Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 21 April 2016[1]

Joined Cases C-105/15 P to C-109/15 P

Konstantinos Mallis and Elli Konstantinou Malli (C-105/15 P),
Tameio Pronoias Prosopikou Trapezis Kyprou (C-106/15 P),
Petros Chatzithoma and Elenitsa Chatzithoma (C-107/15 P),
Lella Chatziioannou (C-108/15 P),
Marinos Nikolaou (C-109/15 P)
v
European Commission,

European Central Bank (ECB)

(Appeal — Programme of stability support for the Republic of Cyprus — Agreement concluded between the Euro Group countries and the Cypriot authorities concerning, inter alia, the restructuring of the banking sector in the Republic of Cyprus — Implementation of that part of the agreement by the Central Bank of Cyprus — Actions for annulment)

I – Introduction

1. By their appeals, Konstantinos Mallis and Elli Konstantinou Malli, in Case C-105/15, Tameio Pronoias Prosopikou Trapezis Kyprou, in Case C-106/15 P, Petros Chatzithoma and Elenitsa Chatzithoma, in Case C-107/15 P, Lella Chatziioannou, in Case C-108/15 P, and Marinos Nikolaou, in Case C-109/15 P, (together, 'Mallis and Others') seek to have set aside the orders in *Mallis and Malli* v *Commission and ECB* (T-327/13, EU:T:2014:909), *Tameio Pronoias Prosopikou Trapezis Kyprou* v *Commission and ECB* (T-328/13, EU:T:2014:906), *Chatzithoma* v *Commission and ECB* (T-329/13, EU:T:2014:908), *Chatziioannou* v *Commission and ECB* (T-330/13, EU:T:2014:904) and *Nikolaou* v *Commission and ECB* (T-331/13, EU:T:2014:905) respectively (together, 'the orders under appeal'), by which the General Court dismissed the actions they had brought against the European Commission and the European Central Bank (ECB) for the annulment of the Euro Group's statement of 25 March 2013 concerning, inter alia, the restructuring of the banking sector in the Republic of Cyprus ('the contested statement'), imposed as a condition for the grant of financial stability aid by the European Stability Mechanism ('ESM').

1 — Original language: French.

II – Legal context

A – *Primary EU law*

2. According to Article 137 TFEU, 'arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group'.

3. Protocol No 14 on the Euro Group ('Protocol No 14') provides:

'Article 1

The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission.

Article 2

The Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States.'

B – *The ESM Treaty*

4. On 2 February 2012, the Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland ('the ESM Treaty') was concluded in Brussels (Belgium). In accordance with Articles 1, 2 and 32(2) of that treaty, the Contracting Parties, that is to say the Member States whose currency is the euro, established among themselves an international financial institution, the ESM, which has legal personality. Following its ratification by all the signatories, the ESM Treaty entered into force on 27 September 2012.

5. Recital 1 of the ESM Treaty reads as follows:

'The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. [The ESM] will assume the tasks currently fulfilled by the European Financial Stability Facility ("EFSF") and the European Financial Stabilisation Mechanism ("EFSM") in providing, where needed, financial assistance to euro area Member States.'

6. Article 3 of the ESM Treaty, entitled 'Purpose', provides:

'The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.'

7. Article 4(1) of the ESM Treaty, entitled 'Structure and voting rules', states the following:

'The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.'

8. Article 5 of the ESM Treaty, entitled 'Board of Governors', provides:

'1. Each ESM Member shall appoint a Governor and an alternate Governor. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance. The alternate Governor shall have full power to act on behalf of the Governor when the latter is not present.

2. The Board of Governors shall decide either to be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the [TEU] and to the TFEU or to elect a Chairperson and a Vice-Chairperson from among its members for a term of two years …

3. The Member of the [Commission] in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers.

…

6. The Board of Governors shall take the following decisions by mutual agreement:

…

(f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3) [of the ESM Treaty], and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18 [of the ESM Treaty];

(g) to give a mandate to the [Commission] to negotiate, in liaison with the ECB, the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3) [of the ESM Treaty];

…'

9. Article 12 of the ESM Treaty, entitled 'Principles', defines the principles governing stability support and provides as follows in paragraph 1:

'If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.'

10. Article 13 of the ESM Treaty, entitled 'Procedure for granting stability support', provides:

'1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the … Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2) [of the ESM Treaty];

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the [International Monetary Fund (IMF)];

(c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the … Commission — in liaison with the ECB and, wherever possible, together with the IMF — with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of [EU] law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The … Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 [of Article 13 of the ESM Treaty] and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

…

7. The … Commission — in liaison with the ECB and, wherever possible, together with the IMF — shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.'

C – *The Memorandum of Understanding of 26 April 2013*

11. A memorandum of understanding ('Memorandum of Understanding on Specific Economic Policy Conditionality') ('MoU') was signed on 26 April 2013 by the Republic of Cyprus and the Commission acting on behalf of the ESM. [2]

12. Its preface states:

'The economic adjustment programme will address short- and medium-term financial, fiscal and structural challenges facing [the Republic of Cyprus]. The key programme objectives are:

— to restore the soundness of the Cypriot banking sector and rebuild depositors' and market confidence by thoroughly restructuring and downsizing financial institutions, strengthening supervision and addressing expected capital shortfalls, in line with the political agreement of the [Euro Group] of 25 March 2013;

…' [3]

13. The first section of the Memorandum of Understanding, entitled 'Financial sector reform', states: '1.26 Second, [Trapeza Kyprou Dimosia Etaira Ltd (Bank of Cyprus) ('Trapeza Kyprou') [4]] is taking over — via a purchase and assumption procedure — almost the entire Cypriot assets of [Cyprus Popular Bank Public Co. Ltd (Cyprus Popular Bank) ('Laiki') [5]] at fair value, as well as the latter's insured deposits and Emergency Liquidity Assistance exposure at nominal value. The uninsured deposits of [Laiki] will remain in the legacy entity. The aim is for the value of the transferred assets to be higher than the transferred liabilities with the difference corresponding to the recapitalisation of [Trapeza Kyprou] by [Laiki] amounting to 9% of the risk-weighted assets transferred. [Trapeza Kyprou] is being recapitalised to reach a core tier one ratio of 9% under the adverse scenario of the stress test by the end of the programme, which should help to restore confidence and normalise funding conditions. The conversion of 37.5% of the uninsured deposits in [Trapeza Kyrpou] into class A shares with full voting and dividend rights provides the largest part of the capital needs with additional equity contributions from the legacy entity of [Laiki]. Part of the remaining uninsured deposits of [Trapeza Kyprou] will be frozen temporarily until the completion of the independent valuation referred to in the paragraph below.

1.27 Third, to ensure that the capitalisation targets are met, a more detailed and updated independent valuation of the assets of [Trapeza Kyprou] and [Laiki] will be completed, as required by the bank resolution framework, by end June 2013. To this end, no later than mid-April 2013, the terms of reference of the independent valuation exercise will be agreed in consultation with the [European Commission], the ECB, and the IMF. Following that valuation, and if required, an additional conversion of uninsured deposits into class A shares will be undertaken to ensure that the core tier one capital target of 9% under stress by end-programme can be met. Should [Trapeza Kyprou] be found to be overcapitalised relative to the target, a share-reversal process will be undertaken to refund depositors by the amount of over-capitalisation.'

2 — The full text of the MoU is available in English on the website of the Ministry of Finance (Ypourgeío Oikonomikón) of the Republic of Cyprus at the following address: http://www.mof.gov.cy/mof/mof.nsf/All/B331D12F3608B009C2257D5D00239594/$file/Memorandum%20%of%20Understanding%20April%202013.pdf.

3 — [Note to the effect that the French translation of the original English of the preface is unofficial].

4 — La Trapeza Kyprou Dimosia Etaira Ltd is often referred to by its name or initials in English, that is to say 'Bank of Cyprus' or 'BoC'.

5 — I am referring to the Greek name for the Cyprus Popular Bank Public Co. Ltd, 'Laiki' ('popular' in Greek).

D – *Secondary EU law*

14. Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth[6] ('Decision 2013/236') provides:

'Article 1

1. In order to facilitate the return of the Cypriot economy to a path of sustainable growth and to fiscal and financial stability, Cyprus shall rigorously implement a macroeconomic adjustment programme (the "programme"), the main elements of which are laid down in Article 2 of this Decision …

Article 2

1. The key objectives of the programme shall be: to restore the soundness of the Cypriot banking sector; to continue the ongoing process of fiscal consolidation; and to implement structural reforms to support competitiveness and sustainable and balanced growth.

…

6. With a view to restoring the soundness of its financial sector, Cyprus shall continue to thoroughly reform and restructure the banking sector and reinforce viable banks by restoring their capital, addressing their liquidity situation and strengthening their supervision. The programme shall provide for the following measures and outcomes:

…

(d) taking steps to minimise the cost to taxpayers of bank restructuring …

…

Article 3

This Decision is addressed to the Republic of Cyprus.'

15. Recital 3 of Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability[7] ('Regulation No 472/2013') provides:

'Full consistency between the Union multilateral surveillance framework established by the TFEU and the possible policy conditions attached to financial assistance should be enshrined in Union law …'

6 — OJ 2013 L 141, p. 32.

7 — OJ 2013 L 140, p. 1. Together with Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ 2013 L 140, p. 11), Regulation No 472/2013 forms part of the 'two-pack' reform to enhance economic integration and convergence between euro area Member States.

16. Regulation No 472/2013 provides:

‘Article 1

Subject matter and scope

1. This Regulation lays down provisions for strengthening the economic and budgetary surveillance of Member States whose currency is the euro, where those Member States:

…

(b) request or receive financial assistance from one or several other Member States or third countries, the [EFSM], the [ESM], the [EFSF], or another relevant international financial institution such as the [IMF].

…

Article 5

Information on envisaged financial assistance requests

A Member State intending to request financial assistance from one or several other Member States or third countries, the ESM, the EFSF, or another relevant international financial institution, such as the IMF, shall immediately inform the President of the [Euro Group] Working Group, the member of the Commission responsible for Economic and Monetary Affairs and the President of the ECB of its intention.

After receiving an assessment from the Commission, the [Euro Group] Working Group shall hold a discussion about the intended request with a view to examining, inter alia, the possibilities available under existing Union or euro area financial instruments before the Member State concerned addresses potential lenders.

A Member State intending to request financial assistance from the EFSM shall immediately inform the President of the EFC, the member of the Commission responsible for economic and monetary affairs and the President of the ECB of its intention.

Article 6

Evaluation of the sustainability of the government debt

Where a Member State requests financial assistance from the EFSM, the ESM, or the EFSF, the Commission shall assess, in liaison with the ECB and, where possible, with the IMF, the sustainability of that Member State’s government debt and its actual or potential financing needs. The Commission shall submit that assessment to the [Euro Group] Working Group where the financial assistance is to be granted under the ESM or the EFSF, and to the EFC where the financial assistance is to be granted under the EFSM.

…

Article 7

Macroeconomic adjustment programme

1. Where a Member State requests financial assistance from one or several other Member States or third countries, the EFSM, the ESM, the EFSF or the IMF, it shall prepare, in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment programme which shall build on and substitute any economic partnership programme under Regulation (EU) No 473/2013 and which shall include annual budgetary targets.

…

The draft macroeconomic adjustment programme shall fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union. The Commission shall orally inform the Chair and Vice-Chairs of the competent committee of the European Parliament of the progress made in the preparation of the draft macroeconomic adjustment programme. That information shall be treated as confidential.

2. The Council, acting by a qualified majority on a proposal from the Commission, shall approve the macroeconomic adjustment programme prepared by the Member State requesting financial assistance in accordance with paragraph 1.

The Commission shall ensure that the memorandum of understanding signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council.

…

Article 15

Voting within the Council

For the measures referred to in this Regulation, only members of the Council representing Member States whose currency is the euro shall vote and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the members of the Council referred to in the first paragraph shall be calculated in accordance with Article 238(3)(a) TFEU.

Article 16

Application to Member States in receipt of financial assistance

Member States in receipt of financial assistance on 30 May 2013 shall be subject to this Regulation as from that date.

…’

17. Decision 2013/236 was repealed and replaced by Council Implementing Decision 2013/463/EU of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus[8] (‘Implementing Decision 2013/463’).

8 — OJ 2013 L 250, p. 40.

18. Recital 6 of that implementing decision reads as follows:

'Following the entry into force of Regulation (EU) No 472/2013, the macroeconomic adjustment programme is now to be adopted in the form of a Council implementing decision. For the sake of clarity and legal certainty, the programme should be readopted on the basis of Article 7(2) of Regulation (EU) No 472/2013. The substance of the programme should remain identical to the one approved by [Decision 2013/236], but also incorporate the results of the review carried out in accordance with Article 1(2) of that Decision. At the same time, [Decision 2013/236] should be repealed.'

19. Article 2(5) of that decision provides:

'With a view to restoring the soundness of its financial sector, Cyprus shall continue to thoroughly reform and restructure the banking sector and reinforce viable banks by restoring their capital, addressing their liquidity situation and strengthening their supervision. The programme shall provide for the following measures and outcomes:

…

(c) taking steps to minimise the costs of bank restructuring carried by taxpayers …'

III – Background to the dispute

20. From 2012 onwards, the Republic of Cyprus was under ever increasing pressure in financial markets, against the background of rising concerns about the sustainability of its public finances, including the significant public support measures called for by its weakened financial sector.

21. Following several successive downgradings of Cypriot sovereign bonds by credit-rating agencies, the Republic of Cyprus became unable to refinance itself at rates compatible with long-term fiscal sustainability. In parallel, the banking sector was increasingly cut off from international market funding and major institutions recorded substantial capital shortfalls.

22. In the first few months of 2012, certain banks established in Cyprus, including Laiki and Trapeza Kyprou, encountered financial difficulties. The Republic of Cyprus therefore considered it necessary for them to be recapitalised.

23. On 25 June 2012, in view of those severely adverse economic and financial conditions, the Cypriot authorities made an official request to the President of the Euro Group for financial assistance under the terms of a loan by the EFSF/ESM, as well as from the IMF, with a view to supporting the return of Cyprus's economy to sustainable growth, ensuring a properly-functioning banking system and safeguarding financial stability in the Union and in the euro area.

24. On 27 June 2012, the Euro Group invited the Commission, in liaison with the ECB, the Cypriot authorities, and the IMF to agree on a macroeconomic adjustment programme for the Republic of Cyprus, including the latter's financing needs, and to take appropriate action to safeguard financial stability in a very challenging environment where there was a risk of spill-over effects from sovereign market turbulence.

25. The Republic of Cyprus and the other Member States whose currency is the euro reached a policy agreement on a draft MoU in March 2013.

26. In a statement dated 16 March 2013, the Euro Group welcomed that agreement and referred to a number of anticipated adjustment measures, including the creation of a tax on bank deposits. The Euro Group indicated that, against that background, the grant of financial assistance to safeguard financial stability in the Republic of Cyprus and the euro area was, in principle, warranted and called on the parties concerned to expedite the negotiations that were underway.

27. On 18 March 2013, the Republic of Cyprus ordered the banks to close on 19 and 20 March 2013. In a statement made the same day, the President of the Euro Group stated that the tax on bank deposits, together with the financial assistance requested, would be used to restore the viability of the Cypriot banking system and hence the financial stability of the Republic of Cyprus. He nevertheless pointed out that, in the Euro Group's view, small depositors were to be treated differently from large depositors and reaffirmed the importance of fully guaranteeing deposits of less than EUR 100 000. Lastly, on behalf of the Euro Group, the President encouraged the Cypriot authorities to put the agreed measures into effect rapidly.

28. The Cypriot authorities decided to postpone the bank closure to 28 March 2013, in order to avoid a run on the banks.

29. On 19 March 2013, the Cypriot Parliament rejected the draft law presented by the Cypriot Government on the creation of a tax on all bank deposits in the Republic of Cyprus. On 22 March 2013 the Cypriot Parliament adopted a new law on the resolution of credit institutions.

30. On 25 March 2013, the Euro Group issued the contested statement,[9] which states:

'The [Euro Group] has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme. This agreement is supported by all euro area Member States as well as the three institutions.

…

The [Euro Group] welcomes the plans for restructuring the financial sector as specified in the annex. These measures will form the basis for restoring the viability of the financial sector. In particular, they safeguard all deposits below EUR 100 000 in accordance with EU principles.

…

The [Euro Group] requests the Cypriot authorities and the Commission, in liaison with the ECB, and the IMF to finalise the MoU at staff level in early April.

…

The [Euro Group] takes note of the authorities' decision to introduce administrative measures, appropriate in view of the present unique and exceptional situation of Cyprus' financial sector and to allow for a swift reopening of the banks. The [Euro Group] stresses that these administrative measures will be temporary, proportionate and non-discriminatory, and subject to strict monitoring in terms of scope and duration in line with the Treaty.

…

9 — The full text of the contested statement is available, in English only, on the websites of the Commission (http://ec.europa.eu/spain/pdf/acuerdo-eurogrupo-chipre.pdf) and the Council (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/136487.pdf).

The [Euro Group] expects that the ESM Board of Governors will be in a position to formally approve the proposal for a financial assistance facility agreement by the third week of April 2013 subject to the completion of national procedures.'

31. The annex to the contested statement was drafted as follows:

'Following the presentation by the authorities [of the Republic of Cyprus] of their policy plans, which were broadly welcomed by the [Euro Group], the following was agreed:

1. Laiki will be resolved immediately — with full contribution of equity shareholders, bond holders and uninsured depositors — based on a decision by the Central Bank of Cyprus ("CBC"), using the newly adopted Bank Resolution Framework.

2. Laiki will be split into a good bank and a bad bank. The bad bank will be run down over time.

3. The good bank will be folded into [Trapeza Kyprou], using the Bank Resolution Framework, after having heard the Boards of Directors of [Trapeza Kyprou] and Laiki. It will take [nine] bn Euros of [Emergency Liquidity Assistance (ELA)] with it. Only uninsured deposits in [Trapeza Kyprou] will remain frozen until recapitalisation has been effected, and may subsequently be subject to appropriate conditions.

4. The Governing Council of the ECB will provide liquidity to [Trapeza Kyprou] in line with applicable rules.

5. [Trapeza Kyprou] will be recapitalised through a deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bond holders.

6. The conversion will be such that a capital ratio of 9% is secured by the end of the programme.

7. All insured depositors in all banks will be fully protected in accordance with the relevant EU legislation.

8. The programme money (up to [ten] bn Euros) will not be used to recapitalise Laiki and [Trapeza Kyprou].'

32. On the same day, the Governor of CBC placed Trapeza Kyprou and Laiki into resolution.

33. On 29 March 2013, two decrees were published in that connection. [10]

34. Decree No 103 provided for the recapitalisation of Trapeza Kyprou, at the expense, in particular, of its own shareholders, bondholders and guaranteed depositors for sums of more than EUR 100 000. [11]

35. In so far as concerns Decree No 104, it provided for the transfer of certain of Laiki's assets and liabilities, including deposits of less than EUR 100 000, to Trapeza Kyprou. Deposits of more than EUR 100 000 remained with Laiki, pending the latter's liquidation.

10 — Namely, the Peri diasosis me idia mesa tis Trapezas Kyprou Dimosias Etaireias Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 103 (Decree of 2013 on the bailing-in of Trapeza Kyprou, Regulatory Administrative Act No 103), EE, Annex III(I), No 4645, 29 March 2013, pp. 769 to 780 ('Decree No 103') and the Peri tis Polisis orismenon ergasion tis Cyprus Popular Bank Public Co. Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 104 (Decree of 2013 on the sale of certain operations of Laiki, Regulatory Administrative Act No 104), EE, Annex III(I), No 4645, 29 March 2013, pp. 781 to 788) ('Decree No 104').

11 — This resolution procedure is often referred to as the bank deposits 'haircut' (levy) or the Cypriot banks 'bail-in'. The term 'bail-out' describes a rescue operation in which the onus is placed on external investors or the taxpayer. The term 'bail-in', on the other hand, refers to a rescue operation in which the bank's creditors are obliged to agree to have a portion of their debt written off.

36. Pursuant to those decrees, the resolution measures relating to Laiki and Trapeza Kyprou were executed between 06.00 and 06.10 on 29 March 2013. Until that time, Mallis and Others had held with Trapeza Kyprou or Laiki deposits which, as a result of the application of the measures provided for by those decrees, were substantially reduced in value. Mallis and Others state that they have lost everything over and above EUR 100 000.

37. After the adoption of Decrees Nos 103 and 104, the Commission embarked upon new discussions with the Cypriot authorities with a view to finalising an MoU.

38. At its meeting on 24 April 2013, the Board of Governors of the ESM:

— confirmed, first, that the Commission and the ECB were entrusted with carrying out the assessments referred to in Article 13(1) of the ESM Treaty and, secondly, that the Commission was entrusted, in liaison with the ECB and the IMF, with the negotiation of the MoU with the Republic of Cyprus;

— decided to grant, in principle, stability support to the Republic of Cyprus in the form of a financial assistance facility ('FAF') in accordance with the proposal of the ESM's Managing Director;

— approved the draft MoU negotiated by the Commission, in liaison with the ECB and the IMF, and the Republic of Cyprus, and

— requested the Commission to sign the MoU on behalf of the ESM.

39. On 25 April 2013, the Council adopted Decision 2013/236, Article 2(6)(d) of which provided that the bail-in of the Cypriot banks was part of the Republic of Cyprus's macroeconomic adjustment programme.

40. The MoU was signed on 26 April 2013 by the Minister for Finance of the Republic of Cyprus, the Governor of the CBC and O. Rehn, Vice-President of the Commission.

41. On 8 May 2013, the Board of Governors of the ESM approved the FAF agreement together with a proposal for the disbursement of a first tranche of the financial assistance to the Republic of Cyprus. That tranche was divided into two disbursements, the first, of EUR 2 billion, to be made on 13 May 2013 and the second, of EUR 1 billion, to be made on 26 June 2013. A second tranche of financial assistance, amounting to EUR 1.5 billion, was to be disbursed on 27 September 2013. Other tranches ranging from EUR 100 million to EUR 600 million were disbursed between December 2013 and July 2015.

42. On 21 May 2013, the Council adopted Regulation No 472/2013, on the basis of which Decision 2013/236 was repealed and replaced by Implementing Decision 2013/463.

IV – The actions before the General Court and the orders under appeal

43. By applications lodged at the Registry of the General Court on 4 June 2013, Mallis and Others brought three actions seeking:

— the annulment of the contested statement, 'which took its final form through [Decree No 104] of the Governor of the [CBC] as the representative and/or agent of the European System of Central Banks … whereby the "sale of certain operations" of [Laiki] was decided and which in essence constitutes a joint decision of not only the [ECB] but also of the … Commission';

— in the alternative, a declaration that the contested statement in essence constitutes 'a joint decision of the [ECB] and/or of the … Commission' irrespective of the shape or form in which it was dressed;

— in the further alternative, the annulment of the contested statement, 'irrespective of the shape or form in which it was dressed';

— in the yet further alternative, the annulment of 'the joint decision of the [ECB] and/or the … Commission … adopted through Euro Group, irrespective of the shape or form in which it was dressed';

— an order requiring the ECB and/or the Commission to pay the costs.

44. By separate documents lodged at the Court Registry on 1 and 9 October 2013 respectively, the Commission and the ECB raised objections of inadmissibility pursuant to Article 114 of the Rules of Procedure of the General Court. They claimed that the Court should:

— dismiss the action as inadmissible and

— order Mallis and Others to pay the costs.

45. By the orders under appeal, the General Court dismissed all the actions as inadmissible.

46. Whereas Mallis and Others sought the annulment of the Euro Group statement of 25 March 2013 but directed their actions against the Commission and the ECB (as confirmed in their written observations),[12] the General Court first of all examined, in paragraphs 38 to 50 of the orders under appeal, whether the contested statement could be imputed to the Commission and the ECB.

47. Relying on Protocol No 14, which provides that the Euro Group is to be an informal meeting of ministers of the euro area Member States 'to discuss questions related to the specific responsibilities they share with regard to the single currency',[13] the General Court held, in paragraph 44 of the orders under appeal, that the Euro Group could not 'be regarded as being under the control of the Commission or the ECB, or [as acting] as an agent of those institutions'.[14]

48. In paragraphs 46 to 50 of the orders under appeal, the General Court also rejected the notion that the contested statement could be imputed to the ESM because that body was controlled by the Commission and the ECB.

49. In paragraphs 51 to 62 of the orders under appeal, the General Court also examined, for the sake of completeness, the question whether the contested statement produced legal effects with respect to third parties.

50. In that regard, it held that, even though the contested statement contained statements which could be regarded as categorical, in particular in relation to the resolution of Laiki and the imposition of a levy on non-guaranteed bank deposits, those statements could not be read in isolation but must, 'on the contrary, … be read in their proper context, from which it is clear that the contested statement is purely informative in nature'.[15]

12 — See paragraph 37 of the orders under appeal.

13 — Article 1 of Protocol No 14.

14 — Paragraph 44 of the orders under appeal.

15 — Paragraph 61 of the orders under appeal.

V – Procedure before the Court of Justice

51. By their appeals of 27 February 2015, lodged at the Court on 4 March 2015, Mallis and Others claim that the Court should:

— set aside the orders under appeal

— set aside the order requiring them to pay the costs at first instance.

52. By their responses, the Commission and the ECB contend that the Court should:

— dismiss the appeals, and

— order the applicants to pay all costs.

VI – The appeals

53. I should say at the outset that I shall be proposing that the Court dismiss the appeals at issue. However, given the importance of the questions which those appeals raise from the point of view of effective judicial protection, their links with the Court's case-law [judgments in *Pringle* (C-370/12, EU:C:2012:756) and *Gauweiler and Others* (C-62/14, EU:C:2015:400)], the relationship (or lack of one) between the ESM system and EU law, and the Court's decision to settle them by way of judgment (as, moreover, it did in the appeals in Joined Cases C-8/15 P, C-9/15 P and C-10/15 P, concerning actions for annulment and damages in connection with an MoU) and to entrust them to the Grand Chamber, I am minded to make a number of preliminary observations before even considering the grounds of appeal raised by Mallis and Others.

A – *Preliminary observations*

1. The Euro Group

54. The Euro Group not being mentioned in the first paragraph of Article 263 TFEU and not being one of the seven EU institutions listed in Article 13(1) TEU, its acts may be the subject of an action for annulment only if it can be regarded as a configuration of the Council or as a body, office or agency of the Union.

55. The Euro Group is explicitly mentioned in Article 137 TFEU, which, with respect to its composition and the arrangements for its meetings, refers to Protocol No 14 annexed to the FEU Treaty.

56. It is clear from the above provisions that the Euro Group consists of the finance ministers of the euro area Member States, whose meetings the Commission and the ECB are invited to attend.

57. Protocol No 14 provides that those ministers 'shall meet informally' and that they 'shall elect a president for two and a half years'.

58. Furthermore, Article 16(6) TEU provides that the Council is to meet in different configurations, the list of which is to be adopted by the European Council in accordance with Article 236(a) TFEU. According to that list, set out in Annex I to the Rules of Procedure of the Council,[16] the Council meets in 10 different configurations,[17] of which the Euro Group is not one.

59. A link between the Euro Group and the Council can be found in the fact that the Euro Group usually meets once a month, on the eve of the Economic and Financial Affairs Council meeting,[18] and the office of the President of the Euro Group Working Group[19] is at the General Secretariat of the Council in Brussels.[20]

60. Furthermore, the FEU Treaty makes special provision for votes by the Council on measures specific to those Member States whose currency is the euro. The first subparagraph of Article 136(2) provides that 'for [those] measures, only members of the Council representing Member States whose currency is the euro shall take part in the vote', which brings to mind the Euro Group, although the Member States whose currency is not the euro do not even take part in its meetings.

61. Despite these points of contact, I am of the opinion that the Euro Group does not constitute a configuration of the Council, not only because the FEU Treaty does not classify it as such and it does not include all the Member States of the European Union, but also because of the different functions the Euro Group and the Council each perform. The Euro Group is the forum in which the Member States whose currency is the euro discuss 'questions related to the specific responsibilities they share with regard to the single currency'[21] whereas, pursuant to Article 16(1) TEU, the Council's functions are far broader and include in particular the exercise, in conjunction with the Parliament, of legislative power within the European Union and the other decision-making powers conferred on the Council alone by the FEU Treaty.

62. That said, the fact that the Euro Group cannot be regarded as a configuration of the Council does not automatically mean that it does not constitute a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU.

63. However, if the Treaty of Lisbon added acts of 'bodies, offices or agencies of the Union' to the list of acts challengeable by way of an action for annulment, so as to ensure that no such act enjoys judicial immunity, the fact remains that the Euro Group, which is not mentioned in Article 263 TFEU, does not have legal personality.

64. There is nothing in the FEU Treaty or in the case-law to suggest that the authors of the FEU Treaty intended to waive that requirement.[22] Whenever the FEU Treaty has sought to make Article 263 TFEU applicable without requiring the possession of legal personality, it has expressly named the institutions, offices, agencies and bodies in question, be that the European Council (added by the Treaty of Lisbon) or the Committee of the Regions.[23]

16 — See Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35).

17 — General affairs; foreign affairs; economic and financial affairs; justice and home affairs; employment, social policy, health and consumer affairs; competitiveness (internal market, industry, research and space; transport, telecommunications and energy; agriculture and fisheries; environment; education, youth, culture and sport.

18 — See the Council's website at the following address: http://www.consilium.europa.eu/fr/council-eu/Euro Group/.

19 — The Euro Group Working Group is a preparatory body for the meetings of the Euro Group and is composed of representatives of the euro area Member States of the Economic and Financial Committee, the Commission and the ECB.

20 — See the Council's website at the following address: http://www.consilium.europa.eu/fr/council-eu/Euro Group/Euro Group-working-group/.

21 — Article 1 of Protocol No 14.

22 — See the judgment in *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraphs 58 and 59).

23 — I note that the first paragraph of Article 263 TFEU does not mention the Court of Auditors, even though, as Article 13(1)TEU provides, it is an EU institution and not merely one of its bodies, offices or agencies. The question whether the institutions in particular must be regarded as bodies, offices or agencies of the Union, or whether that lacuna is an oversight or should be interpreted as meaning that its acts are not challengeable by an action for annulment has not yet arisen.

65. Without prejudice to the possibility of those acts being imputed to an institution mentioned in Article 263 TFEU, or to an office, body or agency of the Union which has legal personality, I think, therefore, that the Euro Group cannot be regarded as an office, body or agency of the Union within the meaning of the first paragraph of Article 263 TFEU.

66. While it is true that that conclusion might pose a problem from the point of view of the principle of effective judicial protection,[24] this would be the case only if the Euro Group had in the Treaty been given the power to adopt acts producing binding legal effects with respect to third parties, which it has not, the Euro Group being a forum for discussion, not a decision-making body. That characteristic means, moreover, that the ECB's participation in Euro Group meetings is not contrary to the independence it is guaranteed under Article 282(3) TFEU, which EU institutions, bodies, offices and agencies and the governments of the Member States must respect.

67. Consequently, acts of the Euro Group cannot be annulled on the basis of Article 263 TFEU.

2. On the ESM and its Board of Governors

68. The ESM Treaty is not part of the EU legal order. Indeed, as the Court held in paragraph 180 of the judgment in *Pringle* (C-370/12, EU:C:2012:756), 'the Member States are not implementing Union law …when they establish a stability mechanism such as the ESM where … the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism'.[25]

69. Under Article 4(1) of the ESM Treaty, the ESM is to have a Board of Governors (in reality, the finance ministers of the ESM Member States, as Article 5(1) of the ESM Treaty states), a Board of Directors and a Managing Director, the supreme executive body being, of course, the Board of Governors.

70. The Chairperson of the Board of Governors is, in principle, the President of the Euro Group (Article 5(2) of the ESM Treaty).

71. It is therefore clear that, to date, the Euro Group and the Board of Governors of the ESM have been composed of exactly the same members, the Board of Governors having decided, since it was first created, to be chaired by the President of the Euro Group.

72. As regards the Commission and the ECB, Article 5(3) of the ESM Treaty provides that the Member of the Commission in charge of economic and monetary affairs and the President of the ECB may participate in the meetings of the Board of Governors as observers.

73. A Member State intending to ask the ESM for financial assistance through the ESM must follow the procedure set out in Article 13 of the ESM Treaty.

74. In accordance with Article 13(1), that Member State must address a request for stability support to the Chairperson of the Board of Governors, who is to entrust the Commission with assessing it, in liaison with the ECB.

75. Article 13(2) of the ESM Treaty provides that the Board of Governors of the ESM may decide in principle to grant stability support to a requesting Member State on the basis of the latter's request and the assessment carried out by the Commission and the ECB.

24 — See, to that effect, Advocate General Jääskinen's Opinion in *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2014:2416, paragraph 51): 'even in the absence of an express provision endowing the entity in question with legal personality, I consider that the wording of the fifth paragraph of Article 263 TFEU creates a very strong presumption to the effect that, if the institutions create an entity which is capable of taking decisions affecting individuals, a remedy must none the less exist'.

25 — See also paragraph 105 of that judgment.

76. Under Article 13(3) of the ESM Treaty, if the Board of Governors takes such a decision, it is to entrust the European Commission and the ECB 'and, wherever possible, together with the IMF … with the task of negotiating, with the [Member State] concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility'.

77. It should be noted that, in accordance with Article 5(6)(g) of the ESM Treaty, it is for the Board of Governors to define, by mutual agreement, the economic policy conditionality which is to be attached to the financial assistance granted to the Member State in difficulty.

78. Under Article 13(4) of the ESM Treaty, the Commission is to sign the MoU on behalf of the ESM if it complies with the conditions set out in paragraph 3 and has been approved by the Board of Governors.

79. The Board of Directors of the ESM must then approve 'the financial assistance facility agreement'. [26]

80. Next, it falls to the Member State concerned to put in place the national measures necessary to fulfil the commitments contained in the MoU.

81. I would recall that, in paragraph 161 of the judgment in *Pringle* (C-370/12, EU:C:2012:756), the Court held that the duties so conferred on the Commission and ECB within the ESM Treaty, 'important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM'. [27]

82. I would observe, however, that Article 13(4) of the ESM Treaty seems to me to confer on the Commission a power (and, in its capacity as guardian of the Treaties, a duty) to block the MoU if the latter is not consistent with the measures of economic policy coordination provided for in the FEU Treaty, as Article 13(3) requires. While it is true that such a refusal by the Commission to execute the mandate to sign the MoU on behalf of the ESM is highly unlikely ('theoretical', the Commission called it at the hearing) given that the Commission will have ensured that the MoU is consistent in the manner required by Article 13(3) of the ESM Treaty at each stage in the process from the point at which the Member State in difficulty made its request, the political improbability of refusal does not detract from the finding in law. That said, any signature by the Commission is effected only on behalf of the ESM and, as paragraph 161 of the judgment in *Pringle* (C-370/12, EU:C:2012:756) states, solely commits the ESM, which is therefore the sole author of the decisions in question.

83. Moreover, given that disputes concerning the ESM Treaty (and, therefore, concerning acts of the ESM) may be submitted to the Court only in accordance with the special agreement procedure (Article 273 TFEU) provided for in Article 37(3) of the ESM Treaty, [28] the Court does not have jurisdiction under Article 263 TFEU to dispose of an action for annulment directed against an act adopted by the ESM.

84. Similarly, national measures adopted on the sole basis of the MoU do not constitute an implementation of EU law by the Member States, even though the second subparagraph of Article 13(3) of the ESM Treaty provides that 'the MoU shall be fully consistent … with any act of … Union law'. [29]

26 — Article 13(5) of the ESM Treaty.

27 — Participation in the meetings of the Board of Governors as observers, negotiating and signing the MoU and monitoring its implementation by the Member State concerned.

28 — See the judgment in *Pringle* (C-370/12, EU:C:2012:756, paragraphs 170 to 176).

29 — See also the judgment in *Pringle* (C-370/12, EU:C:2012:756, paragraph 174).

85. Up to now, however, any measures contained in an MoU adopted under the ESM have also been contained, in varying degrees of detail, in a Council Decision adopted under the FEU Treaty by the Council,[30] a procedure perhaps dictated by the fear that the MoU is not legally binding.

86. That assumption is confirmed by the decisions of certain national courts.

87. The Simvoulio tis Epikratias (Council of State, Greece), in particular, held that the first and second MoUs signed by the Hellenic Republic in 2010 and 2012 respectively did not constitute international treaties because the parties did not assume reciprocal obligations and did not make provision for a mechanism to compel the Hellenic authorities to enforce their terms.[31] According to the Simvoulio tis Epikratias (Council of State), those MoUs constituted only the policy programme that the Member State in question intended to put in place in order to qualify for the financial assistance.[32] In other words, those MoUs were not legally binding instruments.

88. In order to arrive at that finding, the Simvoulio tis Epikratias (Council of State) relied on the fact that, if the MoUs had been legally binding, the Council would not have adopted Decision 2010/320.[33]

89. At all events, the Council decisions thus addressed to a Member State support the view that national measures adopted pursuant to commitments entered into by a Member State vis-à-vis the ESM constitute an implementation of EU law even though the MoU does not constitute an act of EU law, provided, however, that those measures are reproduced in the Council decision adopted after the MoU has been signed.

90. That said, as the General Court held in the orders in *ADEDY and Others* v *Council* (T-541/10, EU:T:2012:626, paragraph 87) and *ADEDY and Others* v *Council* (T-215/11, EU:T:2012:627, paragraph 99),[34] Council decisions reproducing commitments which the Member State in difficulty made in the MoU are not capable of being of direct concern[35] to individuals as referred to in the fourth paragraph of Article 263 TFEU, for which reason the actions for annulment in those cases were inadmissible.

30 — See, in the case of the Republic of Cyprus, Decision 2013/236, Article 2(6)d) of which provided that 'the [macroeconomic adjustment] programme shall provide for the following measures and outcomes … taking steps to minimise the cost to taxpayers of bank restructuring'. The reduction of the cost to taxpayers referred to necessarily entails the participation of deposit holders and, therefore, the imposition of a levy on bank deposits, See also, in the case of the Hellenic Republic, Council Decision 2010/320/EU of 8 June 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (Decision 2010/320), OJ 2010 L 145, p. 6, as amended, and Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (OJ 2011 L 296, p. 38), as amended.

31 — See Simvoulio tis Epikratias (Council of State) (plenary assembly) 668/2012, paragraph 27, and Simvoulio tis Epikratias (Council of State) (plenary assembly) 2307/2014, paragraph 19.

32 — See Simvoulio tis Epikratias (Council of State) (plenary assembly) 668/2012, paragraph 27, and Simvoulio tis Epikratias (Council of State) (plenary assembly) 2307/2014, paragraph 19.

33 — See Simvoulio tis Epikratias (Council of State) (plenary assembly) 668/2012, paragraph 27.

34 — Which findings have not been challenged before the Court of Justice.

35 — There was, by definition, no need to examine whether the applicants in the present cases were individually concerned because the conditions are cumulative. In my view, however, the applicants in these cases could not be regarded as being individually concerned either.

91. However, given that the second subparagraph of Article 13(3) of the ESM Treaty provides that the measures contained in the MoU must 'be fully consistent' with EU law, and in so far as those measures are reproduced in Council decisions, Member States are required by the second subparagraph of Article 19(1) TEU to provide 'remedies sufficient to ensure effective legal protection' enabling the courts of the Member State to refer to the Court of Justice questions for a preliminary ruling on the validity of those decisions and, consequently, the validity of the macroeconomic adjustment programme at issue. [36]

3. Regulation No 472/2013

92. The foregoing is reinforced by the adoption of Regulation No 472/2013, even though that regulation is not applicable, *ratione temporis*, to the contested statement.

93. The purpose of that regulation, as stated in recital 3, is '[to enshrine in Union law] full consistency between the Union multilateral surveillance framework established by the TFEU and the possible policy conditions attached to financial assistance', in other words, consistency between the ESM Treaty and the FEU Treaty.

94. Thus Articles 5 to 7 of Regulation No 472/2013 detail the way in which the Commission and the ECB are to exercise the functions conferred upon them by Article 13 of the ESM Treaty and provide for the adoption of a draft macroeconomic adjustment programme (another name for the MoU referred to in Article 13(3) of the ESM Treaty) and its approval by the Council, the euro area Member States alone have the right to vote. [37]

95. Mirroring Article 13(7) of the ESM Treaty, Article 7(4) of Regulation No 472/2013 confers on the troika, namely: 'the Commission, in liaison with the ECB and, where appropriate, with the IMF', the task of monitoring the progress made by a Member State in the implementation of the MoU.

96. In the same way as the second subparagraph of Article 13(3) of the ESM Treaty provides that the MoU must be 'fully consistent' with EU law, the last subparagraph of Article 7(1) of Regulation No 472/2013 requires that the macroeconomic adjustment programme be consistent with Article 152 TFEU and Article 28 of the Charter.

97. Following the entry into force of Regulation No 472/2013, Decision 2013/236 addressed to the Republic of Cyprus was repealed and replaced by Implementing Decision 2013/463, which readopted the macroeconomic adjustment programme contained in Decision 2013/236 'for the sake of clarity and legal certainty'. [38]

36 — With regard to the present case, it should be noted that, in accordance with the case-law of the Anotato Dikastirio Kyprou (Supreme Court of Cyprus), the depositors affected by the imposition of a levy on their accounts have no interest in bringing an action for annulment against Decrees Nos 103 and 104 because those decrees are not concerned with the relationship between the State and individuals but are addressed to the banks concerned, namely Laiki and Trapeza Kyprou (judgments in *Myrto Christodoulou and Others* v *Kentriki Trapeza Kyprou and Others*, Case No 553/2013 and others, 7 June 2013, and *Vias Dimitriou and Others* v *Kentrikis Trapezas Kyprou and Others*, Case No 1034/2013 and others, 9 October 2014). In accordance with that case-law, depositors may, on the basis of their contractual relationship with the bank, bring an action for damages against the bank before the civil courts, to which proceedings the Republic of Cyprus might be summoned. In that context, the question of the legality of Decrees Nos 103 and 104 and their compatibility with EU law might be raised with a view to establishing the civil liability of the bank and the State. On this face of it, this does not seem to me to be sufficient to satisfy the requirements under Article 19 TEU.

37 — See Article 15 of Regulation No 472/2013.

38 — Recital 6 of Implementing Decision 2013/463.

98. Even if individuals cannot demonstrate that they are directly concerned by such implementing decisions,[39] the Member States are in any case required by the second subparagraph of Article 19(1) TEU to provide 'remedies sufficient to ensure effective legal protection'.[40] As I have explained in point 91 of the present Opinion, national courts must be able to refer to the Court of Justice for a preliminary ruling questions on the validity of implementing decisions and the compatibility of macroeconomic adjustment programmes with the FEU Treaty, the general principles of EU law and the Charter.

B – *The first and third grounds of appeal*

1. Arguments of the parties

99. By their first and third grounds of appeal, Mallis and Others submit that the orders under appeal are vitiated by a failure to state reasons for the General Court's position on the authority which actually and in reality made the decision on the imposition of a levy on deposits held in the Laiki and Trapeza Kyprou banks or at all events prompted or required the Cypriot authorities to effect that levy, in particular by adopting Decrees Nos 103 and 104. It is their contention that the General Court did not take into account the fact that that levy came about only as a result of terms and conditions imposed on the Republic of Cyprus by the Commission and the ECB in the contested statement.

100. Mallis and Others submit that the General Court did not examine their argument that the Euro Group cannot be regarded as a mere forum for discussion. The fact that none of the competences vested in the Commission and the ECB have been conferred upon or delegated to the Euro Group supports the inference that the latter constitutes a means by which the Commission and the ECB take decisions on specific questions linked to the ESM or to financial stability.

101. Furthermore, Mallis and Others argue, the Commission and the ECB are the 'true authors' of the contested statement. They contend in this regard that it was not permissible for the General Court to disregard, as it did, either its own finding in paragraph 61 of the orders under appeal that the contested statement contained a series of statements 'which could be regarded as categorical', or the role of the Commission and the ECB within the context of the ESM Treaty, in accordance with which the Commission negotiates and signs the MoU and, in liaison with the ECB, monitors the implementation by the Member State concerned of the measures provided for in the MoU.

102. The Commission contends that Mallis and Others do not identify those aspects of the orders under appeal which are alleged to be vitiated by an error of law. The first ground of appeal should therefore be regarded as inadmissible. It is at any rate unfounded, given that the orders under appeal were adequately reasoned.

103. The Commission submits that, in their appeals, Mallis and Others argue, without giving any reasons, that the contested statement constituted, in essence, a joint decision of the ECB and the Commission acting 'through the medium of the Euro Group'. The General Court rejected that proposition by means of a detailed line of argument.

39 — See point 90 of the present Opinion.

40 — See footnote 36 to the present Opinion.

104. The argument that the General Court did not examine the fact that the Republic of Cyprus and, in particular, the Governor of the CBC were simply applying the decisions of the Euro Group is nugatory, because it is based on the erroneous premiss that the contested statement was adopted by the Commission and the ECB. At all events, the Commission maintains, that argument is inadmissible and nugatory for it has no bearing on the General Court's assessment of the legality of the contested act.

105. The ECB observes that Mallis and Others seek to call into question the General Court's findings of fact. Furthermore, there is no doubt that that assessment of the facts is not vitiated by any error of law, the claims made by Mallis and Others being, according to the ECB, unsubstantiated by a specific line of reasoning or by case-law.

106. The ECB considers that, at all events, Mallis and Others do not put forward a single argument in their appeals to substantiate their allegation that the General Court erred in law in taking the view that the Commission and the ECB are not the true authors of the contested statement, confining themselves to repeating the arguments rejected by the General Court.

2. Assessment

107. Since both the first and third grounds of appeal specifically seek to contest the General Court's finding that the contested statement cannot be imputed either to the Commission or to the ECB, they should be considered together, on the grounds that they are sufficiently concerned with paragraphs 41 to 50 of the orders under appeal.

108. As to the substance, the observations in points 54 to 82 of the present Opinion lead me to conclude that the contested statement cannot be imputed to the Commission or to the ECB and that, in this regard, the General Court did not err in law. The role of the Commission and the ECB in that procedure is simply to act as agents of the ESM's Board of Governors in negotiating, monitoring and signing (by proxy) the MoU. Furthermore, as the General Court notes in paragraph 43 of the orders under appeal, it is not apparent from the rules which apply to the Euro Group or from the facts that 'that latter body has received any delegation of powers from the Commission or the ECB … or that those institutions have any power of review with regard to the Euro Group or can issue recommendations to it or, still less, give it binding instructions'.

109. That said, I do wonder (even though this makes no difference at all to the ruling to be given on the appeals at issue) whether the General Court ought not to have declared the application inadmissible from the outset, given that it was so clearly directed against the Commission and the ECB with a view to securing the annulment of an act of the Euro Group.

110. It is true that, as the General Court held in paragraph 36 of the orders under appeal, 'the mistaken designation in the application of a defendant other than the body which adopted the contested measure does not render the application inadmissible if the application contains information which makes it possible to identify unambiguously the party against whom it is made, such as the designation of the contested measure and the body responsible for it'.

111. It is also true that the Court declared admissible an action brought against the European Investment Bank (EIB) rather than against the Board of Governors of the EIB at the time when, pursuant to Article 180(b) of the EEC Treaty, the Court had jurisdiction in disputes concerning measures adopted by the Board of Governors of the EIB.[41] It held that, 'although the opening words of the application cite the Bank as a defendant, the application expressly refers to Article 180(b) of the

41 — See the order in *Commission* v *EIB* (85/86, EU:C:1986:292).

EEC Treaty and states at the outset that the purpose of the action is to have "the decision of the Board of Governors of the Bank declared void". It is therefore clear that the action is directed against the Board of Governors as the relevant organ of the Bank, and that the application satisfies the requirements of Article 38(1) of the Rules of Procedure'. [42]

112. More recently, the Court declared admissible an action for annulment against a directive of the Parliament and the Council which had been brought by the Kingdom of Spain but directed only against the Council. [43] The Court held that 'the identification in the original version of the application, of [Directive 2002/15/EU] "of the European Parliament and of the Council" as the subject of the action for annulment amounts to the — implied but certain — designation of both the Parliament and the Council as defendants and leaves no doubt that the applicant's intention from the outset was to bring the action against those two institutions'. [44]

113. Furthermore, the Kingdom of Spain had corrected its application within the period for bringing an action so as to designate the Parliament and the Council as defendants, and the Parliament was therefore able to participate in the proceedings and present its case.

114. In my view, the present case does not contain a 'mistake' of the kind referred to in the order in *Commission* v *EIB* (85/86, EU:C:1986:292) and in the judgment in *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497), although, even then, the applications in the cases that gave rise to that order and that judgment were corrected. Furthermore, as is clear from paragraph 37 of the orders under appeal, Mallis and Others adhered to their decision to direct their actions against the Commission and the ECB and not against the Euro Group.

115. Consequently, although the General Court might not apply to the present case the concept of 'mistaken' designation to which it refers in paragraph 36 of the orders under appeal [45] in order to analyse whether the contested statement could be imputed to the Commission and the ECB, it could have relied to that end on other case-law of the Court of Justice. [46]

116. In paragraph 14 of its judgment in *Parliament* v *Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271), the Court held that, 'it is not enough that an act should be described as a "decision of the Member States" for it to be excluded from review under Article [263 TFEU]. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council'. It follows that, as the Euro Group is not a body, office or agency of the Union, the General Court might on that basis examine, in paragraphs 38 to 50 of the orders under appeal, whether the contested statement is imputable to the Commission and the ECB.

117. Consequently, if error of law there was in the reasoning of the General Court's analysis of the imputability of the contested statement to the Commission and the ECB, that analysis was tenable and justifiable on a different basis.

118. The first and second grounds of appeal should in any case be dismissed as unfounded.

42 — See the order in *Commission* v *EIB* (85/86, EU:C:1986:292, paragraph 6).

43 — See the judgment in *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497).

44 — See the judgment in *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraph 17).

45 — See point 110 of the present Opinion.

46 — See Paragraphs 19 and 20 of the judgment in *Parliament* v *Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271), where the Court rejected the argument that the fact that the Commission is responsible for administering special aid to Bangladesh was sufficient reason to impute to the Council the decision of the Member States to grant that aid, since 'the fourth indent of Article 155 of the [EC] Treaty does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council'.

C – *The second ground of appeal*

1. Arguments of the parties

119. By their second ground of appeal, Mallis and Others submit that the General Court was wrong to reject their argument that the contested statement is an actionable act given that it produced legal effects and gave rise to the legal and factual situation in which the appellants found themselves. What is more, they submit, the General Court upheld the arbitrary argument that the Republic of Cyprus alone is responsible for imposing a levy on bank deposits.

120. The Commission maintains that the second ground of appeal is unfounded because the General Court gave a detailed account of the reasons why the contested statement was not capable of producing legal effects with respect to third parties. This is clear, as the General Court rightly says, both from the provisions governing the functioning of the Euro Group, which do not entitle it to adopt legally binding acts, and from the wording of the contested statement, which is purely informative in nature.

121. The ECB submits that the appellants have not put forward a specific argument to show that the General Court erred in law in taking the view that the Euro Group did not have the power to take binding measures and, therefore, by definition, that its statements did not produce legal effects vis-à-vis third parties within the meaning of Article 263 TFEU. Furthermore, the ECB recalls that the appeal must indicate precisely the grounds and arguments of law relied upon. Mallis and Others simply say that the General Court should have interpreted the aforementioned passages differently, but do not put forward any legal argument in that regard. This ground of appeal should therefore be dismissed as manifestly inadmissible.

2. Assessment

122. It should be recalled that 'it is settled case-law that complaints directed against grounds of a decision of the General Court included purely for the sake of completeness cannot lead to the decision being set aside and are therefore ineffective.' [47]

123. Because the Court's analysis of this matter in paragraphs 51 to 62 of the orders under appeal was included only 'for the sake of completeness', the second ground of appeal, even if it were well founded, could not lead to the orders under appeal being set aside.

124. Consequently, this is an ineffective ground of appeal that must be dismissed.

125. That said, I am minded, in the interests of thoroughness and with reference to points 54 to 67 of the present Opinion, to take the view, further to my reasoning on whether or not the Euro Group constitutes a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU, that the General Court did not err in law in holding that the contested statement was not capable of producing legal effects with respect to third parties.

47 — Order in *Schneider Electric* v *Commission* (C-188/06 P, EU:C:2007:158, paragraph 64). See also, to that effect, the judgments in *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 148) and *OHIM* v *Celltech* (C-273/05 P, EU:C:2007:224, paragraphs 56 and 57), as well as the order in *Piau* v *Commission* (C-171/05 P, EU:C:2006:149, paragraph 86).

126. It is true that, as the General Court suggested in paragraph 61 of the orders under appeal (which refers to 'statements which could be regarded as categorical'), the language and content of the contested statement are not entirely consistent with the definition and tasks of the Euro Group as described in Protocol No 14, namely, that it is an informal meeting of the ministers of the euro area Member States 'to discuss questions related to the specific responsibilities [which the latter] share with regard to the single currency'.

127. I refer in particular to the passages of the contested statement in which the Euro Group announces that it has come to an agreement with the Cypriot authorities concerning the key elements of the macroeconomic adjustment programme and that it has asked them, together with the Commission, the ECB and the IMF, to finalise an MoU setting out those elements. [48]

128. Those key elements set out in the contested statement and in its annex were the guaranteeing of bank deposits up to EUR 100 000, the dismantling of Laiki, the splitting of Laiki into a good bank and a bad bank, the folding of the good bank into Trapeza Kyprou and the participation of depositors, in respect of non-guaranteed deposits, in the procedure for resolving both banks, [49] it being the legality of the latter element that was disputed by Mallis and Others through their action for annulment before the General Court.

129. However, the Euro Group said that it 'welcome[d]' the plan for restructuring the finance sector in the Republic of Cyprus, 'note[d]' the commitments made by the Cypriot authorities and 'expect[ed]' the ESM Board of Governors to approve the proposal for a financial assistance facility agreement swiftly, which language indicates that this did not constitute a decision having binding legal effects.

130. Furthermore, I note that the contested statement was adopted on 25 March 2013, after the Cypriot Parliament had rejected, on 19 March 2013, a draft law imposing a tax on all bank deposits in the Republic of Cyprus, a condition to which the Euro Group had referred in its statement of 16 March 2013, where it expressed the view that the grant of financial assistance to the Republic of Cyprus was, in principle, justified. [50]

131. I also note that the Cypriot authorities immediately adopted other national measures allowing the political agreement referred to in the contested statement to be implemented. The levy on bank deposits held in Laiki and Trapeza Kyprou was provided for in Decrees Nos 103 and 104, which were adopted by the CBC and came into force on 29 March 2013. [51]

132. It is true that that sequence of events shows that the Euro Group clearly carries considerable political weight and that the Member States feel bound by the agreements concluded within that forum. However, this is not sufficient to support the view that the contested statement produced binding legal effects with respect to third parties within the meaning of the Court's case-law.

133. Consequently, I concur with the General Court's observation in paragraph 61 of the orders under appeal that the measures decided on by the Euro Group 'cannot be read in isolation. On the contrary, they must be read in their proper context, from which it is clear that the contested statement is purely informative in nature'.

48 — 'The [Euro Group] has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme. This agreement is supported by all euro area Member States as well as [the Commission, the ECB and the IMF]… The [Euro Group] requests the Cypriot authorities and the Commission, in liaison with the ECB, and the IMF to finalise the MoU at staff level in early April …'

49 — See points 30 and 31 of the present Opinion.

50 — See points 25 to 29 of the present Opinion.

51 — See points 32 to 35 of the present Opinion.

134. The position is otherwise in the case of the provisions of Decision 2013/236 and Implementing Decision 2013/436,[52] which, in Article 2(6)(d) and Article 2(5)(c) respectively, convert the Republic of Cyprus's commitment to impose a levy on bank deposits into a legally binding obligation. However, those provisions are not the subject of the current appeals.

135. For the foregoing reasons, the second ground of the appeals of Mallis and Others should be dismissed.

D – *The fourth ground of appeal*

1. Arguments of the parties

136. By their fourth ground of appeal, Mallis and Others take issue with the order requiring them to pay the costs of the proceedings at first instance and submit that, if the appeal is upheld, they should not be ordered to pay the costs of the proceedings at first instance.

137. The Commission argues that the application for taxation of the costs of the proceedings is wrongly presented by the applicants as a ground of appeal.

138. The ECB submits that this ground of appeal seeks to delay the execution of the orders under appeal and notes in this regard that, under Article 278 TFEU and the first paragraph of Article 60 of the Statute of the Court of Justice, an appeal is not to have suspensory effect.

2. Assessment

139. As the Court held in paragraph 65 of the order in *Schmoldt and Others* v *Commission* (C-342/04 P, EU:C:2005:562), '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". In addition, it is settled case-law that, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the [General Court] on costs must be rejected as inadmissible by virtue of that provision'.[53]

140. Since the fourth ground of appeal is concerned only with the costs and the other grounds must be dismissed, the fourth ground of appeal should also be dismissed as inadmissible.

VII – Conclusion

141. In the light of the foregoing considerations, I propose that the Court:

— dismiss the appeals, and

— order Konstantinos Mallis, Elli Konstantinou Malli, Tameio Pronoias Prosopikou Trapezis Kyprou, Petros Chatzithoma, Elenitsa Chatzithoma, Lella Chatziioannou and Marinos Nikolaou to bear their own costs and to pay, in equal shares, the costs incurred by the Commission and the ECB.

52 — See, by analogy, Simvoulio tis Epikratias (Council of State) (plenary assembly) 668/2012, paragraph 27, and Simvoulio tis Epikratias (Council of State) (plenary assembly) 2307/2014, paragraph 19, as well as points 86 to 88 of the present Opinion.

53 — See also in that regard the judgments in *Henrichs* v *Commission* (C-396/93 P, EU:C:1995:280, paragraphs 65 and 66); *Commission and France* v *TF1* (C-302/99 P and C-308/99 P, EU:C:2001:408, paragraph 31); *Freistaat Sachsen and Others* v *Commission* (C-57/00 P and C-61/00 P, EU:C:2003:510, paragraph 124), and *Tralli* v *ECB* (C-301/02 P, EU:C:2005:306, paragraph 88).