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WRITTEN OBSERVATIONS OF THE REPUBLIC OF AUSTRIA

Case C-370/12*

Document lodged by:

REPUBLIC OF AUSTRIA

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

WRITTEN OBSERVATIONS OF THE REPUBLIC OF AUSTRIA

in accordance with Article 23 of the Protocol on the Statute of the

Court of Justice of the European Union

in

CASE C-370/12

The Republic of Austria submits the following observations on the reference for a preliminary ruling by the Irish Supreme Court by order of 31 July 2012:

I. Questions referred

- 1 The questions referred relate in essence to
 - the validity of European Council Decision 2011/199/EU 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

* Language of the case: English.

- the compatibility with Union law of the Treaty establishing the European Stability Mechanism (ESM).

2 The lengthy referred questions read, verbatim:

1. Whether European Council Decision 2011/199/EU of 25th 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 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. 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 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?

3 In summary, the Republic of Austria is of the opinion that the referred questions 1 and 2 should be answered in the affirmative and question 3 in the negative.

Neither Decision 2011/199/EU nor the ESM Treaty infringes Union law and signature or ratification is not dependent on the entry into force of the amendment to Article 136(3) TFEU, as will be explained more fully below.

II. Legal assessment

1. Question 1: Validity of Decision 2011/199/EU

- 4 The referring court is enquiring, first, as to the admissibility of applying the simplified revision procedure under Article 48(6) TEU and, secondly, whether the content of the proposed amendment infringes the Treaties or the general principles of Union law.
- 5 In the opinion of the Republic of Austria, there are no objections to the validity of Decision 2011/199/EU.

Admissibility of the simplified revision procedure

- 6 According to Article 48(6) TEU, 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. However, the decision may not increase the competences conferred on the Union in the Treaties. The decision is not to enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.
- 7 In the opinion of the Republic of Austria, the conditions for use of the simplified revision procedure have clearly been fulfilled.
- 8 Decision 2011/199/EU amends a provision of Part Three of the TFEU, in that the following paragraph 3 is added to Article 136:

‘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’.

The amendment does not affect other parts of the TFEU, either directly or indirectly.¹

- 9 Decision 2011/199/EU also does not increase the competences conferred on the Union in the Treaties. Not only is that the unanimous view of all the Member

¹ – As borne out by the Commission Opinion of 15 February 2011, COM(2011) 70 final, paragraph 10.

States and the Union institutions² concerned, it is also – as far as can be ascertained – the prevailing view in the legal academic literature.

- 10 In the opinion of the Republic of Austria, that conclusion follows simply from the interpretation of the meaning of the words. A provision such as Article 136(3) TFEU, which simply makes it expressly clear that a certain possibility of action is open to the Member States and does not concern either the Union or its institutions ('the Member States ... may') cannot, purely from its natural meaning, result in an increase in the competences of the Union. The amendment is solely for the purpose of clarification in regard to the specific economic and fiscal policy implications of the ESM. The amendment of the TFEU by the addition of paragraph 3 to Article 136 is intended to eliminate the doubt that has been expressed in public and legal academic debate on the subject – which, furthermore, the Republic of Austria considers to be unfounded – as to the admissibility under Union law of establishing a stability mechanism. In any event, the amendment to the Treaty reduces legal risks associated with the ESM and in that respect appears expedient. Experience shows that additional risk in the financial markets (*ceteris paribus*) leads to higher refinancing costs, which would in any event be counterproductive in regard to the aims of the ESM and its potentially high refinancing requirement.³

1.2 Compatibility of content with the Treaties

- 11 The referring court also enquires as to the validity of Decision 2011/199/EU as regards the content of the amendment it makes to the TFEU, in particular whether the amendment infringes the Treaties or the general principles of Union law.
- 12 It is not apparent to the Republic of Austria how, even from the point of view of its content, Decision 2011/199/EU amending Article 136 TFEU might be considered to infringe Union law.

² – See the Commission Opinion of 15 February 2011, COM(2011) 70 final, paragraph 11: 'Furthermore the amendment does not affect the competences conferred on the Union and its institutions in the Treaties. It does not involve creating a new legal base which would allow the Union to take action that was not possible before this Treaty amendment. Under the draft decision, the permanent stability mechanism will be established directly by Member States whose currency is the euro'.

Paragraph 19 of the European Parliament Resolution of 23 March 2011, OJ 2011 C 247 E/22, also underlines that the draft European Council decision as amended would not increase the competences of the Union and would therefore remain within the scope of the simplified Treaty revision procedure.

³ – That is also indicated, for instance, in the preparatory documentation for the Austrian approval decision, ErlRV 1716 BlgNR XXIV.GP: 'The amendment of Article 136 TFEU increases legal certainty for any measures by the Member States to safeguard financial stability in the euro area as a whole'. http://www.parlament.gv.at/PAKT/VHG/XXIV/1/10716/fname_247181.pdf.

- 13 From the point of view of legal structure alone (according to the ranking of provisions in a legal order), the only deciding factor in assessing the validity of the content of a European Council decision under Article 48(6) TEU is compliance with the norm-generating conditions (in this case according to the simplified revision procedure under Article 48(6) TEU). As argued above (paragraph 1.1), that applies here. The law generated in following that procedure (in this instance Article 136(3) TFEU) ranks equally with other primary law. Therefore, in the opinion of the Republic of Austria, the jurisdiction of the Court of Justice under Article 267 TFEU also relates only to scrutiny of compliance with the provision of Article 48(6) TEU in the adoption of the European Council Decision. If, however, the relevant norm-generating procedure according to Article 48 TEU is followed, the validity of the Treaty amendment cannot be assessed in the light of other primary law.
- 14 In any event, in the application of the law the question might arise how – theoretically possible – conflicts with other equally ranking norms are to be resolved. *Lex specialis* or *lex posterior* principles would normally be applicable in particular in such cases. However, the issue would not be the validity of the content of Decision 2011/199/EU, but the interpretation and application of Article 136(3) TFEU in the specific case.
- 15 The judgment in Case C-540/03⁴ cited by the appellant, referred to on page 9 [NDT:the omissis version] of the order for reference, is therefore not relevant in the present context. That case concerned primary law limits in the creation of authority for Member States in a Council directive to derogate from the provisions of the directive. Clearly the secondary law of the Union cannot authorise action by Member States that infringes primary law. The present case, however, concerns an amendment to the TFEU in a revision procedure expressly provided for by the Treaties and hence the generation of primary law, not the creation of such secondary law.
- 16 Furthermore, as will be explained further in paragraph 19 et seq., the ESM Treaty is fully compatible with the existing Treaties.
- 17 In the opinion of the Republic of Austria, no circumstances can be identified that might affect the validity of Decision 2011/199/EU. Accordingly, referred question 1 is to be answered in the affirmative.

2. Question 2: Compatibility of the ESM Treaty with Union law

- 18 The second question relates to whether Member States are entitled under Union law to enter into and ratify an international agreement such as the ESM Treaty. In view of the function of a reference for a preliminary ruling under Article 267 TFEU, the referring court is obviously thereby seeking to establish whether the

⁴ – Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

Union law provisions it cites are to be interpreted as preventing the conclusion of such agreements by the Member States. The court refers to the following provisions of Union law:

- general provisions of the TEU (Articles 2, 3 and 4(3) TEU, values and aims of the Union, principle of sincere cooperation),
- provisions on the institutions (Article 13 TEU),
- areas of competence (Articles 2(3) and 3(2) TFEU),
- economic and monetary policy (Article 119 et seq. TFEU) and
- general legal principles and fundamental rights of Union law (effective legal protection, legal certainty).

- 19 In the opinion of the Republic of Austria, no conflict can be identified between the provisions of the ESM Treaty and those provisions of Union law. In that respect, the Republic of Austria also expressly supports the legal opinion of the Irish High Court and the Irish Government cited in the order for reference on the grounds for compliance of the ESM Treaty with Union law.
- 20 To ensure that these observations are useful but nonetheless as succinct as possible, the individual provisions of Union law cited by the referring court in question 2 will only be discussed briefly below:

2.1 Compatibility of ESM Treaty with Articles 2 and 3 TEU and the provisions of Part Three, Title VIII TFEU, Articles 119, 120, 121, 122, 123, 125, 126 and 127 TFEU

- 21 The Republic of Austria does not see how an international agreement such as the ESM Treaty will conflict with the Common Provisions in Title I TEU (in this case Articles 2 and 3 TEU). In fact, such a stabilisation mechanism specifically serves to support the values and aims of the Union, which are binding on the Member States who are Contracting Parties to the ESM. It can reasonably be concluded from developments in recent years that, without intervention by the Member States – particularly also through the temporary euro rescue package (EFSF) – and the Union, the financial and economic crisis would have reached a scale that would have been considerably more at odds with the values and aims of the Union and might have led to the collapse of monetary union, with further risks to the integration process as a whole.
- 22 The concretisation of the aims in Article 3 TEU also derives from the various subject chapters of the Treaties. The compatibility of the ESM Treaty with Union law is therefore to be assessed primarily in the light of each of the economic and monetary union provisions in Part Three, Title VIII TFEU that are a concrete

expression of the values and aims of the Union. In the opinion of the Republic of Austria, however, those provisions in the economic and monetary policy articles (in particular Article 122 et seq. TFEU) also do not conflict with a stability mechanism such as the ESM.

- 23 In the field of economic policy the Union has only a coordinating role, not exclusive competence. International law action by the Member States is therefore still admissible here, as long as Union law is taken into account. It is true that monetary policy is an exclusive competence of the Union, but the ESM does not encroach on the competence of the Union (see also paragraph 30 below). Furthermore, Article 119 TFEU only contains basic provisions, which are further detailed in special individual articles (for instance, the obligation to avoid excessive government deficits in Article 126 TFEU obviously incorporates the principle of sound public finances in accordance with Article 121(3) TFEU). As in Article 119 TFEU, basic provisions on economic policy based on market economy principles are also laid down in Article 120 TFEU.

- 24 Contrary to the view of the appellant in the main proceedings (page 11), in particular there is no encroachment on the Council's competence, provided for in Article 121(2) TFEU, to formulate, on a recommendation from the Commission, a draft for the broad guidelines of the economic policies of the Member States and of the Union. As the Irish Government has already stated in the order for reference, in that respect there is also no conflict with Article 121 TFEU, since, under Article 13(3) of the ESM Treaty, stability support by the ESM is dependent on conditions set out in a Memorandum of Understanding, which is 'fully consistent with the measures of economic policy coordination provided for in the TFEU'.

- 25 It is apparent from its wording that Article 122 TFEU expressly relates only to the Union. An international organisation such as the ESM is therefore not covered by that provision, especially since, furthermore, the Union is not a Contracting Party to the ESM. From its wording, the rule is also not to be understood to indicate that financial assistance by the Member States is thus excluded.

- 26 The ESM Treaty also does not create credit facilities for public institutions at the ECB or the central banks. The ESM is financed from capital contributions from its members and loans to the capital markets (see, in particular, Articles 8 and 21 of the ESM Treaty) and Article 123 TFEU is therefore not infringed.

- 27 As regards the compatibility of the ESM with Article 125 TFEU, it is clear from the wording ('a Member State shall not be liable for or assume the commitments of ... another Member State') that no such liability exists directly on the basis of Union law and that is also to be incorporated in national law. Hence, neither voluntarily granted bilateral loans nor loans granted through a special-purpose entity such as the EFSF or an international organisation such as the ESM are excluded. Furthermore, the instruments in the ESM Treaty are chosen in such a

way that there is no conflict with Article 125 TFEU.⁵ According to Article 20 of the ESM Treaty, the ESM is to aim to fully cover its financing and operating costs and is to include an appropriate margin. The system is comparable to the International Monetary Fund, whose existence, together with the possibility of granting loans, was assumed when the Treaties were concluded.

- 28 The ESM Treaty does not detract from the obligation on Member States to avoid excessive government deficits (Article 126 TFEU). Nor is the procedure for observing budgetary discipline affected by the ESM Treaty and, furthermore, the monitoring in the deficit procedure is significantly stepped up by more recent acts of Union law (the ‘six pack’).
- 29 It is not apparent, in regard to Article 127 TFEU, how monetary policy aims (in particular the priority given to price stability) or the tasks of the ESCB (in particular monetary policy, foreign exchange operations, holding and managing foreign reserves, promoting the smooth operation of payment systems, see Article 127(2) TFEU) would be undermined by the ESM Treaty. In any event, strict conditions are to be imposed on ESM assistance (Article 12 ESM Treaty) and the assistance is specifically aimed at safeguarding the stability of the euro area as a whole.

2.2 Compatibility of the ESM Treaty with the exclusive competence of the Union for monetary policy

- 30 In the opinion of the Republic of Austria, the ESM Treaty also does not encroach on the exclusive competence of the Union for monetary policy laid down in Article 3(1)(c) TFEU and the conclusion of international agreements falling within the scope of Article 3(2) TFEU. The ESM serves to safeguard financial stability, but it has no monetary policy competences, nor does it undertake ESCB tasks within the meaning of Article 127(2) TFEU (see paragraph 29 above).

2.3 Compatibility of the ESM Treaty with EU competence for the coordination of economic policy in accordance with Article 2(3) and Part Three, Title VIII TFEU

- 31 As already argued above (paragraph 23), the Union only has a coordinating competence in economic policy. Reference has also been made above (paragraph 24) to the provisions in the ESM (in particular Article 13(3)) which expressly

⁵ – That is also indicated in the preparatory documentation for the Austrian Parliament’s approval of the ESM (ErLRV 1731 BlgNR XXIV.GP): ‘In the negotiations, particular attention was given to the question of the relationship between the ESM Treaty and European Union law. In particular, the financial assistance instruments available were chosen in such a way that they are in any event consistent with the provisions of Article 125(1) TFEU’. http://www.parlament.gv.at/PAKT/VHG/XXIV/1/1_0731/fname_247805.pdf.

assume full compliance with Union measures in the coordination of economic policy. The ESM does not therefore affect Union competences in the field of economic policy coordination.

2.4 Compatibility of the ESM Treaty with the powers and functions of the Union institutions according to the principles laid down in Article 13 TEU

- 32 The Republic of Austria sees no evidence that the ESM Treaty conflicts with the powers and functions of the Union institutions according to the principles laid down in Article 13 TEU. In so far as Union institutions undertake tasks for the ESM, the admissibility of such delegation of functions by decisions of representatives of the Member States by decisions of representatives of the Member States has already been recognised in the case-law.⁶ On 20 June 2011, the representatives of the Governments of the Member States authorised the ESM Contracting States to request the European Commission and the European Central Bank to perform the tasks provided for in the Treaty (see recital 10 of the ESM Treaty). The jurisdiction of the Court of Justice for the settlement of disputes (Article 37(3) of the ESM Treaty) is incontestably based on primary law (Article 273 TFEU, according to which the Court of Justice has jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement).

2.5 Compatibility of the ESM Treaty with the principle of sincere cooperation under Article 4(3) TEU

- 33 In the view of the appellant in the main proceedings (page 9), the ESM Treaty circumvents prohibitions in the Union treaties and that intergovernmental agreement is contrary to the duty of sincere cooperation enshrined in Article 4(3) TEU. As already stated, however, the Republic of Austria cannot identify any infringement of Union law in the ESM Treaty. The purpose of the ESM is to safeguard financial stability in the euro area and in that respect the Member States are also supporting performance of the tasks of the Union. Hence the sincere cooperation obligation is not infringed.

⁶ – ECJ Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 41: ‘No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up’ (with reference to the judgment in Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 20: ‘The fourth indent of Article 155 of 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’).

2.6 Compatibility of the ESM Treaty with the general principles of Union law

- 34 In so far as the Charter of Fundamental Rights is referred to in the order for reference, it must first be pointed out that it applies for the Member States solely in the implementation of Union law. According to its Article 51(2) in particular, the Charter also does not broaden the scope of Union law, establish any new powers or tasks or modify powers and tasks defined by the Treaties. For that reason alone, the Charter of Fundamental Rights cannot be considered applicable to the ESM. It is therefore, in principle, the responsibility of the courts of the Member States to protect fundamental rights in that area.
- 35 Furthermore, as the Irish Government contends in the order for reference (page 14), it is difficult to envisage circumstances in which the ESM Treaty would violate the human rights of citizens and provision is made for the Court of Justice to have jurisdiction for the settlement of disputes between ESM Members (Article 37 ESM Treaty).

2.7 Summary on question 2

- 36 The Republic of Austria is therefore of the opinion that Union law, particularly the TEU and TFEU provisions cited in referred question 2, already, in the version prior to the entry into force of Decision 2011/199/EU, does not prevent the conclusion and ratification of an international agreement such as the ESM Treaty.

3. Question 3: Entitlement of the Member States to enter into and ratify the ESM Treaty before the entry into force of Article 136(3) TFEU

- 37 The third question raises the issue of whether Union law prevents the conclusion and ratification of an international agreement such as the ESM Treaty by the Member States before the entry into force of Decision 2011/199/EU.
- 38 In view of the proposed answer to the second referred question, the Republic of Austria does not consider it necessary to answer the third question. As explained above (paragraph 10), the purpose of Article 136(3) TFEU is to provide clarification and to eliminate doubts as to the admissibility under Union law of establishing a stability mechanism. The entry into force of Decision 2011/199/EU is not therefore a mandatory prerequisite for the signature and ratification of the ESM Treaty.

III. Proposed answers

- 39 In the light of the above observations, the Republic of Austria proposes that the referred questions be answered as follows:

1. Consideration of question 1 has given rise to nothing that might affect the validity of Council Decision 2011/199/EU.
2. The TEU and TFEU provisions cited in question 2 are to be interpreted as meaning that they do not preclude the conclusion and ratification of an international agreement such as the ESM Treaty.
3. In view of the answer to question 2, it is not necessary to answer question 3.

Vienna, 14 September 2012

For the Republic of Austria:

[signature]

SC Dr Gerhard Hesse