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## Rights of European Union Depositors Under Article 17 of the Charter of Fundamental Rights After the Cyprus Bail-Out

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# COMMENT

## RIGHTS OF EUROPEAN UNION DEPOSITORS UNDER ARTICLE 17 OF THE CHARTER OF FUNDAMENTAL RIGHTS AFTER THE CYPRUS BAIL-OUT

Paul Artemou\*

### INTRODUCTION

Banks in the Republic of Cyprus began to deteriorate in 2010 due to risky investments with Greece.<sup>1</sup> The two largest Cypriot banks, Cyprus Popular Bank (Laiki) and Bank of Cyprus (BoC), undertook losses, which made the country economically unstable.<sup>2</sup> After requesting financial assistance from the Eurogroup and International Monetary Fund, there was an agreement for Cyprus to raise € 4.2 billion in return for a € 10 billion bailout.<sup>3</sup> Part of the agreement in raising the funds was a levy of bank deposits towards the recapitalization needs of the two largest banks.<sup>4</sup>

The Cyprus bail-in was unpopular and received much criticism because of its unprecedented and seemingly unfair condition. In this paper, I will investigate to what extent

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<sup>1</sup> Telephone Interview with Athanasios Orphanides, Former Governor, Central Bank of Cyprus (Mar. 28, 2013), <http://www.economist.com/blogs/freeexchange/2013/03/interview-athanasios-orphanides>; *The Economic Adjustment Programme for Cyprus*, at 7 (May 2013), [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/ocp149\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp149_en.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Eurogroup signs off on bailout agreement reached by Cyprus and troika*, EKATHIMERINI, Mar. 25, 2013, [http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_25/03/2013\\_489702](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_25/03/2013_489702).

<sup>4</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1.

Article 17 of the Charter of Fundamental Rights of the European Union (Charter) protects European Union depositors from a 'bail-in' obligation using Cyprus as a case study. I believe that the levying of bank deposits, as a condition of a bail-out of Cyprus by the EU did not violate Article 17 of the Charter. However, I will argue that while the obligation was legal, the European Union should hold a higher standard for bank deposits with regard to Article 17 protection because of the special nature of bank deposits, and for the preservation of confidence in the EU banking system.

#### THE 'CYPRUS BAIL-IN'

##### Cyprus Economic Crisis

When Cyprus introduced the euro in 2008, the economy was thriving, and the island developed into a regional financial center.<sup>5</sup> However, poor risk management practices, delay tactics made by the Cypriot government in the impending economic crisis, and excessive concentration of investments in Greece contributed to a decline in the sustainability of the financial sector.<sup>6</sup>

The largest banks in Cyprus are Cyprus Popular Bank (Laiki) and The Bank of Cyprus (BoC).<sup>7</sup> Laiki and BoC engaged in substantial expansions in Greece, specifically in foreign sovereign debt, leaving them exposed to the adverse macroeconomic developments there.<sup>8</sup> The exposure of Laiki and BoC to the Greek sovereign debt loan book led to increasing levels of non-performing loans within their domestic

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<sup>5</sup> *Id.* at 9 (Macroeconomic imbalances included high current account deficits, lagging exports, significant losses of price/cost and non-price/cost competitiveness, mainly due to wage indexation, delays in the introduction of productivity-and-competition-enhancing structural reforms and the longer term impact on competitiveness and entrepreneurship of an oversized public sector. Strong net inflows of foreign capital (mainly deposits) allowed to the current account deficit to grow, while stoking a credit boom in the domestic economy. Banks' credit policy has also been responsible for the prevailing imbalances); Telephone Interview with Athanasios Orphanides, *supra* note 1; see also Athanasios Orphanides, *What Happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe*, Special Paper 232, LSE Financial Markets Group Special Paper Series, July 2014.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 12; see also Telephone Interview with Athanasios Orphanides, *supra* note 1.

portfolios.<sup>9</sup> Losses due to these rising non-performing loans<sup>10</sup> mounted up causing negative effects on bank capital.<sup>11</sup>

In May 2011, the Cypriot government lost access to the international markets, and in October 2011, Laiki Bank and BoC, who had major operations in Greece, lost close to € 4.5 billion after European leaders executed a haircut of Greek government bonds.<sup>12</sup> Although the Cypriot government tried to step in to limit the damage,<sup>13</sup> the damage was already apparent. That same year, the Cypriot government secured a bilateral loan from Russia in the amount of € 2.5 billion with 4.5% interest to keep the financial sector afloat.<sup>14</sup>

The Cypriot authorities formally requested financial assistance from the European Union and the International Monetary Fund on June 25, 2012.<sup>15</sup> A joint committee of the European Commission, International Monetary Fund, and European Central Bank, also known as the Troika, negotiated the conditions of the financial assistance.<sup>16</sup> An agreement was reached on April 2, 2013 on a comprehensive policy package for the period 2012-16, supporting financing for a total of € 10 billion in return for Cyprus raising an expected € 4.2 billion on its own.<sup>17</sup> On April 24<sup>th</sup>, Cyprus was granted the financial

<sup>9</sup> *Id.*

<sup>10</sup> See INVESTOPEDIA, <http://www.investopedia.com/terms/n/nonperformingloan.asp> (last visited Oct. 10, 2015) (a nonperforming loan is “[a] sum of borrowed money upon which the debtor has not made his or her scheduled payments for at least 90 days. A nonperforming loan is either in default or close to being in default. Once a loan is nonperforming, the odds that it will be repaid in full are considered to be substantially lower. If the debtor starts making payments again on a nonperforming loan, it becomes a re-performing loan, even if the debtor has not caught up on all the missed payments.”).

<sup>11</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 13.

<sup>12</sup> Telephone Interview with Athanasios Orphanides, *supra* note 1; see also Stavros A. Zenios, *Fairness and Reflexivity in the Cyprus Bail-In*, WHARTON FIN. INST. CTR. 1, 2 n.2 (2014), <http://fic.wharton.upenn.edu/fic/papers/14/14-04.pdf> (describing that European leaders wiped out around 80% of the value of Greek debt that the private sector held. The “private sector involvement” exchanged Greek government bonds (GGB) with new long-term GGB and European Stability Fund (ESFS) bonds with a nominal discount of around 50% and much higher fair value discount. This took place on July 21 and October 26, 2011”).

<sup>13</sup> See *The Economic Adjustment Programme for Cyprus*, *supra* note 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Kabir Chibber, *Who are the Troika that Greece depends on?*, BBC NEWS, Oct. 4, 2011 <http://www.bbc.com/news/business-15149626>.

<sup>17</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1; see

assistance on the basis of the agreed Memorandum of Understanding.<sup>18</sup> The Memorandum of Understanding<sup>19</sup> outlined that the funds to be raised by Cyprus would be done through a restructuring of BoC and the dissolution of Laiki involving levies on bank deposits.<sup>20</sup> On April 25<sup>th</sup>, the Council adopted a decision under Article 136 of the Treaty of the Functioning of Europe<sup>21</sup> containing the main elements of the macroeconomic adjustment programme to be implemented by Cyprus.<sup>22</sup> On April 26<sup>th</sup>, a Memorandum of Understanding, consistent with the said-decision, was signed by the Cypriot authorities and the Commission. The Cypriot House of Representatives endorsed the programme on April 30, 2013.<sup>23</sup>

### Provisions of the Memorandum of Understanding

According to the Memorandum of Understanding on Specific Economic Policy Conditionality in the Cyprus agreement, there are four aspects on the restructuring plan of Laiki and BoC.<sup>24</sup>

First, there would be an upfront deleveraging of the

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*Eurogroup signs off on bailout agreement reached by Cyprus and Troika*, EKATHIMERINI, (Mar. 25, 2013), <http://www.ekathimerini.com/149669/article/ekathimerini/news/eurogroup-signs-off-on-bailout-agreement-reached-by-cyprus-and-troika>.

<sup>18</sup> *Id.*

<sup>19</sup> The Memorandum of Understanding describes a binding bilateral or multilateral agreement between two or more parties.

<sup>20</sup> Rick Newman, *The Cyprus Bailout Does the Unthinkable, Vaporizes Bank Deposits*, U.S. NEWS, (Mar. 25, 2013, 11:10 AM), <http://www.usnews.com/news/blogs/rick-newman/2013/03/25/the-cyprus-bailout-does-the-unthinkable-vaporizes-bank-deposits>; see *Eurogroup signs off on bailout agreement reached by Cyprus and Troika*, EKATHIMERINI, (Mar. 25, 2013), <http://www.ekathimerini.com/149669/article/ekathimerini/news/eurogroup-signs-off-on-bailout-agreement-reached-by-cyprus-and-troika>.

<sup>21</sup> See FAQ – Financial Assistance for Cyprus, FINANCIAL STABILITY MECHANISM, at 4 (May 2013), <http://www.esm.europa.eu/pdf/FAQ%20on%20Cyprus%20130520132.pdf>.

<sup>22</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 37.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 39; see also Memorandum of Understanding on Specific Economic Policy Conditionality, CYPRUS MINISTRY OF FINANCE at 7, <http://www.mof.gov.cy/mof/mof.nsf/final%20MOUf.pdf>.

banks.<sup>25</sup> All Greek related assets and liabilities of the two main banks were “carved-out” and acquired by the Greek bank Piraeus Bank,<sup>26</sup> achieving an immediate upfront deleveraging while risk-weighted assets declined substantially, thereby resulting in a lower capital requirement.<sup>27</sup>

Second, there would be an immediate bail-in of some € 1.4 billion of subordinated debt.<sup>28</sup> All *insured* deposits (deposits below €100,000) at Laiki, together with Cypriot and United Kingdom assets were moved to BoC.<sup>29</sup> *Uninsured* deposits (deposits over €100,000) in Laiki, together with the remaining assets and the foreign subsidiaries, remained in the bank and were to be liquidated over time.<sup>30</sup> Simultaneously, the *uninsured* deposits at the BoC were subject to an immediate bail-in of 37.5%, which converted the deposits into Class A shares with full voting and dividend rights to provide the largest part of the capital needs of the bank.<sup>31</sup> Another 22.5% of the uninsured deposits were to be frozen to ensure that the bank is properly capitalized to the necessary standard.<sup>32</sup> Should the bank turn out to be over-capitalized, the excess will be unfrozen and returned to the depositors.<sup>33</sup> The resolution of Laiki and the consolidation of BoC as the leading Cypriot bank resulted in a further immediate deleveraging of the financial sector.<sup>34</sup> The capital needs of Laiki and of BoC, which together totaled about € 10 billion have been covered, exclusively through the contributions of uninsured depositors with full

<sup>25</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 46.

<sup>26</sup> *Id.* at 42; *see also* Memorandum of Understanding on Specific Economic Policy Conditionality, *supra* note 24, at 8.

<sup>27</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 42.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 42, 73; *see also* Memorandum of Understanding on Specific Economic Policy Conditionality, *supra* note 24, at 8.

<sup>31</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 74; Memorandum of Understanding on Specific Economic Policy Conditionality, *supra* note 24, at 8.

<sup>32</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 74; Memorandum of Understanding on Specific Economic Policy Conditionality, *supra* note 24, at 8.

<sup>33</sup> *The Economic Adjustment Programme for Cyprus*, *supra* note 1, at 74.

<sup>34</sup> *Id.* at 42.

contribution of equity shareholders and bond holders.<sup>35</sup>

Third, BoC and Laiki are subject to an independent valuation of their assets, as required by the bank resolution framework. This was to see whether the banks were capitalized sufficiently and whether more uninsured deposits were to be converted.<sup>36</sup>

Finally, the Cyprus Central Bank appoints a new Board of Directors and an acting Chief Executive Officer until Bank of Cyprus' new shareholders are organized in a general meeting. The Board of Directors is responsible to restructure a plan defining the bank's business objectives and credit policies.<sup>37</sup>

## DEPOSITOR'S RIGHTS IN THE EUROPEAN UNION

### General

The relationship between the banker and the customer is generally a contractual one. When a deposit account is opened at a depositary institution, the relationship between the bank and the customer is governed by the contract between the customer and the institution and by applicable statutes and regulations.<sup>38</sup> Essentially, the bank owes the customer the money, therefore making the bank a debtor of the customer.<sup>39</sup>

The bank is obligated to follow the customer's instructions and is considered as an agent of the customer. However, a bank generally does not owe its customer any fiduciary duties, yet this fiduciary duty may be created in some situations.<sup>40</sup> Banks generally have a duty to act in good faith and use ordinary care while dealing with their customers under common law.<sup>41</sup>

The terms and conditions in Cypriot commercial banks may include provisions such as; availability of banking facilities and services, customer's instructions to the bank, customer privacy, expenses, fiduciary deposits, fees and other

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 74-75.

<sup>37</sup> *Id.*

<sup>38</sup> MARK BUDNITZ ET AL., CONSUMER BANKING AND PAYMENTS LAW 14 (5th ed. 2013).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* It is important to note that Cyprus follows English common law.

administrative provisions.<sup>42</sup>

Banking general terms and conditions generally have provisions that authorize deposits held in the name of the customer with the bank to be used as fiduciary deposits.<sup>43</sup> Fiduciary deposits allow the bank to make deposits in any banking institution, in the Bank's name, but for the account and at the risk of the customer.<sup>44</sup> Customers also generally agree that the bank will not be liable for any losses based on placement of deposit. The customer bears the risk of any default by the bank and for any losses resulting from or related to any such default or any acts or omissions of the bank in relation to the making, maintenance and management of the fiduciary deposits and their value or the fluctuation of such value or any other matters pertaining to the fiduciary deposits.<sup>45</sup>

Furthermore, most terms and conditions contain a force majeure clause which states that the bank will not be liable for damages caused as a result of its services being suspended due to the actions of any authority, Cypriot or foreign, strike, lock out, force majeure or any other reasons not proved to be a willful act by the Bank. The same applies in the event that there is material cause for the Bank to suspend or limit, completely or partially, its services for certain days or for a certain time.<sup>46</sup>

### Deposit Guarantee Schemes

Cyprus created The Cyprus Deposit Protection and Resolution of Credit and Other Institutions Scheme (Deposit Protection Scheme) which insures depositors up to € 100,000 in the event banks become insolvent.<sup>47</sup> The European Union

<sup>42</sup> General Terms and Conditions, Laiki Bank, Nov. 2012 (11th Ed.).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at art. 25, § 5.

<sup>46</sup> *Id.*

<sup>47</sup> *Informative Leaflet Addressed to the Covered Institution's Depositors on the Protection Afforded to them by the Cyprus Deposit Protection and Resolution of Credit and other Institutions Scheme*, BANK OF CYPRUS 1, 2 (2013), [http://www.bankofcyprus.com.cy/Documents/Cyprus/Org\\_Methods/Banking\\_Codes\\_Schemes/Eng/10-0489E.pdf](http://www.bankofcyprus.com.cy/Documents/Cyprus/Org_Methods/Banking_Codes_Schemes/Eng/10-0489E.pdf) [hereinafter *Informative Leaflet on Depositors on the Protection*].



established Directive 94/19/EC,<sup>48</sup> which all Members of the European Economic Area<sup>49</sup> are required to follow.<sup>50</sup> The purpose of the Deposit Protection Scheme is to compensate depositors of covered institutions, which pay contributions to the respective deposit protection funds, in the event that a covered institution is unable to repay its depositors.<sup>51</sup> On the other hand, it may be the funding of the implementation of resolution measures.<sup>52</sup>

The Deposit Protection Scheme covers all types of deposits belonging to physical or legal persons, denominated in all currencies.<sup>53</sup> Participation in the Deposit Protection Scheme is compulsory for all banks and licensed credit institutions in Cyprus.<sup>54</sup> Therefore, BoC and Laiki Banks were institutions that participated in the Deposit Protection Scheme.<sup>55</sup>

The Deposit Protection Scheme becomes activated if it is determined that a particular credit institution is unable to repay its deposits.<sup>56</sup> The amount of each depositor's existing deposits are set off against any loans or other credit facilities granted by the covered institution to the depositor, as well as any other counterclaim of the bank in respect of which a right to set off exists.<sup>57</sup>

### Position of Bank Deposits After Cyprus Bail-In

<sup>48</sup> Council Directive 94/19, 1994 O.J. (L 135) 5 (EC).<sub>2</sub>

<sup>49</sup> The European Economic Area (EEA) unites the EU Member States and the three EEA EFTA States (Iceland, Liechtenstein, and Norway) into an Internal Market governed by the same basic rules.

<sup>50</sup> "The provision of deposit insurance in the EU (and also in the three EFTA states that along with the EU nations make up the EEA) is governed by Directive 94/19/EC as amended by 2009/14/EC of the European Parliament and of the Council of 11 March 2009. Directives are legislative acts that specify a result that Member States must achieve, leaving the form and method up to the Member States. This directive requires that Member States are to have and monitor a deposit guarantee scheme that protects most depositors up to € 100,000." Anne Sibert, *Deposit Insurance after Iceland and Cyprus*, VOX (Apr. 2, 2013), <http://www.voxeu.org/article/deposit-insurance-after-iceland-and-cyprus>.

<sup>51</sup> Informative Leaflet on Depositors on the Protection, *supra* note 47.

<sup>52</sup> General Terms and Conditions, Laiki Bank, *supra* note 42.

<sup>53</sup> Informative Leaflet on Depositors on the Protection, *supra* note 47.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Informative Leaflet on Depositors on the Protection, *supra* note 47, at 1.

<sup>57</sup> *Id.*

Members of the European Economic Area, which include the EU, Switzerland, Norway and Iceland, are required to set up deposit-insurance schemes that cover most depositors up to 100,000 €. <sup>58</sup> In a ruling by the European Free Trade Association<sup>59</sup> against Iceland (the “IceSave case”), the court made clear that the deposit protection scheme directive is meant to cover the failure of individual banks, not a systemic crisis. In the event of a sufficiently large banking crisis, depositors may ultimately be protected only up to the ability and willingness of the sovereign nation to step in with the necessary funds. <sup>60</sup>

The Cyprus bail-out has shed even further light at to the position of deposits during a systemic banking crisis. It appears that after the Cyprus bail-in, bank deposits, including insured deposits are not completely safe in the European Union in the event that a country requires a ‘bail-out’ or recapitalization. The situation in Cyprus was highly unusual because the Cypriot government was reported to agree to the terms of the ‘bail-in’ and may have even suggested coming up with domestic funds to satisfy the Troika and avert an economic crisis. <sup>61</sup> However, I believe that every financial crisis is handled urgently and the specific situation that Cyprus found itself in should not be considered to a great extent. I believe that the Cyprus bail-in supported the principle established in the IceSave case because the deposit protection scheme directive is meant to cover the failure of an individual bank, and not a systemic crisis.

The IceSave case and the Cyprus events tend to imply that it is generally accepted that shareholders and depositors should take losses in the event of a systemic bank failure. The

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<sup>58</sup> *Id.*

<sup>59</sup> See THE EUROPEAN FREE TRADE ASSOCIATION, <http://www.efta.int/about-efta/european-free-trade-association> (last visited Oct. 22, 2015) (noting that the European Free Trade Association (EFTA) is an intergovernmental organization that promotes free trade and economic integration to the benefit of its four Member States, and that the European Economic Area (EEA) Agreement, enables three of the four EFTA Member States (Iceland, Liechtenstein and Norway) to participate in the EU’s Internal Market).

<sup>60</sup> Case E-16/11, Judgment, (Jan. 28 2013), [http://www.eftacourt.int/fileadmin/user\\_upload/Files/News/2013/16\\_11\\_Judgment.pdf](http://www.eftacourt.int/fileadmin/user_upload/Files/News/2013/16_11_Judgment.pdf).

<sup>61</sup> Deposit Guarantee Schemes, EUR. PARL. DOC. (2013), <http://eprints.bbk.ac.uk/9634/1/20130703ATT69107EN.pdf>.

Deposit Protection Scheme is only seen as insurance for 'small crises,' such as the failure of an individual or particular bank.<sup>62</sup> However, one questions the fate of unsecured creditors, such as uninsured bank depositors.<sup>63</sup> It appears that uninsured depositors in European banks may not be spared in the event the sovereign is in need of a recapitalization of its banks.<sup>64</sup> Whether the 'bail-in' method is used in future economic crises will remain to be seen.

It is important to note that the Court of Justice by the EU has not reviewed the ruling towards Iceland.<sup>65</sup> Iceland is not a member of the European Union and is not subject to the Charter of Fundamental Rights of the European Union. So, although there appears to be newly established precedent in the EU with respect to deposit protection, I do not believe the IceSave case gives full justification for what occurred in Cyprus.

#### ARTICLE 17 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

##### Background

Article 17 of the Charter of Fundamental Rights of the European Union states:

1. Everyone has the right to own, use dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual Property shall be protected.<sup>66</sup>

<sup>62</sup> Anne Sibert, *Deposit Insurance after Iceland and Cyprus*, VOX (Apr. 2, 2013), <http://www.voxeu.org/article/deposit-insurance-after-iceland-and-cyprus>.

<sup>63</sup> *Id.*

<sup>64</sup> See Jacob Funk Kirkegaard, *Did Cyprus Set A Dangerous Precedent?*, RHODIUM GROUP (Mar. 29, 2013), <http://rhg.com/notes/did-cyprus-set-a-dangerous-precedent>.

<sup>65</sup> *Id.*

<sup>66</sup> THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY at 465 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014) [hereinafter Peers EU Charter Commentary].

Article 17 of the European Union Charter of Fundamental Rights (Charter) is based on Article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>67</sup> enacted in Paris in 1952.<sup>68</sup> Article 52(3)<sup>69</sup> of the Charter applies requiring interpreting the meaning and scope of Article 17 in line with Article 1 of the Additional Protocol to the ECHR. Nonetheless, the Charter may provide more extensive protection.<sup>70</sup>

The right to property has been recognized as a fundamental constitutional right in all Member States of the EU.<sup>71</sup> The judgment *Nold* (1974) implies recognition of the right to property as a fundamental right.<sup>72</sup> It also stressed that it would be legitimate to set up certain limits to these rights, justified by goals of general interest pursued by the Community, provided that the substance of these rights was not affected.<sup>73</sup>

The first judgment dealing with an alleged violation of the right to property was in case *Hauer* (1979), which held that the right to property was guaranteed by common constitutional concepts of the Member States, which were also reflected in the Additional protocol to the Convention for the Protection of

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<sup>67</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, Europ. T.S. No. 009 [Protocol No. 1] (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”).

<sup>68</sup> *Commentary on the Charter of Fundamental Rights of the European Union*, at 163, (June 2006), [http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf). [hereinafter EU Network of Independent Experts Commentary].

<sup>69</sup> Article 52(3) of The European Union Charter of Fundamental Rights reads: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” 2000 J.O. (C 364) 1. [hereinafter Charter of Fundamental Rights].

<sup>70</sup> Peers EU Charter Commentary, *supra* note 66, at 469.

<sup>71</sup> *Id.*

<sup>72</sup> Case C-4/73, *Nold v. Comm’n*, 1974 E.C.R. 491.

<sup>73</sup> *Id.*

Human Rights and Fundamental Freedoms.<sup>74</sup> The Court made a distinction between measures to the deprivation of property and to the restriction on the use of property.<sup>75</sup> Although the European Community could not be prevented from a possibility to control or restrict the use of property in a context of common market regulation, the Court ruled that the restriction had to correspond to the general interest and must not be disproportionate interference for the rights of owner.<sup>76</sup>

### Right to Property

Article 17(1) sentence 1 limits the right to property to lawfully acquired possessions.<sup>77</sup> The right to property may be claimed by natural as well as legal persons but not by public law bodies nor for public undertakings.<sup>78</sup> Also, property extends to all pecuniary interests assigned to the individual in their private interest and as an exclusive entitlement.<sup>79</sup> Property is defined as 'rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.'<sup>80</sup> Lastly, the right to property covers not only moveable and immovable property but also immaterial positions including claims of an economic value, rights of usufruct, liens, *company shares* or intellectual property rights.<sup>81</sup>

As a general rule, the right to property gives protection only to an existing possession.<sup>82</sup> However, there are exceptions when certain conditions are met. The European Court of Human Rights has accorded such protection to applicants having a "legitimate expectation" of collecting an asset, otherwise known as a receivable.<sup>83</sup> However, the notion of a "legitimate expectation" is limited, because Article 1 of the

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<sup>74</sup> Case C-44/79, *Hauer v. Rheinland-Pfalz*, 1979 E.C.R. 3727.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Peers EU Charter Commentary, *supra* note 66, at 473.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 472.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> EU Network of Independent Experts Commentary, *supra* note 68, at 165.

Protocol does not provide a right to become an owner (*i.e.* to acquire ownership).<sup>84</sup> Therefore, “legitimate expectation” must be of a nature more concrete than of “hope” and be based on a legal provision or a legal act such as a judicial decision.<sup>85</sup> However, if the person has effectively waived their right to property by explicit and voluntary consent in full awareness of the circumstances, then there is no deemed interference with property.<sup>86</sup>

A reasonable application of the elements of Article 17 to the Cyprus bail-out generates the conclusion that bank deposits are considered to be existing, lawfully acquired property.<sup>87</sup> Applying the elements of Article 17(1) sentence 1 to the facts, we certainly have a situation where the property owners, *i.e.* bank depositors, have a right “to own, use, dispose of and bequeath his or her lawfully acquired possession.” Bank deposits are considered existing property under the ECHR because they are “rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.”<sup>88</sup> Bank deposits are assets that have value through the currency they represent, and have an established legal position under the legal and monetary system. The holder may do as they wish with their currency such as deposit, withdraw, or invest.

Furthermore, the Cyprus bail-in obligation was not a situation where deposit holders effectively waived their right to property. Effectively waiving one’s right to property requires an explicit and voluntary consent in full awareness of the circumstances.<sup>89</sup> In the case of Cypriot deposit holders, they had no choice as to what happened to their deposits because capital controls were put in place by the Cypriot government,

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<sup>84</sup> *Id.*

<sup>85</sup> EU Charter Commentary, *supra* note 66, at 476.

<sup>86</sup> *Id.*

<sup>87</sup> Note that there has been some speculation that a majority of the uninsured deposits in the Laiki Bank were from Russian money launderers. However, this remains to be merely speculation. Svetlana Ledyeva et al. *Cyprus, corruption, money laundering and Russian round-trip investment*, VOX (June 17, 2013), <http://www.voxeu.org/article/russian-cyprus-round-tripping-corruption-linked-money-laundering>.

<sup>88</sup> Peers EU Charter Commentary, *supra* note 66, at 472.

<sup>89</sup> *Id.*

which prevented withdrawals or transfers of their deposits before and after the bail-in occurred.<sup>90</sup> Additionally, the Cypriot government had imposed a bank holiday during the negotiations as well as during the implementation of the conditions.<sup>91</sup> Shortly after the conditions were implemented, depositors were restricted in the amount of money they could withdraw.<sup>92</sup> Even if the option to withdraw money from the banks were feasible, depositors had no control over the agreement Cyprus would implement as a result of the discussions with the Troika. Although the Cypriot parliament agreed to the terms of the bail-out, no vote occurred among depositors which would constitute explicit and voluntary consent and thus a waiver of the right to property under Article 17 of the Charter.

### Deprivation of Property

Article 17(1) of the Charter distinguishes between two specific categories of limitations and derogations: deprivation of possessions and regulations of the use of property. “Deprivation of property means a formal expropriation which may be based on legislative acts or measures implementing them, i.e. a measure completely and permanently depriving the owner of their property.”<sup>93</sup> One must look to the aim of the measure in distinguishing measures regulating the use of property from those depriving a person of their possessions.<sup>94</sup> “A regulation of the use of property does not constitute a deprivation if the owner of the property remains free to dispose of it or to put it to other uses which are not prohibited.”<sup>95</sup> “According to jurisprudence of the Court, a deprivation of possessions requires not only that a person is deprived of their property, but also that the latter is transferred to another person.”<sup>96</sup>

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<sup>90</sup> *Cyprus eurozone bailout prompts anger as savers hand over possible 10% levy*, REINFORM, <http://www.reinform.nl/?p=5333> [hereinafter Reinform].

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Peers EU Charter Commentary, *supra* note 66, at 478.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

“Deprivation of property covers both *de facto* deprivation as well as formal deprivation.”<sup>97</sup> A formal deprivation is a transfer of ownership based on a legal procedure, whereas a *de facto* deprivation is not.<sup>98</sup> “In assessing both forms of interference with property, the ECHR attempts to strike a fair balance between the right of the individual and the general interest of the community.”<sup>99</sup>

“Article 17(1) sentence 2 sets up *three requirements* necessary to justify a deprivation of possessions.”<sup>100</sup> First, the deprivation of property, “must be based on a sufficiently precise and accessible legal basis regulating the conditions and modalities.”<sup>101</sup> “Second, the deprivation of possessions must be in the public interest.”<sup>102</sup> However, “if the underlying objectives are disproportionate in view of the right to property”, then there can be no deprivation.<sup>103</sup> “Third, a fair compensation for the loss must be paid in good time.”<sup>104</sup> A fair compensation must be calculated on the basis of the current market value.<sup>105</sup> However, exceptional considerations of public interest, such as the realization of fundamental institutional or economic reforms or of measures to promote social justice, may justify a deviation from the full market value.<sup>106</sup>

The notion of public interest is extensive. The ECHR found that with respect to the legislature’s judgment as to what is ‘in the public interest,’ the margin of appreciation available to the legislature in implementing social and economic policies should be wide, unless that judgment is manifestly without reasonable foundation.<sup>107</sup> The concept of reasonable foundation means the Court seeks to find a fair balance or a

<sup>97</sup> EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>98</sup> *Control of Use and Deprivation of Property*, ECHR-ONLINE.INFO; <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/control-of-use-and-deprivation-of-property/>.

<sup>99</sup> *Id.*

<sup>100</sup> Peers EU Charter Commentary, *supra* note 66, at 479.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 480; *see also* EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Peers EU Charter Commentary, *supra* note 66, at 480.

<sup>106</sup> EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>107</sup> *Id.*



proportionality between the interest of the community and the individual right to property.<sup>108</sup>

When assessing the market value, all circumstances of the particular case have to be taken into account. One must look at factors relevant for determining the market value and rules exclusively privileging the state. One relevant factor would be an irrebuttable presumption that the value of the property increased.<sup>109</sup>

In view of the requirements to pay compensation in good time and to base expropriations on an adequate legal basis, a rule determining the amount and the modalities of compensation has to be set up in advance. Otherwise, the deprivation of possessions is illegal. "This applies to formal as well as to *de facto* expropriations."<sup>110</sup>

Compensation following a deprivation of property is also linked to the notion of "reasonableness."<sup>111</sup> The level of compensation is a material factor in assessing proportionality.<sup>112</sup> While compensation is necessary in the taking of property with an amount reasonably related to the value of the property, public interest considerations may permit reimbursement of less than the full market value.<sup>113</sup> A total lack of compensation could be justified only in exceptional circumstances.<sup>114</sup>

Applying the three requirements of Article 17(1) sentence 2 to the conditions of the Cyprus bail-in, it is difficult to ascertain whether there was a deprivation of property. I believe the uninsured bank deposits that remained in Laiki, that were to stay in the bank, and are to be repaid back to depositors through liquidation over time may consist of a deprivation of property. Since the depositors may stand to lose around 80% of their deposits as a result of the Troika designating Laiki to be

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<sup>108</sup> *Id.*

<sup>109</sup> Peers EU Charter Commentary, *supra* note 66, at 481.

<sup>110</sup> Peers EU Charter Commentary, *supra* note 66, at 481; *see also* EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>111</sup> Peers EU Charter Commentary, *supra* note 66, at 481.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

the “bad bank” over BoC.<sup>115</sup> Thus, the potential 80% of deposits that may never be returned may be deemed a deprivation of property under Article 17.

The first requirement under Article 17 is that a deprivation of property must be based on a sufficiently precise and accessible legal basis regulating the conditions and modalities.<sup>116</sup> The Troika relied on Article 136 of the Treaty of the Functioning of Europe to impose conditions on Cyprus. Article 136 of the Treaty of the Functioning of Europe reads:

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote. A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).<sup>117</sup>

C 326/106 EN Official Journal of the European Union 26.10.2012 Based on Article 136 of the Treaty of the Functioning of Europe, The Troika had the legal basis to place conditions on Cyprus that “strengthen the coordination and surveillance of their budgetary discipline” and set out economic policy guidelines.<sup>118</sup> Therefore, it is clear that the Troika had a

<sup>115</sup> *Cyprus Finance Minister: Uninsured Laiki Depositors Could Face 80% Haircut*, GREEK REPORTER, <http://greece.greekreporter.com/2013/03/27/cyprus-finance-minister-uninsured-laiki-depositors-could-face-80-haircut/#sthash.PxHBmldV.dpuf>.

<sup>116</sup> Peers EU Charter Commentary, *supra* note 66, at 479.

<sup>117</sup> Consolidated Version of The Treaty of the Functioning of the European Union art. 136, 2012 O.J. 326/ 47, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

<sup>118</sup> *Id.* at 106.

legal basis to be able to impose some sort of economic regulation and condition based on the Cyprus financial crisis.

The second requirement, that deprivation of possessions must be in the public interest, was arguably met in this situation with regard to the potentially “lost” uninsured bank deposits that were to remain in Laiki. The deteriorated macroeconomic conditions and the lack of bank capital in Laiki and BoC meant that Cyprus had to come up with some sort of bailout measure quickly in order for the banking sector to function again. Essentially, there may not have been much of a choice in how they could respond. The stability and health of Cyprus’ economy is clearly a matter of public interest which would satisfy this prong of Article 17(1).

When considering whether a deprivation of property was justified because of the public interest, one must analyze whether the underlying objectives were disproportionate in view of the right to property.<sup>119</sup> In this case, the underlying objective was to restore the soundness of Cyprus’ financial sector and restore confidence in the banking industry. If Cypriot leaders felt that they had no choice but to concede to the Troika’s demand in levying bank deposits or else face a systemic collapse in Cyprus, then I believe the underlying objective was not disproportionate in view of the right to property.

The third requirement, that fair compensation for the loss be paid in good time, was also met in this situation. Based on the restructuring plan outlined in the Memorandum of Understanding, all insured deposits at Laiki were moved to BoC. For these deposits, there was arguably no deprivation of property because the depositors still hold their property in a different bank. Furthermore, the 37.5% of uninsured deposits at BOC that were converted to shares in the bank do not require any compensation because depositors still own the full value of their property in a different form. However, it is still uncertain as to whether the depositors with new shares in BoC may be able to sell their shares at the same market value that they held their deposits.

With regard to the uninsured deposits in Laiki which were

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<sup>119</sup> Peers EU Charter Commentary, *supra* note 66, at 480.

to remain in the bank to be liquidated over time, the situation is more complex. As bank depositor, there will always be the risk that your deposits will be lost in the event of a bank or system failure. As a depositor, one is taking a risk when putting assets into a bank. Banks have deposit insurance schemes to cover depositors up to a specified amount in the event the bank fails. Therefore, if Laiki is considered a failed bank, and Laiki depositors are losing their uninsured portion of their deposits, then there may be no deprivation of property in this situation since the depositors assumed the risk in the first place. Losing your uninsured deposits to a failed bank is a foreseeable result, however unlikely. As mentioned, depositors will only be entitled to the insured amounts of their deposits during a bank failure, and can expect lose all of their deposits in the case of a financial system crisis.

On the other hand, it was the Troika who designated Laiki to become the “bad bank”, i.e. the bank that would be liquidated while its insured deposits get transferred to the “good bank.” Since Laiki is a failed bank as a result of a government regulation, it is difficult to accept that the same standard of risk of bank failure for bank depositors applies. Rather, it seems that the regulation directly caused a deprivation of property and should be subject to the protection of Article 17. However, it is also possible that Laiki would have inevitably failed if there was no regulation in the first place. The possibility of any other actions taken by the Cypriot government are speculative.

Furthermore, many of the uninsured Laiki depositors stand to lose over 80% of their uninsured deposits since the liquidation may prove insufficient in repaying the depositors in full.<sup>120</sup> If a European court holds that such losses are to be considered a deprivation of property under Article 17 of the Charter, then they are subject to “fair compensation being paid in good time for their loss.”

Since the uninsured depositors in Laiki deserve “fair compensation in good time for their loss,” the measures in place may not meet the obligation of Article 17 by the Troika.

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<sup>120</sup> *Cyprus Finance Minister: Uninsured Laiki Depositors Could Face 80% Haircut*, GREEK REPORTER, <http://greece.greekreporter.com/2013/03/27/cyprus-finance-minister-uninsured-laiki-depositors-could-face-80-haircut/#sthash.PxHBmIdV.dpuf>.

However, the European Court of Human Rights has ruled that “public interest considerations, including measures designed to achieve greater social justice, may permit reimbursement of less than the full market value.”<sup>121</sup> Furthermore, the Court has also ruled that “a total lack of compensation could be justified only in exceptional circumstances.”<sup>122</sup>

In consideration of the Court’s ruling that greater social justice may permit reimbursement of less than full market value, the uninsured Laiki depositors may legally receive less than their full uninsured deposits. However, it is unclear how much less than fair market value is acceptable. Potentially losing 80% of uninsured deposits, especially when dealing with uninsured deposits in the millions, could be extreme. Also, the Court is unclear as to what exceptional circumstances would justify a total lack of compensation.

#### Regulations of the Use of Property

“Article 17(1) sentence 3 of the Charter permits regulations of the use of the right to property where they are provided for by law and necessary for the general interest.”<sup>123</sup> “The legal basis must be . . . precise [and] the requirement of necessity has to be interpreted in . . . light of the jurisprudence.”<sup>124</sup> “A regulation of the use of property has to meet the ‘proportionality test’, and ‘respect.’” Respect is the essence of the right to property.<sup>125</sup>

“The test of proportionality is based on a four-step approach: [(1)] the legitimate objective, [(2)] appropriateness (suitability), [(3)] necessity[,] and [(4)] proportionality. . . of the measure in view of the aims pursued [to] have to be scrutinized *strictu sensu*.”<sup>126</sup> “In its jurisprudence, the ECJ . . . does not clearly distinguish these steps. . . .”<sup>127</sup>

“An objective is legitimate if it serves the public good or the

<sup>121</sup> EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>122</sup> *Id.*

<sup>123</sup> Peers EU Charter Commentary, *supra* note 66, at 481.

<sup>124</sup> Peers EU Charter Commentary, *supra* note 66.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

protection of rights and freedoms of other persons.”<sup>128</sup> [These] objectives may be derived from the general or particular aims of the [European] Union, from the grounds for justification established in the context of the fundamental freedoms[,] and from international obligations. . .”<sup>129</sup>

Next, the measure must be factually suitable to meet the objective pursued (contribute to their achievement), and necessary. “[Necessity] requires that when there is a choice between several appropriate measures, the least onerous measure must be used.”<sup>130</sup>

“[Lastly], a measure is proportionate *strictu sensu* if the conflicting interest has been balanced fairly: The interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.”<sup>131</sup>

The second aspect of the regulation of the use of property involves “respect.” In other words, one must look at the essence of the right to property. The guarantee of the essential content of a right, as distinguished from the proportionality test, constitutes an ultimate threshold. “The essence of the right to property is disrespected when the guarantee of property is deprived of its substance, but not when affected only marginally or when only modalities of its exercise are regulated.”<sup>132</sup>

“The notion of ‘general interest’ . . . contains [two] value[s].”<sup>133</sup> On the one hand, the “general interest” is connected to entrepreneurial activities. On the other hand, it can be connected to values of social-economic nature.<sup>134</sup> “The prevalence of social aspects in the notion of ‘general interest’ requires that the *right to property be subordinate to the aims of public utility*, coinciding with equal relations or with the social

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<sup>128</sup> *Id.* at 482.

<sup>129</sup> *Id.*

<sup>130</sup> Peers EU Charter Commentary, *supra* note 66, at 482.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 485.

<sup>133</sup> WILLIAM B.T. MOCK, HUMAN RIGHTS IN EUROPE: COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 108 (William B.T. Mock et al. eds., 2010) [hereinafter Human Rights in Europe Commentary].

<sup>134</sup> *Id.*

role.”<sup>135</sup>

The third rule includes the right of the state to control the use of property.<sup>136</sup> It includes the right of the state to secure the payment of taxes or other contributions or penalties.<sup>137</sup> The use of property is a more general term which seems to cover various kinds of interference with property.<sup>138</sup> It is frequently disputed whether there has been a “deprivation of possessions” (second rule) or a “control of use of property” (third rule), as the former requires greater justification than the latter.<sup>139</sup> The state is free to take measures “as it deems necessary”. The review by the ECHR limits itself on the issues of legality and purpose.<sup>140</sup>

I believe that the insured Laiki deposits and the uninsured BOC deposits turned equity are regulations of the use of property under sentence 3 of Article 17. Based on Article 17, the Cypriot government as well as the Troika were permitted to regulate the use of property by law in so far as is necessary for the general interest.

Based on ECHR jurisprudence, a regulation of the use of property has to meet the proportionality test, and respect, i.e. the essence of the right to property.<sup>141</sup> The test of proportionality is based on a four step approach, (1) the legitimate objective, (2) appropriateness (suitability), (3) necessity, and (4) proportionality of the measure in view of the aims pursued to have to be scrutinized *strictu sensu*.<sup>142</sup> In its jurisprudence, the ECJ does not clearly distinguish these steps.<sup>143</sup>

Restoring the soundness of the Cypriot banking sector and rebuilding depositors’ and market confidence is clearly a legitimate objective. There is virtually no argument that if Cyprus had not acted quickly on finding a solution, the country

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<sup>135</sup> *Id.*

<sup>136</sup> EU Network of Independent Experts Commentary, *supra* note 66, at 167.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Human Rights in Europe Commentary, *supra* note 133, at 108.

<sup>140</sup> *Id.* at 167.

<sup>141</sup> See EU Network of Independent Experts Commentary, *supra* note 68, at 166.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

would have been in utter turmoil.<sup>144</sup> The implementation of these conditions were necessary and appropriate because Cyprus had no other option than to agree to the terms of the Troika or risk the demise of the country's economy and financial sector.

Here the proportionality of the measure in view of the aims pursued would pass *stricto sensu* scrutiny.<sup>145</sup> *Stricto sensu* scrutiny requires that "[t]he interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests."<sup>146</sup> Here, there is arguably a balance of the conflicting interests; the conditions imposed in the Cyprus bail-out allowed Cyprus to raise the capital required to finance the BoC to meet the criteria for a € 10 billion bail-out from the Troika.<sup>147</sup> At the same time, a majority of Cypriot depositors still had possession of their property through ownership of BoC shares. Additionally, uninsured depositors in either bank were not deprived of any property at all.<sup>148</sup> However, there is a questionable deprivation of property for uninsured depositors of Laiki since their compensation depends on the liquidation of the bank.<sup>149</sup> Overall, the bail-in measures satisfied the Troika's requests while not severely impacting a majority of the depositors in the long run.

The second aspect of the regulation of the use of property involves 'respect'.<sup>150</sup> In this test, the essence of the right to property is disrespected when the guarantee of property is deprived of its substance, but not when affected only marginally or when only modalities of its exercise are regulated.<sup>151</sup> In the case of the Cyprus, I would argue that the guarantee of property was affected marginally and that

<sup>144</sup> See *EU finance ministers approve Cyprus bailout deal*, USA TODAY (Mar. 25, 2013), <http://www.usatoday.com/story/money/2013/03/24/cyprus-eu-bailout-brussels/2014545/>; see also *Cypriot President says he was forced to accept EU bailout*, EURACTIV.COM (Mar. 18, 2013), <http://beta.euractiv.com/section/euro-finance/news/cypriot-president-says-he-was-forced-to-accept-eu-bailout/>.

<sup>145</sup> See Peers EU Charter Commentary, *supra* note 66, at 482.

<sup>146</sup> *Id.*

<sup>147</sup> The Economic Adjustment Programme for Cyprus, *supra* note 1.

<sup>148</sup> See *id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Peers EU Charter Commentary, *supra* note 66, at 481.

<sup>151</sup> *Id.* at 485.



modalities of its exercise were regulated. Thus, the conditions imposed on Cypriot depositors passed this test of 'respect.'

In regards to the notion of 'general interest' under the Article, it is clear that the conditions imposed were for the 'general interest' of the public. It is in the general interest for Cyprus to make sure both of its largest banks do not fail leaving the country in financial ruin and despair.

One may argue that the deposits transferred into equity should not fall under the scrutiny of Article 17 at all because as new shareholders of BoC, they can simply sell their shares and receive their fair market value just as if they withdrew that money from the bank. However, I would still consider this to be a regulation by law since it was by regulation that their deposits were converted into equity. The conversion of deposits into equity as a legal regulation places it under the scrutiny of Article 17 of the Charter. Therefore, I believe that the terms of the Memorandum of Understanding did not violate Article 17, sentence 3 of the Charter.

#### BANK DEPOSITS DESERVE A HIGHER STANDARD UNDER ARTICLE 17

The obligation imposed on Cyprus to levy bank deposits in return for a bailout was largely unpopular and unprecedented. My concern with this type of bail-out obligation is the deterioration of confidence in the banking system of not only Cyprus, but for the European Union as a whole. Although only uninsured deposits were materially affected by these obligations, bank consumers may not feel safe knowing that there is a risk that any portion of their deposits may be lost during an economic crisis.

I believe that European courts should hold a higher standard for bank deposits as a form of property in regard to Article 17 for two reasons: (1) the special nature of bank deposits; and (2) for maintaining confidence in the EU banking system. In keeping these aspects into consideration, the appropriate body of the European Union should hold that the levying of bank deposits should not be allowed unless all other reasonable options have been frustrated, thus leaving a higher standard in the regulation of bank deposits for the general interest according to Article 17.

### Special Nature of Bank Deposits

Various theories arise as to why property in general should be protected. Modern philosophers such as David Hume and John Locke make reference to an unattractive state of nature where property was not protected, and violence among humanity without such protection was imminent.<sup>152</sup> The protection of property is a social construct and for good reason. The protection of property brings social order that benefits everyone in society. Each member of society knows that there are rules that protect their claim to property and do not have to fend anyone off to maintain it. However, there are also situations where society will accept the deprivation or regulation of property when it is for the public good.

The Cyprus bail-out brings into question whether the government can pass a regulation whereby bank deposits can be levied (both insured and uninsured) for the general interest. Although bank deposits are property, most depositors are aware of losing that property when there is a risk of a bank failing

However, I believe that bank deposits have a profound meaning to our daily lives and deserve special treatment. People are not expected to stuff their income under their mattresses; rather, they deposit their income in banks. People deposit their money into banks is because they believe it is safe. Banks have a systematic way to keep deposits safe from fire, theft, and other casualties. Furthermore, people put their money in banks because deposited funds often grow with interest. The interest the bank pays to people for keeping their money in the bank comes from interest that other people pay to the bank in exchange for being allowed to borrow money.<sup>153</sup>

Deposits in the banking system are crucial for the growth of the capitalist economy.<sup>154</sup> Money that is deposited is used by banks for investments that help grow the economy. For

<sup>152</sup> STEPHAN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY* 234 (1991).

<sup>153</sup> Deposit Interest Rate, INVESTOPEDIA, <http://www.investopedia.com/terms/d/deposit-interest-rate.asp>.

<sup>154</sup> MARTIN WOLFSON AND GERALD EPSTEIN, *THE HANDBOOK OF THE POLITICAL ECONOMY OF FINANCIAL CRISES* 163 (2013); *see also Role of banks in the economy*, [ZIMBABWE] HERALD (Oct. 10, 2013), <http://www.herald.co.zw/role-of-banks-in-the-economy/>.

example, a bank may take 90% of the money deposited by a particular individual and use that money to make other investments, such as bank loans to other consumers. Loans by banks to businesses and other consumers increase consumption in the economy, which in turn increases GDP.<sup>155</sup> Therefore, deposits have become an effective and major factor in economic growth.

Another reason why deposits deserve a higher standard is because the bank depositor should not be expected to know if a bank is financially solid. A bank depositor expects their deposits to be untouched, even in the case of an economic crisis. A bank depositor puts their trust in the banks and the government to find a solution to an economic crisis without their deposits being lost.

Furthermore, the bank depositor has the 'legitimate expectation' to collect their deposits. As discussed, 'legitimate expectation' must be of a nature more concrete than of 'hope' and be based on a legal provision or a legal act such as a judicial decision.<sup>156</sup> Depositors do not 'hope' that they will be able to withdraw their deposits at any time. They expect to withdraw their deposits at any time they wish without any resistance from the bank or the government. By levying bank deposits in the form of a regulation, the European Union has diminished this 'legitimate expectation' which is recognized by law to be sacrosanct.

Although banks are considered businesses that are dedicated to making a profit in uncertain markets, I do not believe that society should be unconditionally responsible for having to make banking decisions and be responsible for those decisions. While banks are businesses, they should still be treated as public institutions because of the amount of trust that patrons put into them, as well as their significance in maintaining the global economy.

### Confidence in the EU Banking System

Consumer banking is a system that is essentially based on trust. A person walks into a bank and deposits his income. The

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<sup>155</sup> See *id.*

<sup>156</sup> See EU Network of Independent Experts Commentary, *supra* note 68, at 165.

layman is voluntarily giving his property to the bank to hold for him on the expectation that when he requests his money again, he will be given the full value of his deposit. This person most likely does not have any personal relationship to the managers, tellers, or even executives but he will expect the bank to hold his deposits safe in their care. In essence, there is a level of trust and confidence that keeps the banking system functioning. Without this trust, there is much uncertainty in how depositors will react in times of crisis. If depositors lose confidence in the bank's soundness, they may withdraw their funds not only from that bank but from other perfectly sound banks turning banks insolvent and causing an economic disaster.

Furthermore, when government intervenes and manipulates the validity of that trust, then this can have dire consequences. That government has essentially manipulated and tarnished the basis of the principles of capitalism and that level of trust that consumers have in the system. The consumer will think twice before putting his money in a bank where that government has acted.

Cyprus was an island in which a majority amount of its GDP was based on financial services. The fact that the Cypriot government may take your deposits in the future is a possibility that will make depositors feel uneasy. If the Troika can impose such obligations on Cyprus, an EU member, it may do so to any member. This may include other troubled countries such as Spain, Italy, Ireland, and Greece. Depositors in those countries may want to pull their deposits out which can cause an even further disruption to the economic system.

While I believe that the Cyprus bail-in allowed the country gain a bail-out which saved the banks from turning insolvent, it was still a short term solution that may cause a long term problem. Foreign investors will not want to enter Cyprus in longer knowing that their banks may be subject to regulations whereby their deposits, both insured and uninsured, are at risk of being lost if another economic crisis looms on the horizon.

#### Standard for Using Deposits after a Bail-out

Banking deposits under Article 17 require protection under a much higher standard. When levying deposits in any

situation, including for obligations related to a bail-out, such obligation should only be permitted if the regulating body can 'sufficiently' show that all reasonable options have been exhausted and there is no choice but to raise funds through the levying of bank deposits. Furthermore, if this standard is met, then that regulating body should only be able to take from uninsured deposits, and never from insured deposits.

#### CONCLUSION

The Cyprus bail-in was an unprecedented and largely unpopular regulation in the European Union's response to the Cypriot economic crisis. The bail-in involved the Troika bailing out the country in return for Cyprus raising € 4.2 billion dollars through the restructuring of the two largest banks on the island, and the levying of uninsured bank deposits in those banks.

It is clear that the rights of EU depositors have been altered as a result of the events of the Cyprus bail-out. Bank deposits are no longer completely safe from the negative effects of a financial crisis, especially in the EU.

I believe that the levying of banks deposits by the Cypriot government was legal under Article 17 of the Charter because there was neither an improper deprivation of property nor a regulation by the government without regard to the general interest. Insured deposits in both banks were untouched satisfying the banks Cyprus' deposit guarantee schemes. Furthermore, the uninsured deposits, although potentially subject to loss, are never guaranteed to be paid back in the event of a bank failure, meaning that there was no deprivation of property under Article 17. Also, the regulation that may eventually lead to losses in those deposits have followed the legal elements of Article 17. However, although the levying of bank deposits in Cyprus was legal under Article 17, I believe that the European Union should hold a higher standard to deposits under Article 17 because of the special nature of bank deposits and their importance to the EU economy as a whole.