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

WRITTEN OBSERVATIONS

submitted pursuant to Article 23, second paragraph, of the Statute of the Court of Justice by the

EUROPEAN COMMISSION

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in **Case C-370/12**

THOMAS PRINGLE

And

THE GOVERNMENT OF IRELAND

IRELAND AND THE ATTORNEY GENERAL

Reference to the Court under Article 267 of the Treaty on the Functioning of the European Union from the Supreme Court, for a preliminary ruling on the validity of European Council Decision 2011/199/EU of 25 March 2011 and on the interpretation of the Treaties, the general principles of Union law and the Charter of Fundamental Rights in order to assess whether a Member State whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty

I. RELEVANT PROVISIONS OF UNION LAW

A. Current treaties

1. The Treaties provide for the establishment of an economic and monetary union whose currency is the euro. The monetary union is set up between the Member States whose currency is the euro (hereafter 'the euro area Member States'). The monetary policy for those Member States is an exclusive competence of the Union. This policy is carried out exclusively through the European System of Central Banks (ESCB) and the European Central Bank (ECB) acting in full independence (Article 130 TFEU).
2. As far as economic policies of the Member States are concerned, the Treaties provide for their "coordination" within the Council. Member States remain free to conduct themselves their economic policy but Article 121(1) TFEU establishes an obligation on Member States to regard their economic policies as a matter of common concern and to coordinate them within the Council, with a view to contributing to the achievement of the objectives of the Union and in the context of the broad economic guidelines. Detailed rules for the application of Article 121 TFEU have been adopted by Regulation 1466/97¹.
3. In addition Articles 122 to 126 of the TFEU were inserted by the Maastricht treaty with the aim of ensuring and guaranteeing that Member States take responsibility for their own budgetary policies. These Articles apply to all Member States, since all of them are supposed to enter the euro area at some stage (with the exception of the United Kingdom and Denmark²).

¹ Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209, 2.8.1997, p. 1.

² See Protocols N° 15 and 16 to the Treaties.

4. Article 122(2) TFEU is a provision enabling the Council to decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise. Article 122(2) TFEU enables the Council to grant, under certain conditions, Union financial assistance to a Member State whose difficulties are caused by "*natural disasters or exceptional occurrences beyond its control*".
5. Article 123 TFEU prevents central banks from granting overdraft facilities or any other type of credit facility to the Union or to Member States (prohibition of monetary financing). Article 124 TFEU prohibits measures establishing privileged access by the Union or Member States to financial institutions. This implies that governments should have no access to central bank financing and that financial institutions should not be obliged to acquire government paper for the purpose of financing the public sector deficit.
6. According to the 'no bail out' clause of Article 125 TFEU, the Union and the Member States shall not be liable for or assume commitments of another Member State. Each Member State must bear responsibility for its own debt management and must ensure that it is in a position to honour engagements. It must be clear that neither the Union nor the other Member States stand behind a Member State's debts. The purpose of this rule is thus that the financial markets exercise a degree of discipline on any Member State pursuing unsound budgetary policies, by imposing differential terms on its bonds, and ultimately by refusing to lend. The only exception to the "no bail-out" clause is for "*mutual financial guarantees for the joint execution of a specific project*". This provision has never been applied nor interpreted by the Court of justice.
7. Article 126 TFEU establishes a procedure for the control of the budgetary situation of the Member States. This procedure aims at the avoidance of excessive deficit of the public finances. Under this procedure the Union Institutions, in particular the Commission and the Council, control the deficit and debt levels of the Member States. Deficits are supposed to stay below 3% of GDP and debt levels should normally

remain below 60% of GDP. Detailed rules for the application of Article 126 TFEU were adopted by Regulation 1467/97.³

8. The legal framework for economic coordination and budgetary surveillance described above has been considerably reinforced through the so-called "six-pack" legislation that entered into force in December 2011.⁴

B. European Council Decision

9. On 25 Mars 2011 the European Council adopted a decision amending Article 136 TFEU 'with regard to a stability mechanism for Member States whose currency is the euro'⁵. According to Article 1 of this decision a new paragraph 3 is to be added to Article 136 TFEU. Article 2 stipulates that the decision shall enter into force on 1 January 2013, provided all 27 notifications of the completion of the national procedures have been received, or, falling that, on the first day of the month following receipt of the last of the said notifications

³ Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209, 2.8.1997, p. 6

⁴ Regulations (EU) N° 1173/2011, 1174/2011, 1175/2011, 1176/2011 and 1177/2011 and Directive 2011/85/EU, OJ L 306, 23.11.2011, p. 1. The new rules aim, in the first place, at strengthening the Stability and Growth Pact (SGP) in order to prevent unsustainable fiscal positions, and to correct such positions promptly, should they nevertheless emerge. The reform affects both the preventive arm of the SGP (the procedures to promote surveillance and coordination of economic policies and ensure that excessive deficits are avoided - and its corrective arm) and the Excessive Deficit Procedure (EDP). New enforcement mechanisms, including financial disincentives and fines, apply to non-compliant euro-area Member States. Moreover, the "six-pack" introduced new provisions regarding the debt criterion of the SGP. It is now possible to open an EDP on the basis of the debt criterion alone. In addition, the "six-pack" introduced a new Macroeconomic Imbalances Procedure (MIP). It provides for an answer to the challenge of better monitoring macroeconomic developments in the EU, as macroeconomic imbalances revealed themselves as one of the root causes of the current crisis in certain EU Member States. The starting point of the MIP is the annual Alert Mechanism Report, a kind of "filter" to identify countries and issues for which an in-depth review is warranted. After the in-depth analysis, the Commission will, if appropriate, propose a policy recommendation under the preventive or the corrective arm of the Macroeconomic Imbalances Procedure. Besides the "six-pack", the Commission tabled two regulations for a further strengthening of fiscal surveillance in November 2011.

⁵ OJ L 91, 6.4.2011, p. 1.

10. At the moment of finalizing these observations the notifications of 19 Member States have been sent to the Secretary-General of the Council.

II. BACKGROUND

A. The economic crisis and the solidarity mechanisms between euro area Member States

11. The financial and economic crisis that has hit the Union and its Member States over the last years has required some financial solidarity between the euro area Member States in order to preserve monetary union
12. Apart from the EFSM which was set up within the framework of the Treaties, on the basis of Article 122(2) TFEU⁶, this financial solidarity has been based on intergovernmental mechanisms. These mechanisms have taken 3 forms, namely bilateral support (pooled bilateral loans) granted by one or several Member States, support from a private law company created by the euro area Member States and support from a public international organisation set up by the euro area Member States.
13. Bilateral support was given through pooled bilateral loans from other Member States. Such a solidarity mechanism was activated in support of Greece in 2010. There was a political decision from the euro area Member States on 2 May 2010 in response to the Greek authorities' request submitted on 23 April 2010. Thereafter, the lending Member States and Greece, as borrowing Member State, have concluded an intercreditor agreement (ICA). By this ICA the Lenders entrusted the European Commission with the task of coordinating and monitoring the pooled bilateral loans. Thereafter the Commission, acting on behalf of the Lenders, and Greece concluded a loan facility agreement where the terms and conditions of the bilateral loans have been

⁶ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1.

laid down. The LFA was signed on 8 May 2010. It was a plethora of bilateral agreements whose interpretation and application are governed by private law, and where the lenders agreed uniform conditions under which the loans were granted.⁷

14. The second type of assistance took the form of financial assistance from other States through a private law vehicle, the European Financial Facility Agreement (EFSF).⁸ It is a limited liability company, incorporated under Luxemburg private law in June 2010. Luxemburg was the first shareholder; the other euro area Member States became shareholders thereafter. The EFSF has entered into a Framework Agreement with the euro area Member States.⁹ The EFSF is guaranteed on a pro rata basis by participating Member States and has a nominal funding capacity up to EUR 440 billion. It was also rated AAA by the three major credit rating agencies. The EFSF is a temporary instrument that will expire at the end of June 2013. The EFSF was activated first in the case of Ireland in November 2010 (together with the EFSM) and thereafter by Portugal. The supplementary assistance that was requested by Greece in 2012 was also granted via the EFSF.

B. Treaty establishing the European Stability Mechanism

15. The third response to the financial instability of the euro area took the form a permanent mechanism, i.e. the setting up of an international financial institution (IFI), the European Stability Mechanism (ESM). The treaty establishing the ESM was first signed in June 2011. However, the crisis erupted over the summer and the Heads of State and Governments of the euro area decided to reinforce the ESM by giving it a

⁷ Also bilateral loans have been granted to some euro area Member States. For instance, the United Kingdom, Denmark and Sweden. Although they are not members of the euro area, have provided bilateral loans to Ireland.

⁸ Information on the EFSF is available at: <http://www.efsf.europa.eu/about/index.htm>

⁹ EFSF Framework Agreement of 7 June 2010 and the amendment thereof of September 2011.

larger 'firing power', i.e. a larger financing capacity, as well as a larger number of instruments for assisting Member States in trouble. Further negotiations followed between the concerned States until a revised treaty was finally agreed in February 2012.¹⁰ The ESM Treaty is currently under ratification by the participating Member States. At the time of finalizing these observations, the ratification percentage of the ESM treaty lies at 54,8%.

16. The ESM Treaty provides for the establishment by the euro area Member States of the ESM as an international financial institution with a legal personality of its own (Article 1). The purpose of the ESM is to mobilise funding and provide stability support under strict conditionality for the benefit of euro area Member States experiencing, or threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area and of its Member States (Article 3). The governance structure of the ESM is made up of a Board of Governors and a Board of Directors, as well as a Managing Director and other staff (Article 4). The respective powers of these organs are established by Articles 4 to 7 of the Treaty. Provisions concerning the capital of the ESM are contained in Articles 8 to 11. Articles 12 to 21 describe the principles underlying any support granted by the ESM, the procedure to follow as well as the list of the different instruments available for that purpose. The remaining articles concern the financial management of the ESM and general and transitional provisions.

C. National proceedings

17. Mr Thomas Pringle (hereafter 'the Applicant' or 'the Applicant in the main proceedings') initiated proceedings before the High Court of Ireland. The Applicant challenged the validity under Union law and the Irish Constitution of the European Council Decision and the Treaty establishing the ESM

¹⁰ The full text of the Treaty is available at: <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>

18. By decision of 17 July 2012 the High Court decided that the ESM Treaty was not incompatible with Union law and the Irish Constitution. As regards the European Council Decision it decided that it was completely valid in Union law and that its approval does not require an amendment of the Irish Constitution approved by the Irish people. It also rejected the claim for an interlocutory injunction restraining the Irish government from ratifying the ESM Treaty pending the determination of the proceedings. The High Court also decided to make a preliminary reference to the Court of Justice on the consequences, in terms of compatibility of the ESM Treaty with EU law, of a failure of one or more Member States to ratify the European Council Decision.
19. The Applicant immediately applied to the Supreme Court by way of appeal from the Judgment of the High Court. By decision of 31 July 2012 the Supreme Court rejected the claim related to the Irish Constitution and rejected the injunction claim of the Applicant. The Supreme Court further decided that the determination of the issues between the parties on the appeal raise questions of Union law and referred these questions to the Court of Justice
20. The Irish ratification instruments of the ESM Treaty were deposited with the Secretary-General of the Council on 1st August 2012.

III. QUESTIONS REFERRED TO THE COURT

21. The three questions referred to the Court for a preliminary ruling are the following:
 - a question on the validity of the European Council Decision;
 - a question on the interpretation of provisions of the EU Treaties and of general principles of Union law in order to assess whether euro area Member States are entitled to enter into and ratify an international agreement such as the ESM Treaty;

- a question on whether the entitlement of euro area Member States to enter into and ratify an international agreement such as the ESM Treaty is subject to the entry into force of the European Council Decision.

IV. FIRST QUESTION: VALIDITY OF THE EUROPEAN COUNCIL DECISION

22. The validity of the European Council Decision is questioned on two grounds. First, the use of the simplified revision procedure pursuant to Article 48(6) TEU is questioned, in particular having regard to the third sub-paragraph of this provision (no increase of the competences conferred on the Union in the Treaties). Second, the validity of the Decision is questioned with a general reference to the Treaties and the general principles of the law of the Union.

A. Nature and content of the European Council Decision

23. Before discussing the questions raised by the referring judge, it seems appropriate to recall the content and scope of the European Council Decision.

24. The Decision adds a new paragraph 3 to Article 136 TFEU. This article is one of the three articles that are part of Chapter 4 of Title VIII of the TFEU. This Chapter contains the entire provisions specific to the Member States whose currency is the euro. Paragraph 1 of Article 136 creates a legal base allowing the Council to adopt measures specific to the euro area. Paragraph 2 specifies the detailed rules on voting within the Council when adopting the measures set out in paragraph 1.

25. By contrast with the previous paragraphs, the new paragraph 3 has no relation whatsoever with the competences of the Union. It does not introduce a new legal basis which could be used by the Union Institutions for adopting provisions and it does not

allow the Union to take action that was not possible before this Treaty amendment. Nor does the draft decision reduce the competences conferred on the Union and its Institutions under the Treaties.

26. This new provision merely clarifies that the establishment by the euro area Member States of a stability mechanism would not be contrary to their obligations under EU law, especially Article 125 TFEU, and that this mechanism would be subject to strict conditionality. Because of the uncertainties as regards the exact scope of Article 125 TFEU and in the absence of any case-law of the Court of Justice an explicit clarification of this kind was considered appropriate¹¹ and Article 136 TFEU was considered as the adequate place for the mere reason that it is the main Treaty article that contains provisions specific to the euro area Member States.
27. The first sentence of the text only recognizes that the euro area Member States may establish a stability mechanism. The second sentence merely states that the intention is to link any financial assistance to strict conditionality.
28. The European Council Decision cannot be read as creating a legal basis (or an enabling clause) for the action of the Member States (it does not provide any procedure for the adoption by the euro area Member States of the ESM treaty). The legal basis for establishing a body such as the ESM is to be found rather in the respective national laws of the participating Member States. The mechanism of financial assistance within the euro area as contemplated in Article 136 (3) TFEU is indeed of a purely intergovernmental nature.

¹¹ Other provisions can be found in the Treaties whose purpose is mainly to clarify the legal situation. This is the case for instance for the first paragraph of Article 351 TFEU whose purpose is to lay down, in accordance with the principles of international law, that the application of the Treaties does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder (Case 812/79 *Burgoa* [1980] ECR 2787, para. 8.

29. Neither does the European Council Decision directly or indirectly reduce the competences of the Union. Financial assistance may still be granted within the framework of the Union on the basis of Article 122(2) TFEU, Article 143 TFEU and, if the conditions are satisfied, Article 352 TFEU.
30. It is not unusual to have Treaty articles that contain such provisions addressed to the Member States without interfering with the competences of the Union. For instance the provisions on the free movement of goods within the internal market contain prohibitions (for instance Article 34 TFEU), derogations to these prohibitions (Article 36) and obligations (Article 37) for the Member States. Such provisions do not touch upon the competences of the Union.
31. It is true that it is less usual to find in the Union Treaties provisions addressed to a group of Member States, clarifying how they can act collectively outside the framework of the Treaties without violating certain of its provisions. However, as will be further demonstrated at points 77-81 of these observations, to the extent they do not affect the competences of the Union, such intergovernmental actions are not per se prohibited. Pursuant to Articles 4(1) and 5(2) TEU, "*competences not conferred upon the Union in the Treaties remain with the Member States*". Consequently intergovernmental action as such cannot be seen as being in breach of the duty of sincere cooperation enshrined in Article 4(3) TEU.

B. Degree of judicial control

32. In accordance with Article 267 TFEU, the Court of Justice shall have jurisdiction to give preliminary rulings concerning inter alia the validity of acts of the institutions. The European Council is listed amongst the institutions of the Union in Article 13(1) TEU. The Court is therefore competent for reviewing the validity of the contested Decision.

33. However, for the reasons explained in more details below, the Commission is of the view that the extent of the control by the Court should be limited to the external validity of the act, i.e. whether it was adopted following the correct procedure. The Court should refrain from any control going beyond this since it would be equivalent to controlling the validity of primary law. Such a stance would go beyond the competence of the Court under Article 267 TFEU (and under 263 TFEU by the same token). The amendment adopted by the European Council is incorporated in the Treaties and thus has a constitutional rank. Except as regards its procedure of adoption, the act can therefore not be challenged within the framework of the Union's legal order
34. This control of the external validity of the act should be interpreted broadly. This means that, by controlling the recourse to Article 48(6) TEU and in particular whether the condition that the amendment concerns only Part Three of the TFEU is fulfilled, the Court should make sure that fundamental primary law provisions set outside Part III of the TFEU are not affected. In this respect, one could refer in particular to the Union's values and objectives, the Charter of Fundamental Rights, the "principles" set out in Part I of the TFEU, EU citizenship as set out in Part Two TFEU and the EU's institutional framework.
35. An alternative reasoning which would lead to the same result could be for the Court to reformulate the question of the validity of the European Council Decision into questions of interpretation of Article 48(6) TEU.¹² The questions would then become: 'Is Article 48(6) TEU to be interpreted as meaning that a decision such as the

¹² It is established case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide on the case before it. To that end, the Court of Justice may have to reformulate the questions referred to it (Case C-210/04 FCE Bank [2006] ECR I-2803, paragraph 21, and the case-law cited).

European Council Decision could be adopted under the procedure provided in this paragraph?¹³

36. In the following points, the Commission will address the issue without this reformulation.

C. Use of the simplified revision procedure of Article 48(6) TEU

37. Article 48(1) TEU provides that the Treaties may be amended either in accordance with an ordinary revision procedure, or in accordance with one of the two simplified revision procedures specified in paragraphs 6 and 7 of the same Article.
38. The Council Decision has been adopted in accordance with the simplified revision procedure of Article 48(6) TEU.
39. The conditions for deciding on the correct procedure are specified in Article 48 TEU and have to be respected. According to established case-law, the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves (Judgment of 6 May 2008, Parliament v. Council, C-133/06, point 54). The ordinary revision procedure is the normal one which has to be followed unless the specific conditions for using another one are fulfilled.

¹³ A similar reformulation was decided by the EFTA Court in Case E-6/01 CIBA [2002] EFTA Court Report 281, paras 20. The question was on the validity of a decision taken by the EEA Joint Committee but the EFTA Court is not competent to address such a question. Therefore, it reformulated the question as a question of interpretation of the higher legal principles which determined whether the legal act could be regarded as valid.

40. The conditions for having recourse to the simplified revision procedure of Article 48(6) TEU are the following: First, the proposed amendments may revise only '*all or part of the provisions of Part Three of the TFEU relating to the internal policies and action of the Union*' (article 48(6), first sub-paragraph). As explained above at point 34, going beyond a purely formal analysis of whether the proposed amendment modifies exclusively Treaty language located in Part Three of the TFEU, one should derive from this condition that the proposed amendment may not affect fundamental primary law provisions figuring outside Part Three of the TFEU. Second, the decision shall not increase the competences conferred on the Union in the Treaties (article 48(6), third sub-paragraph). It is considered that a reduction of the competences of the Union would also require the use of the ordinary legislative procedure (interpretation *a contrario* of the second sentence of Article 48(2) TEU which envisages the ordinary revision procedure for proposals that "*serve either to increase or to reduce the competences conferred on the Union in the Treaties*").
41. As regards the first condition, it is not contested that the European Council Decision amends only a specific provision of Part Three of the TFEU, namely Article 136, by adding a new paragraph 3.
42. Moreover, as indicated in its Opinion on the draft Decision, the Commission considers that this amendment does not affect, either directly or indirectly, any other part of the TFEU, the TEU, the Charter or the general principles of Union law.
43. In particular there is no exclusive competence in the current treaties for a permanent mechanism of Union law set up to grant financial assistance to euro area Member States in difficulties. The two provisions that allow for financial assistance to Member States (Articles 122(2) and 143 TFEU) are of a totally different nature: first, both of them involve a financial assistance from the budget of the Union, which is of a different nature than a financial assistance from Member States to Member States. Second, Article 122(2) TFEU allows financial assistance only in very specific circumstances and does not permit to target euro area Member States only. Third

Article 143 TFEU applies to non euro area Member States only. These provisions remain therefore unaffected.

44. The same is true for all the other provisions mentioned by the Applicant. In particular, as far as the Charter is concerned, the judgment of the Supreme Court does not mention any specific article of the Charter that could possibly be infringed or derogated from by the European Council Decision. The Commission fails to see how the new paragraph 3 of Article 136 TFEU could create any problem vis-à-vis the provisions of the Charter.
45. By stating that the euro area Member States may establish a stability mechanism, this decision cannot be read as allowing the creation of a permanent mechanism of economic policy coordination outside of the Treaties. As it is clear from the second sentence of the new paragraph 3, the notion of 'stability mechanism' refers only to the idea of a permanent body in charge of granting financial assistance to euro Member States in difficulties. This provision should be interpreted in a consistent way with the other articles of Title VIII of the TFEU: on the one hand, this amendment leaves totally unaffected the monetary policy to be carried out through the ESCB; on the other hand, any 'strict conditionality' that would be linked to a financial assistance as stated by Article 136(3) TFEU need to be fully consistent with the measures of coordination of the economic policies of the Member States as decided within the Council.
46. The indications given by the Applicant in the main proceedings, as set out on page 8 of the order for reference, should be rejected. They are based on two fundamental misconceptions.
47. On the one hand the Applicant fails to recognize the limited legal content of the European Council Decision which is of an only clarificatory nature. It considers that this decision takes away competence from the Union and/or confers competence to the Member States. As indicated above this reading is at odds with the actual content of the decision.

48. On the other hand the Applicant bases its argument on the actual content of the ESM Treaty on many aspects (for instance as regards the functions to be performed by the Commission and the ECB). This method is to be rejected. Whether the content of the ESM Treaty is in line with the obligations imposed on the Member States by the Union Treaties is a question which has no direct impact on the validity of the European Council Decision as such. These questions should instead be analysed when answering the second question of the Irish Supreme Court on the interpretation of a number of provisions of Union primary law.
49. As regards the second condition, as explained above (paragraphs 23 to 31), the new provision does not touch upon the competences of the Union, neither by increasing nor by reducing them.
50. The Commission recalls in this context that the euro area Member States have already set up and activated a (temporary) stability mechanism, the EFSF, without reducing in any way the coordination of economic policies within the Council.

D. Arguments that the European Council Decision is contrary to the existing Treaties and primary norms of Union law

51. The argument is made that the Court of Justice should assess the validity of this Treaty modification by reviewing its conformity with the Union Treaties, the Charter and the General Principles of Union law.
52. The Commission submits however that the hierarchical rank of such a Treaty amendment is equal to the one of the amended Treaty. Therefore there is no basis for requesting the amendment to be in conformity with (the non amended parts of) the TFEU. Consequently there cannot be any contradiction between the European Council Decision and the existing TFEU provisions listed in the reference for a preliminary ruling. The only requirement is the one recalled above that the proposed amendment may not affect fundamental primary law provisions set outside Part Three of the TFEU.

53. The Commission concludes that examination of the question raised has not revealed any element of a nature so as to affect the validity of European Council Decision 2011/199/EU of 25 March 2011

V. **SECOND QUESTION: INTERPRETATION OF THE TREATIES, THE GENERAL PRINCIPLES OF UNION LAW AND THE CHARTER OF FUNDAMENTAL RIGHTS WITH REGARDS TO THE ESM TREATY**

54. The referring Court raises issues related to the interpretation of the Treaties, the general principles of Union law and the Charter of Fundamental Rights in order to assess whether a euro area Member State is entitled to enter into and ratify an international agreement such as the ESM Treaty.

55. The Commission will discuss below the EU Treaties articles and general principles of law in the order as listed by the Irish Supreme Court at page 18 of its Order for reference.

56. By way of general observation the Commission points out that the content of most of the provisions listed by the Supreme Court does not appear sufficiently precise and unconditional to be given direct effect. Therefore an individual may not rely on these provisions in order to challenge before a national court the validity of a measure taken by national authorities. This is the case in particular as regards Articles 2 and 3 TEU as well as Articles 119 to 121 TFEU.¹⁴

A. **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**

a) Articles 2 and 3 TEU

57. The Order for reference does not indicate the reasons for which the provisions of the ESM Treaty could be considered as incompatible with the provisions of Articles 2 and 3 TEU. The Commission does not see any such reason. As an expression of solidarity between the members of the euro area, the ESM Treaty seems rather in line with the solidarity principle expressed in Article 2 TEU. By contributing to restoring the situation of Member States in financial difficulties, it appears also to contribute positively to the economic and monetary union as enshrined in Article 3(4) TEU.

b) Articles 119, 120 and 121 TFEU

58. These provisions are the basis for the coordination of the economic policies of the Member States. The Commission will therefore discuss these provisions under section B) below (paras 77-81) when assessing the compatibility of the ESM Treaty with the competence of the Union to coordinate economic policies of the Member States.

c) Article 123 TFEU

59. The Order for reference does not indicate how the prohibition of monetary financing could be violated through the setting up of the ESM.

d) Article 125 TFEU

60. The Commission considers that Article 125 TFEU does not prohibit the euro area Member States from entering into an agreement such as the ESM Treaty.

- The scope of the prohibition contained in Article 125 TFEU:

61. The second sentence of Article 125(1) TFEU provides in substance that Member States shall not be liable for or assume the commitments of another Member State. There is no definition either in Article 125 TFEU or in secondary legislation¹⁵ of what

¹⁴ Case C-9/99, Echirolles Distribution [1987] E.C.R. 3697.

¹⁵ See Regulation 3603/93.

is meant by: "...shall not be liable for or assume commitments of..." Moreover, the Court of Justice has never provided an interpretation of these terms

62. This wording is not so clear and unambiguous that it would be sufficient to provide the reader with an evident interpretation of the provision. The notions of 'liability', 'assume' and 'commitments' could be given different meanings in the present context. In such a situation, and in accordance with the interpretation rules used by the Court, one should therefore look at the intention and purpose of the provision as well as its place within the Treaty framework in order to provide an interpretation of its meaning and of its scope.¹⁶
63. The purpose of the no bail-out clause was defined as follows by the Monetary Committee, working on the preparation of the Treaty of Maastricht in 1990:

"Budgetary discipline is a necessary condition for stable prices and a stable currency. It must therefore be one of the foundation stone of EMU. The Treaty should lay down (...) that neither the other Member States nor the Community stand behind any Member State's debts (...),

The Member States will follow budgetary policies which respect the principle of budgetary discipline. In the view of the Monetary Committee these principles include the following (...): Each member State must bear the responsibility for its own debt management and must ensure that it is in a position to honour its engagements. It must be clear that neither the Community nor the other Member States stand behind a Member State's debts. This "no bail-out" rule would ensure that the financial markets exercise a degree of discipline on any Member State pursuing unsound budgetary policies, by imposing differential terms on its paper, and ultimately by refusing to lend (...)."

¹⁶ Case 803/79 Roudolff [1980] ECR 2015.

64. From the above would follow that Article 125 should be interpreted as prohibiting measures by which the liabilities of a Member State *vis-à-vis* the latter's creditors would be taken over by other Member States. Article 123 and 124 TFEU serve the same purpose by prohibiting respectively a privileged access to the central banks and a privileged access to the credit institutions.
65. The first part of this rule ("shall not be liable for") is a reminder of the fact that a State is part of the Union is not an implicit guarantee for the lenders. These lenders have no rights *vis-à-vis* any other State than the borrower. The provision is thus a warning to the lenders that bailing-out is not a right they can claim.
66. The second part of this provision means that the Union and the Member States may not directly engage their financial responsibility *vis-à-vis* the lenders of a Member State ("shall not assume the commitments of"). Therefore, guarantees may not be given to lenders for the debt of a Member State nor are other Member States or the Union allowed to take over a debt and commit themselves directly *vis-à-vis* the lenders to reimburse them. Article 125(1) TFEU therefore prohibits the Union or its Member States to grant directly any kind of guarantees to other Member States' creditors.
67. By contrast, the prohibition does not extend to other forms of financial assistance such as financial assistance directly granted by a Member State to another Member State or the acquisition of the debt of one Member State by another Member State. Such other forms of assistance do not have an impact on the normal functioning of the financial markets in the same way as assuming a guarantee *vis-à-vis* creditors would have. This is confirmed by the fact that other Treaty provisions permit Union financial assistance to Member States (Article 143 TFEU for non euro area Member States and Article 122(2) TFEU for all Member States) without stating that these Articles are derogations from Article 125 TFEU. This is also confirmed by the difference between the wording of Article 123 TFEU ("*Overdraft facilities or any other type of credit facility... shall be prohibited...*") and the wording of Article 125 TFEU. The

prohibition of monetary financing under Article 123 TFEU is defined in much stricter terms than the no bail-out prohibition under Article 125 TFEU, since it expressly prohibits the ECB to give any form of credit to Member States.

68. Article 125 also permits the acquisition of the debt of one Member State by another Member State (purchases of bonds in the primary or secondary markets), because in such cases the original debtor Member State retains liability for the debt under the conditions set at the issuance.

- The application of Article 125 TFEU to the ESM:

69. In sum, the Commission considers that Article 125 TFEU applies to the ESM but that the ESM Treaty is in conformity with this provision.
70. Pursuant to a literal reading of Article 125 TFEU, one could interpret that it is only assistance between Member States which would fall within the scope of its prohibition, and not assistance granted through an intermediary private body (like the EFSF) or international financial institution (like the ESM). The Irish Government seems to have defended this narrow reading of Article 125 TFEU in the main proceedings (see page 15 of the Order for reference).
71. However, if one considers the transaction as a whole, a default of the borrower (the Member State in difficulties) towards the direct lender (the ESM) would lead to an indirect assumption of the debts of that country by the other euro area Member States. Therefore it is the Commission's view that the interposition of an intermediary body such as the ESM does not eliminate the application of the no bail-out clause. The body constitutes no more than an emanation of the participating Member States, which would remain the owner of the entity. The body is replacing the participating Member States for the sole purpose of managing a collective assistance they had agreed to undertake. Financial aid available to a Member State through a fund constituted by euro area Member States outside the framework of the Union remains therefore within the scope of Article 125 TFEU. Otherwise, the Member States could

interpose legal entities in whatever form in order to circumvent the application of the no bail-out clause. The Commission concludes that Article 125 TFEU applies to the ESM.

72. The ESM rules appear nevertheless to be in conformity with Article 125 TFEU from that angle. The assistance provided by the ESM is to be granted to the benefit of Member States in difficulties does not imply guarantees that would benefit third parties. Moreover the assistance envisaged by the ESM Treaty may be activated only at the discretion of the ESM members and for a limited period of time. There is therefore no circumvention of the prohibition of Article 125 TFEU.¹⁷

e) Article 126 TFEU

73. Article 126 TFEU provides for a specific surveillance procedure aiming at avoiding excessive deficits in the Member States. It contains successive steps culminating in the imposition of financial sanctions against euro area Member States that fail to comply with their obligations. This procedure has been substantially reinforced for the euro area Member States within the framework of the six-pack.
74. The Commission fails to see how any provision of the ESM could interfere with this procedure. As far as Member States in difficulties are concerned, the fact that they might benefit from some assistance from the ESM does not exonerate them from their obligations under Article 126 TFEU. Conversely, the financial commitments made by the euro area Member States towards the ESM will be treated in accordance with the classification as decided by Eurostat
75. Consequently, there is no scope for conflict between the ESM treaty and Article 126 TFEU.

¹⁷ It is only if the assistance of the ESM was designed in such a way so as to circumvent the prohibition of Article 125 TFEU that it would raise concern. This would be the case, for instance, if the ESM was conceived so as to guarantee an automatic and permanent financial assistance to its members, thereby undermining the objective of Article 125 TFEU.

f) Article 127 TFEU and the exclusive competence of the Union in monetary policy

76. Article 127 TFEU entrusts the ESCB with the conduct of the monetary policy of the Union. As already indicated, this exclusive competence is not in any way affected by the setting up of the ESM. The granting of stability support to euro area Member States in difficulties is not a task conferred on the ESCB. Moreover the granting of such support by the ESM would not be inconsistent with the pursuit of the monetary policy objectives enshrined in the Treaties (by limiting the disturbance on the sovereign, the ESM may even contribute to containing the distortions of the bond market, that hamper the smooth transmission of monetary policy).

B. Allocation of competences between the national and Union legal orders in the field of economic policy

77. The categories and areas of competences of the Union are defined in Articles 2 to 6 of the TFEU. Article 3(1) TFEU defines the areas for which the Union has an exclusive competence. Article 4 TFEU stipulates that the Union has shared competences with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6 TFEU. Articles 2(3) and 5 TFEU lay down that the Member States shall coordinate their economic and employment policies within the Union
78. It follows from this that a coordination of the economic policies of the Member States has to take place within the Union. This does not exclude some form of coordination taking place outside of the framework of the Treaties but only if full precedence is given to the coordination that takes place within the Union, in accordance with the principle of primacy of Union law. If an intergovernmental mechanism may be created outside the Treaties, it cannot be established against them. In particular the Commission is of the view that a permanent and separate institutional framework can not be set up by a group of Member States outside of the Union with the objective of

coordinating their economic policies since such an institutional structure would necessarily interfere with the functioning of the Treaty-based coordination.

79. Moreover the room that is left for some form of coordination between the Member States outside the framework of the Treaties should not be assessed *in abstracto* but rather in light of the extent to which Union competences are exercised. In this regard, the Commission notes that the degree of coordination of the economic policies of the Member States, and in particular of the euro area Member States, has been reinforced dramatically by the entry into force of the so-called 'six-pack'. It provides for a rigorous and permanent surveillance of the economic and budgetary situation of the Member States, including a system of quasi-automatic financial sanctions for the euro area Member States that do not act as required under EU law. There is therefore at best a limited degree of additional coordination that could take place outside of this framework.
80. These principles are respected as far as the ESM is concerned since its main object is limited to the granting of financial assistance. It is true that so-called 'conditionality rules' will in principle accompany any financial assistance granted by the ESM. The *rationale* for this is that there should be a compensation for the assistance, in the form of structural reforms, in order to guarantee that more financial assistance will not be needed in the future and that the financial situation of the recipient Member State will be restored. These reforms concern the economic and fiscal policy in the larger sense; they may include fiscal measures, reductions in public spending, either one-off or long term, privatization measures, reform of the social security schemes. However, the ESM Treaty provides that any condition set by the ESM must be "*fully consistent*" with any measure of economic policy coordination provided for in the TFEU (Article 13(3)).¹⁸

¹⁸ The same is true for the current EFSF. The EFSF Framework Agreement, point 2(1), foresees that there is a Memorandum of Understanding ('MoU') to be signed with the Borrower "which shall be consistent with a decision the Council may adopt under Article 136 of the TFEU following a proposal of the

81. The Commission therefore concludes that the ESM Treaty is in conformity with the allocation of powers between the Union and the Member States as far as the coordination of the economic policies of the Member States is concerned.

C. Participation of the Union Institutions in the functioning of the ESM

82. The ESM Treaty provides for some limited participation of the Commission and the ECB in the implementation of the instruments of the ESM.
83. The Commission considers that this participation is in line with the law of the Union.
84. First, in principle the Institutions of the Union may only exercise the competences that are granted to them by Union law. However the so-called 'Bangladesh' case law of the European Court of Justice has recognised the possibility of entrusting the Union institutions or bodies with the management of financial instruments created by Member States outside the framework of the European Union. In its judgment in joined cases C-181/91 and C-248/91, ECR I-3685, the Court of Justice dealt with the constitution of a fund of aid to Bangladesh which was an extra-Community instrument and stated that "*The [...] Treaty does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council*" (paragraph 20). In line with this case-law, the 27 Member States have given their agreement as regards the tasks to be exercised by the Commission and ECB within the scope of the ESM treaty.
85. Second, the task entrusted to the Commission and the ECB are not of such a nature and extent so as to alter ("*denature*") their respective roles under the Treaty.

Commission". In practice the policy conditionality has been established in all cases in formal Union acts adopted by the Council before signature of such MoUs.

86. Indeed, the participation of the Commission and the ECB is limited to some powers of management and coordination in the context of the financial assistance foreseen under the ESM Treaty and is therefore of an administrative nature only. They always act on behalf of and for the account of the participating Member States. The decision-making power remains entirely in the hands of the euro area Member States.
87. Because of their purely administrative and preparatory nature, the limited tasks assumed by the Commission and the ECB are therefore not incompatible with the functions of these institutions as defined in the EU Treaties. The euro area Member States merely rely on the technical expertise of the services of the Commission and the ECB for complex assessments of facts. This entails no change to the nature of their functions as defined by the EU Treaties (absence of '*dénaturation*').
88. The fact that the administrative costs stemming from the exercise of those powers are supported by the budget of the Union reflects also normal practice (cf. past examples including the European Development Fund and Schengen).

D. Principle of sincere cooperation (Article 4(3) TEU)

89. The principle of sincere cooperation is set out in Article 4(3) TEU. The Commission takes the view that this provision is respected since the allocation of powers between the Union and the national levels is respected and the ESM Treaty recognizes explicitly the primacy of any measure decided at the level of the Union.

E. General principles of Union law

90. Amongst the general principles of Union law, the Applicant in the main proceedings refers to the general principle of effective judicial protection and the right to an effective remedy as provided for under Article 47 of the Charter as well as to the general principle of legal certainty.

a) Effective judicial protection and the right to an effective remedy

91. The Commission finds it difficult to make observations on this point due to the lack of information from the referring court.
92. The right to an effective remedy and to a fair trial is recognized by Article 47 of the Charter as well as by the case-law of the Court of Justice.
93. The fact that the Applicant in the main proceedings has been given the right to challenge the participation of Ireland in the ESM Treaty seems to confirm that effective judicial protection is ensured. Moreover, future decisions to be taken by the organs of the ESM are not measures that implement Union law. Therefore, Article 47 of the Charter does not apply to them. Whether and how the Member States respect their international obligations under Article 6 ECHR when concluding a Treaty such as the ESM is not for this Court to rule on, but at first sight there seems no risk, given the nature of the decisions to be taken by the ESM, that it could impinge on fundamental rights and freedoms protected by the ECHR.
94. As far as the participating Member States are concerned, the ESM Treaty contains a provision in accordance with Article 273 TFEU giving competence to the Court of Justice.

b) General principle of legal certainty

95. The principle of legal certainty requires that Union rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case C-158/06 ROM-projecten [2007] ECR I-5103, paragraph

25 and the case-law cited). The same principle applies to national measures implementing Union law (see Case C-345/06 Heinrich [2009] ECR I-1659, paragraph 45). However, the ESM Treaty and measures adopted in its framework are not acts of implementation of Union law.

96. In any event, the Commission fails to see in which respect the provisions of the ESM treaty would be problematic in this regard. In the absence of any indication in the referring Order, the Commission is not in a position to comment any further on this issue.

VI. THIRD QUESTION: IS THE RIGHT OF A MEMBER STATE TO ENTER INTO AND RATIFY AN INTERNATIONAL AGREEMENT SUCH AS THE ESM TREATY SUBJECT TO THE ENTRY INTO FORCE OF THE EUROPEAN COUNCIL DECISION?

97. As explained before, there is no provision in the current Treaties that would prevent Member States from entering into and ratifying an agreement such as the ESM Treaty. The European Council Decision' purpose is merely to clarify the legal situation and to confirm the political understanding of the 27 Member States. In such circumstances nothing prevents the euro area Member States from entering into and ratifying the ESM Treaty without having to wait for the entry into force of the European Council Decision.

VII. CONCLUSION

98. The Commission therefore submits that the questions raised by the Supreme Court of Ireland should be answered as follows:

- Consideration of the question raised has disclosed no element of such a nature so as to affect the validity of European Council Decision 2011/199/EU of 25 March 2011;
- European Union law, and in particular the Treaties, the general principles of Union law and the Charter of Fundamental Rights must be interpreted as meaning that it does not preclude euro area Member States from entering into and ratifying an international agreement such as the ESM Treaty;
- The right for the euro area Member States to enter into and ratify an international agreement such as the ESM Treaty is not dependent on the entry into force of European Council Decision 2011/199/EU.

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Agents for the Commission



EUROPEAN COMMISSION

Brussels, 08 October 2012
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**TO THE PRESIDENT AND MEMBERS OF THE
COURT OF JUSTICE OF THE EUROPEAN UNION**

CORRIGENDUM

to the

WRITTEN OBSERVATIONS

submitted by the

EUROPEAN COMMISSION

in Case C-370/12

THOMAS PRINGLE

And

THE GOVERNMENT OF IRELAND

IRELAND AND THE ATTORNEY GENERAL

Paragraph 40 (page 14), last sentence : "It is considered that a reduction of the competences of the Union would also require the use of the ordinary revision procedure ...";

Paragraph 47 (page 15), second sentence : "He considers that ...";

Paragraph 48 (page 16), first sentence : "On the other hand the Applicant bases his argument on ..."

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