



Council of the European Union

Brussels, 19 December 2018

SGS18/10300

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

## **CROSS-APPEAL**

lodged by the Council of the European Union pursuant to Article 176  
of the Rules of Procedure of the Court of Justice,

### **in Case C-603/18 P**

**Dr. K. Chrysostomides & Co. LLC and Others,**

represented by Takis Panagiotis Tridimas, Barrister, having agreed that service may be effected on him via e-Curia or, failing that, on fax no +357 22 779939 and, where necessary, at the following address: 1, Lampousas Str., 1095 Nicosia, Cyprus.

#### **Appellants/Applicants at first instance**

Appeal against the judgment delivered on 13 July 2018 by the General Court (Fourth Chamber, Extended Composition) in Case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v. Council of the European Union and Others*, seeking to have that Judgment set aside,

this Appeal having been notified to the Council of the European Union on 9 October 2018,

**COUNCIL OF THE EUROPEAN UNION,**

represented by Mr Alberto DE GREGORIO MERINO, Director in the Council Legal Service, Ms Evgenia CHATZIOAKEIMIDOU and Ivan GUROV, legal advisers in the Council Legal Service, as Agents, having agreed that service may be effected on them via e-Curia or, failing that, at fax No +32.2.281.56.56 and, where necessary, at the following address: Council of the European Union, Registry of the Legal Service, for the attention of Mr Alberto DE GREGORIO MERINO, Ms Evgenia CHATZIOAKEIMIDOU and Ivan GUROV, rue de la Loi, 175, 1048 Brussels,

#### **Cross-appellant / Defendant at first instance**

the other Parties to the proceedings before the General Court being:

**European Central Bank,**

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

**European Union, represented by the European Commission,**

**Defendants at first instance**

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## I. INTRODUCTION

1. The legal and factual background to this appeal is set out in detail in paragraphs 1-46 of the contested judgment.<sup>1</sup>
2. In summary, several individuals and companies - depositors and/or shareholders in Cyprus Popular Bank (Laïki) and the Bank of Cyprus (BoC) - (the applicants at first instance) brought actions for non-contractual liability before the General Court of the European Union in order to be compensated for losses they claim to have suffered as a result of measures, which were taken in order to address the financial difficulties experienced by these banks.
3. Since these measures were part of a macroeconomic adjustment programme, set out in the form of a memorandum of understanding (MoU) signed by the Cypriot authorities and the European Stability Mechanism (ESM), but negotiated, on behalf of ESM, by the Commission together with the European Central Bank (ECB) and the International Monetary Fund (IMF), the applicants' action was directed against the Council of the European Union, the European Commission, the European Central Bank, the Euro Group and the European Union.
4. In the contested judgment, the General Court recognised that the adoption of a MoU pursuant to the ESM Treaty corresponds to an objective of general interest of the Union, namely that of ensuring the stability of the banking system of the euro area as a whole<sup>2</sup> and concluded that the applicants at first instance had not succeeded in demonstrating an infringement of the right to property, of the principle of protection of legitimate expectations, or of the principle of equal treatment and consequently, rejected their claims for compensation for damages.

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<sup>1</sup> See Annex A.1. of the appeal.

<sup>2</sup> Paragraph 255 of the contested judgment.

5. The Council agrees entirely with this conclusion and the present cross-appeal does not seek to overturn it.
6. However, in the same judgment, the General Court rejected the plea of inadmissibility lodged by the Council on 14 July 2014 regarding the actions of the Euro Group cited by the appellants<sup>3</sup>, and regarding Council Decision 2013/236 addressed to Cyprus on specific measures to restore financial stability and sustainable growth<sup>4</sup> (Council Decision).
7. With regard to the cited Euro Group actions, the General Court departed from, or at least strongly qualified the previously-settled case-law, which holds that the Euro Group cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union. For that reason, the Council lodged an appeal on 21 September 2018<sup>5</sup> seeking to set aside the parts of the contested judgment where the General Court has concluded that certain acts of the Euro Group could entail the non-contractual liability of the Union.
8. By their appeal in the present case, the appellants request the Court to quash the decision of the General Court, invoking eight grounds of appeal regarding the jurisdiction of the Court, the admissibility and the substance of the case.
9. In its response to the appeal, the Council submits that all grounds of appeal are unfounded and should be dismissed.
10. In the present cross-appeal, the Council submits that the General Court erred in law in rejecting the plea of inadmissibility concerning the Council Decision.

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<sup>3</sup> **Annex B.1.**

<sup>4</sup> OJ L, 141, 28.5.2013, p. 32 (**Annex B.2.**).

<sup>5</sup> Appeal brought on 21 September 2018 by the Council of the European Union against the judgment of the General Court delivered on 13 July 2018 in Case T-680/13: *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others* (Case C-597/18 P), (**Annex B.3.**).

## II. ADMISSIBILITY

11. According to Article 176 of the Rules of Procedure of the Court of Justice, a cross-appeal may be submitted within the same time-limit as that prescribed for the submission of a response by a document separate from the response.
12. According to Article 178 of those Rules of Procedure, a cross-appeal shall seek to have set aside, in whole or in part, the decision of the General Court and it may also seek to have set aside an express or implied decision relating to the admissibility of the action before the General Court.
13. Since the General Court dismissed the Council's plea of inadmissibility and hence considered that the Council decision could entail the non-contractual liability of the Union, the Council is entitled to bring the present cross-appeal in order to request the Court of Justice to set aside the contested judgment in its part which dismisses this plea of inadmissibility of the Council.<sup>6</sup>

## III. IN LAW

### A. Reasoning of the General Court

14. The Council concurs with the General Court's reasoning in paragraph 101 of the contested judgment that it is necessary to examine the question of attributability of the harmful measures to the defendants in the context of the examination of the Court's jurisdiction, in so far as the Court does not have jurisdiction to hear actions for compensation for damage not imputable to the Union under Article 340 TFEU, but to a Member State or other entity external to the Union.

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<sup>6</sup> The Court of Justice has ruled that there is nothing to preclude a party from bringing both an appeal and a cross-appeal against a judgment of the General Court, see judgments of the Court in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services and Others v Commission*, EU:C:2009:610, paragraphs 31–39.

15. The General Court, in paragraph 103 of the contested judgment, considered necessary to examine first, whether the adoption of the harmful measures was required by the defendant institutions and second, whether the Republic of Cyprus had discretion to reject such a requirement, in accordance with the case law cited in paragraphs 81 to 85 of the contested judgment.
16. The Council agrees with the General Court's approach but is of the view that the General Court failed to draw the appropriate conclusions vis-à-vis the Council decision in its entirety.
17. First, with regard to the part of Article 2(6)(b) of the Council Decision relating to the integration of Laiki into BoC, as well as with regard to Article 2(6) (d) on minimising the costs to taxpayers of bank restructuring, the General Court accepts in paragraphs 178-179 of the judgment that the Council Decision merely identifies, in general terms, measures that the Republic of Cyprus was required to adopt without referring to specific rules, allowing thus a wide margin of discretion to the Cypriot authorities. The General Court concludes accordingly that the alleged harm of the applicants results not from the Council Decision but from the implementing measures adopted by the Republic of Cyprus. The Council fully concurs with this conclusion.
18. Then, in contrast, the General Court failed to reach a similar conclusion in paragraphs 180-181 of the judgment with regard to the part of Article 2(6)(b) of the Council Decision dealing with establishing an independent valuation of the assets of the banks concerned. Subsequently, it considered that the Council required the Republic of Cyprus to implicitly maintain or continue to implement the harmful measures consisting in the conversion of uninsured deposits in BoC into shares.

19. Furthermore, while examining the margin of discretion of the Republic of Cyprus to escape that requirement, the General Court concluded in paragraph 191 of the contested judgment that the Republic of Cyprus had no margin of discretion to revoke the conversion of deposits in BoC into shares, and consequently, in paragraph 192 it concluded that it had jurisdiction to hear the case in so far as it related to the relevant part of Article 2(6)(b) of the Council Decision.

**B. Misinterpretation by the General Court of the case law regarding non-contractual liability of the Union**

20. According to settled case law, the Union may be held liable for actions of Member States under two conditions: first, the adoption of the harmful measures must be required by an act of the Union binding a Member State in legal terms<sup>7</sup>; second, the action taken by the Member State may not fall within its genuine discretion<sup>8</sup>.

a) *The adoption of the harmful measures were not required by Council decision*

21. The sequence of facts that allegedly caused the appellants' damage is unequivocal: the Cypriot Resolution Law of 22 March 2013 restructuring BoC and Laiki -and its subsequent implementing decrees- predate the Council Decision. This demonstrates that the harmful measures were not required by the Council Decision, as also stated in paragraph 157 of the contested judgment.

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<sup>7</sup> Case 133/79 *Sucrimex v Commission* EU:C:1980:104, para 22; Case 217/81 *Interagra v Commission* EU:C:1982:222, paras 8 et sq. Case T-54/96 *Oleifici Italiani and Fratelli Rubino Industrie Olearie v Commission* EU:T:1998:204, paras 66 et sq.; Case T-212/06 *Bowland Dairy Products v Commission* EU:T:2009:419, paras 41-43.

<sup>8</sup> Joined Cases 89 and 91/86 *Étoile commerciale and CNTA v Commission* EU:C:1987:337, paras 16-21; Case T-261/94 *Schulte v Council and Commission* EU:T:2002:27, para 52; Case T-93/95 *Laga v Commission* EU:T:1998:22, para 47; Case T-94/95 *Landuyt v Commission* EU:T:1998:23, para 47; Case T-146/01 *D.L.D. Trading v Council* EU:T:2003:344, paras 80-82 and 91-97; Case T-541/10 *ADEDY and Others v Council* EU:T:2012:626, paras 70-88; Case T-215/11 *ADEDY and Others v Council* EU:T:2012:627, paras 79-100.

22. Despite this unequivocal chronological sequence and contrary to well-settled case law, the General Court effectively follows the applicants' theory on the "continuum" of acts. In paragraph 158 of the judgment it initially criticises their line of reasoning as "speculative" and states that the applicants failed to adduce any evidence seeking to establish the truth or even the likelihood of the defendants' acts being a necessary condition for the maintenance or continued implementation of the harmful measures by the Republic of Cyprus. In contrast to that statement, it accepts the applicants' theory in the following paragraph 159 of the judgment "*as meaning that the defendants obliged the Republic of Cyprus to maintain or continue to implement those measures*".
23. This counter-intuitive interpretation departs from the well-settled case law on causality that requires the existence of a direct causal link between the defendants' conduct and the damage allegedly suffered by the applicants. It is based on the speculation that the Republic of Cyprus would have invoked or ceased to implement the harmful measures in the absence of the Council decision. However, in paragraph 180 of the judgment, the General Court itself put into question the practicability of such an exercise in view of the circumstances of the case and in light of the financial position of the concerned banks.
24. The Council respectfully submits that the damage of the appellants would have occurred even in the absence of the Council decision. Independently from the existence of the Council decision, the Republic of Cyprus had adopted and would have to maintain or continue implementing the harmful measures, since they were included in the MoU bilaterally signed between the Republic of Cyprus and the ESM. The requirement to maintain and continually implement the harmful measures could not be attributed to the Council but is attributable only to the Republic of Cyprus in the context of its negotiations with ESM following its own decision to request ESM financial assistance<sup>9</sup>.

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<sup>9</sup> See in that vein paragraph 167 of the contested judgment.



25. As explained by the Council in its plea of inadmissibility<sup>10</sup>, its statement of defense of 28 July 2015<sup>11</sup> and its reply to the General Court's questions of 14 July 2017<sup>12</sup>, the Council Decision reflects a common practice that has developed since the beginning of the crisis of the euro area, according to which conditionality attached to assistance - that has been agreed intergovernmentally between the beneficiary Member State and the ESM - is coupled with Council Decisions based on Article 136 TFEU.<sup>13</sup> As also indicated in recital (14) of the Council Decision, this practice ensures the correspondence and consistency between the intergovernmental and Union spheres of action.
26. It results from the above that the conversion of the deposits in BoC into shares was not imposed by the Council Decision; Article 2(6)(b) thereof merely lays down that an independent valuation of the assets of the banks concerned is to be completed quickly. The obligation to carry out an independent valuation presupposes a deposit-equity swap, but does not impose it. The latter is based upon the prior decision of the Cypriot authorities to convert the uninsured deposits in BoC into shares, which is the only act at the origin of the alleged damage of the appellants.
27. For these reasons, the General Court erred in law by considering in paragraph 180 that the Council, by means of Article 2(6)(b) of its Decision, required the Republic of Cyprus to maintain or continue to implement the harmful measure consisting in the conversion of uninsured deposits in BoC into shares.

*b) The Republic of Cyprus had a margin of discretion as to the harmful measures*

28. Even if it were accepted that the provision in question also imposes the obligation for Cyprus to carry out the said conversion (*quod non*), Cyprus retained a large margin of discretion on the manner to do it and even, on not doing it, as explained below.
29. The finding of the General Court that the Republic of Cyprus had no margin of discretion to revoke the conversion of deposits in BoC into shares is based on the fact that the Council Decision had legally binding effects and was thus mandatory for the Republic of Cyprus.<sup>14</sup>

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<sup>10</sup> See especially paragraphs 22-24 thereof (**Annex B.1.**).

<sup>11</sup> See paragraph 67 thereof (**Annex B.4.**).

<sup>12</sup> See paragraphs 7-16 thereof (**Annex B.5.**).

<sup>13</sup> See also paragraph 190 of the contested judgment.

<sup>14</sup> See paragraphs 185-188 of the contested judgment.

30. However, the mandatory character of an EU act does not equal to the absence of a margin of discretion of the national authorities. If the reasoning of the General Court was followed, the second condition required by the case law cited in point 15 of this cross-appeal would be superfluous and the analysis of the General Court inoperative.
31. The Council Decision is of mandatory character and produces legally binding effects in its entirety, in accordance with Article 288 TFEU. Nevertheless, this correctly did not prevent the General Court from considering - in paragraphs 178 -179 of the contested judgment- that the Council decision left a considerable margin of discretion to the Cypriot authorities for the purpose of defining the specific rules required by Article 2(6)(b) for the integration of Laiki into BoC and by Article 2(6)(d) for the minimisation of the costs to taxpayers of bank restructuring.
32. The differentiation of the reasoning of the General Court regarding Article 2(6) (b) for the conversion of deposits in BoC into shares is supported neither by the case law nor by any difference in the submitted evidence. Similarly to the rest of the provisions of the Council Decision, the concerned provision is drafted in general terms and contains no specific rule as to that conversion. It is the preceding implementing measures adopted by the Cypriot authorities that laid down the specific rules of that conversion.<sup>15</sup>
33. When it comes to the independent valuation of the assets of the banks concerned, some light on the precise content thereof may be shed by point 1.27 of the MoU signed bilaterally between Cyprus and ESM: the relevant provision sets merely a timeframe for following steps to be taken by Cyprus, "if required". Moreover, that provision refers to the terms of reference being agreed by mid-April 2013, in order to complete the valuation by end June 2013, "as required by the bank resolution framework"<sup>16</sup>. It is clear from this wording that all relevant requirements are laid down by the relevant Cypriot law.

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<sup>15</sup> See also reasoning of the General Court in paragraph 178 regarding the integration of Laiki into BoC.

<sup>16</sup> Emphasis added.

34. Such broad reference in the Council Decision to the timing of the assets valuation is not capable of limiting the margin of discretion of the Cypriot authorities as to the specific terms of that exercise or the following steps to be taken, such as additional conversion or share-reversal process. As already explained in the reply of the Council to the General Court's question of 14 July 2017<sup>17</sup>, the Council Decision imposes obligations formulated in a broad manner concerning the attainment of budgetary objectives, leaving to Cyprus the power to determine how the desired results are to be achieved.
35. The above has been confirmed by the General Court's Orders in Cases *ADEDY and Others v. Council*<sup>18</sup> that concerned Council decisions addressed to Greece, which are of an identical nature with the present Council decision. In those cases, the Court concluded that the relevant Council Decisions were of a wide range and required national implementing measures for which the Member State concerned enjoyed a great margin of discretion.
36. In the view of the Council, that case law is fully applicable to the present Council Decision and hence, the General Court erred in departing therefrom. The General Court should have concluded that the Republic of Cyprus had a great margin of discretion as to the relevant harmful measure. That discretion breaks the direct causal link between the Council Decision and the alleged damage of the appellants.
37. It results from the above that the General Court erred in law in concluding in para 243 of judgment that it had jurisdiction to hear the case and that the latter is admissible in so far as it relates to the obligation to maintain or implement the conversion into shares of uninsured deposits in BoC as follows from Article 2(6)b of Council Decision.

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<sup>17</sup> See points 12-14 thereof (**Annex B.5.**)

<sup>18</sup> See Case T-541/10 *ADEDY and Others v Council*, EU:T:2012:626, paragraphs 70- 88 and T--215/11 *ADEDY and Others v Council*, EU:T:2012:627, paragraphs 79-100.

#### IV. CONCLUSION

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

- to set aside the parts of the contested judgment in which the General Court dismissed the plea of inadmissibility raised by the Council in respect of the Council Decision;
- to declare the action at first instance against the Council as inadmissible; and
- to order the respondents to pay the costs of the present proceedings.



Alberto DE GREGORIO



Evgenia CHATZIOAKEIMIDOU



Ivan GUROV

Council Agents