INTRODUCTORY NOTE TO PRINGLE V. IRELAND (E.C.J.)

BY SUSAN POWER*

[November 27, 2012]
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Introduction

On November 27, 2012, the Court of Justice of the European Union (ECJ) issued a landmark decision on the question of the compatibility of the European Stability Mechanism Treaty with European Union law. The Court ruled on the following issues related to the permanent bailout fund: the validity of Decision 2011/199/EU adopted by the European Council to amend Article 136 of the Treaty on the Functioning of the European Union (TEFU) in accordance with the simplified revision procedures; whether the European Council exceeded its competence by using the simplified revision procedure under Article 48(6) of the Treaty on European Union (TEU) to establish the stability mechanism in violation of the treaties; the compatibility of the Treaty Establishing the European Stability Mechanism (ESM) with the treaties founding the European Union; and whether Decision 2011/199/EU encroached on the competence of the Union to coordinate economic and monetary policies of the Member States.

Background to the European Stability Mechanism

Following the collapse of Lehman Brothers Holdings Inc. in the United States in 2008, the global financial system was catapulted into a financial crisis categorized by toxic debt, failed banks, and escalating levels of sovereign debt. Stymied by the "no overdraft clause" in Article 123 of the TEU and the "no bailout clause" in Article 15 of the TEU, the seventeen member states of the Eurozone responded by adopting the European Stability Mechanism (ESM Treaty),[1] thereby replacing the temporary European Financial Stabilization Mechanism (EFSM)[2] with the permanent European Stability Mechanism (ESM) to fund member states in financial difficulty. Buttressed by the Treaty on Stability, Coordination and Governance in the Monetary Union (TSCG),[3] Eurozone Member States were required to adhere to a strict fiscal policy. On December 9, 2011, a decision was made to accelerate the entry into force of the ESM Treaty to facilitate the payment of €700 billion in capital to the ESM by July 1, 2012. However, this created an anomalous legal vacuum because the Decision 2011/199/EU which amended Article 136 (TFEU) to create a stability mechanism for Member States did not enter into force until January 1, 2013.[4] As such, the mechanism operated in parallel with the TFEU. Whether this was beyond the structure of the EU Treaty framework became the issue in *Pringle v. The Government of Ireland*.

The Irish Challenge

In *Pringle v. The Government of Ireland*, Dáil Éireann[5] member Deputy Thomas Pringle challenged the compatibility of the ESM Treaty with the Irish Constitution and the EU Treaties. Pringle questioned how the ESM Treaty signed on February 2, 2012, was "purportedly made possible" by Decision 2011/199/EU, when that decision was not expected to enter into force until January 1, 2013.[6] He argued that the amendment of Article 136 of the TFEU using the newly adopted, simplified revision procedure was unlawful and contrary to the conditions on amendments established in Article 48(6) TEU. Accordingly, he argued that the adoption of Council Decision 2011/199/EU on this basis was invalid.[7] Furthermore, Pringle asserted that the proposed amendment of Article 136(3) of the TFEU, by Council Decision 2011/199/EU facilitating the grant of financial assistance subject to strict conditions, would effectively confer new competences on the Union, which were impermissible using the simplified revision procedure.[8]

An earlier challenge in *Doherty v. The Referendum Commission* to judicially review the constitutionality of the Fiscal Stability Treaty was refused in the Irish High Court.[9] There, Justice Hogan noted that "one could not realistically seek to explain the likely impact of the TSCG without reference to the question of the ESM and, indeed, it would be wholly artificial to seek to do so."[10] The Court found that it could not express a definitive view on whether the Irish government could refuse to approve a European Council decision and, in any event, this issue was expected before the courts in the now famous *Pringle* Case.[11]

Re-examining the treaty law arguments posed in *Doherty* on the ratification of the amendment to Article 136 TFEU, the High Court in *Pringle* abandoned the arguments raised in *Doherty* on "approval" and "ratification."[12] Instead, the Court questioned whether the entry into force of Decision 2011/199/EU in accordance with Article 48(6) was

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an essential precondition for the coming into force of the ESM Treaty.[13] Accordingly, the High Court referred the issue to the ECJ for a preliminary ruling under Article 104a of the Courts Rules Procedure.[14] The decision was appealed to the Irish Supreme Court, which confirmed that the government had not exceeded its constitutional authority by ratifying the ESM Treaty. However, the issues referred to the ECJ remained pending.[15]

The Judgment

On November 27, 2012, a full Court of Justice sitting in its plenary formation of twenty-seven judges rejected Deputy Pringle's arguments and rendered a judgment in favor of the Irish government.

ESM, an International Treaty

The ECJ found that Article 122(2) of the TFEU merely provided for *ad hoc* financial assistance and, as such, did not form the legal basis for a permanent financial stability mechanism.[16] Notwithstanding, the Court held that the members of the Eurozone States were entitled to establish a stability mechanism, provided that those Member States "not disregard their duty to comply with European Union law when exercising their competences in that area."[17] Appositely, this finding recognizes that the European Stability Mechanism is a creature of international law, created in the international legal order between the Member States of the Eurozone. Accordingly, the temporal gap between the ratification of the ESM Treaty and the Decision 2011/199/EU on January 1, 2013, was irrelevant.

No Bailout Clause

Traversing the controversial "no bailout" clause in Article 125 of the TFEU, which prohibits the assumption of liability of Member States for the financial commitments of another Member State, the Court found that "the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions."[18] Member States were thus still bound to comply with their EU law obligations; in fact, the grant of finance subject to strict conditionality under Article 136(3) ensured compliance with European Union law and the coordination of Member States economic policies.[19] Regarding adherence to Article 125 TFEU, the Court adopted a liberal reading, noting that it was "supported by other provisions" relating to economic policy, which it distinguished from the restrictive wording of Article 123 TFEU.[20]

Simplified Revision Procedure

Notably, this case heralds the first use of the simplified revision procedure introduced under the Lisbon Treaty.[21] It is certainly a welcome interpretation by the Court on the issue of amendments of Union Treaties by European Council decisions under this rubric. The Court found that the insertion of Article 136(3) of the TFEU, amended by Article 1 of Decision 2011/199, did not confer any additional competences on the Union.[22] Effectively, this did not impact the creation of the European Stability Mechanism, as this originated from a separate treaty outside the framework of the European Union. Certainly it would appear that the Court, in adopting a restrictive approach to the use of the simplified revision procedure, is acting within Article 48(6) TEU.

Economic versus Monetary Policy

Although the Irish High Court was concerned in *Pringle* that the amendment of Article 136(3) of the TFEU potentially affected provisions in Part I of the Treaty on the monetary policy of the Union through the simplified revision procedure, this was discounted by the ECJ.[23] Instead the Court drew a distinction between monetary policy in maintaining price stability, and economic policy conducted in accordance with the principle of an open market economy with free competition.[24] Unlike monetary policy, economic policy does not fall within the exclusive competence of the Union. As the ESM only concerns grants of financial assistance, this falls within the area of economic policy and therefore, potentially outside the Treaty framework.[25]

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Dispute Resolution

Despite the creation of the ESM outside the treaty framework, the Court noted that disputes arising between ESM members in relation to the ESM Treaty may be subject to the jurisdiction of the ECJ on the basis of Article 273 (TFEU) "if that dispute is submitted to it under a special agreement."[26] However, the ESM Treaty provides no avenue for individual redress.[27] Although the right to an effective remedy is provided for under the ESM Treaty, as a general principle under Article 47 of the Charter of Fundamental Rights of the European Union, this applies in the context of Member States in the international legal order.[28]

Conclusion

Fundamentally, the ECJ breathed life into the anomalous European Stability Mechanism by interpreting the founding treaties in a manner supportive of their objectives to finance states with floundering economies. While this brings the intergovernmental mechanism across the threshold of the international legal system and into the domain of the European Union by making it subject to strict conditionality, it does so at a cost. The use of the simplified revision procedure to sidestep the European Treaty framework reignites concerns that the ESM lacks the requisite legislative and democratic safeguards integral to the Union Treaties.

Although Ireland was the only State to refer these questions to the ECJ, similar issues were heard before the German Constitutional Court[29] and the Estonian Supreme Court.[30] That cases have been brought in multiple jurisdictions underscores the political disquiet surrounding the mechanism, particularly concerning the conferral of competence on the institutions of the Union by Decision of the European Council.

Despite the ruling of the ECJ, grave problems persist with the conditionality clauses attached to future ESM loans. Arguably, these encroach on the fundamental freedoms of a Member State to pursue domestic economic policies in areas such as taxation, borrowing, competition, and privatizing public services. Moreover, the lack of accountability to the individual citizen is problematic, considering that the ESM operates with full legal personality, privileges, and immunities in each Member State.[31]

ENDNOTES

1 Doherty v. The Referendum Commission, [2012] I.E.H.C. 211, ¶ 9 (H. Ct.) (Ir.), *available at* http://www.bailii.org/ie/cases/IEHC/2012/H211.html (last visited Sept. 23, 2013).

2 *See* EFSF Framework Agreement, June 7, 2010, http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf.

3 Case C-370/12, Pringle v. Ireland (Nov. 27, 2012), ¶ 9, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0370:EN:HTML.

4 COUNCIL OF THE EUROPEAN UNION, FACTSHEET, EUROPEAN STABILITY MECHANISM (2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132734.pdf.

5 Dáil Éireann is the Irish Parliament.

6 Pringle v. The Government of Ireland, [2012] I.E.H.C. 296 ¶ 187, *available at* http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/0ca92db7c606f3c680257a4b003aa637?OpenDocument (last visited Sept. 23, 2013).

7 *Id.* ¶ 8.

8 *Id.* ¶ 152. The newly amended Article 136(3) provides: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality." For additional analysis, *see* Bruno de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, 6 SWED. INST. EUR. POL'Y STUD. 1 (2011), http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf.

9 Doherty, *supra* note 1.

10 *Id.* ¶ 29.

11 *Id.* ¶ 65.

12 Pringle, *supra* note 6, ¶ 180.

13 *Id.* ¶ 194.

14 *Id.* ¶¶ 24-28, 197.

15 Thomas Pringle v. The Government of Ireland, Ireland and the Attorney General, [2012] I.E.S.C. 47, *available at* http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/db079f79be08a50e80257a9c004f4975?OpenDocument&Highlight=0,pringle (last visited Sept. 23, 2013).

16 Case C-370/12, *supra* note 3, ¶ 65.

17 *Id.* ¶¶ 68-69.

18 *Id.* ¶ 136.

19 *Id.* ¶ 69. However, Jonathan Tomkin cogently notes that the European Parliament had earlier "expressed regret that the

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European Council had not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism within the Union legal order." Jonathan Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 GER. L. J. 169, 184 (2013), http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_169-190_ESM%20Special_Tomkin.pdf.

20 Case C-370/12, *supra* note 3, ¶ 132.

21 *Pringle, supra* note 6, ¶ 141.

22 *Id.* ¶ 72.

23 *Id.* ¶ 47.

24 *Id.* ¶¶ 48-52.

25 *Id.* ¶ 60.

26 *Id.* ¶ 171.

27 *Id.* ¶ 23.

28 *Id.* ¶ 180. For additional discussion, *see* Pieter-Augustijn Van Malleghem, Pringle*: A Paradigm Shift in the European Union's Monetary Constitution,* 14 GER. L. J. 141, 157 (2013), http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_141-168_ESM%20Special_van%20Malleghem.pdf.

29 Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Case No. 2 BVE 4/11, Jun. 19, 2012 (Ger.).

30 Press Release, Supreme Court of the Republic of Estonia, The Supreme Court: Provision Of The Treaty Establishing The European Stability Mechanism Contested By The Chancellor Of Justice Deemed Constitutional (Jul. 12, 2012), http://www.nc.ee/?id=1340.

31 Treaty Establishing the European Stability Mechanism art. 32, Feb. 2, 2012, http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf. For instance, Article 32 (3) of the ESM Treaty provides: "The ESM, its property, funding and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that the ESM expressly waives its immunity for the purpose of any proceedings or by the terms of any contract, including the documentation of the funding instruments."

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PRINGLE v. IRELAND

JUDGMENT OF THE COURT (Full Court)
27 November 2012 (*)

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In Case C-370/12,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 31 July 2012, received at the Court on 3 August 2012, in the proceedings

Thomas Pringle

v

Government of Ireland,

Ireland,

The Attorney General,

THE COURT (Full Court),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Rosas, G. Arestis, J. Malenovský, M. Berger and E. Jarašiūnas, Presidents of Chambers, E. Juhász, A. Borg Barthet, U. Lõhmus, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan, D. Šváby, A. Prechal, C.G. Fernlund, J.L. da Cruz Vilaça and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: T. Millett, Deputy Registrar,

having regard to the decision of the President of the Court of 4 October 2012 that the case be dealt with under the accelerated procedure, in accordance with Article 23a of the Statute of the Court of Justice of the European Union and Article 105(1) of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 23 October 2012,

after considering the observations submitted on behalf of:

– Mr Pringle, by J. Rogers and P. Callan, Senior Counsel, and by R. Budd and J. Tomkin, Barristers-at-Law, instructed by J. Noonan, Solicitor,
– Ireland, by E. Creedon, acting as Agent, and by M. Cush and S. Murphy, Senior Counsel, and by N. Travers and C. Donnelly, Barristers-at-Law,
– the Belgian Government, by T. Materne, J.-C. Halleux and C. Pochet, acting as Agents,
– the German Government, by T. Henze and J. Möller, acting as Agents,
– the Greek Government, by A. Samoni-Rantou, G. Karipsiades and K. Boskovits, acting as Agents,
– the Spanish Government, by N. Díaz Abad, acting as Agent,
– the French Government, by E. Belliard, G. de Bergues and E. Ranaivoson, acting as Agents,
– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,
– the Cypriot Government, by D. Lysandrou and N. Kyriakou, acting as Agents,
– the Netherlands Government, by C. Wissels and M. Bulterman, acting as Agents,
– the Austrian Government, by G. Hesse, acting as Agent,
– the Slovak Government, by B. Ricziová, acting as Agent,
– the United Kingdom Government, by E. Jenkinson, acting as Agent, and by A. Dashwood QC,
– the European Parliament, by A. Neergaard and R. Crowe, acting as Agents,
– the European Council, by H. Legal, G. Maganza and A. de Gregorio Merino, acting as Agents,
– the European Commission, by J.-P. Keppenne, L. Romero Requena and B. Smulders, acting as Agents,

after hearing the Advocate General,

gives the following

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JUDGMENT

1. This reference for a preliminary ruling concerns, first, the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1), and, secondly, the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU, 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principles of effective judicial protection and legal certainty.

2. The reference was made in an appeal against a judgment of the High Court (Ireland) in proceedings brought by Mr Pringle, a member of the Irish Parliament, against the Government of Ireland, Ireland and the Attorney General seeking a declaration, first, that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 constitutes an unlawful amendment of the FEU Treaty and, secondly, that by ratifying, approving or accepting the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded in Brussels on 2 February 2012 ('the ESM Treaty'), Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded.

I. LEGAL CONTEXT

A. Decision 2011/199

3. On 16 December 2010 the Belgian Government submitted, in accordance with the first subparagraph of Article 48(6) TEU, a proposal for the revision of Article 136 TFEU which consisted of adding a paragraph 3 to that article.

4. The European Parliament, the European Commission and the European Central Bank ('the ECB') each issued an opinion on the proposal, on 23 March, 15 February and 17 March 2011 respectively. Decision 2011/199 was adopted on 25 March 2011.

5. Recitals 2, 4 and 5 of the preamble to that decision are as follows:

> '(2) At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect.
>
> . . .
>
> (4) The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself. At its meeting of 16 and 17 December 2010, the European Council agreed that, as this mechanism is designed to safeguard the financial stability of the euro area as [a] whole, Article 122(2) of the [FEU Treaty] will no longer be needed for such purposes. The Heads of State or Government therefore agreed that it should not be used for such purposes.
>
> (5) On 16 December 2010, the European Council decided to consult, in accordance with Article 48(6), second subparagraph, of the TEU, the European Parliament and the Commission, on the proposal. It also decided to consult the [ECB]. . . .'

6. Article 1 of Decision 2011/199 provides:

> 'The following paragraph shall be added to Article 136 of the [FEU] Treaty:
>
> "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of

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any required financial assistance under the mechanism will be made subject to strict conditionality.'"

7. Under Article 2 of Decision 2011/199:

'Member States shall notify the Secretary-General of the European Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.'

B. The ESM Treaty

8. The contracting parties to the ESM Treaty are the Member States whose currency is the euro.

9. Recitals 1 and 16 of the preamble to the ESM Treaty are as follows:

'(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism ("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.

. . .

(16) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 [TFEU].'

10. Article 1 of the ESM Treaty, headed 'Establishment and members' provides:

'1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the "European Stability Mechanism" ("ESM").

2. The Contracting Parties are ESM Members.'

11. Article 3 of the ESM Treaty describes the purpose of the ESM, whose maximum lending capacity is initially to be fixed by Article 39 of that treaty at EUR 500 000 million, as follows:

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

12. Article 4(1), (3) and (4), first subparagraph, of the ESM Treaty state:

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

. . .

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. . . .'

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13. Article 5(3) of the ESM Treaty provides that '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'.

14. Under Article 5(7)(m) of the ESM Treaty, the Board of Governors is to take decisions by qualified majority 'on a dispute, in accordance with Article 37(2)'.

15. Article 6(2) of the ESM Treaty states that '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 ESM Board of Directors]'.

16. Article 8(5) of the ESM Treaty provides:

> 'The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. . . .'

17. Article 12 of the ESM Treaty defines the principles governing the provision of stability support and states in paragraph 1:

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

18. The procedure for granting stability support to an ESM Member is described in Article 13 the ESM Treaty 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 public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the [International Monetary Fund (IMF)];
>
> (c) to assess the actual or potential financing needs of the ESM Member concerned.
>
> 2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.
>
> 3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the 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 a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.
>
> The MoU shall be fully consistent with the measures of economic policy coordination provided for in the [FEU Treaty], 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.

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6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

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.'

19. The ESM may grant support to an ESM Member by means of the instruments provided for in Articles 14 to 18 of the ESM Treaty, namely financial assistance in the form of a precautionary credit line (Article 14) and in the form of loans (Articles 15 and 16), purchase of bonds issued by an ESM Member on the primary market (Article 17) and operations on the secondary market in relation to bonds issued by an ESM Member (Article 18).

20. In accordance with Article 20(1) of the ESM Treaty, '[w]hen granting stability support, the ESM shall aim to fully cover its financing and operating costs and shall include an appropriate margin'.

21. Article 25(2) of the ESM Treaty provides:

'If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.'

22. Under Article 32(2) of the ESM Treaty, the ESM is to have full legal personality.

23. Article 37 of the ESM Treaty, headed 'Interpretation and dispute settlement', states:

'1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.'

II. THE BACKGROUND TO THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

24. On 13 April 2012 Mr Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law.

25. Mr Pringle further claimed that Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of the EU and FEU Treaties concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy. Further, he claimed that the ESM Treaty confers on the Union's institutions new competences and tasks which are

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incompatible with their functions as defined in the EU and FEU Treaties. Lastly, he claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty.

26. By a judgment of 17 July 2012 the High Court dismissed Mr Pringle's action in its entirety.

27. On 19 July 2012 Mr Pringle brought an appeal against that judgment before the referring court.

28. In those circumstances the Supreme Court decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

> '(1) Is . . . Decision 2011/199. . . valid:
>
> – having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties?
>
> – having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?
>
> (2) Is a Member State of the European Union whose currency is the euro, having regard to
>
> – Articles 2 and 3 TEU and the provisions of Part Three, Title VIII, TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;
>
> – the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;
>
> – the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;
>
> – the powers and functions of Union institutions pursuant to principles set out in Article 13 TEU;
>
> – the principle of sincere cooperation laid down in Article 4(3) TEU;
>
> – the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union ['the Charter'] and the general principle of legal certainty,
>
> entitled to enter into and ratify an international agreement such as the ESM Treaty?
>
> (3) If . . . Decision [2011/199] is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?'

III. CONSIDERATION OF THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

A. The first question

29. By its first question, the referring court seeks to ascertain whether Decision 2011/199 is valid in so far as it amends Article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under Article 48(6) TEU, of an Article 136(3) relating to the establishment of a stability mechanism.

1. The jurisdiction of the Court

30. Ireland, the governments of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria and the Slovak Republic, the European Council and the Commission submit that the jurisdiction of the Court to examine the first question is limited, if not excluded, because the question relates to the interpretation of primary law. They contend that the Court has no power under Article 267 TFEU to assess the validity of provisions of the Treaties.

31. In that regard, first, it must be borne in mind that the question of validity concerns a decision of the European Council. Since the European Council is one of the Union's institutions listed in Article 13(1) TEU and since the

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Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU 'to give preliminary rulings concerning . . . the validity . . . of acts of the institutions', the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council.

32. Next, it must be stated that Decision 2011/199 concerns the insertion of a new provision of primary law in the FEU Treaty, namely paragraph 3 of Article 136 TFEU.

33. As submitted by Ireland and the governments and institutions mentioned in paragraph 30 of this judgment, it is true that, in accordance with indent (a) of the first paragraph of Article 267 TFEU, the examination of the validity of primary law does not fall within the Court's jurisdiction. Nonetheless, after the entry into force of the Treaty of Lisbon, which introduced, in addition to the ordinary procedure for the revision of the FEU Treaty, a simplified revision procedure under Article 48(6) TEU, the question arises whether the Court is required to ensure that the Member States, when they undertake a revision of the FEU Treaty using that simplified procedure, comply with the conditions laid down by that provision.

34. In that regard, it must be recalled that, under the first subparagraph of Article 48(6) TEU, the simplified revision procedure concerns 'revising all or part of the provisions of Part Three of the [FEU] Treaty, relating to the internal policies and actions of the Union'. The second subparagraph of Article 48(6) confirms that '[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the [FEU] Treaty'. Under the third subparagraph of Article 48(6), such a decision 'shall not increase the competences conferred on the Union in the Treaties'.

35. Since it is necessary that compliance with those conditions be monitored in order to establish whether the simplified revision procedure is applicable, it falls to the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU.

36. To that end, it is for the Court to verify, first, that the procedural rules laid down in Article 48(6) TEU were followed and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded, and that they do not increase the competences of the Union.

37. It follows from the foregoing that the Court has jurisdiction to examine the validity of Decision 2011/199 in the light of the conditions laid down in Article 48(6) TEU.

2. Admissibility

38. Ireland claims that the question referred for a preliminary ruling is inadmissible because, first, in accordance with the case-law established in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, the applicant in the main proceedings should have brought a direct action under Article 263 TFEU for the annulment of Decision 2011/199 within the time-limit for proceedings laid down in the sixth paragraph of that article and, secondly, he should in any event have brought his action to challenge the validity of that decision before the national courts within a reasonable time. Mr Pringle did not commence the main proceedings until 13 April 2012, although Decision 2011/199 was adopted on 25 March 2011.

39. In that regard, it must be recalled that any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for a preliminary ruling (see Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 35; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 40, and Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 45). It must be emphasised that under indent (b) of the first paragraph of Article 267 TFEU the admissibility of a reference for a preliminary ruling made on the basis of that provision is not subject to a condition that such a party has complied with a time-limit within which a case challenging the validity of the Union act concerned must be brought before the national court or tribunal with jurisdiction. In the absence of regulation by the Union,

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time-limits for the introduction of actions before national courts are to be determined by the national rules of procedure and it is exclusively for the courts and tribunals of the Member States to assess whether such time-limits have been respected in the main proceedings.

40. It is clear from the order for reference both that the High Court rejected Ireland's argument that the action brought before it was out of time and that the referring court found it unnecessary to re-consider the matter.

41. Nonetheless, the point must be made that the recognition of a party's right to plead the invalidity of an act of the Union presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act (see, to that effect, *TWD Textilwerke Deggendorf*, paragraph 23; *E and F*, paragraph 46, and Case C-494/09 *Bolton Alimentari* [2011] ECR I-647, paragraph 22). Were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time-limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time-limit for his bringing an action has expired (see, to that effect, *TWD Textilwerke Deggendorf*, paragraphs 18 and 24; *E and F*, paragraphs 46 and 48, and *Bolton Alimentari*, paragraphs 22 and 23).

42. In the present case, it is not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU.

43. Accordingly, Ireland's argument that the first question should be declared to be inadmissible cannot be accepted.

44. It follows from the foregoing that the first question is admissible.

3. Substance

45. It is necessary to examine, first, whether the amendment of the FEU Treaty envisaged by Decision 2011/199 concerns solely provisions of Part Three of the FEU Treaty and, secondly, whether it increases the competences conferred on the Union in the Treaties.

a) Whether the revision of the FEU Treaty concerns solely provisions of Part Three of that treaty

46. It must be stated that Decision 2011/199 amends a provision of Part Three of the FEU Treaty, namely Article 136 TFEU, and thereby formally satisfies the condition stated in the first and second subparagraphs of Article 48(6) TEU that the simplified revision procedure may concern solely provisions of that Part Three.

47. However, the referring court is unsure whether the revision of the FEU Treaty does not also affect provisions of Part One of that treaty. It seeks to ascertain whether Decision 2011/199 encroaches on the competence of the Union in the area of monetary policy and in the area of the coordination of the economic policies of the Member States.

48. In that regard, it must be recalled that, under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy. The monetary policy of the Union is the subject of, inter alia, Article 3(1)(c) TFEU and Articles 127 TFEU to 133 TFEU.

49. Further, under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union.

50. Article 3(1)(c) TFEU states that the Union is to have exclusive competence in the area of monetary policy for the Member States whose currency is the euro.

51. Moreover, under Article 119(1) TFEU, the activities of the Member States and the Union are to include the adoption of an economic policy based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, conducted in accordance with the principle of an open

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market economy with free competition. The Union's economic policy is the subject of Articles 2(3) TFEU, 5(1) TFEU and 120 TFEU to 126 TFEU.

52. It must therefore be determined, first, whether Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that '[t]he Member States whose currency is the euro may establish a stability mechanism', grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro. If that were the case, the Treaty amendment concerned would encroach on the Union's exclusive competence as laid down in Article 3(1)(c) TFEU and, since the latter provision is to be found in Part One of the FEU Treaty, such an amendment could be made only by using the ordinary revision procedure provided for in Article 48(2) to (5) TEU.

53. In that regard, it must first be observed that the FEU Treaty, which contains no definition of monetary policy, refers, in its provisions relating to that policy, to the objectives, rather than to the instruments, of monetary policy.

54. Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that the European System of Central Banks ('ESCB') is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU. Further, under Article 139(2) TFEU, Article 127(1) TFEU is not to apply to Member States with a derogation within the meaning of Article 139(1).

55. It is necessary therefore to examine whether or not the objectives to be attained by the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 and the instruments provided to that end fall within monetary policy for the purposes of Articles 3(1)(c) TFEU and 127 TFEU.

56. As regards, first, the objective pursued by that mechanism, which is to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.

57. As regards, secondly, the instruments envisaged in order to attain the objective concerned, Decision 2011/199 states only that the stability mechanism will grant any required financial assistance; it contains no other information on the operation of that mechanism. The grant of financial assistance to a Member State however clearly does not fall within monetary policy.

58. It must next be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199, the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union. Constituted by various regulations of the European Parliament and the Council adopted on 16 November 2011, namely Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1), Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L 306, p. 8), Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L 306, p. 12), Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306, p. 25); by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L 306, p. 33), and by Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ 2011 L 306, p. 41), that framework establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances.

59. While the provisions of the regulatory framework referred to in the preceding paragraph and the provisions in the chapter of the FEU Treaty relating to economic policy, in particular Articles 123 TFEU and 125 TFEU, are essentially preventive, in that their objective is to reduce so far as possible the risk of public debt crises, the objective

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of establishing the stability mechanism is the management of financial crises which, notwithstanding such preventive action as might have been taken, might nonetheless arise.

60. In the light of the objectives to be attained by the stability mechanism the establishment of which is envisaged by Article 1 of Decision 2011/199, the instruments provided in order to achieve those objectives and the close link between that mechanism, the provisions of the FEU Treaty relating to economic policy and the regulatory framework for strengthened economic governance of the Union, it must be concluded that the establishment of that mechanism falls within the area of economic policy.

61. That finding is not called into question by the fact that the ECB issued, on 17 March 2011, an opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 C 140, p. 8). Although it must be accepted that the second subparagraph of Article 48(6) TEU provides that '[t]he European Council shall act by unanimity, after consulting . . . the [ECB] in the case of institutional changes in the monetary area', the fact remains that it is clearly apparent from the wording of recital 5 of the preamble to Decision 2011/199 that the European Council consulted the ECB on its own initiative and not because it was under any obligation under that provision to do so.

62. In any event, the consultation of the ECB on the draft of Decision 2011/199 cannot affect the nature of the envisaged stability mechanism.

63. Consequently, Article 1 of Decision 2011/199 which, by the addition of a paragraph 3 to Article 136 TFEU, envisages the establishment of a stability mechanism, is not capable of affecting the exclusive competence held by the Union under Article 3(1)(c) TFEU in the area of monetary policy for the Member States whose currency is the euro.

64. Secondly, as regards whether Decision 2011/199 affects the Union's competence in the area of the coordination of the Member States' economic policies, it must be observed that, since Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures, the provisions of the EU and FEU Treaties do not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.

65. Admittedly, Article 122(2) TFEU confers on the Union the power to grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the preamble to Decision 2011/199, Article 122(2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that decision. The fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty.

66. Further, even if Article 143(2) TFEU also enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, that provision covers only Member States whose currency is not the euro.

67. As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act (see Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263, paragraph 95).

68. Consequently, having regard to Articles 4(1) TEU and 5(2) TEU, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199 (see, to that effect, Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685, paragraph 16; Case C-316/91 *Parliament* v *Council* [1994] ECR I-625, paragraph 26, and Case C-91/05 *Commission* v *Council* [2008] ECR I-3651, paragraph 61).

69. However, those Member States may not disregard their duty to comply with European Union law when exercising their competences in that area (see Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 32). However, the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under

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paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies.

70. It follows from all the foregoing that Decision 2011/199 satisfies the condition laid down in the first and second subparagraphs of Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified revision procedure may concern only provisions of Part Three of the FEU Treaty.

b) Whether the revision of the FEU Treaty increases the competences conferred on the Union in the Treaties

71. The referring court further seeks to ascertain whether Decision 2011/199 satisfies the condition laid down in Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified procedure may not have the effect of increasing the competences of the Union.

72. In that regard, it should be recalled that Article 136(3) TFEU, the insertion of which is provided for by Article 1 of Decision 2011/199, confirms that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law.

73. That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty.

74. Even though the ESM Treaty makes use of the Union's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union's institutions in that connection.

75. It follows that Decision 2011/199 does not increase the competences conferred on the Union in the Treaties.

76. It follows from all the foregoing that the answer to the first question is that examination of that question has disclosed nothing capable of affecting the validity of Decision 2011/199.

B. The second question

77. The second question concerns the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, and of the general principles of effective judicial protection and legal certainty. The referring court seeks to ascertain whether those articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement such as the ESM Treaty.

1. The jurisdiction of the Court

78. The Spanish Government maintains that, since the Union is not a contracting party to the ESM Treaty, the Court has no jurisdiction to interpret, in the context of a reference for a preliminary ruling, the provisions of that treaty (see Case C-132/09 *Commission* v *Belgium* [2010] ECR I-8695, paragraph 43 and case-law cited).

79. In that regard, suffice it to say that the second question, by its very wording, concerns the interpretation of various provisions of European Union law and not the interpretation of provisions of the ESM Treaty.

80. The Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law (see, to that effect, Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 25 and case-law cited).

81. The Court therefore has jurisdiction to examine the second question.

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2. Admissibility

82. A number of the governments who submitted observations to the Court, along with the Commission, maintain that the second question is partly inadmissible because the referring court failed to provide any information as to how the interpretation of certain provisions and certain principles referred to in the second question is of any relevance to the outcome of the dispute before it.

83. It should first be recalled that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20; and the order of 13 January 2010 in Joined Cases C-292/09 and C-293/09 *Calestani and Lunardi*, paragraph 18).

84. The Court has previously held that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court should give at least some explanation of the reasons for the choice of the European Union law provisions of which it requests an interpretation (order of 3 May 2012 in Case C-185/12 *Ciampaglia*, paragraph 5 and case-law cited).

85. Further, it must be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that governments of the Member States and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case-file that may be sent to the Court by the national court (order of 23 March 2012 in Case C-348/11 *Thomson Sales Europe*, paragraph 49 and case-law cited).

86. In the present case, as stated by Ireland, the Slovak Government and the Commission, the order for reference gives no explanation of the relevance to the outcome of the dispute of the interpretation of Articles 2 TEU and 3 TEU. As maintained by the German, Spanish and French Governments and the Commission, the same is true of the interpretation of the general principle of legal certainty.

87. Consequently, the second question is inadmissible in so far as it concerns the interpretation of Articles 2 TEU and 3 TEU and the general principle of legal certainty.

88. Further, the Netherlands Government and the Commission express their uncertainty as to the direct effect of Articles 119 TFEU to 121 TFEU. Since those articles do not impose on Member States clear and unconditional obligations which may be relied on by individuals before the national courts, they contend that the question is inadmissible in so far as it concerns the interpretation of those articles. Ireland, which considers that none of the provisions referred to in the question has direct effect, maintains that the question is inadmissible in its entirety.

89. In that regard, in accordance with the Court's case-law, the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of European Union law irrespective of whether or not they have direct effect (see Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraph 34 and case-law cited).

90. Further, it is clear that the purpose of the referring court's question is not to determine whether the applicant in the main proceedings can assert a right directly based on the articles concerned of the EU and FEU Treaties. The purpose of requesting criteria for interpretation from the Court is solely to enable the referring court to assess whether the provisions of the ESM Treaty are compatible with European Union law.

91. It follows from all the foregoing that the second question is admissible in so far as it concerns the interpretation of Articles 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and of the general principle of effective judicial protection.

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3. Substance

92. Interpretation is therefore required, first, of the provisions of the FEU Treaty relating to the Union's exclusive competence, namely Articles 3(1)(c) TFEU and 127 TFEU on the Union's monetary policy and Article 3(2) TFEU on the Union's competence for the conclusion of an international agreement, secondly, of provisions relating to the Union's economic policy, namely Articles 2(3) TFEU, 119 TFEU to 123 TFEU, 125 TFEU and 126 TFEU and, finally, of Articles 4(3) TEU and 13 TEU and the general principle of effective judicial protection.

a) Interpretation of provisions relating to the Union's exclusive competence

i) Interpretation of Articles 3(1)(c) TFEU and 127 TFEU

93. The referring court seeks to ascertain whether the stability mechanism established by the ESM Treaty falls under monetary policy and, accordingly, under the Union's exclusive competence. It follows from Article 3 of the ESM Treaty that its purpose is to support the stability of the euro. The referring court further refers to the argument of the applicant in the main proceedings that the grant of financial assistance to Member States whose currency is the euro or the recapitalisation of their financial institutions, and the necessary borrowing for that purpose, on the scale envisaged by the ESM Treaty, would increase the amount of euro currency in circulation. The Treaties on which the Union is founded confer on the ECB the exclusive power to regulate money supply in the euro area. The applicant argues that those Treaties do not allow a second entity to carry out such tasks and to act in parallel with the ECB, outside the framework of the European Union legal order. Further, an increase in money supply has a direct influence on inflation. Consequently, the applicant claims that the activities of the ESM could have a direct impact on price stability in the euro area, which would go to the very core of the Union's monetary policy.

94. In that regard, as is apparent from paragraph 50 of this judgment, the Union has, under Article 3(1)(c) TFEU, an exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. The objective pursued by the ESCB in general and the Eurosystem in particular is, in accordance with Articles 127(1) TFEU and 282(2) TFEU, to maintain price stability.

95. However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty.

96. Under Articles 3 and 12(1) of the ESM Treaty, it is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who 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. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency, while the financial assistance which the ESM grants must be entirely funded – the provisions of Article 123(1) TFEU being respected – from paid-in capital or by the issue of financial instruments, as provided for in Article 3 of the ESM Treaty.

97. As is apparent from paragraph 56 of this judgment, any effect of the activities of the ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.

98. It follows from the foregoing that Articles 3(1)(c) TFEU and 127 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 3(2) TFEU

99. The referring court asks whether the ESM Treaty is an international agreement the operation of which may

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affect the common rules on economic and monetary policy. To that end, the national court refers to recital 1 of the preamble to that treaty which states that the ESM will assume the tasks currently fulfilled by the EFSF and the EFSM.

100. In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion . . . may affect common rules or alter their scope'.

101. It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.

102. First, since the EFSF was established by the Member States whose currency is the euro outside the framework of the Union, the assumption by the ESM of the tasks conferred on the EFSF is not such as to affect common rules of the Union or alter their scope.

103. Secondly, even if it is apparent from recital 1 of the preamble to the ESM Treaty that the ESM will, among other tasks, assume the tasks hitherto allocated temporarily to the EFSM, established on the basis of Article 122(2) TFEU, that fact is not such as to affect common rules of the Union or alter their scope.

104. The establishment of the ESM does not affect the power of the Union to grant, on the basis of Article 122(2) TFEU, *ad hoc* financial assistance to a Member State when it is found that that Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

105. Moreover, since neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM (see paragraphs 64 to 66 of this judgment), the Member States are entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area.

106. The conclusion and ratification of the ESM Treaty by the Member States whose currency is the euro therefore does not jeopardise in any way the objective pursued by Article 122(2) TEU or by Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1), adopted on the basis of that provision, and does not prevent the Union from exercising its own competences in the defence of the common interest (see, to that effect, Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 105).

107. Consequently, Article 3(2) TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

b) Interpretation of various provisions of the ESM Treaty relating to economic policy

i) Interpretation of Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU

108. The national court refers to the argument of the applicant in the main proceedings that the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law. The applicant claims that it is clear from recital 2 in the preamble to Decision 2011/199 that the European Council itself considered that the establishment of a permanent stability mechanism required an amendment of the FEU Treaty. The applicant further claims that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU confer on the Union's institutions the competence for the coordination of economic policy. The referring court also seeks to ascertain whether the ESM Treaty encroaches on the power of the Council of the European Union to issue recommendations under Article 126 TFEU and, in particular, whether 'conditionality' provided for by the ESM Treaty is the equivalent of the recommendations provided for by that article.

109. In that regard, first, it is apparent from paragraph 68 of this judgment that the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law.

110. Next, the ESM is not concerned with the coordination of the economic policies of the Member States, but

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rather constitutes a financing mechanism. Under Articles 3 and 12(1) of the ESM Treaty, the purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems.

111. While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union.

112. The second subparagraph of Article 13(3) of the ESM Treaty expressly provides that the conditions attached to any stability support are to be 'fully consistent with the measures of economic policy coordination provided for in [the FEU Treaty]'. Further, it is apparent from Article 13(4) that the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination.

113. Lastly, nor does the ESM Treaty affect the competence of the Council of the European Union to issue recommendations on the basis of Article 126(7) and (8) TFEU to a Member State in which an excessive deficit exists. First, the ESM is not called upon to issue such recommendations. Secondly, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty provide that the conditions imposed on ESM Members who receive financial assistance must be consistent with any recommendation which the Council might issue under the above-mentioned provisions of the FEU Treaty.

114. It follows that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 122 TFEU

115. It must first be recalled that, under Article 122(1) TFEU, the Council of the European Union may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

116. Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.

117. Next, in relation to Article 122(2) TFEU, the referring court, in order to assess whether the ESM encroaches on the competence attributed to the Union by that provision, asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that article empowers solely the Union's institutions to grant financial assistance.

118. In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119. The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120. Further, nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.

121. It follows that the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law and, in particular, with measures

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adopted by the Union in the area of coordination of the Member States' economic policies (see paragraphs 68 and 69 of this judgment). As is apparent from paragraphs 111 to 113 of this judgment, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty are intended to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

122. Consequently, Article 122 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iii) Interpretation of Article 123 TFEU

123. Article 123 TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

124. The referring court asks whether the conclusion and ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty is not intended to circumvent the prohibition laid down in Article 123 TFEU since those Member States may not, either directly or through intermediary bodies created or recognised by them, derogate from European Union law or condone such a derogation.

125. In that regard, it must be held that Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.

126. It is apparent from Articles 3, 12(1) and 13 of the ESM Treaty that it is the ESM which grants financial assistance to an ESM Member when the conditions stated in those provisions are met. Accordingly, even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Article 123 TFEU, since that article is not addressed to them.

127. Moreover, there is no basis for the view that the funds provided by the ESM Members to the ESM might be derived from financial instruments prohibited by Article 123(1) TFEU.

128. Consequently, Article 123 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iv) Interpretation of Article 125 TFEU

129. The referring court asks whether an agreement such as the ESM Treaty is in breach of the 'no bail-out clause' in Article 125 TFEU.

130. It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to 'be liable for . . . the commitments' of another Member State or 'assume [those commitments]', that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.

131. That reading of Article 125 TFEU is supported by the other provisions in the chapter of the FEU Treaty relating to economic policy and, in particular, Articles 122 TFEU and 123 TFEU. First, Article 122(2) TFEU provides that the Union may grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. If Article 125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, Article 122 TFEU would have had to state that it derogated from Article 125 TFEU.

132. Secondly, Article 123 TFEU, which prohibits the ECB and the central banks of the Member States from granting 'overdraft facilities or any other type of credit facility', employs wording which is stricter than that used in the 'no bail-out clause' in Article 125 TFEU. The difference in the wording used in the latter article supports the view that the prohibition stated there is not intended to prohibit any financial assistance whatever to a Member State.

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133. Accordingly, in order to determine which forms of financial assistance are compatible with Article 125 TFEU, it is necessary to have regard to the objective pursued by that article.

134. To that end, it must be recalled that the origin of the prohibition stated in Article 125 TFEU is to be found in Article 104b of the EC Treaty (which became Article 103 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

135. It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.

136. Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. As is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.

137. However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.

138. As regards the ESM Treaty, it is clear, first, that the instruments for stability support of which the ESM may make use under Articles 14 to 18 of the ESM Treaty demonstrate that the ESM will not act as guarantor of the debts of the recipient Member State. The latter will remain responsible to its creditors for its financial commitments.

139. The granting of financial assistance to an ESM Member in the form of a credit line, in accordance with Article 14 of the ESM Treaty, or in the form of loans, in accordance with Articles 15 and 16 of the ESM Treaty, in no way implies that the ESM will assume the debts of the recipient Member State. On the contrary, such assistance amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains responsible for its commitments to its creditors in respect of its existing debts. It should be observed in that regard that, under Article 13(6) of the ESM Treaty, any financial assistance granted on the basis of Articles 14 to 16 thereof must be repaid to the ESM by the recipient Member State and that, under Article 20(1) thereof, the amount to be repaid is to include an appropriate margin.

140. As regards the stability support facilities provided for in Articles 17 and 18 of the ESM Treaty, first, the purchase by the ESM of bonds issued by an ESM Member on the primary market is comparable to the granting of a loan. For the reasons set out in the preceding paragraph, the ESM does not by purchasing such bonds assume the debts of the recipient Member State.

141. Next, as regards the purchase on the secondary market of bonds issued by an ESM Member, it is clear that, in such a situation, the issuing Member State remains solely answerable to repay the debts in question. The fact that the ESM as the purchaser on that market of bonds issued by an ESM Member pays a price to the holder of those bonds, who is the creditor of the issuing ESM Member, does not mean that the ESM becomes responsible for the debt of that ESM Member to that creditor. That price may be significantly different from the value of the claims contained in those bonds, since the price depends on the rules of supply and demand on the secondary market of bonds issued by the ESM Member concerned.

142. Secondly, the ESM Treaty does not provide that stability support will be granted as soon as a Member State

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whose currency is the euro is experiencing difficulties in obtaining financing on the market. In accordance with Articles 3 and 12(1) of the ESM Treaty, stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.

143. It is apparent from paragraphs 111 and 121 of this judgment that the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States' economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy.

144. Thirdly, the national court refers to an argument of the applicant in the main proceedings that the rules relating to capital calls stated in Article 25(2) of the ESM Treaty are incompatible with Article 125 TFEU in that they imply that the ESM Members guarantee the debt of the defaulting member.

145. In that regard, it must be noted that Article 25(2) of the ESM Treaty provides that where a Member State that is an ESM Member fails to pay the sum called for, a revised increased capital call is to be made to all the other ESM Members. However, under that same provision, the defaulting ESM Member State remains bound to pay its part of the capital. Accordingly, the other ESM Members do not act as guarantors of the debt of the defaulting ESM Member.

146. Consequently, a mechanism such as the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU.

147. It follows that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

c) Interpretation of Article 4(3) TEU

148. Pursuant to the principle of sincere cooperation, established in Article 4(3) TEU, Member States are, inter alia, to refrain from any measure which could jeopardise the attainment of the Union's objectives.

149. The national court refers to the argument of the applicant in the main proceedings that the establishment of the ESM is incompatible with the provisions of the FEU Treaty relating to economic and monetary policy and, consequently, also with the principle of sincere cooperation contained in Article 4(3) TEU.

150. Such an argument cannot be accepted.

151. It is apparent from paragraphs 93 to 98 and 108 to 147 of this judgment that the establishment of a stability mechanism, such as the ESM, does not infringe the provisions of the FEU Treaty relating to economic and monetary policy. Further, as is apparent from paragraphs 111 to 113 of this judgment, the ESM Treaty contains provisions which ensure that, in carrying out its tasks, the ESM will comply with European Union law.

152. It follows that Article 4(3) TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

d) Interpretation of Article 13 TEU

153. Article 13(2) TEU provides that each institution of the Union is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

154. The referring court asks whether the allocation, by the ESM Treaty, of new tasks to the Commission, the ECB and the Court is compatible with their powers as defined in the Treaties. It is appropriate to examine separately the role which the Commission and the ECB, on the one hand, and the Court, on the other, will be called upon to play under the ESM Treaty.

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i) The role allocated to the Commission and the ECB

155. The ESM Treaty allocates various tasks to the Commission and to the ECB.

156. As regards the Commission, those tasks consist of assessing requests for stability support (Article 13(1)), assessing their urgency (Article 4(4)), negotiating an MoU detailing the conditionality attached to the financial assistance granted (Article 13(3)), monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)), and participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)).

157. The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating an MoU (Article 13(3)) and monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).

158. In that regard, it is apparent from the case-law of the Court that 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 framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see *Parliament* v *Council and Commission*, paragraphs 16, 20 and 22, and *Parliament* v *Council*, paragraphs 26, 34 and 41), provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-0000, paragraph 75).

159. The duties allocated to the Commission and to the ECB in the ESM Treaty constitute tasks of the kind referred to in the preceding paragraph.

160. First, the activities of the ESM fall under economic policy. The Union does not have exclusive competence in that area.

161. Secondly, the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.

162. Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.

163. As regards the Commission, it is stated in Article 17(1) TEU that the Commission 'shall promote the general interest of the Union' and 'shall oversee the application of Union law'.

164. It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By 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, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.

165. As regards the tasks allocated to the ECB by the ESM Treaty, they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution. By virtue of its duties within the ESM Treaty, the ECB supports the general economic policies in the Union, in accordance with Article 282(2) TFEU. Moreover, it is clear from Article 6.2 of the Statute of the ESCB that the ECB is entitled to participate in international monetary institutions. Article 23 of that Statute confirms that the ECB may 'establish relations . . . with organisations'.

166. The argument that, since the judgments in *Parliament* v *Council and Commission* and *Parliament* v *Council* predate the inclusion in the Treaties of provisions relating to enhanced cooperation, the Member States whose currency is the euro should have established enhanced cooperation between themselves in order to be entitled to make use of the Union's institutions within the ESM, cannot be accepted.

167. It is clear from Article 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation.

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168. However, it is apparent from paragraphs 64 to 66 of this judgment that the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM.

169. In those circumstances, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) The role allocated to the Court

170. It must be recalled that, under Article 37(2) of the ESM Treaty, the Board of Governors is to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that treaty. Under Article 37(3) thereof, if an ESM Member contests the decision referred to in paragraph 2, the dispute is to be submitted to the Court of Justice.

171. In that regard, first, it is apparent from recital (16) of the preamble to the ESM Treaty that the jurisdiction which the Court is called upon to exercise under Article 37(3) of the ESM Treaty is based directly on Article 273 TFEU. Under that article, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement.

172. Secondly, while it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the existence of a special agreement, there is no reason, given the objective pursued by that provision, why such agreement should not be given in advance, with reference to a whole class of pre-defined disputes, by means of a provision such as Article 37(3) of the ESM Treaty.

173. Thirdly, the disputes to be submitted to the jurisdiction of the Court are related to the subject-matter of the Treaties within the meaning of Article 273 TFEU.

174. In that regard, it must be observed that a dispute linked to the interpretation or application of the ESM Treaty is likely also to concern the interpretation or application of provisions of European Union law. Under Article 13(3) of the ESM Treaty, the MoU which is to be negotiated with the Member State requesting stability support must be fully consistent with European Union law and, in particular, with the measures taken by the Union in the area of coordination of the economic policies of the Member States. Accordingly, the conditions to be attached to the grant of such support to a Member State are, at least in part, determined by European Union law.

175. Fourthly, it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the condition that only Members States are parties to the dispute submitted to it. That said, since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU.

176. It follows that the allocation by Article 37(3) of the ESM Treaty of jurisdiction to the Court to interpret and apply the provisions of that treaty satisfies the conditions laid down in Article 273 TFEU.

177. It follows from all the foregoing that Article 13 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

e) Interpretation of the general principle of effective judicial protection

178. The national court observes, referring to an argument put forward by the applicant in the main proceedings, that the establishment of the ESM outside the European Union legal order may have the consequence that the ESM is removed from the scope of the Charter. The referring court seeks to ascertain whether the establishment of the ESM is thereby in breach of Article 47 of the Charter which guarantees that everyone has the right to effective judicial protection.

179. In that regard, it must be observed that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify

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powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 51, and Case C-256/11 *Dereci and Others* [2011] ECR I-0000, paragraph 71).

180. It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.

181. It follows from the foregoing that the general principle of effective judicial protection does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

182. In those circumstances, the answer to the second question is that Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or the ratification of that treaty by those Member States.

C. The third question

183. By this question, the referring court asks whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199.

184. In that regard, it must be recalled that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States (see paragraphs 68, 72 and 109 of this judgment). Accordingly, that decision does not confer any new power on the Member States.

185. Consequently, the answer to the third question is that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.

IV. COSTS

186. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Full Court) hereby rules:

1. **Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.**
2. **Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded at Brussels on 2 February 2012, or the ratification of that treaty by those Member States.**
3. **The right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.**

[Signatures]

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