) and (3) of the Law of 22 March 2013 opens a right to compensation for a party that considers itself to be injured in comparison with the situation it would have been in with the liquidation of the bank concerned. As a result, when the General Court established its findings about the provisions of national law it did not distort the clear sense of the evidence before it, and those findings should stand.

67. The appellants then take issue with paragraphs 280 and 281 of the judgment under appeal where the General Court ruled that nothing in section 22 of the Law of 22 March 2013 allowed it to be claimed that the valuation undertaken for the purposes of the implementation of resolution measures would bind a national court hearing a claim for compensation.[38] However, the appellants limit themselves to asserting that "*under the [Law of 22 March 2013], affected parties do not in practice receive effective protection*". They identify no reason why the General Court was wrong to rule as it did, whether by reference to the wording of section 22 or in light of rulings of the Cypriot courts. Such a claim is not admissible in the context of an appeal.

68. Finally, the appellants contest paragraph 282 of the judgment under appeal, finding that, given the need to act swiftly so as to protect the stability of the Cypriot financial system and avoid spreading contagion to other euro-area Member States, the lack of a consultation procedure before the adoption of the harmful decrees did not mean that the appellants' right to property was infringed.[39] The appellants object that the conduct of the respondents had induced the need for quick action and that in contrast to the ruling invoked by the General Court of the European Court of Human Rights of 2016 in *Mamatas and others* v *Greece*,[40] where there was some consultation of affected parties, there was no consultation as regards the harmful measures.

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38 Appeal, point 88.

39 Appeal, points 89 to 91.

40 CE:ECHR:2016:0721JUD006306614. Judgment of 21 July 2016; applications no. 63066/14, 64297/14 and 66106/14.

69. The first ground of objection by the appellants, that the respondents had generated the need for the Cypriot authorities to take action quickly, is an unproven allegation. It is not established, and it does not in any event alter the fact that Cyprus had to take immediate action to avoid a meltdown of its financial system.[41]

70. The second ground of objection by the respondents overlooks the fact that the European Court of Human Rights noted at paragraph 133 of its ruling in *Mamatas* that the applicants before it in that case were not part of the negotiations between Greece and its bondholders before Greece restructured its debt. In other words, the claimants in *Mamatas* whose rights to property were not impermissibly restricted by Greece's conduct were persons who were not heard before the restructuring of which they complained. Those persons are identically situated to the appellants. The fact that the *Mamatas* ruling concerns a fact-pattern where there was some dialogue with the representatives of certain bondholders does not assist the appellants because there was no consultation of the claimants in *Mamatas*. In any event, there is no such right to be heard *ex ante* by shareholders and creditors in the context of resolution procedures, where there is by definition a need to take rapid action.[42]

71. The first ground of objection to the claimed breach of property rights, that there was no basis in law for the restrictions imposed on the appellants, must thus be rejected.

72. The appellants' second ground under their sixth plea is that the General Court erred at paragraphs 300 to 316 to find no breach of the principle of proportionality, because it would have been possible to put in place alternatives to the harmful measures that were less restrictive than those measures were.[43] They reject the finding at paragraph 302 of the judgment under appeal that it was clear from the documents in the file that any approach other than that which was finally agreed either was unfeasible or would not have allowed delivery of the expected results.

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41 For the same reason, the similar claim in point 110 of the appeal must be dismissed.

42 The Commission notes in passing that such a view is consistent with the case-law of the European Court of Human Rights. It ruled that the Convention was not breached in the context of putting a bank into a special bankruptcy procedure without the involvement of its shareholders or its creditors – see, to that effect, Application no. 50357/99 *Camberrow MM5 AD* v *Bulgaria*, Decision of 1 April 2004. That Court found no breach of Article 6 of the Convention, or of Article 1 of Protocol 1, in the absence of any hearing of the applicant (the main shareholder of a bank) prior to the decision to effect a forced sale of all of the bank's assets, its striking off the register of companies and the complete extinction of the rights of its shareholders and of those of certain creditors.

43 Appeal, points 95 to 115.

73. First, the appellants object to the invocation by the General Court of the general bank levy that the Cypriot Parliament had rejected on 19 March 2013. However, the General Court did nothing more than use the rejection of that measure to show that that measure, which would have been less onerous for the appellants, was unfeasible at the moment when it became imperative to save the Cypriot banking system.

74. Next, the appellants dispute the reliance by the General Court on a report of the IMF of May 2013, which had shown that a public capital injection into the banks would have overburdened Cypriot taxpayers and left the banking system of Cyprus excessively large and liable to threaten the stability of the Member State. They limit themselves to describing that report as an *ex post facto* rationalisation, and make no attempt to explain why the General Court was wrong to accord it probative value.

75. The appellants also contest the use of that same IMF report in paragraph 304 of the judgment under appeal[44] in relation to solutions to the problems faced by Cyprus that would not generate further debt, beyond the EUR 10 billion made available to that Member State. The appellants argue there is no *a priori* maximum attached to the financial assistance that its partners could lend to Cyprus. However, the Cypriot authorities were entitled not to seek amounts greater than were necessary to address the problems faced by its economy, and so not to pile up unsustainable public debt or burden present and future taxpayers with unmanageable levels of debt. The IMF report was cogent evidence of what was possible within such parameters and the appellants have not succeeded in casting doubt on the General Court's reliance on it.

76. The appellants go on to question the finding of necessity by pointing to the other euro-area Member States that received financial assistance, arguing that the General Court was wrong in finding a lack of comparability between the situation of Cyprus and those of those other Member States.[45] None of the objections raised by the appellants seeks to engage, however, with the finding in paragraph 312 of the judgment under appeal. The General Court observed that due to the size of its financial sector (800% of the Member State's GDP) Cyprus was different from all of those other Member States, and presented unique circumstances because no other

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44 Although footnote 76 to the appeal cross-refers to paragraph 58 of the judgment under appeal, that reference is obviously incorrect. It seems from point 99 of the appeal that the appellants seek to contest paragraph 304.

45 Appeal, points 101 to 106.

country in Europe had a banking sector that was even remotely comparable. The appellants confine themselves to stating that the reasons that led Cyprus to seek assistance cannot provide an objective justification for the harmful measures of which they complain. However, the need for Cyprus to seek financial assistance was directly linked to the plight of its banks and its decision to adopt the harmful decrees was also the immediate consequence of addressing its banking sector's problems in a manner that would be sustainable as regards its own public finances. The appellants show no error in law by the General Court in identifying that factor as being relevant in any analysis of comparability of the financial assistance provided to various euro-area Member States at different points in time.

77. The appellants then challenge paragraphs 309 and 310 of the judgment under appeal, in which the General Court refuted their claim at first instance that there could have been a measure that would have imposed lower losses on deposits just above EUR 100,000 and higher losses on deposits well above that threshold. They present that alternative as a less restrictive measure than a uniform haircut on all deposits above EUR 100,000.[46] The appellants object to the General Court's demonstration that such an alternative would have either raised too little capital to be effective or raised enough capital but still impose losses on them that they had not shown would be significantly lower than the losses they in fact suffered.[47] According to them, that logic presupposes only a fixed level of financial assistance was available to Cyprus.

78. However, it is not possible just to assume that Cyprus could have incurred as much public debt as would suffice to alleviate losses that would otherwise fall on the shareholders, bondholders and uninsured depositors of the banks concerned, without regard to the sustainability of that Member State's public debt or the burdens such borrowing would create for past and future taxpayers.

79. In any event, the appellants' objection to paragraphs 309 and 310 of the judgment under appeal do not properly address the criticism made of their argument by the

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46 Appeal, points 107 to 109.

47 That demonstration was in a somewhat stylized form, since as the General Court noted at paragraph 307 of the judgment under appeal the applicants at first instance had failed to provide any concrete evidence or quantifications regarding that alternative haircut scheme. The appellants counter at point 107 of the appeal that they do not have to provide any such precise quantification, but in the absence of figures in support of their alternative scheme it is not possible to see how the General Court could evaluate if their favoured option would have been effective but less restrictive.

General Court at paragraph 307 of the same ruling. The General Court held there that the argument presented to it lacked any concrete evidence to support it and was, moreover, wholly unquantified. The appellants confine themselves to the contention that it was not for them to quantify precisely what percentage haircut would have been applicable in their mooted alternative to the harmful measures. Such a stance is, however, incorrect; the Union Courts cannot pronounce on whether a given measure is disproportionately restrictive in comparison with another measure where the characteristics of the latter are completely unspecified. For that reason alone, that limb of the necessity argument should also be rejected.

80. For the same reason, the laconic reference in point 111 of the appeal to *Gauweiler*[48] is of no aid to the appellants. They assert that the ECB had "*a large array of options at its disposal to calm the markets, secure the stability of the [e]uro, and promote financial stability*". Nowhere in the appeal do they identify what they mean in referring to "*a large range of options*". Moreover, they never spoke in their application at first instance of such action by the ECB, which means that they are raising those (unidentified) alternative measures for the first time in the appeal. That claim must also be dismissed.

81. The appellants conclude their claims as to necessity in relation to the first group of harmful measures by disputing paragraph 314 of the judgment under appeal.[49] The General Court noted there that the applicants at first instance had not established that the true market value of their assets was such that it was necessary to pay them compensation given the risk of the banks concerned undergoing a disorderly default if no action had been taken. The appellants raise two claims in reaction.

82. First, they allege that the General Court has distorted the clear sense of the evidence in making that finding. The appellants fail to identify what documents in the file before the General Court contradict that finding, let alone how there is a evident misreading of the documents in question. That claim cannot succeed in an appeal.

83. Their other claim is that even if true such a finding would not justify an illegal measure, and they claim that in the present case they have been the victims of

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48 Case C-62/14 *Gauweiler and others* EU:C:2015:400.

49 Appeal, points 112 and 113.

discrimination. That latter contention is the object of their eighth ground of appeal and so the Court will have to examine it there. Even so, the alleged discrimination cannot be assumed so as to overturn the General Court's finding that the harmful measures did not fall foul of the principle of proportionality.

84. As the final component of their challenge to the first group of harmful measures, the appellants argue that the General Court was wrong to find that those measures did not breach the principle of proportionality *stricto sensu*.[50] Presumably they contest in that part of the appeal the portion of the judgment under appeal to be found at paragraphs 317 to 324 thereof, although they fail to identify where is the error of law whose existence they wish to establish.[51] In that connection, they argue that the lack of progressivity of the haircut on deposits is incompatible with proportionality.

85. That sole argument is a lightly recycled version of the argument presented in points 107 to 109 of the appeal, an argument that must be rejected for the reasons set out above. Moreover, in terms of proportionality the appellants are basically arguing that the level of haircut should have been tailor-made to the individual circumstances of each depositor, without taking account of the need for the Cypriot authorities to act in a timely manner that would have been inconsistent with such an approach. The appellants fail, in addition, to have regard to the factor set out in paragraph 322 of the judgment under appeal, where the General Court noted that, if it emerged ultimately that uninsured depositors of BoC had had to contribute in excess of what was needed to restore equity capital, that excess amount would be treated as though no conversion had taken place. That element ensures that disadvantages flowing from the harmful measures cannot be disproportionate to the objectives they pursue.

86. The claims regarding the first group of harmful measures must be rejected.

3.6.2. On the second group of harmful measures

87. The appellants next contest the judgment under appeal as regards a second group of harmful measures that the General Court identified in paragraph 326 of that ruling.[52]

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50 Appeal, points 116 to 118.

51 Which is, in itself, sufficient reason to dismiss this part of the appeal as inadmissible.

52 Appeal, points 119 to 123.

That group comprises conversion of the bonds of BoC into shares and reduction in the nominal value of the ordinary shares in BoC from EUR 1 each to one cent, and the sale of the Greek branches. Paragraphs 327 to 331 of the judgment under appeal examine the conversion of bonds and reduction of shares' nominal value, while the General Court analysed the sale of Greek branches in its paragraphs 333 to 359.

88. In relation to paragraphs 327 to 331 of the judgment under appeal the appellants limit themselves to a reference back to their arguments on the first group of harmful measures. As already shown, those arguments are inadmissible, unfounded or both. Moreover, the appellants do not address the reasons given in paragraph 330 of the judgment under appeal as to why shareholders and bondholders have claims against a bank that are riskier in nature than those of depositors, where the General Court ruled that bondholders and shareholders of banks bear, in principle, the full risk of their investments. The appellants put forward nothing in context of their claims regarding the first group of harmful measures that is relevant to the risk profile of shareholders and bondholders, as opposed to depositors. They have not contested that portion of the judgment under appeal and so must be taken to have accepted the consequences drawn by the General Court from such higher levels of risk as regards the proportionality of the second group of harmful measures.

89. That part of the sixth plea should therefore be rejected.

90. As regards the sale of Greek branches, the first of the appellants' two arguments is that any justification of restrictions on the right to property inherent in that measure is defective because the measure itself discriminated between Member States and between depositors on grounds of nationality. However, that argument anticipates the eighth ground of appeal and the Court should examine it there.

91. By their other argument, the appellants dispute that the Greek branches were sold through an open, transparent and non-discriminatory procedure when Piraeus Bank bought them. The General Court made a finding to that effect at paragraphs 351 to 357 of the judgment under appeal, in the course of which it examined and rejected the arguments at first instance and the evidence produced in support of those claims. At point 123 of the appeal, the appellant cursorily argue the General Court distorted the clear sense "*of the extensive evidence submitted in their written observations [at first instance]*", but do not identify what pieces of evidence they have in mind and

still less how those documents manifestly contradict the analysis of the General Court. Such a claim is not admissible in an appeal. The Court should be reject it and so the challenge to the second group of harmful measures.

3.6.3. On Article 14.4 of the ECB Statute

92. The Commission respectfully submits that the General Court did not err in law at paragraphs 362 to 403 of the judgment under appeal. It will however leave to the ECB the task of commenting on the latter's powers in relation to ELA, and showing that the final part of the sixth ground of appeal must be rejected.

3.7. Seventh Plea: The General Court correctly found no breach of the principle of protection of legitimate expectations

93. By their seventh plea, the appellants contest the judgment under appeal as regards its findings on legitimate expectations. In so doing, they dispute paragraphs 407 to 439 of the judgment under appeal. They present three strands in that plea.

94. The first limb of that plea relates to the letters of 11 February 2013 from the Head of Governor's Office of the CBC to the executive directors of BoC and of Laïki.[53] The General Court found that the CBC sent the two letters acting in its own capacity and the letters had no bearing on the responsibility of the Union. After examining Article 282(1) TFEU and the mission statement of the ECB and the Eurosystem, the General Court held that the status of the CBC as part of the Eurosystem did not mean that the ECB or the Union takes responsibility for such letters, where their contents relate to functions performed by national central banks on their own responsibility and liability.[54]

95. The appellants' arguments do not show that the letters covered a matter from which the ECB and the Eurosystem had any competence. While they object that it is "*extremely difficult, if not impossible, for a third party to work out the capacity under which communication by a central bank has been made*", the CBC sent the letters in question to the chief executives of Cyprus' two largest banks. Those addressees would have been aware of the division of roles between national and Union-level authorities in a matter central to their business activities. It is also worth

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53 Appeal, points 135 to 144.

54 Judgment under appeal, paragraphs 409 to 423.

recalling that both letters purported to interpret the Cypriot Constitution, which is an area on which no Union body would venture a view.

96. Against that background, the first limb of this plea should be rejected as unfounded.

97. By the plea's second limb, the appellants argue that the General Court wrongly held that the Eurogroup statement of 21 January 2013 created no legitimate expectations for them.[55] Specifically, they challenge the paragraphs 427 and 428 of the judgment under appeal. There the General Court held that the Eurogroup was not a competent authority capable of creating legitimate expectations under Union law and that if any legitimate expectations were created by the letter of 21 January 2013 they were linked to the draft MoU of 29 November 2012 that was never established and whose contents differed from those of the MoU of 26 April 2013.

98. The second limb is inoperative. Even if the appellants' two grounds of complaint were upheld, there would still be an absence of elements necessary for legitimate expectations to have been created on which the appellants could have relied. The General Court ruled in paragraph 426 of the judgment under appeal that nothing in the Eurogroup statement of 21 January 2013 constituted a clear and precise assurance from which legitimate expectations could have been derived. Since that finding seems to go unchallenged in the appeal, the appellants' claims cannot invalidate the rejection of their argument at first instance. If point 146 of the appeal does, in fact, challenge that finding, the appellants do not show that there was the decision of precision needed for legitimate expectations to arise. They claim at most that the statement pointed to a continuation of discussions, but for their appeal to succeed they would need to show a position that definitively protected shareholders, bondholders and depositors in all circumstances.

99. By the final limb of the seventh plea, the appellants dispute paragraph 430 to 439 of the judgment under appeal.[56] There the General Court held that they had failed at first instance to establish that they were able to derive a legitimate expectation either from the fact that the grant of FAF to other euro-area Member States had not been

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55 Appeal, points 145 to 147.

56 Appeal, points 148 to 152

made subject to measures comparable to the harmful measures or from the authorisation by the ECB for a long period of the CBC providing ELA to Laïki.

100. The appellants rely on again on their "continuum" argument to contest those findings,[57] but that claim is baseless since the appellants have never managed to move beyond speculation in making the argument.

101. The appellants' other argument in that strand of the seventh plea disputes the finding in paragraph 433 of the judgment under appeal that there was an "*absence of clear and express engagement by the competent authorities*".[58] Their claim that an engagement of that kind existed is pure assertion, unsupported in the appeal by any mention of specific evidence before the General Court whose meaning the latter distorted. Their argument should be rejected and with it the seventh plea as a whole.

3.8. Eighth plea: On the principle of equal treatment

102. By their final plea, the appellants contest the rejection in the judgment under appeal of the allegations at first instance that the harmful measures breached the principle of equal treatment.[59] In that respect, they revisit the five alleged instances of discrimination that they had invoked at first instance.

103. The appellants first dispute the basis of the finding, at paragraph 451 of the judgment under appeal, of no comparability in the respective situations of the CBC, on the one hand, and the uninsured depositors of BoC and Laïki and the shareholders of BoC (collectively 'the unprotected persons'), on the other hand.[60]

104. First, they argue that the claims of both the CBC and the unprotected persons were all grounded in contractual arrangements, so that it was legally irrelevant that the CBC took its decisions to provide ELA exclusively on the basis of public interest objectives while the unprotected persons acted solely in their private pecuniary interests when they became exposed to the banks. They also contend that the status of the debts arising from ELA as secured (so that the CBC was a preferred creditor,

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57 Appeal, points 150 and 152.

58 Appeal, point 151.

59 Judgment under appeal, paragraphs 440 to 508.

60 Appeal, points 154 to 161.

unlike the uninsured depositors, whose claims had a lower rank, and the shareholders, who had no priority whatsoever) was legally irrelevant.

105. ELA is a secured liability, while uninsured deposits are an unsecured liability. Those situations are not like for like. That different treatment of the differing situations is consistent with equal treatment, especially as it ensured no reversal of the order of priority under insolvency law.[61] Moreover, apart from ELA Cyprus excluded several other liabilities from bail-in, such as liabilities towards the government, municipalities and public entities.[62] The logic of the Cypriot authorities was presumably that to bail in those liabilities would produce no gains in terms of sparing Cypriot taxpayers the burden of the costs of resolving and restructuring BoC. That logic would also apply to the ELA granted by the CBC, which ultimately the taxpayer would have had to cover in the event it was not repaid in full.

106. The counter-claims in the appeal do not weaken the holdings of the General Court.

107. The argument that the ECB was responsible for the amounts of ELA owed to the CBC and the need to repay it[63] requires the claims directed against the ECB in other pleas to succeed. As those pleas have failed, that argument should also be dismissed.

108. The contention that the transfer of the CBC's ELA claim to BoC did not seek to protect the CBC, but rather national central banks of other euro-area Member States,[64] is an unsupported claim that must be rejected for a lack of evidence.

109. The appellants' last submission, that it is disproportionate to extinguish the Laïki deposits,[65] is not relevant to their claim of non-discrimination since what is at issue is different treatment of two classes that are not similarly situated.

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61 For that reason, the claim at point 161 of the appeal that the case-law invoked by the General Court was irrelevant because it dealt with bonds and not with uninsured deposits raises an issue that is not germane in considering if discrimination existed.

62 Decree N 103 (Bailing-in of [BoC] Decree, Official Journal (of the Republic of Cyprus), part I, N 4645, K.P.D 103/2013 of 29.03.2013, pages 769-780) (Annex A.8 to the application at first instance), paragraph 6(4).

63 Appeal, point 158.

64 Appeal, point 159.

65 Appeal, point 160.

110. Second, the appellants claim that the General Court erred in finding that there was no unequal treatment as a result of the different treatment of their deposits and those in the Greek branches.[66] The General Court first held that the depositors amongst the applicants at first instance were treated less favourably than depositors in the Greek branches since the former were subject to bail-in measures while the latter were not. It then ruled that there was an objective justification for that difference in treatment, namely preventing deposit flight in Greece at a point in time when the liquidity position of banks in that Member State was under severe strain, to an extent that it might not have been possible to supply them with sufficient ELA. Finally, the General Court concluded that the difference of treatment was appropriate to achieve that objective and did not go beyond what was necessary for that purpose.

111. Taking their arguments in a logical order, the appellants start by disputing paragraph 467 of the judgment under appeal where the General Court identified an objective justification. They dismiss that ground as "*a vague risk*".[67] They do not explain in what manner the ground identified by the General Court was incapable of justifying different treatment. In any event, the case-law of the Union Courts on the role of tackling a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the Union as a whole[68] contradicts any attempt to argue that such a ground of justification cannot be deployed. As for the degree of risk that was involved, while the appellants speak of a "*vague risk*" they do not explain in what manner the General Court distorted the evidence on which it found that a sufficient level of risk existed for different treatment to be justifiable.

112. Second, the appellants allege that the sale of the Greek branches was not compatible with the right to property.[69] They do no more by making that claim then cross-refer to their sixth plea in this appeal, and their allegation falls along with that plea.

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66 Appeal, points 162 to 166.

67 Appeal, point 165.

68 See Case C-526/14 *Kotnik and others* EU:C:2016:570, paragraphs 50 and 91; Joined Cases 8/15 P to C-10/15 P *Ledra Advertising* v *Commission and ECB* EU:C:2016:701, paragraph 72; and Case C-41/15 *Dowling and others* EU:C:2016:836, paragraphs 50 and 55.

69 Appeal, point 164.

113. Finally, they maintain as they did at first instance that the Eurogroup had previously encouraged the PSI (a restructuring of Greek government debt held by the non-official creditors of that Member State) despite the contagion effects that measure would have for BoC and Laïki. They contend that context makes it arbitrary to treat those banks, their shareholders, depositors and bondholders and Cyprus itself differently from how Greece, its banks and their shareholders, depositors and bondholders were treated.[70] However, they do not show that the General Court erred in paragraph 477 of the judgment under appeal when it ruled that the applicants at first instance had at no time demonstrated that if the Eurogroup had given any such encouragement such conduct by the Eurogroup would have justified not taking account of the risk of contagion of the Greek banking system. Indeed, the availability of such an objective justification, whose presence the Court has repeatedly confirmed, cannot be limited in the manner that the appellants seek to do.

114. The second limb of their final plea should therefore be rejected.

115. By way of the third limb of the same plea, the appellants impugn paragraphs 479 to 486 of the judgment under appeal. They claim that the General Court erred in law there by ruling that the guarantee provided to deposits up to EUR 100,000 by Directive 94/19[71] put such insured deposits into a situation that was different in a legally relevant fashion to deposits above that amount.[72]

116. However, as the General Court held, there was no impermissibly different treatment. In formal terms, Cyprus treated all depositors in the same manner, and applied the same haircut in percentage terms to the depositors of BoC above EUR 100,000 irrespective of the size of their deposit.[73] In addition, it imposed no burden on any depositor for amounts up to EUR 100,000, irrespective of the size of their deposit. In material terms, there was also no discrimination. The Cypriot authorities fixed the threshold of EUR 100,000 objectively, which corresponds with their obligations under Union law. Union law protected deposits up to EUR 100,000, as provided at

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70 Appeal, point 166.

71 Directive 94/l9/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ 1994 L 135, p.5, as amended by Directive 2009/14/EC of 1I March 2009, OJ 2009 L 68, p. 3.

72 Appeal, points 167 to 170.

73 It should be noted again that there was no bail-in whatsoever for the uninsured depositors of Laïki.

the time by Directive 94/19, while deposits above that level were not. The Union legislator had therefore identified objective differences between the two groups of depositors, in light of which there was no unlawful discrimination

117. The appellants object that compliance with Directive 94/19 cannot ensure compliance with the right to property.[74] However, they do not explain the relevance of that objection to a plea based on equal treatment. The appellants also assert there that the principle of non-discrimination outranks Directive 94/19. However, as the General Court noted at paragraph 483 of the judgment under appeal the applicants at first instance had not invoked the unlawfulness of that directive.

118. The appellants also argue that unlike the situation under Directive 94/19, in which depositors may pursue their claims for uninsured sums through a liquidation procedure, they have no such possibility under the harmful decrees. However, as the General Court had noted in paragraph 277 of the judgment under appeal, section 26(2) and (3) of the Law of 22 March 2013 opens a right to compensation for a party that considers itself to be injured in comparison with the situation it would have been in without resolution and without liquidation of the bank concerned. Against that background, the harmful measure leaves the appellants no worse off than they would have been if the banks concerned had gone into liquidation.

119. Finally, the appellants consider that the contents of the Eurogroup statement of 16 March 2013 and the respondents' reaction to it, insofar as it evoked a possible levy on deposits below EUR 100,000, shows that the latter did not consider that they had to comply with Directive 94/19.[75] However, the appellants do not explain in what way their claim is relevant to the chain of reasoning set out by the General Court in the judgment under appeal. This claim should be rejected and with it the third limb.

120. The penultimate limb of their eighth plea is a claim that the General Court wrongly held they suffered no discrimination in comparison to depositors, bondholder and shareholders in banks in other euro-area Member States that received financial assistance.[76] They also dispute the finding that there was no discrimination against

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74 Appeal, point 168.

75 Appeal, point 170.

76 Appeal, points 171 to 175.

Cyprus vis-à-vis those other Member States. They call into question the holdings in paragraphs 490 and 491 of the judgment under appeal, that the characteristics of the measures surrounding any grant of financial assistance by the ESM may vary significantly from one grant to another and that they had not explained how the situation of Cyprus was comparable to that of those other euro-area Member States.

121. First, they allege that the status of depositors, bondholder and shareholders in banks does not vary from one Member State to another.[77] However, that allegation has no impact on the cogency and validity of the General Court's reasons in paragraphs 490 and 491 of the judgment under appeal, relating to the Member States themselves.

122. Next, they point out that as depositors they were blameless in the process that led Cyprus to need financial assistance, a feature that, they say, they share with Greek depositors.[78] However, that allegation has again no bearing on the reasoning in those portions of the judgment under appeal.

123. The appellants do attempt to engage with paragraphs 490 and 491 of the judgment under appeal when they point to the size (absolute and relative) of the financial assistance benefitting the various Member States.[79] However, they do not address key relevant differences relied on by the General Court (referring to what it had already found in paragraphs 311 to 313), such as the imbalances in the financial sector of Cyprus and the fact that that sector was so large in comparison with the size of the national economy. As a result, they do not overturn the findings of the judgment under appeal, and the fourth limb of their eighth plea should be rejected.

124. By the final limb of the eighth plea, the appellants dispute the judgment under appeal insofar as the General Court held that they were in a different situation from the members of cooperative banking sector in Cyprus.[80] The General Court that there was a difference in the solvency or insolvency of the cooperative banking sector, BoC and Laïki at the time of the facts, so there was no unlawful discrimination against the applicants at first instance.

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77 Appeal, point 172.

78 Appeal, point 173.

79 Appeal, points 174 and 175.

125. The appellants object first that the ECB precipitated the insolvency of BoC and Laïki by its decision of 21 March 2013 to stop the provision of ELA.[81] They make that claim without any support. It falls along with the second plea in this appeal, regarding the press release of 21 March 2013 and the decision referred to in it.

126. The appellants then dispute the adequacy of findings as to solvency and insolvency as an objective justification for a difference of treatment in the absence of any decision by an administrative or judicial body.[82] However, as paragraph 504 of the judgment under appeal noted, the appellants had not disputed that solvency could be a relevant criterion for justifying different treatment between several banks. Moreover, as paragraph 503 records, there was no dispute that BoC and Laïki were insolvent at the time of the facts. It is not possible for the appellants now, for the first time and in the context of an appeal, to call into question the use of that criterion or how it was applied to BoC and Laïki. As for an evaluation of solvency of the cooperative bank sector, the General Court made no error in law when it considered that the sector's status could be evaluated without the need for a judicial or administrative decision. The absence of such a decision does not equate, as the appellants wrongly maintain it does, to a "*vague concept of insolvency*". It is possible to identify if a firm is or is not solvent without the intervention of a judge or an administrative body.

127. Finally, the appellants argue that the General Court distorted the clear sense of the evidence when it ruled on the insolvency argument. They refer in that regard to the IMF report of May 2013.[83]

128. The appellants have overlooked that the status of the Cypriot cooperative banking sector (which was the only factual matter in dispute, since they accepted that BoC and Laïki were insolvent) was established by the General Court at paragraph 503 of the judgment under appeal. The General Court relied there on section 3.1 of the disclosures made by the Co-operative Central Bank in May 2013 under pillar 3 of

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80 Appeal, points 176 to 179.

81 Appeal, point 177.

82 Appeal, point 178.

83 Appeal, point 179.

the Basel framework and on responses of the ECB during the hearing (both as regards the situation of the sector on 31 December 2012). The General Court used the IMF report of May 2013 to corroborate that conclusion rather than to reach it. Since the appellants do not question the foundations for the finding reached by the General Court, that final part of the fifth limb of the eighth plea is inoperative.

4. FORM OF ORDER SOUGHT

129. The Commission has the honour to request the Court to rule that:

the appeal should be rejected as inadmissible, unfounded and inoperative; and

the appellants should pay the costs of both instances.

Leo FLYNN Jean-Paul KEPPENNE Tim MAXIAN RUSCHE

Agents for the Commission