Reports of Cases

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

Joined Cases C-8/15 P, C-9/15 P and C-10/15 P

Ledra Advertising Ltd (C-8/15 P)
Andreas Eleftheriou (C-9/15 P)
Eleni Eleftheriou (C-9/15 P)
Lilia Papachristofi (C-9/15 P)
Christos Theophilou (C-10/15 P)
Eleni Theophilou (C-10/15 P)
v
European Commission

European Central Bank

(Appeals — European stability mechanism — Stability support programme for Cyprus — Memorandum of Understanding on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and European Central Bank (ECB), the International Monetary Fund (IMF) and the European Commission — Actions for compensation and annulment — Obligations of the Commission)

1. The key legal question raised by these appeals is the role of the Commission and, to a lesser extent, the European Central Bank ('ECB'), in the negotiation and signing of the Memorandum of Understanding concluded between the Republic of Cyprus and the European Stability Mechanism ('ESM') during the financial crisis of the years 2012-2013 ('MoU'). Examination of this issue also raises questions as to the Commission's legal obligations in its activities pursuant to the ESM Treaty,[2] particularly in light of the judgment of 27 November 2012 delivered by the full Court in *Pringle* ('*Pringle*').[3]

2. These appeals concern three claims for damages brought against the Commission and the ECB by depositors of two large Cypriot banks, the Bank of Cyprus ('BoC') and Cyprus Popular Bank ('CPB'). The depositors claim that, following the Republic of Cyprus' request for financial assistance from the ESM and restructuring of the two banks in question, they suffered losses of between EUR 480 000 and EUR 1 600 000. The appellants also seek partial annulment of the MoU for an alleged breach of their right to property.

1 — Original language: English.

2 — Treaty Establishing the European Stability Mechanism, signed by the Member States of the Eurozone on 2 February 2012, and which entered into force for the first 16 Member States that had ratified it on 27 September 2012.

3 — Judgment of 27 November 2012 in *Pringle*, C-370/12, EU:C:2012:756.

I – Legal framework

A – *The ESM Treaty*

3. Recital 1 of the ESM Treaty is worded 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.’

4. Article 3 of the ESM Treaty 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 the ESM Members, financial institutions or other third parties.’

5. Article 4(1) of the ESM Treaty states:

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

6. Article 5(3) of the ESM Treaty provides:

‘The Member of the European 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 [of the ESM] as observers.’

7. Article 6(2) of the ESM Treaty states:

‘The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each [to the Board of Directors of the ESM].’

8. Article 12(1) of the ESM Treaty reads:

‘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 instruments chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.’

9. Article 13 of the ESM Treaty (entitled 'Procedure for granting stability support') provides as follows:

'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 European 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);

(b) to assess whether the public debt is sustainable. Whenever appropriate and possible, such an assessment is expected to be conducted together with the 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 financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European 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 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 European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 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 European 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.'

B – *Memorandum of Understanding between the Republic of Cyprus and the Commission*

10. Paragraphs 1.23 to 1.27 of the MoU (entitled 'Restructuring and resolution of [CPB] and [BoC]') state:

'1.23. The accounting and economic value assessment mentioned has revealed that the two largest banks of Cyprus were insolvent. To address this situation the government has implemented a far reaching resolution and restructuring plan. In order to prevent the build-up of future imbalances and to restore the viability of the sector, while preserving competition, a fourfold strategy has been adopted which does not involve taxpayers' money.

1.24 First, all Greek-related assets (including shipping loans) and liabilities were carved out, estimated in the adverse scenario respectively at EUR 16.4 and 15.0 billion. The Greek assets and liabilities were acquired by Piraeus bank, the restructuring of which will be dealt with by the Greek authorities. The carve-out was based on an agreement signed on 26 March 2013. With the book value of the assets at EUR 19.2 billion, the carve-out has substantially reduced the cross exposures between Greece and Cyprus.

1.25. With respect to the UK branch of [CPB], all the deposits were transferred to the UK subsidiary of the [BoC]. The associated assets were folded into the [BoC].

1.26. Second, [BoC] is taking over via a purchase and assumption procedure the Cypriot assets of [CPB] at fair value, as well as the insured deposits and Emergency Liquidity Assistance exposure at nominal value. The uninsured deposits of [CPB] will remain in the legacy entity. The value of the transferred assets will be higher than the transferred liabilities with the difference corresponding to the recapitalisation of [BoC] by [CPB] amounting to 9% of the risk weighted assets transferred. [BoC] is 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 restoring confidence and normalising funding conditions. The conversion of [37.5%] of uninsured deposits in [BoC] 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 [CPB]. Part of the remaining uninsured deposits of [BoC] will be temporarily frozen.

1.27. Third, to ensure that the capitalisation targets are met, a more detailed and updated independent valuation of the assets of [BoC] and [CPB] 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 [Commission], ECB and 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 target of 9% under stress by end-program can be met. Should the bank be found to be overcapitalised relative to the target, a share-reversal process will be undertaken to refund depositors by the amount of the over-capitalisation.'

C – National law

1. Law of 22 March 2013

11. Pursuant to Articles 3(1) and 5(1) of the Law on the resolution of credit and other institutions (O peri exiyiansis pistotikon kai allon idrimaton nomos 'the Law of 22 March 2013'),[4] the Central Bank of Cyprus ('CBC') was entrusted, together with the Minister for Finance, with the resolution of the institutions covered by that law.

12. To that end, Article 12(1) of the Law of 22 March 2013 provides that the CBC may, by decree, restructure the debts and obligations of an institution under resolution, including by means of the reduction, modification, rescheduling or novation of the principal or outstanding amount of any type of claim, existing or future, against that institution, or by means of a conversion of debt instruments or obligations into equity. Moreover Article 12(1) provides that 'insured deposits', within the meaning of the fifth paragraph of Article 2 of the Law of 22 March 2013, are to be excluded from those measures. It is common ground that the deposits in question are generally deposits of up to EUR 100 000.

2. Decrees Nos 103 and 104

13. On 29 March 2013, Decrees No 103 and No 104 were adopted on the basis of the Law of 22 March 2013.[5]

14. The 2013 Decree on the 'bailing-in' of BoC, Regulatory Administrative Act No 103 (to peri diasosis me idia mesa tis Trapezas Kyprou Dimosias Etaireias Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 103, 'Decree No 103') provided for the recapitalisation of BoC — at the expense, inter alia, of its uninsured depositors, its shareholders and its bondholders — in order to enable it to continue to provide banking services. Accordingly, each uninsured deposit was converted into three sets of instruments: BoC shares (37.5% of each uninsured deposit), instruments that were convertible by BoC either into shares or into deposits (22.5% of each uninsured deposit), and instruments that were convertible into deposits by CBC (40% of each uninsured deposit)[6]. Decree No 103 entered into force at 6.00 on 29 March 2013, in accordance with Article 10 thereof.

15. The 2013 Decree on the sale of certain operations of CPB, Regulatory Administrative Act No 104 (to Peri tis Polisis Orismenon Ergasion tis Cyprus Popular Bank Public Co Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 104, 'Decree No 104') provided, pursuant to Articles 2 and 5 thereof, for the transfer of certain assets and liabilities from CPB to the BoC, including deposits of up to EUR 100 000. These transfers took place at 6.10 on 29 March 2013. Deposits over EUR 100 000 remained with CPB, pending its liquidation.

II – Background to the proceedings

16. During the first few months of 2012, certain banks established in Cyprus, including CPB and BoC, experienced financial difficulties. The Republic of Cyprus deemed it necessary to recapitalise them and submitted a request for financial assistance from the EFSF or the ESM to the President of the Eurogroup.

4 — EE, Annex I(I), No 4379, 22 March 2013.

5 — EE, Annex III(I), No 4645, 29 March 2013, p.769 to 780 and 781 to 788.

6 — These figures are without prejudice to the reduction in the value of the uninsured deposits finally agreed.

17. By its statement of 27 June 2012, the Eurogroup indicated that the financial assistance requested would be provided by the EFSF or the ESM in the framework of a macro-economic adjustment programme to be set out in the form of an MoU which would be negotiated by the European Commission together with the ECB and the IMF, on the one hand, and by the Cypriot authorities, on the other.

18. The Republic of Cyprus and the other Member States whose currency is the euro reached a political agreement on a draft MoU in March 2013. By its statement of 16 March 2013, the Eurogroup welcomed that agreement and referred to some of the adjustment measures envisaged, including the introduction of a levy on bank deposits. The Eurogroup indicated that, against that background, it considered that — in principle — financial assistance was warranted in order to safeguard financial stability in the Republic of Cyprus and the euro area, and called upon the relevant parties to accelerate the ongoing negotiations.

19. On 18 March 2013, the Republic of Cyprus declared a bank holiday on 19 and 20 March 2013. The Cypriot authorities decided to extend the bank holiday until 28 March 2013 in order to avoid a run on the banks.

20. On 19 March 2013, the Cypriot Parliament rejected the Cypriot Government's Bill relating to the introduction of a levy on all bank deposits in Cyprus.

21. On 22 March 2013, the Cypriot Parliament adopted the Law of 22 March 2013.

22. By its statement of 25 March 2013, the Eurogroup indicated that an agreement had been reached with the Cypriot authorities on the key elements of a future macro-economic adjustment programme, which was supported by all the Member States whose currency is the euro, as well as by the Commission, the ECB and the IMF. In addition, the Eurogroup welcomed the plan for the restructuring of the financial sector mentioned in an annex to that statement. The same day, the Governor of the CBC put BoC and CPB into resolution. Decrees Nos 103 and 104 were published on 29 March 2013.

23. At its meeting on 24 April 2013, the ESM Board of Governors took the following decisions:

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

— to approve the draft MoU negotiated by the Commission (together with the ECB and the IMF) and the Republic of Cyprus;

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

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

25. Finally, on 8 May 2013, the ESM Board of Directors approved the agreement relating to the FAF and a proposal concerning the terms of payment of a first tranche of aid to the Republic of Cyprus. That tranche was divided into two disbursements, paid on 13 May 2013 (EUR 2 billion) and 26 June 2013 (EUR 1 billion), respectively.

III – Procedure before the General Court and orders under appeal

26. By three separate applications lodged on 24 May 2013, (i) Ledra Adverstising Ltd ('Ledra'), (ii) A. Eleftheriou, E. Eleftheriou and L. Papachristofi ('Eleftheriou and Others'), and (iii) C. Theophilou and E. Theophilou ('Theophilou and Another') (collectively referred to in this Opinion as 'the appellants') brought proceedings before the General Court, requesting compensation for damage allegedly suffered as a result of the inclusion of paragraphs 1.23 to 1.27 in the MoU and an annulment of those paragraphs of the MoU.

27. By three orders delivered on 10 November 2014 in Cases T-289/13, *Ledra Advertising* v *Commission and ECB*,[7] T-291/13, *Eleftheriou and Papachristofi* v *Commission and ECB*,[8] and T-293/13, *Theophilou* v *Commission and ECB*[9] ('the orders under appeal'), the General Court dismissed the applications as being in part inadmissible and in part lacking any foundation in law.

IV – Procedure before the Court and forms of order sought

28. By appeals lodged on 9 January 2015, the appellants essentially request the Court to:

— set aside the orders under appeal, with respect to the first two heads of claim, namely, the claim to pay compensation, and/or annul the disputed passages in the MoU;

— refer the cases back to the General Court;

— reserve the costs.

29. In all three cases, both the Commission and the ECB submit that the Court should:

— dismiss the appeals;

— order the appellants to pay the costs.

30. By decision of 27 July 2015, the President of the Court ordered the joinder of Cases C-8/15 P, C-9/15 P and C-10/15 P for the purposes of the oral procedure and the judgment.

31. The appellants, the Commission and the ECB presented oral argument at the hearing held on 2 February 2016.

V – Assessment of the grounds of appeal

32. The appellants have lodged virtually identical appeals, putting forward four grounds of appeal in support of their actions. Three of those grounds concern the General Court's dismissal of their first head of claim: the request for damages. One ground of appeal concerns the part of the orders in which that court rejected their second head of claim: the request for annulment of paragraphs 1.23 to 1.27 of the MoU.

33. However, before examining, in turn, each of those grounds, I shall consider the admissibility of the appeals.

7 — EU:T:2014:981.

8 — EU:T:2014:978.

9 — EU:T:2014:979.

A – *Admissibility of the appeals*

1. Argument of the parties

34. The Commission and the ECB raise an objection to the admissibility of the appeals. The Commission claims that the appeals are insufficiently clear, precise and intelligible to meet the requirements set out in the Rules of Procedure of the Court ('the Rules of Procedure'). The ECB, for its part, contends that the appeals confine themselves to repeating or reproducing the arguments previously submitted before the General Court, without offering any new or specific legal arguments against the order under appeal.

2. Assessment

35. According to settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 168(1)(d) of the Rules of Procedure of the Court that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. In this regard, Article 169(2) of the Rules of Procedure specifies that the pleas in law and legal arguments relied on must identify precisely those points in the grounds of the decision of the General Court which are contested.[10] Moreover, appeals ought to have a coherent structure,[11] and explain the grounds of appeal and the forms of order sought with sufficient clarity and precision.[12]

36. These requirements are by no means the result of mere formalism; they are crucial in order to guarantee principles of fundamental importance such as legal certainty, sound administration of justice, and the protection of the rights of defence of the other parties to the proceedings.[13] That appears all the more true, when it is considered that the Court hears cases in all 24 official languages of the Union and has to deal, on a daily basis, with courts, public authorities, and legal counsel from different national legal systems, each with its own rules, concepts, traditions and cultures.

37. Against that background, I must acknowledge that the arguments put forward by the Commission and the ECB regarding the admissibility of the present appeals are not without merit. Apart from the general lack of care and precision in their drafting and presentation, the appeals discuss in a rather confused manner issues of law and of fact. The poor structure and the lack of headings, table of contents or executive summary make it arduous for the reader to find the logical thread behind the various passages of the appeals.

38. This made it difficult to discern with certainty the number and type of grounds of appeal and the arguments put forward. This is particularly true with regard to certain legal and factual aspects which go to the very heart of the appellants' case: for example, the identification of the conduct which gave rise to the alleged financial loss.

39. In the light of the above, I am of the view that the Court ought to seriously consider the possibility that the appeals do not comply, in whole or in part, with the requirements laid down in the provisions of the Court's Statute and Rules of Procedures referred to above.

10 — See also, among many, judgment of 3 December 2015 in *Italy* v *Commission*, C-280/14 P, EU:C:2015:792, paragraph 42 and the case-law cited.

11 — See, inter alia, order of 29 November 2007 in *Weber* v *Commission*, C-107/07 P, unpublished, EU:C:2007:741, paragraphs 26 to 28.

12 — See, to that effect, judgment of 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraphs 29 and 30 and the case-law cited.

13 — See, to that effect, judgment of 11 September 2014 in *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 41 and the case-law cited.

40. If, in spite of the appellants' carelessness, the Court were to take the view that the appeals cannot be declared inadmissible in their entirety, I believe that four grounds of appeal should be dealt with. Contrary to the ECB's argument, those grounds of appeal do not merely reproduce arguments put forward at first instance but include a critique of the orders under appeal.

41. Any additional criticism of the orders under appeal included in the appeals is, to my mind, manifestly not presented in a sufficiently clear and structured manner to be considered to be a proper or self-standing ground of appeal. The appeals also include a number of statements in which the appellants criticise findings of fact made by the General Court.[14] However, according to settled case-law, the assessment of the facts is not, other than in cases where the evidence produced before the General Court has been distorted, a question of law which is subject, as such, to review by the Court.[15] Thus, had those statements to be considered as one or more additional grounds of appeal, they would at any rate be inadmissible.

B – *First ground of appeal*

1. Argument of the parties

42. By their first ground of appeal, directed against paragraphs 45 and 46 of the orders under appeal, the appellants submit that the General Court committed an error in law in concluding that the adoption of the MoU did not originate with the Commission or the ECB. In particular, they claim that the General Court failed to take into account the Commission's duty — referred to in paragraph 164 of *Pringle* — to ensure that the MoUs concluded by the ESM are compatible with EU law.

43. The Commission contends that the General Court did not err in law when it concluded that the MoU is an act of international public law concluded between the ESM and the Republic of Cyprus. The ESM Treaty entrusted the Commission with the power to sign the MoU on behalf of the ESM but that institution is not a party to the agreement. As such, any obligation for the Commission stemming from *Pringle* does not alter the legal nature of the MoU, which the appellants claim is the cause of their damage.

44. The ECB submits that this plea is inadmissible and in any event unfounded. It contends that the General Court was correct in its understanding that the adoption of the MoU could not have originated with the Commission or the ECB. As such, the orders under appeal were right in holding the actions for compensation inadmissible.

2. Assessment

45. This ground of appeal raises, in essence, the issue of whether the Union can be held liable, under Articles 268 and 340 TFEU, to pay damages for losses caused, directly or indirectly, by an MoU entered into by the ESM and a member of the ESM having requested financial assistance pursuant to Article 13 of the ESM Treaty.

14 — See, for example, point 8 in each of the appeals.

15 — See judgment of 1 October 2014 in *Council* v *Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 16 and the case-law cited.

46. In that regard, I would call to mind that, according to that provision, the MoU — detailing the conditionality attached to the financial assistance facility to be granted by the ESM — is negotiated by the Commission, in liaison with the ECB and, wherever possible, together with the IMF. The MoU is signed by the Commission, on behalf of the ESM, subject to approval by the Board of Governors of the ESM.

47. At the outset, it seems important to point out that, according to settled case-law, the purpose of an action for damages against the Union is to seek compensation for damage resulting from a measure or from unlawful conduct attributable to an institution.[16] Pursuant to Article 340 TFEU, any act of an institution (or of its servants) in the performance of their duties can in principle give rise to the Union's liability.

48. Before the General Court, the appellants developed two lines of argument in support of their contention that the conduct which caused the alleged damage is attributable to the EU institutions.

a) First line of argument

49. The main line of argument put forward by the appellants at first instance, as I understand it, consisted in arguing that the damage allegedly suffered was caused by the signature of the MoU, an act which they considered attributable to the Commission and the ECB.

50. In paragraphs 40 to 47 of the orders under appeal, the General Court pointed out that, according to settled case-law, it has jurisdiction only in disputes relating to compensation for damage caused by the institutions of the Union or by its servants in the performance of their duties. Consequently, a claim for compensation that is directed against the Union and is based on the mere illegality of an act or course of conduct that has not been adopted by an institution of the Union or by its servants is inadmissible. That court went on to observe that, although the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the objectives of that treaty, it is apparent from *Pringle* that the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, that the activities pursued by those two institutions within the ESM Treaty solely commit the ESM. Therefore, the General Court concluded that the adoption of the MoU did not originate with the Commission or the ECB and, consequently, that it lacked jurisdiction to consider a claim for compensation based on the illegality of certain provisions of the MoU.

51. To my mind, the reasoning of the General Court cannot be faulted. It is common ground that the ESM Treaty is, despite the strong links it has with the EU Treaties, an international agreement signed outside the EU legal framework. Entering into force after the ratification procedures in the contracting States were completed, that treaty created a new international organisation with its own rules, mission, institutions and staff.

52. With the agreement of all EU Member States,[17] the ESM Treaty conferred certain tasks on some EU institutions (Commission, ECB, Council and Court of Justice). In fact, even before the signature of the ESM Treaty, the Court had held that, under certain conditions, the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the EU framework.[18]

16 — See judgment of 23 March 2004 in *European Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, paragraph 59 and the case-law cited.

17 — See recital 10 of the ESM Treaty.

18 — See especially judgment of 30 June 1993 in *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraphs 16, 20 and 22; judgment of 2 March 1994 in *Parliament* v *Council*, C-316/91, EU:C:1994:76, paragraphs 26, 34 and 41; Opinion 1/92, of 10 April 1992, EU:C:1992:189, paragraphs 32 and 41; and Opinion 1/09, of 8 March 2011, EU:C:2011:123, paragraph 75.

53. Nonetheless, the fact that one or more institutions of the Union may play a certain role within the ESM legal framework does not alter the nature of the acts of the ESM. Those acts are extraneous to the EU legal order: they are decided by ESM's own institutions and bind only the ESM. [19] The EU is not a party to the ESM Treaty (and neither are all of its Member States). It follows from Article 216(2) TFEU that the Union is, as a rule, bound only by the international agreements to which it is a party. [20]

54. I hardly need to point out, in this context, that it cannot be considered that, subsequent to the entry into force of the ESM Treaty, the Union has assumed, and thus has transferred to it, the powers previously exercised by the Member States that fall within that treaty. [21] The ESM Treaty is an instrument of economic policy which, according to Article 6 TFEU, is not an area of exclusive competence of the EU. Nor has the specific sector in which the ESM Treaty intervened become an area of exclusive competence by virtue of the legislation enacted by the Union. As the Court has observed in *Pringle*, nothing in the FEU Treaty indicates that the Union has exclusive competence to grant financial assistance to a Member State experiencing, or threatened by, severe financing problems. [22]

55. The fact that certain acts of EU law refer to the ESM provisions (and vice versa) cannot lead to a different conclusion. It follows from settled case-law that the fact that one or more acts of EU law may have the object or effect of incorporating into EU law certain provisions set out in an international agreement which the Union has not itself approved is not sufficient for bringing that international agreement within the scope of EU law. [23]

56. Furthermore, I call to mind that the Court has recently confirmed that there is no place in the EU legal order for hybrid acts, not provided for in the Treaties, adopted under procedures which involve without distinction elements falling within the decision-making process specific to the EU and elements of an intergovernmental nature. [24]

57. Lastly, I ought to point out that any financial consequence stemming from those acts is to be borne solely by the ESM budget. [25] Conversely, to accept the arguments put forward by the appellants would imply — as the ECB notes — that the EU budget would ultimately be affected by decisions taken within an international organisation to which not all EU Member States are party.

58. Therefore, the fact that international agreements entered into by the ESM and one of its Members (*in casu*, the Republic of Cyprus) are negotiated by the Commission and ECB, and signed by the Commission on behalf of the ESM, cannot alter the real legal nature of those agreements: [26] they are acts of the ESM.

59. Accordingly, the General Court was correct in holding that the MoU cannot be attributed to the Commission or the ECB.

19 — Cf. *Pringle*, paragraph 161.

20 — See, to that effect, judgment of 21 December 2011 in *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 50, 52 and 60 to 62 and the case-law cited.

21 — See judgment of 21 December 2011 in *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 63 and the case-law cited.

22 — *Pringle*, see especially paragraph 120.

23 — See, to that effect, judgment of 21 December 2011 in *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 63 and the case-law cited.

24 — See, to that effect, judgment of 28 April 2015 in *Commission* v *Council*, C-28/12, EU:C:2015:282, paragraph 51.

25 — See Chapter 4 of the ESM Treaty.

26 — I need not deal with the issue of whether an MoU signed by the ESM and one of its Members is a legally-binding agreement or only an act of political value.

b) Second line of argument

60. Nor do I reach a different conclusion on the liability of the Union in this case if I turn to the alternative line of argument put forward by the appellants on this point.

61. The appellants argue that the damage allegedly suffered by them was caused by the Commission's failure to fulfil its duty to ensure that the MoU fully complied with EU law. In that regard, the appellants refer to paragraphs 164 and 174 of *Pringle*, in which the Court stated: (i) '[b]y its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it … to ensure that the memoranda of understanding concluded by the ESM are consistent with [EU] law'; and (ii) 'the MoU which is to be negotiated with the Member State requesting stability support must be fully consistent with [EU] law'.

62. Having doubts as to the admissibility of this argument, the General Court dealt with it only briefly. It merely noted that, in any event, the alleged damage came into existence before the MoU had been signed and this meant that a nexus of causality between the conduct of the Commission and that damage had not been established.[27]

63. Regardless of the admissibility aspect and of the correctness of the General Court's reasoning, I take the view that the appellants' second line of argument also is unpersuasive.

64. To explain why, I shall address, in turn, the following two issues. First, I shall deal with the premiss on which that argument is based: the existence of a legal obligation, for the Commission, to ensure that acts adopted by bodies or the organisations on behalf of which it acts outside the EU framework respect EU law, whose breach can give rise to the Union's financial liability. Second, I shall examine whether, during the negotiations culminating in the signature of the MoU, there could possibly have been a breach of EU law which it was the Commission's duty to avert.

i) On the Commission's obligations when acting outside the EU framework and the related liability of the Union

65. At the outset, I must observe that, on the face of it, paragraph 164 of *Pringle* does not expressly mention any specific *obligation* for the Commission. The wording of that passage seems to suggest that, by intervening in the negotiations of an MoU it is possible for the Commission to ensure its consistency with EU law. However, to really grasp the true meaning of that passage, I think one must read it in its context.

66. In that part of *Pringle*, which concerned the roles of the Commission and of the ECB, the Court was examining whether the tasks attributed by the ESM Treaty to certain EU institutions were compatible with the EU Treaties. One of the conditions which, according to case-law, must be fulfilled to ensure compatibility is that those extra tasks 'do not alter the essential character of the powers conferred on those institutions' by the EU Treaties.[28] As regards the Commission, the Court recalled, in paragraph 163 of the judgment, that, pursuant to Article 17(1) TEU, that institution 'shall promote the general interest of the Union' and 'shall oversee the application of Union law'.

67. Therefore, the statement in paragraph 164 of *Pringle* must be read against the background of Article 17(1) TEU. The Court reviewed the ESM Treaty and concluded that no provision of that treaty appeared to require the Commission to perform tasks which could collide with its EU constitutional mission of promoter of the interests of the Union and 'Guardian of the Treaties'. On the contrary, the Commission's role in the ESM Treaty seemed perfectly in line with that mission.

27 — Paragraph 54 of the orders under appeal.

28 — See the case-law referred to in *Pringle*, paragraph 158.

68. What are the implications of all this for the present proceedings?

69. I agree with the appellants that, even when acting outside the EU framework, EU institutions must scrupulously observe EU law. The Commission is thus not permitted, even when acting on behalf of the ESM, deliberately to breach the EU rules. Moreover, the Commission may not contribute, through its conduct, to an infringement of the EU rules committed by other entities or bodies. [29]

70. However, I do not agree with the appellants that that obligation is so extensive that it may be considered that an obligation as to the result is imposed on the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities and any EU rule which may be applicable to the situation. At most, I could conceive that an obligation might exist for the Commission to deploy its best endeavours to prevent such a conflict arising.

71. The far-reaching obligation as to the result claimed by the appellants does not derive either from the text of the ESM Treaty or, more importantly, from Article 17(1) TEU itself.

72. As regards the ESM Treaty, I must point out that Article 13(3) thereof states only that the MoU is to be 'fully *consistent* with the *measures of economic policy coordination* provided for in the TFEU'. [30] Neither the ESM Treaty, nor the Court — when interpreting that treaty in *Pringle* [31] — referred to a requirement of full *compliance* of the MoU with the whole of *EU law*.

73. On the one hand, the two terms of 'compliance' and 'consistency' should not be confused. Indeed, from a legal standpoint, they refer to two rather different concepts: the former requires obedience and full conformity between two texts, whereas the latter is satisfied by the mere compatibility and non-contradiction between them.

74. On the other hand, only the EU measures of economic policy coordination are expressly mentioned. There is a reason for this: a lack of consistency between the EU measures of economic policy coordination and the MoU would run the risk of compromising the effectiveness of the former, and thereby the whole EU action in that field. A requirement of full conformity between the MoU and all aspects of EU law was not deemed necessary since the ESM system is not part of the EU legal order.

75. As concerns, next, Article 17(1) TEU, I take the view that the Commission's duties when acting outside the EU Treaties cannot, generally, be different from or more onerous than those when acting within that framework. Let me explain.

76. In its role as 'Guardian of the Treaties', the Commission is not obliged to act against any possible breach of EU law which it becomes aware of, on pain of infringing Article 17 TEU. As the General Court emphasised in a number of previous decisions, the purpose of Article 17 TEU is to provide a general definition of the Commission's powers: it is thus a provision of institutional nature and not a justiciable rule intended to confer rights upon individuals. [32] It cannot be argued that every time the Commission breaches a specific Treaty provision, or does not prevent such a provision being breached by another entity, that breach amounts to an infringement of the general provision of Article 17 TEU. [33]

29 — Cf. *Pringle*, paragraph 112.

30 — Emphasis added.

31 — See, in particular, paragraphs 164 and 174 of *Pringle* referred to by the appellants.

32 — See, notably, order of 27 October 2008 in *Pellegrini* v *Commission*, T-375/07, unpublished, EU:T:2008:466, paragraph 19 and the case-law cited.

33 — See, to that effect, judgment of 25 June 1998 in *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 453.

77. A parallel may probably further elucidate this point. Under the regime established by Articles 258 to 260 TFEU (one of the primary forms of action in which the Commission exercises its role as 'Guardian of the Treaties'), the Commission enjoys discretionary powers in deciding whether, and if so when, to institute proceedings against Member States suspected of having breached EU law. It has the same leeway in deciding the actions or omissions attributable to the Member States against which those proceedings should be brought. [34]

78. Importantly, the Commission acts, within those procedures, only in the general interest of the Union, [35] even if the result of such procedures may also, indirectly, serve the interests of individuals. [36] In point of fact, Articles 258 to 260 TFEU do not expressly confer any right upon individuals. Individuals may not, therefore, challenge the Commission's conduct in the context of those procedures. [37] In particular, individuals have, in principle, no standing to claim compensation from the Union for the damage they may have suffered because of the Commission's action or inaction under Articles 258 and 260 TFEU. The only conduct which they may challenge as the 'source of damage' is that of the Member State(s) responsible for the breach of the EU rules. [38] The Commission is, however, answerable for the manner in which it fulfils that role to the European Parliament which may, if it sees fit, pass a motion of censure under Article 234 TFEU, obliging the Commission to resign as a body.

79. The same principles should, to my mind, apply a fortiori when the Commission acts as 'Guardian of the Treaties' outside the EU legal framework.

80. Accordingly, I conclude that, in the light of Article 17(1) TEU, and *Pringle* being taken into account, there is no obligation as to the result for the Commission to avert any possible conflict or tension between the provisions of an act adopted by other entities and any EU rule which may apply to the situation. In addition, individuals have no right to claim compensation from the Union for damages allegedly suffered because of the Commission's action or inaction when it acts as 'Guardian of the Treaties'.

81. That said, and for completeness' sake, I shall also examine whether the signature of the MoU could have actually led to the breach of EU law complained of by the appellants.

ii) On the applicability of the Charter of Fundamental Rights of the European Union [39]

82. Even if the Court were to consider that the duties of the Commission, as 'Guardian of the Treaties', when it acts outside the EU framework are more far-reaching than those argued above, and that a breach of those duties can indeed give rise to the Union's financial liability, there would be an additional issue to address. That issue is, in substance, whether the signature of the MoU resulted in a possible breach of EU law which the Commission should have averted.

34 — See, inter alia, judgments of 5 November 2002 in *Commission* v *Luxembourg*, C-472/98, EU:C:2002:629, paragraphs 34 to 38; and 28 October 2010 in *Commission* v *Lithuania*, C-350/08, EU:C:2010:642, paragraph 33.

35 — See judgment of 11 August 1995 in *Commission* v *Germany*, C-431/92, EU:C:1995:260, paragraph 21 and the case-law cited.

36 — See, to that effect, judgment of 24 March 2009 in *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 67.

37 — See, among many, judgments of 14 February 1989 in *Star Fruit* v *Commission*, 247/87, EU:C:1989:58, paragraphs 10 to 14; and 17 May 1990 in *Sonito and Others* v *Commission*, C-87/89, EU:C:1990:213, paragraphs 6 and 7.

38 — See, notably, order of 23 May 1990 in *Asia Motor France* v *Commission*, C-72/90, EU:C:1990:230, paragraphs 13 to 15. See also order of the General Court of 14 January 2004 in *Makedoniko Metro and Michaniki* v *Commission*, T-202/02, EU:T:2004:5, paragraph 43.

39 — 'The Charter'

83. At first instance, the appellants complained of an alleged infringement, by reason of the inclusion of paragraphs 1.23 to 1.27 in the MoU, of their fundamental right to property, as enshrined in Article 17 of the Charter. However, leaving aside the fact that the appellants did not elaborate on how the disputed passages of the MoU infringed Article 17 of the Charter,[40] they also failed to explain why the Charter would be applicable to the MoU in the first place.

84. According to Article 51(1) of the Charter, '[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union … and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

85. For the reason explained above, I have no doubt that the Commission is to respect the EU rules, especially the Charter, when it acts outside the EU legal framework. After all, Article 51(1) of the Charter does not contain any limit as to the applicability of the Charter with respect to the EU institutions, as it does for Member States.[41] Furthermore, that provision also calls on the EU institutions to *promote* the application of Charter.

86. That does not mean, however, that the Commission is *required* to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework. I must once again stress that, by entering into the ESM Treaty, certain EU Member States exercised the competence they retained in the field of economic policy.

87. According to settled case-law, the fundamental rights guaranteed within the EU legal order are designed to be applied in all situations regulated by EU law, but may not be applied outside those situations.[42] Under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. Importantly, the concept of 'implementing Union law', as referred to in Article 51(1) of the Charter, requires a certain degree of connection above and beyond the fact that the matters covered by national law and EU law are closely related or that one of those matters has an indirect impact on the other.[43] Among the other elements to be taken into account is whether there is another substantive provision of EU law (apart from that in the Charter invoked) which, being applicable to the situation, imposes an obligation on the Member States in question.[44]

88. In *Pringle*, the Court has already held that the Member States did not implement EU law when they established the ESM and, therefore, the Charter was not applicable to the ESM Treaty.[45] Against that background, the appellants might have been expected to explain, in the present proceedings, why that solution might not hold true in respect of the MoU. Yet, even when requested at the hearing to elaborate on this point, the appellants did not provide any explanation: they merely took for granted the applicability of the Charter to the MoU. In particular, the appellants did not invoke any provision of EU law which, being applicable to the MoU, would bring that act within the scope of EU law for the purposes of the Charter.

89. Consequently, I take the view that, in any event, the appellants have not shown that the MoU may constitute an implementation of EU law and that, as a result, the provisions of the Charter are applicable to it.

40 — The applications merely discussed a possible breach of Article 1 of Protocol 1 to the ECHR, without drawing any link between those two provisions.

41 — Cf. Peers, S., 'Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework', *European Constitutional Law Review*, 2013, pp. 51 to 53.

42 — See, inter alia, judgment of 26 February 2013 in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19.

43 — See, to that effect, judgment of 6 March 2014 in *Siragusa*, C-206/13, EU:C:2014:126, paragraph 24 and the case-law cited.

44 — See, to that effect, judgment of 27 March 2014 in *Torralbo Marcos*, C-265/13, EU:C:2014:187, paragraph 33 and the case-law cited.

45 — See paragraphs 178 to 181 of *Pringle*.

90. In that regard, as provided for in Article 51(1) of the Charter, the institutions ought to apply the Charter in accordance with their respective powers and with due regard for the limits of the competences of the Union. Therefore, there is no basis for claiming that the Commission was obliged to apply the standards of the Charter to the MoU. It could be argued that the Commission, far from preventing a breach of EU law, would thereby have extended the applicability of the Charter into a field of law which is not meant to be regulated by that instrument.

91. In reaching this conclusion I find support in several recent orders of the Court which concerned individuals' challenges to various restructuring measures taken by the national authorities during the recent economic crisis. Failing any explanation of the applicability of the Charter to the Member States' measures in question, the Court held that it had no jurisdiction to rule on the compatibility of those measures with the Charter. [46]

c) Final remarks

92. Having considered the appellants' claims to be ill founded, I would simply add the following remarks.

93. My reading of Article 17(1) TEU and *Pringle* does not imply that the ESM legal framework is a legal vacuum, in which violations of individuals' rights cannot be challenged. It simply means that the Charter does not generally constitute the legal instrument against which the lawfulness of the acts adopted by the ESM or actions taken by the ESM institutions or their agents should be assessed. Indeed, there are legal remedies available to the individuals who consider themselves affected by possible breaches of their rights in a situation such as that of the appellants.

94. On the one hand, other national and international bills of rights [47] may be applicable to their situation and, consequently, other national and international courts are likely to have jurisdiction to hear their claims based on those legal instruments.

95. On the other hand, within the EU legal order, there are judicial avenues for addressing possible breaches of EU law committed within the context of the ESM, should they actually occur. Yet, in such cases, judicial proceedings should generally not be brought against the institutions, if they act on behalf of the ESM and have no power to take decisions on their own.

96. Apart from the reasons given above, this position seems to me to be supported by an additional set of considerations.

97. Article 340 TFEU provides that '[i]n the case of non-contractual liability, the Union shall, *in accordance with the general principles common to the laws of the Member States*, make good any damage caused by its institutions or by its servants in the performance of their duties.' [48]

98. Given that they were performing tasks outside the framework of the EU, the conduct of the EU institutions criticised by the appellants in the present cases should be viewed mainly through the lens of public international law. Those institutions were in fact acting on behalf of an international organisation (the ESM), whose members are sovereign States, with a view to concluding an international agreement (the MoU) between that organisation and one of its contracting States (the

46 — See orders of 14 December 2011 in *Cozman*, C-462/11, unpublished, EU:C:2011:831; 14 December 2011 in *Corpul Național al Polițiștilor*, C-434/11, unpublished, EU:C:2011:830; 7 March 2013 in *Sindicato dos Bancários do Norte and Others*, C-128/12, unpublished, EU:C:2013:149; 26 June 2014 in *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12, EU:C:2014:2036; and 21 October 2014 in *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-665/13, EU:C:2014:2327.

47 — Such as the Constitution of the Republic of Cyprus and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

48 — Emphasis added.

Republic of Cyprus). Under the rules of public international law (rules whose validity and value, it is almost unnecessary to point out, are accepted and recognised by all the Member States of the Union, as well as by the Union itself), the conduct of agents of international organisations is generally imputable to the organisation itself.

99. For example, Article 6(1) of the Draft Articles on the responsibility of international organizations ('the Draft Articles'),[49] states that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization'. Importantly, however, Article 7 of the Draft Articles adds that '[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'.

100. It seems to me that those provisions can be taken as a source of inspiration in the present case. There is no doubt that the Commission and the ECB are institutions of an international organisation (the EU) that have been placed at the disposal of another organisation (the ESM). When negotiating and/or signing the MoU, they acted on behalf, and under the actual control, of the Board of Governors of the ESM. Accordingly, they appear to fall within the situation envisaged in Article 7 of the Draft Articles: they acted as 'agents'[50] of the ESM.

101. In accordance with the principles reflected in the Draft Articles, I thus take the view that the Commission's and the ECB's conduct when negotiating and/or signing the MoU ought, in principle, to be attributed to the international organisation on behalf of which they carried out those tasks (the ESM), and not to the international organisation of origin (the EU). It may be different, however, where a person is able to demonstrate that an EU institution has, acting outside the EU framework, committed a sufficiently serious breach of a rule of law that is liable to cause damage to him. For example, this would be the case if the Commission or ECB erroneously released in the public domain confidential or wrongful information which may cause harm to certain natural or legal persons.[51] Those would be acts which might be attributable to the Commission or ECB themselves. In the present procedure, however, the legal and factual context appears different.

102. In fact, in the present cases, by invoking an alleged failure to act by the Commission, the appellants intended to circumvent the fact that the ESM, and the ESM alone, is responsible for the acts which it adopts pursuant to the ESM Treaty.

103. Thus, in case of real violations of EU law by the ESM, proceedings may generally be started against the Member States which are ultimately responsible for those violations. While acting outside the EU framework they cannot infringe EU provisions which may be applicable or, in any event, jeopardise the effectiveness of any EU measure which may be affected by their conduct.[52]

49 — Adopted by the International Law Commission of the United Nations at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10) (*Yearbook of the International Law Commission*, 2011, vol. II, Part Two).

50 — The concept of 'agent of an international organization' is defined very broadly in Article 2(d) of the Draft Articles, encompassing any 'official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.

51 — See, to that effect, judgment of the General Court 18 December 2009 in *Arizmendi and Others* v *Council and Commission*, T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, EU:T:2009:530, paragraphs 61 to 71.

52 — That principle stems especially from Article 4(3) TEU. See, to that effect, judgments of 31 March 1971 in *Commission* v *Council* ('ERTA'), 22/70, EU:C:1971:32 paragraphs 21 and 22; and 5 November 2002 in *Commission* v *Luxembourg*, C-472/98, EU:C:2002:629, paragraph 85.

104. Therefore, Member States which take decisions as ESM Members may, within the EU legal order, be held liable for possible breaches of EU law committed in that context. Consequently, a citizen who considers himself affected by such breaches would be entitled to bring proceedings before the competent national courts, pursuant to the Court's case-law regarding State liability for breaches of EU law. [53]

105. These principles are by no means typical of public international law only, but also apply to principals/agents relationships in many civil, commercial and administrative national legal systems, both within the EU and elsewhere. Traditionally, the principal is responsible (externally) for the wrongdoings committed by its agents when dealing with third parties on his behalf. However, when the agent has acted without the necessary authority, the agent may subsequently (internally) be held liable to indemnify the principal for his loss or damage. [54]

106. My conclusion seems further corroborated by the Court's line of cases according to which, in case of joint non-contractual liability of the Union and a Member State, the individuals allegedly wronged are required first to launch proceedings before the competent national courts if it is the Member States' authorities that are mainly or primarily responsible for the alleged breaches. [55] This principle seems to be a fortiori applicable in the present proceedings, insofar as the appellants did not demonstrate that the EU institutions were legally responsible, even if only in part, [56] for the act which allegedly gave rise to the damage complained of.

107. In the light of all the above, the General Court did not err in law in concluding that the MoU did not originate with the Commission or ECB and that, that being the case, the Union cannot incur liability, under Articles 268 and 340 TFEU, for the inclusion in the MoU of certain passages which are allegedly in breach of the Charter. The first ground of appeal should accordingly be dismissed.

C – *Second ground of appeal*

1. Argument of the parties

108. By their second ground of appeal, directed against paragraph 43 of the orders under appeal, the appellants criticise the General Court for failing to take into account certain declarations made by Mr Asmussen, who was, at the relevant time, a member of the executive board of the ECB. The appellants allege that Mr Asmussen told the President of Cyprus, during a meeting that took place on 15 March 2013, that, 'unless Cyprus agreed to the demands made of it regarding closing the debt sustainability gap, the ECB would cut off bank liquidity to Cyprus forthwith'. [57] Accordingly, the General Court ignored a key factual element when it concluded that the MoU was an act attributable to the ESM (and not the Commission and ECB) and, as such, could not form the basis of a liability of the Union.

53 — Case-law which started with the judgments of 19 November 1991 in *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428; and 5 March 1996 in *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79.

54 — For both an historical and comparative perspective, see Müller-Freienfels, W., 'Agency — Law', in *Encyclopædia Britannica*, 2016, retrieved from http://www.britannica.com/topic/agency-law.

55 — This is my reading of the judgments of 14 July 1967 in *Kampffmeyer and Others* v *Commission*, 5/66, 7/66, 13/66 to 16/66 and 18/66 to 24/66, EU:C:1967:31; and 12 April 1984 in *Unifrex* v *Commission and Council*, 281/82, EU:C:1984:165.

56 — A joint liability of the Union cannot, however, stem from the fact that an EU institution merely provides advice or issues non-binding guidance to the national authorities. Cf., to that effect, judgments of 26 February 1986 in *Krohn Import-Export* v *Commission*, 175/84, EU:C:1986:85; and 10 May 1978 in *Société pour l'exportation des sucres* v *Commission*, 132/77, EU:C:1978:99.

57 — The appellants refer to this statement as 'the unless-demand'.

109. The Commission contends that this ground of appeal is a new legal and factual argument which was raised for the first time in the appellants' replies at first instance. It is arguably neither a matter which has come to light in the course of the procedure nor an amplifying plea. The General Court was thus correct in discarding the allegations of the appellants on this point. In any case, Mr Asmussen's alleged 'unless-demand' does not change the fact that the MoU binds only the ESM and not the Union.

2. Assessment

110. It seems to me that the alleged declaration of Mr Asmussen constitutes evidence which the appellants produced to support their contention that the MoU originated with the Commission and the ECB and that, as a consequence, the EU should be held liable for the alleged damage suffered as a result of it.

111. By means of this ground of appeal, the appellants thus criticise the assessment of evidence by the General Court.

112. For that reason, regardless of whether this piece of evidence was submitted before the General Court in good time, the present ground of appeal is to my mind inadmissible. The Court may not carry out a review of the evidence produced or offered at first instance, save in cases where the General Court has distorted the clear sense of that evidence.

113. However, in the present proceedings, the appellants merely call into question the General Court's failure to take into account one piece of evidence, without invoking any distortion of the clear sense of that evidence.

114. In any event, the Commission and ECB are quite right in pointing out that, whatever Mr Asmussen may, in his personal or official capacity, have said in his meeting with the President of Cyprus cannot have any bearing on the legal nature of the MoU. It is the ESM which is ultimately responsible for the content of that act.

115. The second ground of appeal is thus inadmissible and, in any event, unfounded.

D – *Third ground of appeal*

1. Argument of the parties

116. By their third ground of appeal, directed against paragraph 54 of the orders under appeal, the appellants contest the General Court's findings that there was no nexus of causality between the damage they claim to have suffered and the alleged inaction of the Commission. The General Court found that the alleged reduction of the value of the appellants' deposits was caused by the entry into force of Decree No 103, which occurred before the MoU was signed. In particular, in the appellants' view, the General Court erred in assessing the concept of 'conditionality': the MoU set out not only certain conditions that Cyprus had to meet in the future, but also certain conditions that Cyprus had already met.

117. The Commission rejects the allegations of errors of law put forward by the appellants and, in particular, the allegation that the recapitalisation of BoC and of CPB through 'bail-in' measures was part of the conditionality required by Article 13 of the ESM Treaty. In its view, the Cypriot authorities decided to enact those measures in full autonomy.

118. The ECB, for its part, submits that the appellants ask, in essence, for a re-evaluation of the evidence, without putting forward any argument based on an alleged error of law, which is not permissible on appeal.

2. Assessment

119. I take the view that the present ground of appeal is inoperative. Indeed, regardless of whether or not the General Court has committed an error of law in interpreting and applying the concept of nexus of causality, that error would not be capable of leading to the setting aside of the orders under appeal.

120. As explained in the context of the first ground of appeal, the conduct from which the alleged damage originated cannot be imputed to the EU institutions. In that case, therefore, there is no need to determine whether or not the three conditions required to trigger the Union's non-contractual liability [58] are fulfilled.

E – *Fourth ground of appeal*

1. Argument of the parties

121. By their fourth ground of appeal, directed against paragraph 54 of the orders under appeal, the appellants essentially submit that the General Court made an error of law in declaring inadmissible their request for partial annulment of the MoU. They contend that, if the Court accepts the arguments they have put forward in the first three grounds of appeal, it would follow that the fourth ground of appeal too is well founded.

122. The Commission and the ECB both consider that, in light of the arguments developed in the context of the other grounds of appeal, this ground too should be dismissed.

2. Assessment

123. For pleadings lodged with the Court, being concise is a great virtue, whereas being too laconic is a cardinal sin. The present ground of appeal — developed in only one, brief, paragraph of the appeals — treads the fine line between those two concepts.

124. Indeed, one may be forgiven for thinking that it is rather exceptional that an error of law allegedly committed by the General Court may be identified, explained and demonstrated with the required clarity and exhaustiveness in a single paragraph of a submission.

125. In any event, it may not be necessary to discuss the admissibility of the present ground of appeal, since it is, I believe, manifestly ill founded.

126. It is settled case-law that in an action for annulment, as provided by Article 263 TFEU, the EU Courts have jurisdiction only to review the legality of acts of institutions, bodies, offices or agencies of the Union. [59]

58 — For those conditions see, among many, judgment of 25 March 2010 in *Sviluppo Italia Basilicata* v *Commission*, C-414/08 P, EU:C:2010:165, paragraph 138.

59 — See, judgments of 31 March 1971 in *Commission* v *Council*, 22/70, EU:C:1971:32, paragraph 42; 30 June 1993 in *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 13; and 13 July 2004 in *Commission* v *Council*, C-27/04, EU:C:2004:436, paragraph 44.

127. The MoU was concluded by the Republic of Cyprus and the ESM, neither of which is an institution of the EU. The ESM has been established by the Member States whose currency is the euro. The Court held in *Pringle* that those Member States are entitled to conclude an agreement between themselves for the establishment of a stability mechanism.[60] According to settled case-law, the Court in principle lacks jurisdiction to review actions of Member States when they collectively exercise their power as Member States, rather than members of the Council.[61]

128. It is true that, in some exceptional cases, the Court has reserved the power to review acts which, despite having formally been adopted as acts of the Member States meeting within the Council, because of their content and the circumstances in which they were adopted, are to be regarded as acts of the Council.[62] Nonetheless, that is manifestly not the case of the present proceedings: the act challenged was adopted pursuant to the rules of an international agreement to which the Union is not a party, and which created an international organisation with a legal personality distinct from and independent of that of the Union.

129. Therefore, since the MoU cannot be the subject of an action for annulment under Article 263 TFEU, the fourth ground of appeal is also to be dismissed and, with it, the appeals in their entirety.

VI – Costs

130. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

131. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure, the appellants should pay the costs of these proceedings, both at first instance and on appeal.

VII – Conclusion

132. Having regard to all the above considerations, I propose that the Court:

— dismiss the appeals;

— order Ledra Advertising Ltd to pay the costs relating to Case C-8/15 P both at first instance and on appeal;

— order Andreas Eleftheriou, Eleni Eleftheriou and Lilia Papachristofi to pay the costs relating to Case C-9/15 P both at first instance and on appeal; and

— order Christos Theophilou and Eleni Theophilou to pay the costs relating to Case C-10/15 P both at first instance and on appeal.

60 — *Pringle*, paragraph 68.

61 — See, to that effect, judgments of 30 June 1993, *Parliament and Council* v *Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12; and 4 September 2014, *Commission* v *Council*, C-114/12, EU:C:2014:2151, paragraphs 38 to 41.

62 — See judgment of 30 June 1993 in *Parliament* v *Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14, and the Opinion of Advocate General Jacobs in the same case, EU:C:1992:520, points 20 to 22.