Frankfurt am Main19 March. 2015

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

RESPONSE

pursuant to Article 173 of the Rules of Procedure of the ECJ

IN CASE C-9/15 P

Andreas Eleftheriou and Others

Represented by Alper Riza, Barrister at Law (UK), Christophoros Paschalides, Solicitor (UK) and Antonis Paschalides, Advocate (Cyprus)

Appellants,

Applicants before the General Court

– v –

European Central Bank

Having its seat at Sonnemannstrasse 20, 60314 Frankfurt-am-Main, Germany, and represented by Ms Petra Senkovic and Mr Panagiotis Papapaschalis, acting as agents where service can be effected primarily by e-Curia, and, failing that, by post at the above address, e-mail (LegalAdviceTeam@ecb.europa.eu) telefax (0049-69-1344-6886) or by other technical means of communication,

and **European Commission**

Respondents,

Defendants before the General Court

We respond on behalf of the first of the above Respondents, the European Central Bank (hereafter the 'ECB') which was notified of the Appeal on 15 January 2014 and has the honour to present its Response.

The ECB will set out the reasons why the Appeal is manifestly inadmissible and manifestly unfounded, and could thus be rejected on the basis of Article 181 of the Rules of Procedure of the European Court of Justice ("RP ECJ"):

I. SCOPE OF THE APPLICATION IN APPEAL – SUMMARY OF ECB PLEAS IN LAW

A- Scope of the Appeal – the Contested Order

(1) The Applicants appeal against the order of the General Court (First Chamber) delivered on 10 November 2014 in Case T-291/13 (Contested Order).

(2) As a preliminary remark, the ECB notes that the Appellants by explicitly indicating that they seek to set aside the Contested Order with respect to the "*first two heads of claim*" (at paragraph 6, page 2 of the Appeal) they do not contest the General Court's findings as to their third head of claim (at paragraphs 61- 63 of the Contested Order). Consequently, the Contested Order has, in that regard, become definitive.

(3) In addition, as to the request of the Appellants to be heard by the full Court (at paragraph 5, page 2 of the Appeal), the ECB submits that the RP ECJ do not provide for the possibility to request the Court to sit as a full Court. Moreover, none of the conditions set out in Article 16 (4) and (5) of the Statute ECJ for a hearing by the full Court are met.

(4) Insofar as the ECB understands the Appeal, it consists of the following:

- The Appellants identify paragraphs 1- 23 of the Contested Order which refer to the "*background to the dispute*" (at paragraph 8, page 2 of the Appeal) and it seems that they intend to challenge the facts of the case as assessed by the General Court at first instance. The Appellants contest a number of factual assessments and factual findings of the General Court or put forward new factual statements (see in particular paragraph 8 a., d., e., f., i., j. and k. on pages 2-6 of the Appeal).

- The Contested Order is allegedly vitiated by an error of law in its interpretation of the European Stability Mechanism ('ESM') Treaty and in particular of Article 13(3) and (4) thereof. The Appellants argue that the '*true authors*' of the Memorandum of Understanding ('MoU') concluded between the Republic of Cyprus and the ESM were the European Commission and the ECB (at paragraph 8, point i, j, and k, paragraph 9, pages 5-6 of the Appeal). In this context, the Appellants contend that the General Court failed to appraise the decision-making scheme envisaged in the ESM Treaty with regard to '*prior compliance with conditionality*' attached to the MoU (at paragraph 8.,point d, vi, page 13 of the Appeal).

- In so far as their vision of the involvement of the ECB and European Commission in the decision-making within the ESM is contradicted by the judgement in *Pringle*[1], the Appellants go as far as inviting this Court to revisit *Pringle* (at paragraph 5, page 2 of the Appeal).

- In addition, according to the Appellants, the legal assessment of the facts is flawed and in particular the General Court failed to take into account the following "*important facts*":

  a. a previous version of the MoU already incorporating the bail-in provisions was put forward in November 2012 by the European Commission and the ECB;

  b. the lack of legal basis for the bail-in of deposits in Cyprus, considered by the Appellants to be the Bank Recovery and Resolution Directive ('BRRD') which was not yet applicable; and

  c. the "*unless-demand from the ECB supported by the Commission of Cyprus to close the debt sustainability gap through the bail-in mechanism on pain of having euro liquidity to Cyprus cut off*" (at paragraph 8, point d, pages 3-4 of the Appeal).

(5) Although it is not clear from the Appeal, the ECB understands that the Appellants challenge paragraphs 22, 45-47, 54 and 55-60 of the Contested Order. The Appellants claim that the Contested Order should be quashed in so far as it rejects their claims for annulment of the disputed passages of the MoU and for compensation for the damages they allegedly suffered (at paragraph 6, page 2 of the Appeal).

---

[1] *Thomas Pringle v Government of Ireland*, Case C-370/12, ECLI:EU:C:2012:756.

B- Summary of the ECB's pleas in law

(6) The ECB understands that the General Court conducted a factual appraisal of the facts[2] which falls outside the scope of this Court's review since, pursuant to Article 58 of the Statute of the Court of Justice, appeals are limited to points of law. The ECB contends that the Appellants in essence contest the findings of facts made by the General Court and not the legal assessment of those facts. Therefore, any such plea does not constitute a point of law which is subject, as such, to review by the Court of Justice in appeal proceedings and is thus manifestly inadmissible.

(7) In addition, the ECB submits that the Appellants may not validly invoke the errors allegedly committed by the General Court in assessing the evidence[3] necessary for a consideration of the merits of the action for annulment and damages that they brought before the General Court, in order to dispute the inadmissibility of their heads of claim. In truth, the Appellants seek a fresh examination of the facts[4] by the Court of Justice without substantiating what infringement of the law the General Court committed (at paragraph 4, p. 1 of the Appeal) , which is also manifestly inadmissible..

(8) Furthermore, the ECB contends that no infringement of law[5] by the General Court has been established by the Appellants; therefore this Appeal must be dismissed as manifestly unfounded. A straightforward comparison of the Contested Order with Appellant's account of it reveals that their understanding of the Contested Order is manifestly selective and incorrect. In determining whether [any] error was patent, the Appellants fail to demonstrate how the reasoning of the General Court is vitiated by an error in law. Moreover, while the General Court must access all the evidence that the parties submit during the proceedings, the General Court's duty under Article 36 and the first paragraph of Article 53 of the Statute of the European Court of Justice to state reasons for its judgements does not mean that it has to exhaustively address each argument that the parties put forward[6]. While the Appellants assert that the Contested

---

2 *Mariette Turner v Commission of the European Communities*, C-115/90, ECLI:EU:C:1991:131, paragraphs 13-14.
3 *Elfriede Sebastiani v European Parliament*, C-294/91, ECLI:EU:C:1992:363, paragraphs 13-14.
4 *Telefónica SA and Telefónica de España SAU v European Commission*, Case C-295/12, ECLI:EU:C:2014:2062, paragraph 113.
5 *Pescados Congelados Jogamar SL v Commission of the European Com*munities, C-249/99, ECLI:EU:C:1999:571, paragraph 22
6 *Aalborg Portland and Others v Commission*, C-204/00, ECLI:EU:C:2004:6, paragraph 372.

Order is based on an erroneous [legal] assessment of the facts, it is quite apparent from the Order that the General Court took into account all essential evidence submitted before it to reach its decision. Hence the Appeal must be dismissed as clearly inadmissible and unfounded.

(9) It follows from the foregoing considerations taken as a whole that the pleas in law submitted by the Appellants in support of this Appeal are either manifestly inadmissible or manifestly unfounded and must, therefore, be dismissed pursuant to Article 181 of the RP ECJ.

II. LEGAL CONSIDERATIONS

1. As to the pleas raised with respect to the first head of claim

A –Preliminary Observations: the right of Appeal is limited to points of law

(10) Before examining the pleas raised by the Appellants, it should be borne in mind that Article 256(2) TFEU provides that decisions given by the General Court may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and the limits laid down by the Statute. The Court has *consistently* held that under Article 58 of the Statute of the Court appeals are limited to grounds concerning the infringement of rules of law, to the exclusion of any challenge relating to the facts as determined by the General Court at its absolute discretion[7].

(11) In the same vein, Article 168(1)(d) of the RP ECJ provides that the appeal must contain the pleas in law and the legal arguments relied on in support of it. It follows from those provisions that an appeal must indicate precisely which elements of the contested judgment it challenges, and also the legal arguments which specifically support the appeal[8]. Similarly, paragraph 20 of the Practice Directions to parties concerning cases brought before the Court[9] stipulates that the appeal must "*identify precisely those points*

---

7 *Thomson Sales Europe v European Commission*, C-498/09 P, ECLI:EU:C:2010:338, paragraph 81; *V. v Parliament*, C-18/91 P, ECLI:EU:C:1992:269, paragraph 15 ; *Commission v Brazzeli and Others*, C-136/92 P, ECLI:EU:C:1994:211 paragraph 29 ; *Commission v Département du Loiret and Scott*, C-295/07P,ECLI:EU:C:2008:707, paragraph 95.

8 *N v Commission of the European Communities*, C-252/97, ECLI:EU:C:1998:385, paragraphs 17-19. *Aloys Schröder, Jan Thamann and Karl-Julius Thamann v Commission*, C-221/97 P, ECLI:EU:C:1998:597, paragraph 35.

9 Rules of Procedure: Practice Directions to parties concerning Cases brought before the Court, OJ L 31, 31.1.2014, p. 1–13.

in the grounds of that decision that are contested and set out in detail the reasons for which that decision is alleged to be vitiated by an error of law".

(12) By these standards, the ECB finds that the abovementioned requirements are not satisfied by the pleas in law stated by the Appellants which, while criticising the examination made in substance by the General Court of their claims as a whole, confine themselves to repeating or reproducing the arguments previously submitted to the General Court, including those based on facts *dismissed* by the latter, without offering any legal argument in support of their pleas[10]. In reality, those pleas seek to obtain merely a *re-examination of the application*[11], which is outside the jurisdiction of this Court. In actual fact the Appellants seek a fresh examination of the facts[12] by the Court of Justice (at paragraph 8 on pages 2-6, paragraph 9 point b. on pages 8-9, and paragraph 9 point g on pages14-16 of the Appeal).

B- The Appellants' first plea: The decision-making mechanism under the ESM Treaty

(13) In support of their first plea, the Appellants seek to challenge the legal appraisal made by the General Court of the 'true nature' of the decision-making mechanism envisaged in the ESM Treaty (at paragraph 9 of the Appeal).

(14) As the General Court correctly found in paragraph 44 of the Contested Order "*the MoU was adopted jointly by the ESM and the Republic of Cyprus...However, it is apparent from Article 13(4) of the ESM Treaty that the Commission is to sign the MoU only on behalf of the ESM*". The General Court went on explaining in paragraph 45 that "*the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the objectives of that Treaty,[and] it is apparent from the case-law of the Court of Justice (Pringle at paragraph 161) that the duties conferred on the Commission and the ECB within the ESM Treaty* ***do not entail any power to make decisions of their own*** *and, moreover, that the activities pursued by those two institutions within the ESM Treaty solely commit the ESM*" (emphasis added).

---

[10] *Windpark Groothusen GmbH & Co. Betriebs KG v Commission*, C-48/96 P, ECLI:EU:C:1998:223, paragraph 56; *Thomson Sales Europe v European Commission*, C-498/09 P, ECLI:EU:C:2010:338, paragraph 82.

[11] *Paul De Hoe v Commission of the European Communities*, C-338/93, ECLI:EU:C:1994:85, paragraphs 17-19.

[12] See above footnote 4

(15) In that connection, the ECB submits that *Pringle* is considered good law and that the General Court was correct in understanding that the adoption of the MoU could not have originated with the Commission or the ECB (at paragraph 46 of the Contested Order). As the General Court (a) has jurisdiction only in disputes relating to compensation for damage caused by the institutions of the European Union or by its servants in the performance of their duties, a fact that the Appellants do not contest and (b) can only adjudicate on the legality of acts of the institutions, bodies, offices or agencies of the European Union, which the Appellants do not put into question either and since ***nor the ESM neither the Republic of Cyprus are among these institutions***, the General Court was therefore right in holding that the action for damages and the action for annulment covered by Articles 340 and 263 TFEU respectively, were inadmissible (at paragraphs 47 and 59 of the Contested Order).

(16) To the extent that in paragraph 5 and in paragraph 9 points i)-v) of their Appeal the Appellants invite the Court to revisit its decision in *Pringle*, the ECB also submits that an appeal cannot be formed against anything else but the relevant Contested Order given by the General Court and the operative part thereof, which is in the present case the Contested Order of the General Court of 10 November 2014.

(17) In the light of the above, the ECB submits that the General Court has correctly applied Articles 340 and 263 TFEU. It follows that the first plea is manifestly inadmissible and in any event manifestly unfounded.

C- The Appellants' second plea: The erroneous appraisal of evidence by the General Court

(18) In support of their second plea, the Appellants attempt a number of factual statements (paragraph 8, points a., d., e., f., i., j., and k., on pages 2-6 of the Appeal), and they claim, in essence, that the General Court erred in its interpretation of the evidence submitted to it. The Appellants argue that the General Court did not take into account their submissions (paragraph 9, point b, page 8 of the Appeal) and ignored the evidence produced before it (paragraph 9, point d, page 10 of the Appeal) which allegedly amounts to a defect in the reasoning of the Contested Order. This plea raises, in essence, the question whether the evidence adduced by the Appellants in the

proceedings before the General Court enabled the latter to conclude, with a sufficient degree of certainty on the "*true authors*" of the MoU.

(19) Regarding the factual statements, the Appellants state in essence that it is for the ECJ to assess three questions on which the General Court have erred, notably what were the conditions of the "Financial Assistance Facility", when did prior compliance with those conditions take place and who were the true authors of the bail-in. The Appellants are answering their own questions, expecting the ECJ to follow their approach (at paragraph 8, i., j. and k of the Appeal).

(20) The point at issue relates basically to the evaluation of evidence[13], which cannot form the subject-matter of an appeal, the latter being restricted, as is well known, to questions of law. As stated above, the General Court alone has jurisdiction to find facts and it is the sole entity responsible for a factual assessment of all the relevant evidence. The Court of Justice has no jurisdiction to establish the facts[14] or, in principle, to examine the evidence which the General Court accepted in support of those facts[15]. Provided that the evidence has been properly obtained and that the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it[16]

(21) More specifically, and on the basis of the evidence adduced before the General Court, as far as the circumstances in which the MoU was concluded, it is clearly beyond question that no error in law has vitiated the assessment of facts. The General Court found that "*the MoU was signed on 26 April 2013 by the Minister for Finance of the Republic of Cyprus, the Governor of CBC and Mr O. Rehn, Vice-President of the Commission, on its behalf*" (at paragraph 21 of the Contested Order)" and that subsequently "*on 8 May 2013, the ESM Board of Directors approved the agreement relating to the financial assistance facility and a proposal concerning the terms of*

---

[13] *Commission v Socurte*, C-143/95, ECLI:EU:C:1997:3, paragraph 36.
[14] *Pitrone v Commission*, C-378/90P, ECLI:EU:C:1992:159, paragraphs 12-13.
[15] *Jarosław Majtczak v Feng Shen Technology Co. Ltd and Office for Harmonisation in the Internal Market*, Case C-266/12, ECLI:EU:C:2013:73, paragraph 32.
[16] *Carmine Salvatore Tralli v European Central Bank*, C-301/02, ECLI:EU:C:2005:306, paragraph 78.

payment of a first tranche of aid to the Republic of Cyprus" (paragraph 23 of the Contested Order).

(22) The ECB also notes that the Appellants make factual statements in an attempt to establish a causal link between what they believe to be an unlawful behaviour of the ECB (and the Commission) and the loss they allegedly suffered: in paragraph 54 of the Contested Order, and even though the ECB is not specifically mentioned therein, the General Court found that "*the MoU was **signed after the reduction in the value of the applicant's deposit at BOC***" (emphasis added). In paragraph 8 f) of their Appeal, the Appellants state that the sequence of events was the other way round, i.e. that it is the reduction in the value of depositors occurred after the signing of the MoU. Such statement is manifestly inadmissible at the stage of the appeal.

(23) Without proving that a rule of law has been breached, the Appellants merely contest the General Court's appraisal of the facts. The Appellants' case in this regard is in essence limited to a simple assertion that the General Court erred in law in appraising the facts, without having submitted any concrete reasoning to that effect. That cannot be regarded as sufficient. The Appeal fails to establish with the requisite level of certainty that the evidence provided with their initial Application was not merely circumstantial. It follows that this plea must be rejected because the Appellants provide no indication of the reason for which the alleged omission of evaluating the said evidence ought to lead to a different result.

(24) Moreover, the ECB submits that the General Court has exclusive jurisdiction to find the facts save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been *distorted*[17], constitute a point of law[18].

(25) A mere claim of mistakes is not sufficient to establish 'evidentiary distortion'[19]. In any event, it is for the Appellants to indicate precisely the evidence alleged that has been

---

[17] *Odette Simon v Commission of the European Communities*, C-274/00, ECLI:EU:C:2002:401, paragraph 46 ; *Hilti AG v Commission*, C-53/92 P, ECLI:EU:C:1994:77, paragraph 42; *John Deere Ltd v Commission*, C-7/95P, ECLI:EU:C:1998:256, paragraphs 21-22 ; *Ferriera Acciaieria Casilina v Commission* , C-282/99 P; EU:C:2001:348, paragraph 94.

[18] *Denmark v Commission*, C 417/12 P, ECLI:EU:C:2014:2288, paragraphs 48-50.

[19] *Asos v OHIM*, C 320/14 P,ECLI:EU:C:2015:6, paragraphs 32,37,38.

distorted without recourse to new evidence[20]. This distortion must be *manifest* in the evidence already presented before the General Court, without being necessary to reassess the evidence [21] and must have an impact on the operative part of the decision: this is a high threshold of proof.

(26) In light of this test, the ECB notes that the evidence adduced before the General Court and on which the General Court decided upon has not been distorted. Such distortion is not expressly raised by the Appellants and in any case the Appellants are far from demonstrating it.

(27) The Appellants merely dispute the factual assessment of the evidence carried out by the General Court. Their main argument is that the General Court should have drawn different conclusions from those which it adopted having regard to the evidence placed before it.

(28) As the Court of Justice has repeatedly held, it is, however, for the Court of First Instance alone to assess the value which should be attributed to the evidence placed before it[22]. The Appellants may not validly invoke the errors allegedly committed by the General Court in assessing the evidence[23] necessary for a consideration of the merits of the action in order to dispute the inadmissibility of heads of claim.

(29) Furthermore, the obligation to state reasons[24] does not require the General Court to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question

---

[20] *Comitato «Venezia vuole vivere» (C-71/09 P), Hotel Cipriani Srl (C-73/09 P) and Società Italiana per il gas SpA (Italgas) (C-76/09 P) v European Commission* Joined cases C-71/09 P, C-73/09 P and C-76/09 P ECLI:EU:C:2011:368, paragraph 152.

[21] *Cartoon Network v OHIM*, C-670/13 P ; ECLI:EU:C:2014:2024, paragraph 36; PKK and KNK v Council, C-229/05 P, EU:C:2007:32, paragraph 37; *General Motors v Commission*, C-551/03, P ECLI:EU:C:2006:229, paragraph 54.

[22] See, to that effect, *Deutsche Bahn AG v Commission of the European Communities*, C-436/97, ECLI:EU:C:1999:205, paragraph 19; *Hilti v Commission*, C-53/92 P, ECLI:EU:C:1994:77, paragraph 42, and *H v Commission* C-291/97 P [1998] ECR I-3577, paragraph 19; *Deere v Commission*, C-7/95 P, ECLI:EU:C:1998:256, paragraph 21; *Antillean Rice Mills and Others v Commission* C-390/95 P, paragraph 29; and *P-R Front national and Martinez v Parliament*, Joined Cases C-486/01 P-R and C-488/01, ECLI:EU:C:2002:116, paragraphs 83 to 85.

[23] *Elfriede Sebastiani v European Parliament*, C-294/91, ECLI:EU:C:1992:363, paragraphs 13-14.

[24] *Aalborg Portland and Others v Commission*, C-204/00, ECLI:EU:C:2004:6, paragraph 372.

were taken and provides the competent Court with sufficient material for it to exercise its power of review[25].

(30) It transpires from the foregoing considerations that this plea is inadmissible, since it is merely repeating arguments which the Appellants have already set out at first instance and which the General Court answered to[26].

(31) As regards the part of the plea relating to a reference in *Krohn*[27], it is sufficient to observe that the Appellants have provided no explanation on how the Contested Order constitutes an infringement of any principle provided therein. This plea is *beyond understanding.*

2. As to the appellants views with respect to the second head of claim

(32) In paragraph 10 of the Appeal, the Appellants seem to argue that, given their pleas regarding the first head of claim, *"the second head of claim at paragraphs 55 to 60 of the judgment would fall away automatically"*.

(33) The ECB is of the view that since the pleas regarding the first head of claim are manifestly inadmissible and manifestly unfounded, the Appellants' submissions are ineffective.

(34) In addition, the ECB notes that apart from paragraph 10 of their Appeal, the Appellants did not raise any additional pleas against the second head of claim.

(35) It follows from the foregoing considerations taken as a whole that the pleas in law submitted by the Appellants in support of this Appeal are manifestly inadmissible and in any event manifestly unfounded and this Appeal could thus be dismissed pursuant to Article 181 of the RP ECJ.

---

[25] *Italy v Council* C-120/99, ECLI:EU:C:2001:567, paragraph 28.
[26] *Thomson Sales Europe v European Commission*, C-498/09 P, ECLI:EU:C:2010:338, paragraph 82.
[27] *Krohn & Co. Import-Export GmbH & Co. KG v Commission of the European Communities,* Case 175/84, ECLI:EU:C:1987:8.

III. COSTS

(36) Pursuant to Article 278 TFEU and Article 60(1) of the Statute of the Court of Justice an appeal shall not have an automatic suspensory effect. The Appellants ask for a suspension of the Contested Order and they claim that it is only fair for the costs "*to abide by the outcome of the appeal*" (in paragraph 11, p. 17 of the Appeal).The ECB submits that such request is for the sole purpose of delaying the implementation of the Order at first instance while the Appeal is still pending. It should be recalled that, under the second paragraph of Article 58 of the Statute of the Court of Justice, "*no appeal shall lie regarding only the amount of the costs or the party ordered to pay them*" as the allocation of costs is inextricably linked to the main ruling and thus cannot be challenged by an isolated Appeal[28]. In addition, given the absence of an automatic suspensory effect due to the Appeal, the Appellants should have initiated interim proceedings within the meaning of Article 278 TFEU. In particular, the Appellants should have applied to the Court of Justice for an order suspending the effects of the Contested Order. Such request, which needs to be lodged by way of a separate document (Articles 190 (1) and 160 (4) RP ECJ), was never lodged with the President of the Court of Justice[29].

(37) The ECB notes that the Appeal does not contain any form of order sought regarding costs. Paragraph 11 of the Appeal only refers to the costs in the proceedings before the General Court.

(38) Since the Appeal is manifestly inadmissible and unfounded, the Appellants should be ordered to pay the costs incurred by the ECB in these proceedings pursuant to Articles 184 (1) and 138(1) of the RP ECJ.

---

[28] *Carmine Salvatore Tralli v European Central Bank*, C-301/02, ECLI:EU:C:2005:306, paragraph 88 et seq.
[29] *Hochbaum v Commission*, Case T-77/91, ECLI:EU:T:1991:60, paragraph 21.

III. CONCLUSIONS

In view of the foregoing, the ECB respectfully requests the Court of Justice to decide as follows:

1. The Appeal is rejected; and
2. The Appellants bear all costs of the proceedings.

Petra Senkovic

Panagiotis Papapaschalis

Agents of the ECB