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WRITTEN OBSERVATIONS OF THE KINGDOM OF BELGIUM

Case C-370/12 \*

**Document lodged by:**

THE KINGDOM OF BELGIUM

**Usual name of the case:**

PRINGLE

**Date lodged:**

14 September 2012

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**KINGDOM OF BELGIUM**

**Federal Public Service**

**Foreign Affairs,**

**External Trade and**

**Cooperation for Development**

**COURT OF JUSTICE**

**OF THE EUROPEAN UNION**

**Written observations**

**of the Belgian Government**

submitted pursuant to Article 23(2) of the Protocol on the State of the Court of Justice of the European Union by the Belgian Government, represented by the Minister for Foreign Affairs, having as Agents Carinne POCHET, Counsellor, Tristan MATERNE and Jean-Christophe HALLEUX, Attachés at the Directorate-General for Legal Affairs of the Federal Public Service Foreign Affairs, External Trade and Cooperation for Development, 15 rue des Petits Carmes, Brussels 1000, in Case:

**C-370/12**

\* Language of the case: English.

**Thomas Pringle**

**v**

**Government of Ireland, Ireland and Attorney General**

in the context of a reference for a preliminary ruling made by the *Supreme Court* (Ireland) by decision of 31 July 2012 and registered at the Court of Justice on 3 August 2012 (No 912.294), concerning, 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; and [second] the question whether, in adopting and ratifying the Treaty establishing the European Stability Mechanism concluded at Brussels on 2 February 2012, Ireland would assume obligations incompatible with the Union Treaties.

**To the President and Members  
of the Court of Justice of the European Union**

The Belgian Government has the honour to submit following observations:

**I – FACTS AND PROCEDURE**

- 1 The plaintiff, Mr Thomas Pringle, is a Member of the Irish Parliament.
- 2 On 13 April 2012, being opposed to the Treaty Establishing a European Stability Mechanism concluded at Brussels on 2 February 2012 ('the ESM Treaty'), the plaintiff brought an action before the defendants in the main proceedings (the Irish Government, Ireland and the *Attorney General*) in the *High Court*.
- 3 His action was based, first, on grounds relating to the unconstitutionality of the acts of approval and the national implementing measures and, second, on grounds relating to the infringement of the European Treaties.
- 4 The *High Court* dismissed all the plaintiff's claims by judgment of 17 July 2012.
- 5 The applicant immediately appealed against that decision to the *Supreme Court*, which on 31 July 2012 decided to request the Court of Justice to give a preliminary ruling on validity, in answer to the following questions:

*'(1) Whether European Council Decision 2011/199/EU of 25 March 2011 is 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 of 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) 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 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 and the general principle of legal certainty;*

*is a Member State of the European Union whose currency is the euro entitled to enter into and ratify an international agreement such as the ESM Treaty?*

*(3) If the European Council Decision 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?’*

- 6 In its decision of 31 July 2012 the *Supreme Court* requested the Court to apply in the present case the accelerated procedure provided for in Article 104a of the Rules of Procedure.
- 7 The Court agreed to deal with the case under the accelerated procedure, in accordance with the Supreme Court’s request.

## **II – EUROPEAN LEGAL FRAMEWORK**

- 8 **Article 48 of the Treaty on European Unity** (‘TEU’) provides:

*‘1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.*

*...*

*Simplifies revision procedures*

*6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or*

*part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.*

*The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.*

*The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties. ...'*

- 9 **Articles 122 to 126 of the Treaty on the Functioning of the European Union (TFEU)** are provisions of primary law intended to ensure budgetary discipline in the Member States.

*'Article 122*

*(ex Article 100 TEC)*

*1. Without prejudice to any other procedure provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in supply of certain products, notably in the area of energy.*

*2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.*

*Article 123*

*(ex Article 101 TEC)*

*1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies government by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.*

*2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.*

*Article 124*

...

*Article 125*

*(ex Article 103 TEC)*

*1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*

*2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.*

*Article 126*

*(ex Article 104 TEC)*

*1. Member States shall avoid excessive government deficits.*

*2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:*

*(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:*

- either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,*
- or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;*

*(b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.*

*The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.*

*3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.*

*The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.*

*4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.*

*5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.*

*6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.*

*7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.*

*8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.*

*9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.*

*In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.*



*10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised with the framework of paragraphs 1 to 9 of this Article.*

*11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:*

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,*
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,*
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected;*
- to impose fines of an appropriate size.*

*The President of the Council shall inform the European Parliament of the decisions taken.*

*12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.*

*13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.*

*When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.*

*A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).*

*14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.*

*The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.*

*Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.’*

**10 Article 136 TFEU provides:**

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

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

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

*2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.*

*A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).’*

**11 Article 1 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 (‘Decision 2011/199/EU’) <sup>1</sup> provides:**

*‘The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:*

*“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 any required financial assistance under the mechanism will be made subject to strict conditionality.”’*

**12 Article 2 of that decision provides:**

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

<sup>1</sup> – OJ 2011 L 91, p. 1.

*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.'*

### **III – ANALYSIS**

- 13 By its **first question**, the Supreme Court seeks to ascertain, in essence, whether Decision 2011/199/EU is valid with respect to EU law, (i) in view of the possible increase of the competences conferred on the Union by the Treaties, and (ii) in view of the content of the amendment of Article 136 TFEU effected by Decision 2011/199/EU, in that it might be contrary to the Treaties and to the general principles of European Union (EU) law.
- 14 By its **second question**, the Supreme Court asks whether a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty.
- 15 In the Belgian Government's submission, the answers to those questions must be in the **affirmative**.  
  
– Decision 2011/199/EU does not entail any increase of the competences of the EU
- 16 Article 48(6) TEU provides in its second subparagraph that '*[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.*'
- 17 The third paragraph of Article 48(6) TEU provides that '*[t]he decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties*'.
- 18 Recourse to the simplified revision procedure is authorised by Article 48(6) TEU, provided that the revision concerns provisions of Part Three of the Treaty on the Functioning of the European Union relating to Union policies and internal actions and does not increase the competences conferred on the Union.
- 19 Decision 2011/199/EU is wholly consistent with the conditions thus laid down in Article 48(6) TEU.

- 20 Indeed, in the Belgian Government's submission, it is impossible to claim that that decision increases the competences of the European Union when its objective is to specify that the Member States whose currency is the euro – and not the European Union – may establish a stability mechanism in order to preserve the stability of the euro area as a whole. Decision 2011/199/EU explains the competences that may be exercised by the Member States; it therefore has a merely declaratory effect. Conversely, it does not create any new legal bases that would have enabled the Union to undertake action that would not have been possible before the simplified revision of the Treaty. Accordingly, Decision 2011/199/EU does not in any way increase the competences conferred on the Union.
- 21 It will be noted that both the European Commission and the European Parliament and the European Central Bank, which were consulted pursuant to Article 48(6) TEU, considered that Decision 2011/199/EU did not entail any increase of the competences of the European Union.
- 22 Thus, the Belgian Government supports the Opinion which the European Central Bank had expressed on the draft European Council Decision, in which it had emphasised that even before its entry into force, the text of Article 136(3) TFEU 'helps to explain, and thereby confirms, the scope of Article 125 TFEU with respect to safeguarding the financial stability of the euro area as a whole.'<sup>2</sup> The revision of Article 136 TFEU is not intended to alter the obligations of the Member States as resulting in particular from Article 125 TFEU, but explains the way in which that article should be interpreted.
- 23 Nor can the fact that the Treaty establishing the European Stability Mechanism (ESM) confers specific functions on the Commission and the European Central Bank be assimilated to the conferral of new competences on the European Union. The possibility of entrusting tasks to the institutions outside the framework of the European Union was accepted by the Court of Justice in its '*Bangladesh*' judgment of 30 June 1993.<sup>3</sup>
- 24 Article 48(6) TEU does not place other limits on the amendment of the European Treaties decided on the basis of that provision.

<sup>2</sup> – Opinion of the European Central Bank on a 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 (CON/2011/24) (OJ 2011 C 140, p. 8).

<sup>3</sup> – Joined Cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* [1993] ECR I-3865, paragraph 20, where the Court held that the Treaty '*does not prevent 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*'.

– A decision adopted under Article 48(6) TEU has the value of primary law: accordingly, review by the Court is limited to examination of its formal validity

- 25 A revision of the provisions of Part Three of the Treaty on the Functioning of the European Union on the basis of Article 48(6) TEU has, if the conditions and the procedure which it lays down are observed, the same effects as an ordinary revision procedure of the European Treaties. Even if Decision 2011/199/EU had been inconsistent with other provisions of the European Treaties, *quod non*, it could not be inferred that the decision was to that extent invalid. An amendment to the Treaties on the basis of Article 48(6) TEU has the value of a Treaty. It is not a rule of secondary law whose compatibility with the other provisions of the Treaties can be examined. For that reason, the Belgian Government maintains that the Court does not have jurisdiction to examine the ‘substantive’ validity of the amendments made to the Treaty by a European Council Directive adopted under Article 49(6) TEU.
- 26 Admittedly, the Court of Justice has jurisdiction to examine the ‘formal’ validity of a European Council Decision adopted under Article 48(6) TEU, namely to examine compliance with the conditions for recourse to the simplified procedure provided for in Article 48(6) TEU, in particular the condition that the decision amending the Treaty adopted by the European Council must not increase the competences of the Union.
- 27 In the alternative, the Belgian Government will submit that Article 136 TFEU, as amended by Decision 2011/199/EU, remains in every respect wholly compatible with the other provisions of the European Treaties.  
  
– Decision 2011/199/EU and the ESM Treaty are in any event wholly compatible with the provisions of the Treaties; accordingly, a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty
- 28 The Belgian Government has just explained why in its view the Court cannot examine the compatibility of the future Article 136(3) TFEU with the Treaties (or the general principles of law).
- 29 However, in case the Court, nonetheless, should embark on that examination, the Belgian Government would make the following observations.
- 30 It cannot be claimed that the conclusion of the ESM Treaty would infringe the obligation of sincere cooperation referred to in Article 4(3) TEU. Quite to the contrary, the conclusion of the ESM Treaty is a specific application of the duty of loyal cooperation. Under Article 4(3) TEU the Member States and the European Union are required to assist each other in carrying out tasks which flow from the Treaties. The preservation of the stability of the euro area is without doubt an essential task which flows from the European Treaties and the conclusion by certain Member States of the ESM Treaty facilitates the achievement of that task.

- 31 The finance mechanism established by the ESM Treaty cannot be regarded as coming within the monetary policy for the Member States whose currency is the euro, which, pursuant to Article 3(1)(c) TFEU, comes within the exclusive competences of the European Union. Articles 121 TFEU, 122 TFEU, 123 TFEU, 125 TFEU and 126 TFEU, infringement of which was alleged before the Irish courts, come within Chapter 1 of Title VIII of the FEU Treaty, which covers economic policy, and not Chapter 2, which covers monetary policy.
- 32 Furthermore, Article 121(2) TFEU, which lays down the procedure for the adoption of recommendations laying down the broad guidelines of the economic policies of the Member States, is not altered by the ESM Treaty. The ESM Treaty will play no part in the coordination of the economic policies of the Member States.
- 33 Nor does participation in the ESM infringe the ‘no bail out’ principle referred to in Article 125 TFEU. Article 125 TFEU establishes that no Member State is to be liable for or to assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law of another Member State. On the other hand, it does not prohibit temporary financial assistance subject to strict conditions being introduced in order to preserve the stability of the euro area. The two provisions are complementary and Article 136(3) TFEU does not in any way undermine the budgetary discipline pursued by Article 125(1) TFEU.
- 34 The prohibition imposed on the ECB and the central banks of the Member States on granting credits cannot be extended to the ESM, which is a separate entity. Nor can the fact that a Member State undertakes to subscribe to the capital of the ESM be compared to the grant of an overdraft facility or a credit.
- 35 The assertion that the ESM Treaty is incompatible with Article 122(1) TFEU must likewise be rejected. Article 122 TFEU allows the Council, on a proposal from the Commission, to decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation. The Union financial assistance that may be activated on the basis of that provision is, however, without prejudice to the possibility of the grant of financial assistance by the Member States. The European Union does not have exclusive competence in that matter.
- 36 Last, by its **third question**, the Supreme Court asks the Court of Justice whether, if the European Council Decision is held valid, the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty is subject to the entry into force of that decision.
- 37 In the Belgian Government’s submission, the answer to that question should be in the **negative**.
- 38 As already stated, the new text of Article 136 TFEU merely helps to explain and confirms an interpretation which was binding even before its adoption. Article

136(3) TFEU is not the legal basis for the establishment of financial assistance mechanisms between the Member States. The ESM Treaty flows from the sovereign will of the Member States; the Member States are therefore free to adopt such a treaty, provided that the obligations which it lays down are compatible with the EU and FEU Treaties. The entry into and ratification of the ESM Treaty are therefore not subject to the entry into force of Decision 2011/199/EU.

#### **IV – CONCLUSION**

- 39 In the light of the foregoing, the Belgian Government propose that the Court of Justice of the European Union should answer the questions referred to it for a preliminary ruling as follows:

**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 was correctly adopted on the basis of Article 48(6) of the Treaty on European Union.**

**Owing to its status as primary law, Decision 2011/199/EU cannot be the subject of an examination of its substantive validity.**

If such examination were none the less possible:

**Decision 2011/199/EU discloses no incompatibility with the Treaty on European Union or the Treaty on the Functioning of the European Union, and a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty.**

**The entry into and ratification of the ESM Treaty are not subject to the entry into force of Decision 2011/199/EU.**

Brussels, 14.09.2012

Carinne POCHET    Tristan MATERNE    Jean-Christophe HALLEUX

Agents of the Belgian Government